Virginia Regulatory Town Hall

Final Regulation
Agency Background Document

Agency Name:	State Water Control Board
VAC Chapter Number:	9 VAC 25-210
Regulation Title:	Virginia Water Protection Permit Regulation
Action Title:	Virginia Water Protection Permit Regulation Amendments
Date:	June 13, 2001

Please refer to the Administrative Process Act (§ 9-6.14:9.1 *et seq.* of the *Code of Virginia*), Executive Order Twenty-Five (98), Executive Order Fifty-Eight (99) , and the *Virginia Register Form,Style and Procedure Manual* for more information and other materials required to be submitted in the final regulatory action package.

Summary

Please provide a brief summary of the new regulation, amendments to an existing regulation, or the regulation being repealed. There is no need to state each provision or amendment; instead give a summary of the regulatory action. If applicable, generally describe the existing regulation. Do not restate the regulation or the purpose and intent of the regulation in the summary. Rather, alert the reader to all substantive matters or changes contained in the proposed new regulation, amendments to an existing regulation, or the regulation being repealed. Please briefly and generally summarize any substantive changes made since the proposed action was published.

Revisions have been made to the Virginia Water Protection Permit Regulation to incorporate changes to the Code of Virginia §§62.1-44.3, 44.5,44.15,44.15:5, and 44.29 relating to wetlands as mandated by the General Assembly in Senate Bill 648 and House Bill 1170, and other changes that the Department or the public deems necessary and are warranted. Numerous changes have been made throughout the final regulation amendments. Most of these involved clarification of definitions, exemptions, informational requirements for applicants, and requirements for the evaluation of compensatory mitigation alternatives. Language was added to provide for continuation of coverage under replacement state general permits after expiration of the original permit, and for certification of future Corps of Engineers nationwide or regional permits as meeting these regulatory requirements after a public comment process. The process of minor modifications of general permit authorizations was clarified to be consistent with minor modifications of individual permits. Transition language for the regulation was added to

conform to statutory requirements that the regulations become effective on August 1, 2001 for the Virginia Department of Transportation and on October 1, 2001 for all other applicants.

Statement of Final Agency Action

Please provide a statement of the final action taken by the agency: including the date the action was taken, the name of the agency taking the action, and the title of the regulation.

On June 12, 2001, the State Water Control Board adopted the amendments to the Virginia Water Protection Permit Regulation 9 VAC 25-210 et seq. for publication in the Virginia Register.

Basis

Please identify the state and/or federal source of legal authority to promulgate the regulation. The discussion of this statutory authority should: 1) describe its scope and the extent to which it is mandatory or discretionary; and 2) include a brief statement relating the content of the statutory authority to the specific regulation. In addition, where applicable, please describe the extent to which proposed changes exceed federal minimum requirements. Full citations of legal authority and, if available, web site addresses for locating the text of the cited authority, shall be provided. If the final text differs from that of the proposed, please state that 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 Section 62.1-44.2 et seq. of the Code of Virginia. Specifically, Section 62.1-44.15 authorizes the Board to adopt rules governing the issuance of water quality permits and directs the State Water Control Board to design regulatory programs to achieve no net loss of existing wetland acreage and function. Section 62.1-44.15:5 authorizes the Board to issue a Virginia Water Protection Permit consistent with the provisions of the Clean Water Act and to protect instream beneficial uses. The revisions exceed federal minimum requirements through the reporting of all impacts to wetlands and through the regulation of Tulloch ditching and fill in isolated wetlands, which are currently not federally regulated, based on state statutory mandates.

Section 1341 (formerly Section 401) of the Clean Water Act (33 USC 1341) requires state certification of federal permits for discharges into navigable waters.

The Office of the Attorney General has certified that the State Water Control Board has the authority to adopt the proposed amendments.

Purpose

Please provide a statement explaining the need for the new or amended regulation. This statement must include the rationale or justification of the final regulatory action and detail the specific reasons it is essential to protect the health, safety or welfare of citizens. A statement of a general nature is not acceptable, particular rationales must be explicitly discussed. Please include a discussion of the goals of the proposal and the problems the proposal is intended to solve.

The purpose of the Virginia Water Protection Permit Regulation 9VAC-25-210 et seq. is to establish the procedures and requirements to be followed in connection with the issuance of a VWP permit by the board pursuant to the State Water Control Law. The amendments are necessary to protect the public health, safety and welfare by providing increased protection of the Commonwealth's wetland resources, which are important for maintaining water quality, flood control and providing fish and wildlife habitat.

Substance

Please identify and explain the new substantive provisions, the substantive changes to existing sections, or both where appropriate. Please note that a more detailed discussion is required under the statement of the regulatory action's detail.

Substantive changes have been made to the regulation to incorporate statutory changes and to clarify requirements to permittees and the general public. The definition section has been expanded to clarify usage of specific terms. A section on how wetland delineations are to be conducted has been added. The process of applying for a permit, and the information the applicant needs to supply, have been detailed and clarified, as have the permit review timeframes. The process of avoidance and minimization of impacts, and compensation for unavoidable impacts, has been clarified. The types of permit changes that qualify as minor modifications have been expanded. The use of state general permits for wetland impacts has been added.

Issues

Please provide a statement identifying the issues associated with the final regulatory action. The term "issues" means: 1) the advantages and disadvantages to the public of implementing the new provisions; 2) the 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 include a sentence to that effect.

Advantages of the regulatory changes to the public and the Commonwealth are that they provide increased protection of the Commonwealth's aquatic resources by regulating excavation and drainage activities, and impacts to isolated wetlands not currently within the purview of the U.S. Army Corps of Engineers under §404 of the Clean Water Act. The changes provide for no net loss of wetland acreage and function, further protecting a valuable resource of the Commonwealth. The changes also streamline the permitting process by providing more clarity and certainty and decreasing the amount of time for permit issuance.

Disadvantages of the regulatory changes to the public are that the activities regulated have been increased (Tulloch ditching and isolated wetlands) and there is now increased reporting of all impacts to wetlands in order to track the goal of no net loss of wetland acreage and function.

Statement of Changes Made Since the Proposed Stage

Please highlight any changes, other than strictly editorial changes, made to the text of the proposed regulation since its publication.

Changes made to the regulation since its publication as proposed have included clarification of definitions, clarification of exemptions and exclusions, and clarification of the evaluation of compensatory mitigation options. A provision has been added to allow for certifications of Corps of Engineers nationwide or regional permits as meeting the requirements of this regulation after an approval period involving public comment.

Public Comment

Please summarize all public comment received during the public comment period and provide the agency response. If no public comment was received, please include a statement indicating that fact.

Please refer to the Summary of Public Comment section attached to the end of this document.

Detail of Changes

Please detail any changes, other than strictly editorial changes, that are being proposed. Please detail new substantive provisions, all substantive changes to existing sections, or both where appropriate. This statement should provide a section-by-section description - or crosswalk - of changes implemented by the proposed regulatory action. Include citations to the specific sections of an existing regulation being amended and explain the consequences of the changes.

Section 210-10 – Definitions:

Numerous definitions have been added or modified for clarity, including "Code"; "Dredging"; Fill";"In lieu fee fund"; Mitigation bank"; "USACE"; "VMRC";"Water quality standards".

Sections 210-20, 210-30 and 210-40 were repealed.

Section 210-45 – Wetland delineation:

This section has been modified to emphasize that the Corps federal manual shall be used as the approved method for delineating wetlands and shall be interpreted consistent with federal guidance. This will avoid discrepancies between the two agencies regarding wetland delineation.

Section 210-50 - Prohibitions and requirements for VWP permits:

This section was modified to comply with proper format guidelines.

Section 210-60 – Exclusions:

This section was modified to comply with proper format guidelines. Language was added to subsection I to clarify the exemption for maintenance of existing ditches.

Section 210-80 – Application for a permit:

Added A 1 to clarify the timeframes of a VWP permit. Added A 2 to clarify that commencement of any activity for which a VWP permit is required prior to permit issuance is prohibited. The definition of beneficial uses in B 1 k (1) (b) was modified to mirror the definition section to maintain consistency. Added language to B 1 k (3) to clarify informational requirements, per Corps comments. Changed language in B 1 k (4) (c) to reflect that hydrologic analyses were to include a typical year, a dry year and a wet year. Changed language in B 1 k (4) (d) to reflect that the conceptual mitigation plan information requirements are listed in subdivision (c), not (b) as had been previously listed. Also in this section site or sites was written out and the old language of site(s) was struck to follow proper formatting. Added B 1 k (4) (e) to clarify the requirement of an applicant to prove that an in-lieu-fee fund is willing to accept the donation and compensate for the impact. Subdivisions D 1 & 2 were combined to follow proper formatting.

Section 210-90 – Conditions applicable to all VWP permits:

Changed language in A to replace VWP permit holder with the term permittee , and replace the term Act with Law as these terms are defined in the regulation. Added language to subdivision 2 of D to clarify and to cross-reference the section of the regulation dealing with permit extensions.

Section 210-100 – Signatory requirements:

This section was modified to comply with proper format guidelines, and to correct the referenced subdivisions accordingly.

Section 210-110 - Establishing applicable standards, limitations or other VWP permit conditions: Last sentence deleted from subsection B as the requirement was too specific to be appropriate. Added the term "Law" where appropriate in subsection C for clarity. Added language to subsection D to clarify and to cross-reference the section of the regulation dealing with permit extensions. Replaced the term discharge with regulated activity in subdivision 4 of E for clarification.

Section 210-115 – Evaluation of mitigation alternatives:

Added the correct federal reference in subsection A for Guidelines for Specification of Disposal Sites for Dredged or Fill Material. The phrase "or streams" was added where the term wetland was used in this section to clarify that wetland and stream impacts are addressed. Subdivisions E 1 through 5 were modified to clarify the regulatory requirements of in-lieu-fee fund approval. Much of the language in F 1 was removed as it was duplicative of § 62.1-44.15:5 of the Code, instead the Code was referenced.

Section 210-130 – VWP general permits:

Subdivisions B 5, 6 and 7 were struck because they did not logically relate as subdivisions of subsection B, instead they were replaced as subsections C, D, and E . Subsection C was struck and replaced as H. It was moved because subsections F and G were added. Subsection F was added to avoid the situation where an applicant would need to reapply for coverage because a VWP general permit regulation expires, instead the language allows the activity to be covered under the replacement VWP general permit. Subsection G was added to clarify the process by

which the board may certify or certify with conditions a nationwide or regional permit proposed by the USACE. This will serve to avoid dual permitting.

Section 210-140 – Public notice of VWP permit action and public comment period:

Language in 9VAC25-210-140B was modified to replace the term "allow" with the term "provide" and the term "comment" was inserted to clarify that the board will provide a comment period. Also language was added to the end of this subsection to clarify that the board shall consider the public comment in their final decision. The term "discharge" was replaced with "proposed activity" in section 140 as the term discharge was not appropriate.

Section 210-160 – Public comments and hearing:

Subsection A was deleted as it duplicated information found at 140 A. The regulation citation was referenced for Procedural Rule No. 1 in subsections A, B and C to provide clarification.

Section 210-170 – Public notice of hearing:

The phrase "or fish and wildlife resources" was added to subdivision C 6 to address the statutory requirement that these resources be an element of the evaluation process.

Section 210-180 - Rules for modification, revocation and reissuance, and termination of VWP permits:

Revised the section to meet format standards and referred to the 15 year VWP permit limit at subsection B for clarification.

Section 210-200 – Transferability of permits:

Removed the terms "seller", "owner" and "proposed new owner" and replaced them with "permittee", "existing permittee" and "new permittee" as appropriate to clarify the intent of the section.

Section 210-210 – Minor modification:

Subdivision B 9 was deleted and subdivision B 8 was modified to address minor modifications to VWP general permits. This modification provides regulatory consistency among the VWP individual permits and the VWP general permits.

Section 210-220 – Waiver of a VWP permit:

Language was added to subsection A clarifying that any applicant that claims a waiver based upon the requirements outlined in the definition of "Isolated wetlands of minimal ecological value" is responsible for proving that qualification in the event that it is questioned.

Section 210-230 – Denial of the permit:

Language has been added to this section to enumerate the reasons for permit denial, including failure to provide the applicable permit fee.

Section 210-260 – Transition:

Language was added to address the implementation of the regulation effective August 1, 2001 for linear transportation projects of the Virginia Department of Transportation in response to a statutory mandate of the General Assembly. For all other applications, the effective date of this regulation remains October 1, 2001.

Family Impact Statement

Please provide an analysis of the regulatory action that assesses the impact on the institution of the family and family stability including the extent to which 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.

It is not anticipated that this regulation will have a direct impact on families.

Summary Of Public Comments and DEQ Responses

Virginia Water Protection Permit Regulation

9 VAC 25-210 et seq.,

and

Virginia Water Protection General Permits

9 VAC 25-660 et seq., 9 VAC 25-670 et seq.,

9 VAC 25-680 et seq., 9 VAC 25-690 et seq.

The public comment period for these draft regulations was February 26, 2001 through April 27, 2001. Four public hearings were held in Staunton, Richmond, Woodbridge, and Chesapeake:

1. March 29, 2001, Staunton City Council Chambers: Mr. Hunter Craig, presiding; two citizens attended, two citizens spoke
2. April 2, 2001, General Assembly Building: Dr. Tom Van Auken, presiding; 19 citizens attended, 10 citizens spoke
3. April 3, 2001, DEQ Northern Virginia Regional Office: Mr. Lance High, presiding; nine citizens attended, two citizens spoke
4. April 5, 2001, Chesapeake City Council Chambers: Mr. Preston Futrell, presiding; 80 citizens attended, 37 citizens spoke

A total of 110 citizens attended the public hearings, with 51 speakers providing testimony. A total of 81 written comments (including email and facsimile correspondence) were received from citizens; state, federal and local government agencies; and various business, trade, and environmental advocacy organizations. All of the written comments and audio tapes from the public hearings 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, and the rule-making they apply to has been indicated. A list of acronyms and abbreviations used in this summary is presented at the end.

1. **General Permit Wetland Thresholds:** Comments on this issue were many, varied and often conflicting. However, no one disagreed with the lower threshold of 0.1-acre for general permitting requirements. Many of the commentors — particularly citizens and several environmental advocacy groups — believe that the 2-acre upper threshold for the transportation and development general permits is too high. Of these commentors, approximately one-quarter of the commentors believe the transportation general permit threshold is too high versus approximately three-quarters of the commentors who believe the development general permit threshold is too high. Some commentors — particularly individual citizens, the Chesapeake Bay Foundation (CBF), and other environmental advocacy groups — believe that the thresholds for the transportation and development general permits should be consistent with the utility general permit of 1-acre. Other commentors — including the Southern Environmental Law Center (SELC), the James River Association (JRA), other environmental advocacy groups, the Chesapeake Bay Local Assistance Department (CBLAD), and some citizens — believe that the thresholds for all general permits (i.e. utilities, transportation, and development general permits) should be 0.5-acre. The 0.5-acre threshold would mirror those thresholds found in federal general permits, and would, according to their reasoning, afford DEQ with an expedited coordination period with the USACE for attaining a State Programmatic General Permit (SPGP).

   Many commentors — including SELC and JRA, the Sierra Club, other environmental advocacy groups, and some citizens — believe that a 2-acre threshold does not afford enough wetland protection, as there is not a strict adherence to avoidance and minimization of

wetland resources prior to taking the proposed impacts. In addition, the general permits, by definition, provide less opportunity for public comment on a given project, and with a 2-acre threshold, few projects will receive public scrutiny. JRA believes that all impacts over 0.5-acre should be authorized through the individual permit process to address "no net loss" commitments and provide opportunities for public comment. Several environmental advocacy groups have noted that approximately 90% of all wetland permits issued by the U.S. Army Corps of Engineers (USACE) are at or below two acres. JRA presented statistics for an unidentified year, which indicated that 82% of projects reviewed by the USACE had up to 0.5-acre of wetland impacts, 91% of projects had up to 1-acre of wetland impacts, and 96% of projects had up to 2-acres of impacts.

On the other hand, many other commentors — particularly the City of Chesapeake, business associations, industry, the Home Builders Association of Virginia (HBAV), the Virginia Association of Commercial Real Estate (VACRE), and other development associations — believe that the general permit thresholds, as proposed, provide sufficient protection of wetland resources. Several business groups have noted that when wetland acres rather than the number of permits are considered, only 59% of impacted wetland acres in FY99 were at or below the 2-acre threshold. Since the statutory intent of "no net loss" was focused on wetland acreage, the business groups believe that the percentage of permits below 2-acres is irrelevant when considering acreage of wetland impacts. Many of the business and trade group commentors believe that projects authorized under the development general permit, with a 2-acre threshold, will create efficiency and consistency in the permitting process, and most importantly, reduce the permit review time for projects from 120 days to 45 days. Further, the Virginia Department of Transportation (VDOT) indicates that 84% of their projects during FY99 proposed impacts at or less than 2-acres. Additionally, the Virginia Association of Municipal Wastewater Agencies, Inc. (VAMWA) recommends a 3-acre threshold for the utility general permit.

Several commentors — particularly business associations and some citizens — believe that adequate opportunity for public review is currently provided for projects above the USACE's 0.5 acre nationwide permit threshold. Several commentors suggest that since all proposed wetland impacts will be reported to DEQ prior to commencement, these impacts will be scrutinized for avoidance and minimization beyond that currently performed for USACE permits.

***Response*:** We believe that the upper and lower thresholds for coverage of wetland impacts under the general permits meet the statutory goals of protecting state waters and fish and wildlife resources from significant impairment while covering the majority of projects in the Commonwealth under a streamlined permitting program. The general permits contain a provision for reporting all wetland impacts, which will aid in tracking how the Commonwealth is meeting the goal of "no net loss" of wetland resources through our permitting program. The lower threshold of 0.1-acre for permitting requirements to apply under the general permits is consistent with the federal nationwide permit program, and provides compensatory mitigation for all but the smallest impacts. The upper thresholds for the general permits were set for each class of activities by considering the type and scope of impacts covered under each general permit. It was not our goal to set the thresholds to be

consistent with the upper thresholds of the federal nationwide permit program, and this is not a requirement to obtain a SPGP as some commentors have indicated; the SPGP will have its own thresholds set by the USACE through a process involving public comment.

The Technical Advisory Committee (TAC) spent much time discussing threshold limits for the utility general permit. Representatives from utility organizations were asked to provide the TAC with general statistics on their permanent impacts. Dominion Virginia Power provided information to the TAC indicating that the majority of their permanent wetland impacts on past projects were at or below 1-acre. VAMWA was asked to provide similar information, but indicated that they did not have these statistics. The consensus of most members of the TAC was that the majority of permanent wetland impacts associated with utility projects could be covered under a general permit with a 1-acre threshold. We are not proposing to change this provision.

The general permits have the identical requirement as the individual permit process to demonstrate avoidance and minimization of impacts to surface waters to the maximum extent practicable, and to provide a complete application prior to beginning the review process timeline of 45 days. The general permits provide the same or greater compensatory mitigation for unavoidable impacts to surface waters, as the compensation ratios are set by regulation and cannot be negotiated to a lower level, as they can and often are under the individual permit review process. There are provisions within the general permit regulations to deny use of the general permit in favor of the individual permit review process should there be significant issues concerning threatened or endangered species or the type of impacts proposed. For these reasons, we do not propose any changes to the wetland thresholds as presented.

2. **General Permit Stream Thresholds:** A few commentors — particularly CBLAD, USACE, the U.S. Fish & Wildlife Service (USFWS), and JRA — believe that the general permit for impacts less than one-half of an acre should also contain some threshold limit for impacting linear feet of intermittent stream channel in addition to the threshold of 250 linear feet for perennial streams. CBF suggests a 375 linear feet threshold. USFWS believes that there should be no differentiation between threshold limits on perennial streams versus intermittent streams, and the threshold for impacts to all streams should be 500 feet, irrespective of perennially.

   Several commentors — particularly business associations and the development community — believe that there should be no threshold limit on impacts to intermittent streams at all. These commentors believe that there is no standard mapping protocol or field methodology to distinguish, simply and quickly, between perennial and intermittent streams.

   ***Response*:** We agree with many of the commentors that both perennial and intermittent streams are a valuable resource that should also receive protection under this permit program. For this reason, we proposed upper limits for both perennial and intermittent streams on the development and transportation general permits, and for perennial streams on the half-acre and utility general permits. We have added the same upper threshold of 1500 linear feet of intermittent stream to the half-acre and utility general permits as impacts to intermittent

streams are likely to occur as part of the activities covered; its omission was an oversight during development of the draft regulations. The limits on intermittent stream impacts are higher than that for perennial streams because intermittent streams oftentimes have a somewhat lesser role in providing instream beneficial uses regulated under our program. We note that the USACE's nationwide permit program contains limits only on perennial streams, with no upper limit on intermittent streams. We also note that the general permits provide for 1:1 compensation for any unavoidable stream impacts to address water quality and fish and wildlife resource issues.

3. **Performance Bonds:** Many of the commentors — particularly citizens, CBLAD, CBF, JRA, SELC, and other environmental advocacy groups — believe that a performance bond should be required to ensure that compensatory mitigation is actually constructed and then regularly monitored to ensure the site's success. CBF presented data from unspecified other states indicating that 40%-80% of required wetland compensation projects are never completed. Further, these commentors believe that while the USACE and the Virginia Marine Resources Commission (VMRC) require a performance bond as part of their permit programs, projects that will require a DEQ permit but no additional USACE or VMRC permit have no bonding provisions.

   Other commentors — particularly HBAV, VACRE, other business and development associations and industry — believe that requiring a performance bond for wetland mitigation projects is duplicative and costly because the USACE already requires a bond on some projects. Also, these commentors suggest that since compensatory mitigation is an enforceable part of the VWP permit, performance bonding is unnecessary. Further, these commentors believe that bonding requirements do not lend a spirit of trust between the regulatory agency and the applicants. Additionally, VDOT opposes performance bonding because they believe committing public funds for transportation projects in an "unusable escrow fund" is unnecessary.

   ***Response*:** DEQ does not have a clear statutory authority to require such performance bonds. Demonstrating successful compensatory mitigation is an enforceable condition of a permit, and specific performance criteria for compensatory sites are part of the permit. Should the permit condition requiring compensatory mitigation success not be met, some type of corrective action or enforcement action will be taken.

4. **Permitting of Stormwater Management Facilities under General Permits:** Many of the commentors — particularly citizens; several environmental advocacy groups including CBF, SELC and JRA; and CBLAD — believe that the development general permit should not authorize the construction of stormwater management facilities in wetlands. The commentors believe that these facilities should be authorized under an individual permit process to allow greater public scrutiny of all alternatives related to the siting of these facilities. CBLAD does not consider such facilities a water-dependent activity in Resource Protection Areas (RPAs), meaning that these facilities are subject to other state and local regulations in addition to any VWP permit action.

On the other hand, many of the commentors — particularly the City of Chesapeake, Accomack County, VDOT, HBAV, VACRE, other business associations and industry — believe that the construction of stormwater management facilities should remain authorized under the one-half acre and development general permits, and should be authorized in the transportation general permit, because these facilities are required by law and often must be located in wetlands due to other project constraints. The commentors believe that requiring all projects with stormwater management facilities to undergo the individual permit process will render the development and transportation general permits useless. Further, many of these commentors believe that development projects undergo extensive scrutiny of their stormwater management plans through the public participation process at the local zoning and planning levels. Therefore, prohibiting the use of general permits for projects requiring stormwater management facilities on the basis of additional public review is duplicative and unnecessary.

***Response*:** The proposed general permits exclude the location of stormwater management facilities in perennial streams. Since all development projects, including transportation projects, require some type of stormwater management facility, restricting the use of general permits for their construction would render the general permits less useful to the regulated community. Therefore, we will keep this provision in the general permits. Further, stormwater management facilities are attendant features of transportation projects, and we agree that this provision should be added to the transportation general permit.

5. **Preservation of Wetlands:** Many of the commentors — particularly citizens, CBF, JRA, and other environmental advocacy groups — believe that wetland preservation, as part of compensatory mitigation, should only be granted for wetlands that are currently under some immediate development threat. Most of these commentors believe that preserving wetlands not under immediate threat does not achieve "no net loss" of wetland resources.

   Several commentors — particularly business associations and some citizens — believe that preservation of any existing wetland should be allowed, as proposed in the regulations. Other commentors believe that wetland preservation should be allowed without any associated wetland restoration or creation. These commentors believe that wetland preservation in addition to wetland restoration or creation will cause unnecessary financial burdens on localities.

   ***Response*:** According to various statistics (e.g. U.S. Environmental Protection Agency, CBF, USFWS, Alliance for the Chesapeake Bay, and others) Virginia has lost approximately one-half of its wetland resources in nearly 400 years of existence. Wetland resources not under immediate threat today may be threatened in future years, and it is impossible to predict precisely which areas may be developed in future generations. The regulations, as proposed, recognize that the remaining wetland resources within the Commonwealth are valuable to the surrounding landscape. Preservation of these resources, in combination with creation and restoration, will indeed lead to "no net loss" of wetland acreage and function.

   Furthermore, wetland preservation without associated wetland restoration or creation is not allowed by statute. Specifically, § 62.1-44.15:5D of the Code of Virginia states, "When

utilized in conjunction with creation, restoration or mitigation bank credits, compensation may incorporate (i) preservation or restoration of upland buffers adjacent to wetlands or other state waters or (ii) preservation of wetlands."

6. **Modifications to Permitted Impacts under General Permit Authorizations:** Many of the commentors — particularly citizens, several state and federal agencies, and several environmental advocacy groups — believe that a modification to a general permit authorization should be limited to a one-time modification not to exceed 0.25 acre and 50 linear feet of steam channel, similar to the minor modification of an individual permit. Further, these commentors believe that the applicant must provide additional documentation to demonstrate that avoidance and minimization of wetland impacts were considered. Other commentors believe that the applicant must reapply for a new permit authorization since the scope of the project has changed.

   Some commentors — particularly business associations, industry, VDOT, and some citizens — believe that modification of a general permit authorization should allow additional wetland impacts up to the threshold of the each particular general permit. By placing a one-time cap on modifications, these commentors believe that a new application, incurring additional time and cost to the applicant would be necessary for unpredictable conditions.

   ***Response*:** After careful consideration of all the comments, we have revised the general permits to allow for a cumulative modification of a general permit authorization up to an additional 0.25 acre of wetland impact and 50 linear feet of stream channel. This is similar to the minor modification provision for individual permits. Any additional impacts would require the application for a new general permit, provided that the cumulative total wetland or stream impacts do not exceed the upper threshold of that permit. If the general permit threshold would be exceeded, then an individual permit application will be necessary. In any case, new information must be provided on avoidance and minimization of additional impacts, and all additional impacts must be compensated according to the original authorization's compensation ratios.

7. **Changes to Permit Monitoring Requirements as a Minor Modification:** CBF is concerned with the proposed revision in 9 VAC 25-210-210B(2), which they believe allows a reduction in permit monitoring requirements to be considered a minor modification. CBF does not object to the existing language that provides for increased reporting requirements to be considered a minor modification. However, they believe that allowing for elimination of certain monitoring requirements without opportunity for public review and comment is a substantially different issue. They believe permit conditions offered during review and negotiation of a permit application often influence conclusions reached regarding the overall impact of a project to state waters and fish and wildlife resources, and that eliminating those conditions should require a new permit application and public notice. Similarly, CBF recommends that DEQ revise Subsection B(7) to clarify that this subsection does not apply to compensatory mitigation monitoring requirements by inserting the following sentence: "This provision is not applicable to compensatory mitigation monitoring requirements."

***Response*:** We disagree with CBF's concerns in 9 VAC 25-210-210B(2). According to the regulations, the permittee must demonstrate to DEQ that the change in monitoring requirements is justified based upon the circumstances and facts associated with that project. Regarding Subsection B(7), we believe that this language is pertinent to the monitoring of specific pollutants, not general compensatory mitigation requirements.

8. **Exclusion for Construction and Maintenance of Drainage Ditches:** Many commentors — particularly the Hampton Roads Planning District Commission (HRPDC), the City of Chesapeake, HBAV, VACRE, and other development associations — believe that maintenance activities in existing drainage ditches should not require a permit. These commentors state that such maintenance activities are required to comply with Municipal Separate Storm Sewer System VPDES permits. Further, the City of Chesapeake and Accomack County believe that all man-made ditches should be excluded from the definition of surface waters, and hence, their construction would not require a permit.

   ***Response*:** Maintenance of existing drainage ditches is, and always has been, an exclusion in the regulations (9 VAC 25-210-60I). However, in response to these comments, we have further clarified that maintenance of existing drainage ditches is an excluded activity, provided that the final dimensions of the maintained ditch do not exceed the average dimensions of the original ditch. Excavation of new drainage ditches in wetlands, or an increase in the cross-sectional area of existing ditches, will require a VWP permit as mandated by the statutory requirement to regulate excavation in wetlands.

9. **Definition of Perennial Streams:** Many commentors — particularly business associations, the development community, and industry — believe that the proposed definition of perennial stream is too broad to accurately and consistently apply in the field. These commentors believe that this broad definition will lead to additional project costs without a simple test for making these determinations.

   Representatives of the northern Virginia development community and CBF recommend deleting the definition for perennial stream and, alternatively, incorporating definitions for "major" and "minor" streams to enhance the reliability and consistency of the general permit program. The definition for "major streams" should be based upon the best available science and incorporate drainage areas more reflective of Virginia's varying physiographic regions. These commentors recommend the following definitions for major and minor stream adapted from "A discussion of Intermittent and Perennial Streamflow" (Athanas and Rolband, 1999 draft):

   "Major stream means a surface water body (or stream segment) having at least the following drainage areas per physiographic region:

Coastal Plain	140 acres
Piedmont North	330 acres
Piedmont South	280 acres

Blue Ridge	**225 acres**
Valley and Ridge	700 acres
Piedmont/Blue Ridge Transition	280 acres.

Minor stream means a surface water body (or stream segment) that is not a major stream."

The USACE is concerned that the definition of "perennial stream" in the 0.5-acre general permit will create a situation where DEQ and USACE perennial determinations will conflict.

***Response*:** We recognize that there is a large base of scientific literature on the designation and delineation of ephemeral, intermittent, and perennial streams. No one methodology has been widely accepted or utilized and many of the proposed methods are difficult to implement, as they require certain field skills, scientific expertise, or time. Other suggested methods, such as the use of different drainage areas for different physiographic regions, are confusing to both the regulated community and to the DEQ permit writer, as they require the application of different standards depending upon a project's location within the state. We have chosen a practical definition of perennial streams that is easily applied and has a basis in science. In general, a 320-acre (or ½ square mile) drainage area separates free-flowing streams from those that flow intermittently during the year. By definition, we are also allowing some discretion on the application of the 320-acre criterion when there are clear field conditions pointing either to year-round flow or intermittent flow. We are not proposing to change the definition from that presented in the draft regulations.

10. **Stream Compensation:** The USFWS recommends that impacts to streams be compensated in all instances by eliminating the phrase "when practical" in the mitigation section of the regulation. Further, the USFWS recommends that the 1:1 stream mitigation ratio be increased to some unspecified higher level. Also, the USFWS believes that three years of monitoring for stream restoration projects are inadequate to determine success.

    CBF and USACE recommend clarifying the compensation requirements for stream impacts to reflect the need to investigate opportunities to compensate "in-kind" prior to authorizing "out-of-kind" replacement. CBF recommends the following: replicating the following language regarding compensating for stream impacts that is found in the development general permit: "Compensatory mitigation for unavoidable impacts to streams is provided at a 1:1 replacement to loss ratio via stream relocation, restoration, purchase of mitigation bank credits or contribution to an in-lieu fee fund that includes stream restoration."

    ***Response*:** The phrase "when practical" acknowledges that stream compensation opportunities do not always exist. Where reasonable opportunities do exist, DEQ will require preservation/restoration of a similar class stream on a 1:1 basis. DEQ will retain the flexibility to evaluate stream monitoring requirements based upon the specific nature of each project.

    This language highlighted by CBF and the USACE has been clarified in the regulations: "compensatory mitigation for unavoidable impacts to streams shall be provided at a 1:1

replacement to loss ratio via stream relocation, restoration, riparian buffer establishment, or purchase to mitigation bank credits or contribution to an in-lieu fee fund that includes stream restoration, when feasible." CBF's recommended language is already in the regulation.

11. **Coverage of Activities under the Utility General Permit:** Several commentors — particularly VDOT, VAMWA, Dominion Virginia Power and local governments — support the provision that allows construction of access roads for installation and maintenance of utility lines. Both VAMWA and the City of Chesapeake request that the provision for a permanently maintained maintenance corridor without compensation be extended from the proposed 20-foot width to a 30-foot width.

    Further, VAMWA recommends identifying pump station access roads as an allowable structure under the utility general permit. Both VDOT and VAMWA request that the VWP regulations not hamper emergency responses for utility line repairs.

    One commentor, Dominion Virginia Power, requests that preservation be allowed as sole compensation for wetland impacts in instances where it is deemed that preservation of that site would have a greater positive impact on the aquatic environment.

    The City of Chesapeake recommends that the reference "trenching for a utility line cannot be constructed in a manner that drains wetlands (e.g. backfilling with extensive gravel layers creating a french drain effect)" be removed, as stone or gravel bedding materials are often used to maintain the structural integrity of the utility line.

    ***Response*:** The TAC — including representatives from local government, VAMWA and Dominion Virginia Power — spent considerable time discussing the issue of maintenance corridor widths. The consensus of the TAC was that a 20-foot wide maintenance corridor was generally adequate to facilitate most maintenance operations. Additionally, VDOT supports the 20-foot wide corridor as being consistent with its utility easements. We are not proposing to change this provision. Pump station access roads would be an attendant feature already allowed under the regulation.

    The regulations already contain a provision for emergency repairs under 9 VAC 25-210-60H, which excludes maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, groins, levees, dams, riprap breakwaters, causeways, bridge abutments or approaches, and transportation and utility structures from the need for a permit. No changes to this provision are needed.

    Preservation alone, as compensatory mitigation for wetland impacts, is specifically prohibited by statute and this is reflected in the regulations.

    We cannot remove the phrase "trenching for utility lines cannot be constructed in a manner that drains wetlands…" (9 VAC 25-670-100-I-E-3), as the effect of these procedures is to drain wetlands. The draining of wetlands is an activity specifically identified by statute as requiring a VWP permit.

12. **Isolated Wetlands of Minimal Ecological Value:** Several commentors — particularly citizens, CBF, SELC, and other environmental advocacy groups — believe that some timbering restrictions should be included in this definition. These commentors believe that, although being forested prevents a wetland from being designated an "isolated wetland of minimal ecological value", there is also an exclusion in the regulations to allow for normal silvicultural activities. In short, an isolated, forested wetland could be timbered, then, because of this timbering activity, would be considered of minimal ecological valuable. Further, these commentors believe that small isolated wetlands serve critical functions for amphibian habitat and natural stormwater detention. A few commentors — particularly citizens, CBLAD, and environmental advocacy groups — believe that isolated wetlands associated with "wetland/upland complexes" should be excluded from this definition. CBF supports the overall definition of "isolated wetlands of minimum ecological value" as proposed in the regulations.

    The Department of Conservation and Recreation (DCR), CBLAD, SELC, JRA and several citizens recommend that vernal pool wetlands be specifically excluded from the definition of "isolated wetlands of minimum ecological value" as these wetland types provide critical habitat for amphibians.

    A few commentors — particularly VACRE, business associations, and some citizens — believe that the 0.1-acre threshold is too restrictive and should be decreased to some lower level. VACRE recommends that the definition be changed to allow impacts to isolated forested wetlands up to 0.05-acre. Other commentors, particularly the Hampton Roads Chamber of Commerce (HRCC) and the City of Chesapeake, believe that small wetland areas, regardless of vegetation type, provide little benefit to the landscape relative to potential economic/development losses associated with protecting these areas. These commentors believe that a "wetland of minimal ecological value" should be defined by its size only, and the forested exclusion should be omitted. The City of Chesapeake believes that there is no scientific evidence demonstrating that isolated, forested wetlands are ecologically more valuable than isolated, nonforested wetlands. Further, VAMWA supports the language regarding isolated wetlands of minimal ecological value without a presumption relative to ecological value.

    ***Response*:** The proposed definition was drafted following considerable debate and discussion during numerous TAC meetings. The TAC worked deliberately to develop a functional definition. The definition offers a system that is both workable and predictable by eliminating any reference to a case-by-case analysis. Further, the TAC struck a compromise to remove language pertaining to complexes of isolated wetlands, as it was not considered workable. In addition, the TAC consciously sought to exclude from the definition of "isolated wetlands of minimal ecological value" those wetlands that provide substantial function and value, such as forested wetlands. As evidenced by testimony provided by Dr. Carl Hershner of the Virginia Institute of Marine Science (VIMS) during the TAC meetings, the scientific community recognizes forested wetlands as providing critical ecological values such as water quality protection, flood control, and migratory bird and amphibian habitat. Vernal pool wetlands are excluded from being a "isolated wetland of minimal ecological

value" if such areas include at least one of the five established criteria defined in the regulation. These systems do not need to be specifically excluded from the definition. The proposed definition represents a compromise by the environmental and development communities represented on the TAC, and is based upon scientific evidence. DEQ does not agree that this definition should be altered from that which is proposed.

13. **Definitions:** Several commentors suggested various changes to definitions of words and phrases in the regulations:

    a. ***Single and Complete Project*:** VDOT and Old Dominion Electrical Cooperative recommend that the definition of a single and complete project not include a reference to "independent utility", but rather, "independent utility" should be separately defined.

    Response: The definition of "independent utility" has been separated from that of "single and complete project", consistent with definitions found in federal regulations.

    b. ***Normal Residential Gardening, Lawn and Landscape Maintenance*:** The USACE recommends eliminating this definition from the regulations because the general public may not be aware of the location of wetlands of their property.

    Response: The statute specifies an exclusion for "normal residential gardening, lawn and landscape maintenance" which are incidental to an occupant's ongoing residential use of property. The TAC discussed the definition of "normal residential gardening, lawn and landscape maintenance" at length, and the proposed definition was developed from consensus of those TAC members. We are not proposing any changes to this definition.

    c. ***Normal Agricultural Activities and Normal Silvicultural Activities*:** The USACE suggests adding a reference to USACE regulations that govern these activities.

    ***Response*:** We instead reference the Virginia code to maintain consistency within state programs.

    d. ***Surface Waters*:** The USACE is concerned that there is a distinction between surface water-driven wetlands and groundwater-driven wetlands. The USACE is also concerned that groundwater-driven wetland systems may not be protected since the proposed definition of "surface water" excludes groundwater. The USACE suggests changing the definition of "surface water" to include the phrase "saturated wetlands" or to clarify that "surface waters" include the top twelve inches of the soil profile. CBF recommends inserting the phrase "including wetlands" after the word "water" in the definition of surface water for clarity and consistency with the state law.

    ***Response*:** The definition of "State waters" is, "all water, on the surface and under the ground, wholly or partially within or bordering the Commonwealth or within its jurisdiction, including wetlands." Surface waters are defined as all state waters except groundwater, and hence include all wetlands. Since the phrase "including wetlands" in the definition of "State waters" does not differentiate between surface water-driven

wetlands and groundwater-driven wetlands, any area meeting the general definition of wetlands would be subject to the authority of these proposed regulations. No change is proposed.

e. ***Mitigation Banking:*** CBF recommends substituting the following definition of "mitigation banking" rather than the proposed definition in the regulations: "wetland restoration, creation, enhancement, and in appropriate circumstances preservation of wetlands or upland buffers adjacent to wetlands or other state waters, undertaken expressly for the purpose of compensating for unavoidable wetland losses in advance of development actions through the sale, purchase or use of credits from an operation that has been approved and is operating under a signed banking agreement in accordance with all applicable federal and state guidance, laws or regulations for the establishment, use and operation of mitigation banks."

Response: We believe that the language in the proposed regulations is clear. We disagree that this recommended change is needed in the definition of "mitigation banking."

f. ***Permanent Flooding or Impounding*:** The USACE is concerned that this definition does not consider that dry ponds or extended-detention basins cause an impact to upstream waters and wetlands. Further, the USACE is concerned that the construction of temporary sedimentation basins on construction sites, which does not include the placement of fill materials in surface waters, is exempt from the VWP regulations.

***Response*:** The definition of "permanent flooding or impounding" reflects a compromise negotiated by the TAC, and allows that dry ponds and extended detention basins would require a permit only if they involved fill or excavation of wetlands and would not be considered to permanently flood or impound wetlands.

g. ***Permanent and Temporary Impacts:*** CBF recommends deleting the definition of permanent impact as it is unnecessary and, as written, is inconsistent with the Virginia Water Protection Permit statute. CBF recommends retaining the definition for temporary impact but revising the language to read: "means construction activities in wetlands and surface waters in which the ground is restored to its pre-construction contours and elevations and where certain functions and values of wetlands and surface waters are not permanently adversely affected." This definition provides more consistency with the USACE Nationwide Permit 12 (Utility Line Activities). Furthermore, VDOT recommends the addition of a definition for "temporary impacts".

Response: The definition of permanent impact has been deleted, and we have added a definition for temporary impacts that meets the intent of the suggested comment. The definition of "temporary impacts", included in the proposed utilities general permit, has been added to the other permits.

h. ***Channelization*:** VDOT recommends that the definition of "channelization" distinguish between channelization practices and natural stream design techniques.

***Response*:** The definition of channelization used in the general permits parallels the definition found in the federal wetland regulations. We do not believe that the language of this definition results in confusion with natural stream design techniques. Further, natural stream design techniques that result in impacts to state waters would likely require a permit.

i. ***Utility Line*:** CBF recommends that DEQ revise the definition of "utility line" so that it is more consistent with the USACE Nationwide Permit 12, as follows: "The term utility line does not include activities that drain a ~~wetland~~ surface water ~~to convert it to an upland~~, such as drainage tiles or french drains; however, it does apply to pipes conveying drainage from another area."

***Response*:** We have made the suggested change.

j. ***Real Estate Subdivisions*:** USACE suggests adding the grandfather date for real estate subdivisions to the definitions.

***Response*:** The suggested change has been made.

k. ***State Programmatic General Permit*:** The USACE recommends that the definition of "state programmatic general permit" be changed to: "a type of general permit developed to reduce duplication with another regulatory program that (1) is substantially similar to the USACE's regulatory program and (2) will have minimal environmental consequences both individually and cumulatively." CBF recommends a definition similar to the USACE's suggestion.

***Response*:** The definition of "state programmatic general permit" has been changed to reference the USACE's enabling regulation 33 CFR Part 32S.

l. ***Fill*:** The City of Chesapeake, Accomack County, and HRPDC recommend that the definition of "fill" be revised to exclude incidental fallback. CBF recommends substituting "surface water" for "a water body or wetland" in this definition to provide consistency regarding DEQ's jurisdiction under this program.

***Response*:** As our statutory authority is not based on the regulation of fill material alone, but rather any filling or excavation of wetlands, the question of incidental fallback is not relevant within the VWP program. We have revised this definition to incorporate CBF's recommendation concerning use of the term "surface water".

m. ***Enhancement*:** The City of Chesapeake believes that the definition of enhancement should include a definition of the phrase "aquatic function or values".

***Response*:** We believe that both the language and its intent are clear, and that no further revisions are needed.

n. ***Preservation*:** CBF suggests the insertion of "threatened wetlands and upland buffers adjacent to" prior to the word "resources" in the proposed definition of preservation. CBF believes this change will insure that permit applicants are prohibited from offering compensation that includes preservation of wetlands and other resources not under substantial development pressure. Further, they believe that meaningful compensation should allow for preservation (in conjunction with restoration and creation) that protects in perpetuity resources that might otherwise be lost. Also, CBF recommends that DEQ develop criteria in guidance for determining what may or may not be deemed "threatened."

***Response*:** We do not believe it is necessary to change the definition of "preservation" as proposed.

o. ***Water Quality Standards*:** CBF recommends that DEQ revise this definition to read: "*means those standards found at 9 VAC 25-26-10 et seq. adopted by the Board*."

Response: This definition has been revised, but with additional clarifications recommended by the OAG.

p. ***Shoreline Protection*:** CBF recommends deleting references in the definition of "shoreline protection" that pertain to projects in tidal wetlands, as the general permits do not authorize tidal wetland impacts.

Response: This definition has been changed to "bank protection", which pertains to nontidal areas.

14. **Delineation Site Map:** The City of Chesapeake believes that DEQ did not intend for the delineation map to include areas beyond those proposed for impact and requiring a permit. Therefore, Chesapeake recommends that the word "site" be removed from this phrase.

***Response*:** The intent of the delineation site map is to show the location of wetlands in relation to the entire project site, not just the areas proposed for impact. Without review of the entire project (i.e., the site), we cannot evaluate whether avoidance and minimization of wetland impacts has occurred to the maximum extent practical. We do not propose any changes to this provision.

15. **Chesapeake Bay Resource Protection Areas:** Several commentors — particularly VACRE, HBAV, HRCC, other development and business associations, the City of Chesapeake, and some citizens — believe that the requirement for depicting RPAs on site maps submitted with a permit application is too burdensome for applicants and beyond the regulatory authority of DEQ. Further, these commentors believe that state and local government agencies do not precisely map RPA boundaries, which would cause undue financial burden, time constraints, and confusion on the regulated public.

CBF recommends revising the registration statement to allow an applicant to submit project maps depicting RPAs on local government CBPA maps to facilitate compliance with this

requirement. CBLAD supports the inclusion of RPA locations on maps submitted with the registration statement.

***Response*:** We are only asking that the applicant provide the approximate location of any RPAs on the delineation site map so that we can coordinate with the locality when reviewing the application. We are not asking for a precise location nor duplicating any local regulatory requirements. The wording regarding this requirement has been modified to better reflect our intent.

16. **DEQ Acquisition of State Programmatic General Permit:** Many commentors — business associations, state and federal agencies, industry, local planning districts, and local governments — believe that DEQ must seek and successfully acquire a State Programmatic General Permit (SPGP) in a timely fashion to reduce or eliminate duplicative permitting processes.

    Most commentors, particularly business associations and industry, believe that the Commonwealth should take the lead in authorizing activities in State waters. These commentors believe that there should not be a dual-permitting process, where applicants must obtain both a federal and a state permit authorizing the same activity.

    The USACE is concerned that any project authorized a USACE Regional, General, or Nationwide Permit, and for which a 401 water quality certification was issued by DEQ, would be excluded from the requirements of these proposed regulations. The USACE is concerned that the language of Paragraph E (9 VAC 25-660-30) contradicts that language found in the exclusion section (9 VAC 25-210-60, Paragraph 1) of the VWP regulation. The USACE notes that the exclusion language in the general permit regulations is inconsistent. CBF expressed similar concerns.

    VDOT supports the elimination of duplicative permitting for projects that already are certified under a USACE nationwide permit.

    ***Response*:** DEQ is actively working with the USACE to establish standard operating procedures and protocols that will be incorporated into a Memorandum of Understanding (MOU) between the agencies, as a precursor to obtaining an SPGP to reduce program overlap. In the interim, the general permits contain provisions that certification of a USACE nationwide permit will constitute coverage under the general permit until the SPGP is approved.

    The USACE and CBF are correct about the confusing language within the regulation on this issue. We have made a change to 9 VAC 25-210-60A to go back to the original language that activities addressed under a USACE nationwide or regional permit for which no Section 401 water quality certification is required are exempt from the regulation. We then added 9 VAC 25-210-130G to allow DEQ to continue to certify USACE nationwide or regional permits through a public comment period as meeting the requirements of this regulation.

17. **Upland Buffers as Mitigation:** A few commentors — particularly CBLAD, JRA, and other environmental advocacy groups — believe that upland areas currently protected by the Chesapeake Bay Preservation Act should not receive any mitigation credits. These commentors recommend including the following language in the general permits: "Where local zoning ordinances provide for riparian and floodplain protection, the preservation and restoration of upland buffers in conjunction with mitigation shall be allowed only where the extent of such buffer exceeds the lateral extent already required by local ordinance."

    ***Response*:** The TAC discussed this subject at length, and a modified version of the above language was included. The language reflects that such credit will be given only to the extent that additional protection and water quality and fish and wildlife resource benefits are provided.

18. **Secondary Impacts:** A few commentors, mostly citizens, believe that secondary impacts (i.e., additional surface runoff and flooding) from filling activities should be included in impact calculations. These commentors believe that filling a wetland area will increase surface runoff to surrounding upland areas, presenting increased potential flooding where a lesser flood potential currently exists.

    ***Response*:** Secondary impacts are considered when evaluating avoidance and minimization opportunities during the permit application review process. By statute, they cannot be directly regulated.

19. **Mitigation within the Watershed of Impact:** A few commentors, particularly citizens and environmental advocacy groups, believe that wetland mitigation should occur in the same watershed as the authorized wetland impact. These commentors believe that mitigation occurring in an adjacent watershed produces a net loss of wetland function in the watershed where a wetland impact has been authorized.

    ***Response*:** The sequence for evaluation of compensatory mitigation alternatives is detailed in 9 VAC 25-210-115, and includes first looking onsite and then off-site for opportunities. In all cases, the applicant must show that the proposed compensatory mitigation is the most practical and ecologically preferable alternative. There is a statutory requirement that the purchase of mitigation bank credits as compensation must be from the same or adjacent Hydrologic Unit Code (HUC) within the same river watershed.

20. **Construction Inspections:** A few commentors, particularly citizens and environmental advocacy groups, believe that DEQ should be performing more inspections of construction projects authorized by a VWP permit. These commentors believe that DEQ inspections should ensure that permitted impacts are not exceeded during construction. Further, these commentors believe that DEQ must ensure that mitigation is constructed according to approved plans and authorizations.

    ***Response*:** Through the increased use of general permits for most wetland impacts, staff will have more time to perform permit compliance inspections.

21. **Certification Statement:** Several commentors — particularly business associations, industry, and some local governments — believe that the certification statement found in 9 VAC 25-210-100 creates a sense of fear, mistrust, and intimidation from the regulatory agencies. These commentors suggest that the certification statement be reworded to soften the language or that the certification statement be eliminated.

    ***Response*:** This language is used in all water permits, and will not be changed in this regulation.

22. **General Permit Compensation Ratios:** The USACE recommends removing specific compensatory mitigation ratios from the general permits to allow more flexibility for DEQ on a project-by-project basis. On the other hand, CBF supports our use of standardized compensation ratios as they provide greater assurance that the impacts under the general permits achieve "no net loss" of wetland acreage and function.

    ***Response*:** One of the major points discussed by the TAC was that by including specific mitigation ratios in the general permits, we could ensure that the goal of "no net loss" of wetland acreage and function through permitted impacts was met. The inclusion of these ratios gives DEQ the ability to use the general permits for larger impacts and remain confident that "no net loss" will be achieved. The applicant is free to use the individual permit process if they want more flexibility with regard to mitigation ratios.

23. **Avoidance and Minimization:** Several commentors — particularly citizens, CBF, JRA, and other environmental advocacy groups — believe that the regulations, as proposed, do not clearly require an evaluation of opportunities to avoid and minimize wetland impacts on a given project. The SELC recommends adding a presumption that an activity not requiring proximity to state waters has other practical alternatives to the proposed wetland impact. Furthermore, CBF and JRA believe that the proposed regulatory language of the general permits regarding avoidance and minimization is too general. CBF recommends modifying 9 VAC 25-210-115A to read: "Measures, such as locating elsewhere on one or more alternative parcels, reducing the size, scope, configuration, or density of the proposed project, and other alternative designs, that would avoid or result in less adverse impact to state waters shall be considered in determining if done to the maximum extent practicable. For those activities that do not require proximity to state waters, practicable alternatives that do not involve state waters are presumed to be available, unless clearly demonstrated otherwise."

    The USACE is concerned that in-lieu fee funds under the general permits will be used without regard to avoidance and minimization of wetland impacts and without regard to potential for on-site mitigation or mitigation banks. One citizen in Accomack County believes that mitigation is not necessary in all cases. This citizen believes that there is not enough technical information available to support the mitigation ratios proposed in the VWP general permit regulations.

    ***Response*:** Section 404 (b) (1) of the Clean Water Act [40 CFR 230.10(a)] requires an applicant to first avoid, then minimize wetland impacts before proposing compensation for adverse impacts to the environment. The Section 404 (b) (1) guidelines are incorporated by

reference into the VWP regulations. Further, 9 VAC 25-210-115 discusses the demonstration of avoidance and minimization and other measures (i.e., reducing the size, scope, and configuration or density of the project to avoid or result in less adverse impact to surface waters) that must be considered. The general permit regulations incorporate, by reference, the requirements outlined in the VWP regulation. Therefore, avoidance and minimization to the maximum extent practical is incorporated into all of the VWP and general permit regulations.

24. **Purpose of Regulation:** CBF objects to the removal, in its entirety, of the "purpose" section of the regulations. They believe that the language of this section was specifically negotiated during several TAC meetings and provided additional clarity to the requirements of the VWP program regarding mitigation, cumulative impact considerations, public comment, and agency coordination. It is their understanding that this removal represents a policy decision by staff of the Virginia Register, and not DEQ. CBF believes the provisions of the purpose section as developed by the TAC to be substantive and critical. CBF urges DEQ to include a summary of the statutory requirements in this section.

    Further, CBF recommends that DEQ specify that VWP permit applications will be circulated to the following agencies for review and comment: VIMS, DGIF, DCR, DACS, VMRC, the USACE, USFWS, USEPA, and the National Marine Fisheries Service (NMFS). They believe that regulations must also specify procedures for resolving conflict between agency recommendations and DEQ permit decisions.

    ***Response*:** The purpose section was removed in accordance with current procedures of the Virginia Register. CBF's suggested language outlines the process the Board uses to determine whether to issue permits. This language is contained elsewhere in the regulations and is also in the statute. Further, DEQ believes that the procedural requirements recommended by CBF are more appropriately addressed in its internal permit manual as guidance for VWP staff. Therefore, according to the registrar, the purpose section is not needed.

25. **Exemptions for Specific Regions, Localities, or Activities:** A few commentors, particularly citizens and local government agencies, believe that specific localities or activities should be exempt from these regulations. One citizen from Richmond believes that all cities should be exempt because cities, according to his reasoning, generally do not contain wetlands and these regulations would adversely affect economic development initiatives. One citizen from Accomack County believes that the regulations should exempt the Melfa Industrial Park and that the regulations will adversely shift development pressures from one region or locality to another if the quantity of nontidal wetlands is less in another locality. The Chesapeake City Public School Administration believes that public school construction should be exempt from the VWP regulations because of the need to provide schools at specific locations.

    ***Response*:** We believe that the regulations should apply equally to all localities and projects in the Commonwealth.

26. **Regional Discrimination:** Some citizens and business association representatives from the Tidewater area suggest that the proposed regulations disproportionately affect the Hampton Roads region, and, therefore, discriminate against Hampton Roads. One citizen in Accomack County is concerned with the quantity of land being subjected to these regulations, both in Accomack County and statewide. On the other hand, CBF suggests that most nontidal wetlands (76% from their data) occur in areas or regions outside of Hampton Roads.

    ***Response*:** The proposed regulations will be applied to projects throughout the Commonwealth, regardless of county or region. According to a report from VIMS (Special Report No. 00-1, Wetlands in Virginia, dated January 2000), approximately 75% of nontidal wetlands occur in regions outside of Hampton Roads. The report states that Accomack County contains approximately 185,551 acres of vegetated nontidal wetlands; approximately 1,075,961 acres of vegetated nontidal wetland are estimated to occur throughout the Commonwealth. Further, for FY94 and FY95, USACE data show that approximately 84% of nontidal wetland impacts authorized by then Nationwide Permit 26 occurred in Chesterfield, Henrico, and Fairfax counties, all outside of the Hampton Roads region. We do not believe that the regulations discriminate against any one region of the Commonwealth.

27. **Exclusion of Histosols from General Permit Coverage:** The Department of Conservation and Recreation (DCR) believes that all general permits should include a prohibition for use in wetlands underlain by histosols. Several citizens and business associations from the Hampton Roads area believe that since, in their reasoning, all soils in Hampton Roads are histosols, general permits for linear projects would be useless if histosols were excluded. On the other hand, CBF's review of U.S. Department of Agriculture soil surveys for the Cities of Virginia Beach, Chesapeake, and Suffolk indicates that only 17% of mapped soils for those localities are underlain by histosols and that the location of these soils is in areas not likely to experience widespread development due to regulatory constraints: the Great Dismal Swamp, the Northwest River and North Land River swamps, Back Bay marshes, and First Landing State Park.

    ***Response*:** We agree that the exclusion of histosols for linear projects, such as roads and utilities, could limit the use of these general permits for infrastructure projects in the Hampton roads region, and therefore, this prohibition was not included in the utility and transportation general permits.

28. **Fee Schedules:** Several commentors — particularly business associations and industry — recommend that the regulations include a fee schedule for VWP application fees. These commentors believe that having a fee schedule in the regulations will allow them to better plan their permitting requirements.

    ***Response*:** DEQ has a separate and distinct fee regulation (9 VAC 25-20-10 et seq.) for all permit programs.

29. **Comprehensive Wetland Mapping:** A few commentors, particularly local planning districts, recommend that DEQ pursue the development of a comprehensive wetland mapping program.

***Response*:** We support such a program and encourage the seeking of sources of additional funding to develop a comprehensive wetland mapping program. Note that the USFWS has National Wetland Inventory (NWI) map coverage for most of Virginia. Many of these NWI maps have been revised and placed in a digital format. Although NWI maps are limited by the quantity of ground-truthing of aerial photographic signatures, NWI maps can provide a valuable baseline for wetland resources identification.

30. **Review Period for General Permit Applications:** VAMWA requests that the VWP general permit application review period be reduced from 45 days to 20 days, and that a DEQ failure to act within the regulatory time frame deems a permit approved. One citizen in Accomack County believes that the permit application review period should be less than 30 days. The City of Poquoson recommends shortening the permit application review period to some unspecified time.

    CBF recommends revising 9 VAC 25-690-20D to ensure consistency with the statutory requirement that projects complying with a general permit shall be deemed approved if the Board fails to act within 45 days of receipt of a complete preconstruction application.

    ***Response*:** The timeframes for general permit review are set by statute. We also believe the review time frames are clearly explained within the general permit regulations.

31. **Signatory Requirements for VWP Permits:** VDOT supports the regulatory flexibility, as stated in the proposed regulations, that does not specifically designate or limit the individuals who can be an applicant.

    ***Response*:** These changes were made as a result of discussions within the TAC and conform with state law.

32. **DEQ Signatory Requirements for Mitigation Banks and Multi-Project Mitigation Sites:** CBF recommends that 9 VAC 25-210-115F be clarified so that DEQ is authorized to participate in development of mitigation bank agreements by including a new subsection: "6. DEQ is authorized to serve as a signatory to agreements governing the operation of wetland mitigation banks." Further, CBF recommends that DEQ should also require multi-project mitigation sites comply with guidance developed for mitigation banks. In particular, they recommend that 9 VAC 25-210-115F5 should read: "For multi-project mitigation sites, the VWP permit shall place upon the permittee conditions similar to those placed upon a mitigation bank as contained in the mitigation banking instrument to which the Board or Department is a signatory in order to ensure that long term monitoring and maintenance of wetlands functions and values."

    ***Response*:** This section has been modified to refer directly to the section regarding mitigation banks in the statute. We disagree with CBF's recommendation regarding multi-project mitigation sites. No changes regarding this suggestion are proposed.

33. **Conceptual Mitigation Plans:** VDOT supports the provisions, as stated in the proposed regulations, that permits may be authorized with conceptual mitigation plans.

    ***Response*:** This provision was a result of discussions within the TAC. Note, however, that while permits may be authorized with conceptual mitigation plans, final mitigation plans must be submitted within the time frames specified by the permit.

34. **Guidance on "Ecologically Preferable" Mitigation:** VDOT supports the provisions, as stated in the proposed regulations, allowing the use of ecologically preferable off-site compensation, even if on-site compensation may be practical but not ecologically preferable. Further, VDOT requests regulatory guidance on a test for "ecologically preferable" compensation. Also, VDOT supports the provisions, as stated in the proposed regulations, that one mitigation site may serve as compensation for multiple projects.

    ***Response*:** While the regulations have incorporated flexibility to the extent practical while providing protection to wetland resources, the applicant must first prove that off-site compensation is ecologically preferable to on-site compensation. "Ecologically preferable" considers both replacement of wetland acreage and wetland function. There is no new test for ecologically preferable compensation. The USACE and DEQ have always looked for the most practical and ecologically preferable compensatory mitigation for a project. As found in federal guidance, on-site compensation is required unless the applicant can demonstrate otherwise. DEQ has provided guidance to VDOT on this issue in the past, and informational requirements will be contained in the permit manual. Multi-project mitigation sites are viewed as a form of off-site compensation.

35. **Meaning of the Term "Appropriate":** VDOT is concerned that the term "appropriate" is inconsistently applied in Section 115C of the proposed regulations. Further, VDOT is concerned that the phrase "except as specified below" in Section 115F1 contradicts Section 115F1Cii.

    ***Response*:** We believe that the meaning of the term "appropriate" is clear in Section 115C. The phrase "except as specified below" in Section 115F1Cii was taken verbatim from the statute.

36. **VWP Permit Extensions:** VDOT supports the provision, as stated in the proposed regulations, allowing a written request rather than a reapplication to extend a permit. CBF recommends deleting the language found in the last sentence of 9 VAC 25-210-90D2. They believe that this statement requires application for a new VWP permit to extend a permit expiration date. Further, CBF believes this language contradicts a consensus reached by the TAC that a permit extension may be requested as a modification to an existing permit and without requiring a new application. Also, they believe this language contradicts 9 VAC 25-210-185. CBF recommends replacing "amendment" with "modification" after the word "permit" in the last line of 9 VAC 25-210-185.

    ***Response*:** This provision was a result of discussions within the TAC. We have incorporated CBF's comments on this provision to refer to 9 VAC 25-210-185.

37. **Calculation of Dominance under General Permits:** The USACE suggests changing paragraph A1 of the 0.5-acre general permit (9 VAC 25-660-40) to include "basal area" as an unbiased measure to determine dominance in a forested community. Further, the City of Chesapeake believes that the method of assessing dominance is not grounded in science.

    ***Response*:** The regulations have been revised to incorporate the USACE'S recommendation of allowing basal area measurements in addition to percent aerial cover to determine dominance in forested communities. We disagree with Chesapeake's concerns about these calculations. The methods for assessing dominance proposed in these regulations are consistent with those methods outlined in the USACE'S 1987 Federal Delineation Manual. We have standardized the methods between all four general permits.

38. **Exclusion of Agricultural Activities from the General Permits:** The USACE recommends that agricultural-related activities be excluded from the development and one-half acre general permits. The USACE believes that not excluding agricultural-related activities under these general permits will necessitate a revision of the Local Operating Procedures (LOP) established by the USACE, the Natural Resource Conservation Service (NRCS), the USEPA, and the USFWS. These LOP's were created in 1995 to eliminate interagency conflicts, conflicting delineations, and duplication of efforts.

    CBF recommends that DEQ seek to comply with local operating procedures developed by the USACE , NRCS, and the USFWS to expedite review of agricultural activities and avoid duplicative requirements. CBF recommends that DEQ eliminate Subsection B as it may inadvertently jeopardize the "status-quo" procedures established for the agricultural community by the federal government. Alternatively, DEQ may wish to authorize those activities that comply with "minimal effect determination" standards established by the USACE, NRCS, and USFWS under this general permit.

    Response: Based upon the USACE recommendation and discussions with the Virginia Farm Bureau, we have removed agricultural-related activities from the development general permit. It would still be possible to cover non-exempt agricultural activities under the 0.5-acre general permit should that be necessary. However, we propose no change in how these agency projects will be dealt with through the USACE and NRCS, and existing certification of USACE nationwide permits covering agricultural activities will remain in place.

39. **Wetland Delineations:** VDOT supports the use of the USACE's manual and guidance on delineations. The USACE is concerned that the proposed regulation requires wetland delineation confirmations for all projects. The USACE does not routinely confirm VDOT wetland delineations or delineations for small projects impacting less than 0.1-acre. The City of Chesapeake and Accomack County believe that there is no formal requirement for a USACE-confirmed delineation, and such delineation confirmation should be optional.

    USACE does not believe that wetland delineation data sheets are a necessary component for the registration statement.

CBF recommends that the sentence "The Board shall adopt appropriate guidance and regulations to ensure consistency with the U.S. Army Corps of Engineers' implementation of delineation practices" be added to 9 VAC 25-210-45 to ensure consistency and compliance with the statute.

VDOT requests that their projects, coordinated through the Inter-Agency Coordination Meeting (IACM), meet the VWP application requirement for a USACE determination.

***Response*:** The VWP regulation has been revised to conform to current USACE delineation confirmation practices. We disagree with Chesapeake and Accomack County that there is no requirement to have a USACE-confirmed delineation. According to statute, the Board shall adopt guidance and regulations for review and approval of wetland delineations in accordance with USACE procedures. DEQ has been actively coordinating with the USACE to establish procedures for confirming wetland delineations. Based upon our agreement with the USACE, the USACE will continue to review and confirm wetland delineations under their current protocols and procedures. We have revised 9 VAC 25-210-45 to incorporate CBF's suggested language. VDOT projects coordinated through the IACM will meet the application requirements for a USACE determination. Further, we believe wetland delineation data sheets are helpful when evaluating in-kind mitigation options.

40. **Inclusion of Tidal Waters under General Permits:** The USACE and HRPDC recommend that the language in the general permits be clarified to emphasize that activities in tidal waters are not covered under these proposed regulations. CBF recommends clarification that the general permits do not authorize impacts to tidal wetlands. CBF recommends incorporating the following language into all of the general permits: "These general permits do not apply to activities governed under Chapter 13 (§ 28.2-100 et seq.) of Title 28.2." On the other hand, VDOT requests that the transportation general permit be utilized in tidal waters in addition to nontidal waters.

    ***Response*:** The language in all of the general permits has been clarified to reflect that these general permits are not for tidal impacts. We have referenced Chapter 13 (§ 28.2-100 et seq.) of Title 28.2. The statute specifically excludes tidal waters from coverage under general permits.

41. **Compensation for Open Water Impacts:** The City of Chesapeake and HRPDC believe that compensation for impacts to open waters exceeds the legislative intent of "no net loss" of wetland acreage and function and exceeds current USACE requirements. Further, Chesapeake believes that the compensation is only required for impacts in wetlands. VDOT recommends that we do not require compensation for open water impacts, as it is difficult to find opportunities to satisfy this requirement, especially in urban areas.

    The USACE is concerned that stream impacts, including riffle & pool complexes, could be compensated with the creation of open water lakes and ponds. They believe that streams provide habitat different from that of lakes or ponds, and that stream habitat value could be lost with out-of-kind compensation.

***Response*:** DEQ disagrees with the commentor's interpretation regarding impacts to open water. The statute requires compensation for impacts to wetlands, and open water is a type of wetland according to the Cowardin classification of wetland types. For clarity as to when compensation for open water impacts will be required, language has been inserted into the regulation specifying that "compensatory mitigation for open water impacts may be required, as appropriate, to protect State waters and fish and wildlife resources from significant impairment." We have clarified the section regarding stream impacts to address the USACE'S concern.

42. **Conditions Applicable to all VWP Permits:** CBF recommends that DEQ revise 9 VAC 25-210-90A to read: "Any VWP permit noncompliance is a violation of the law," They believe that DEQ's proposed language "any VWP permit violation is a violation of the law" is redundant and unclear in its meaning. Moreover, they believe that DEQ's internal definition of "violation" under its VPDES enforcement program is inappropriate here. Further, CBF recommends including the following language in the first paragraph of 9 VAC 25-210-130: "General permits shall include terms and conditions as the Board deems necessary to protect state waters and fish and wildlife resources from significant impairment." They believe that this language reflects requirements established in the statute.

    ***Response*:** On advice from DEQ's enforcement section, we do not propose any changes regarding the recommended language for violations. We do not propose any changes regarding the recommended language for general permit terms and conditions.

43. **Condition for Activities Involving Minimal Environmental Consequences:** VDOT requests a provision allowing for a waiver from permitting requirements, if an applicant can demonstrate that an activity involves only minimal environmental consequences and that the impacts have been compensated.

    ***Response*:** This is not allowed by statute.

44. **Exclusion for Maintenance Activities:** VDOT requests that minor deviations from a structure's configuration or filled areas (due to changes in materials, construction techniques, or standards) be allowed when necessary to make repairs, rehabilitations, or structure replacements, if those minor deviations are less than one-quarter acre of wetland impacts and 50 linear feet of stream impacts.

    ***Response*:** We do not believe that the activities described constitute routine maintenance, which is allowed as an unpermitted activity provided that there is no change in pre-existing contours or configurations. The requested change will not be made.

45. **Reasons for Permit Denials:** CBF recommends substitution of the following language for Subsection A4: "The proposed compensatory mitigation plan: a) fails to achieve no net loss of existing wetland function and acreage; or b) fails to meet submission and design guidelines or requirements; or c) is insufficient or unsatisfactory for the proposed impacts." They believe that this revised language will insure that the proposed regulations comply with the statute and provide increased clarity of the Board's requirements for compensatory

mitigation. Additionally, CBF recommends that DEQ replicate this language within each regulation governing the VWP general permits. They believe that the standards for denial of a general permit pre-construction notification are identical to those for denial of an individual permit application and the regulations should state as such.

VDOT requests a provision to require a written response to the applicant when a permit application is proposed for denial.

The Department of Game & Inland Fisheries (DGIF) is concerned with the language that unconditionally denies a permit for activities that occur in natural or stockable trout streams. DGIF suggests that some activities may occur in natural or stockable trout streams by including permit conditions such as a time-of-year restriction for instream work. DGIF recommends changing the language from "…would be permanently and negatively impacted by the proposed activity…" to "…unacceptable impacts…"

***Response*:** We do not agree that the proposed language is necessary because the general permit regulations must comply with all provisions of the VWPP regulations as stated in each general permit. 9 VAC 25-210-230 states that "the applicant shall be notified by letter of the board's preliminary decision to tentatively deny the VWP permit requested." We believe that this language is clear, and meets the intent of VDOT's request. With regard to the comment on trout waters, we believe that a permanent, negative impact is the same as an unacceptable impact, and therefore, meets the intent of DGIF's request.

46. **Water Quality Certifications:** VDOT supports the provision, as stated in the proposed regulations, that DEQ water quality certificates issued between December 31, 1989 and August 1, 2001 will remain in effect.

Response: This provision primarily affects water withdrawal permits.

47. **Application for a VWP Permit:** CBF recommends removing the language "in accordance with current federal regulations" from 9 VAC 25-210-80 B 4. They believe that this language contradicts the statute requiring avoidance, minimization, and compensation. Additionally, CBF recommends inserting the phrase "to the maximum extent practicable" following "surface waters" and the phrase "to achieve no net loss of existing wetland acreage and functions" following the word "compensation" for consistency with, and compliance with, the statute.

***Response*:** We believe that there is no contradiction with the statute regarding 9 VAC 25-210-80 B 4. This reference relates to the Section 404(b)(1) guidelines, which have been incorporated by reference in to the regulation. We have revised the regulation to include CBF's other suggestions.

48. **Deed Restrictions:** CBF is concerned with the appropriateness of using deed restrictions rather than conservation easements for long-term protection. They believe that deed restrictions do not provide DEQ with direct enforcement authority if a compensation site is impacted without authorization in the future. CBF recommends that DEQ require use of

conservation easements to protect compensation sites in perpetuity, and that conservation easements should specifically prohibit any future use of the compensation site for agriculture, silviculture, or development purposes.

***Response*:** The use of deed restrictions has been standard practice, and is consistent with the USACE's procedures.

49. **Applications Received After May 20, 1992:** VDOT is concerned with the provision, as stated in 9 VAC 25-210-260A, that all applications received after May 20, 1992 will be processed in accordance with the revised VWP regulations. VDOT is concerned that retroactive review will delay project implementation and unnecessarily increase project costs.

    ***Response*:** The registrar inadvertently inserted an incorrect date. This date has been changed to August 1, 2001 for VDOT linear transportation projects and October 1, 2001 for all other projects.

50. **General Permit Terms:** CBF supports the TAC compromise to place a fixed term of 5 years on all of the general permits. They believe this provision should be included in the program regulation to provide necessary assurances to the environmental community that DEQ will undertake a periodic public review of the general permits, assess their impact to state waters and fish and wildlife resources, and make revisions as necessary. The TAC thought this periodic review was an important opportunity to evaluate the general permit acreage thresholds and make adjustments if necessary to meet "no net loss" of wetland acreage and function under these permits.

    ***Response*:** The provisions are a result of discussions within the TAC. General permit regulations have a 5-year term so that they have periodic review.

51. **General Permit Authorization Term:** VDOT supports the provision that general permits are authorized for a 5-year term from the date of authorization, rather than a fixed date expiration for all authorizations. CBF recommends deleting the first sentence of 9 VAC 25-210-130C to avoid confusion over the terms of the general permits versus the length of a specific project authorization under a general permit. CBF recommends that Subsection A(2) be revised to reflect the consensus of the TAC that specific projects be authorized under the general permits for 3, rather than 5, years.

    ***Response*:** The provisions are a result of discussions within the TAC. 9 VAC 25-210-130C has been rewritten to clarify the general permit term relative to the length of a specific project authorization. Note that general permit authorizations are 3 years for the one-half acre and utility general permits and 5 years for the development and transportation general permits as discussed in the TAC.

52. **Compensation for Unavoidable Impacts:** VDOT requests that the regulations clearly state that compensatory mitigation is not required for unavoidable permanent impacts up to one-tenth acre.

***Response*:** In general, compensatory mitigation is only required for permanent wetland impacts. However, there are instances where compensatory mitigation is appropriate for temporary impacts due to their nature and extent. This is consistent with current USACE and DEQ practice. No changes will be made.

53. **Use of General Permits for Construction of Wetland Mitigation Banks:** VDOT requests that the transportation general permit authorize activities for the construction of wetland mitigation banks. Further, VDOT requests that the construction of wetland banks be authorized under the 0.5-acre or less general permit.

***Response*:** The construction of a wetland mitigation bank is not a linear transportation project or attendant feature, and is often constructed in a location remote from the project site. It would, therefore, not be appropriate to cover the permitting of a wetland mitigation bank under a transportation general permit. The construction of a wetland mitigation bank could be permitted under the 0.5-acre general permit provided that construction impacts to surface waters do not exceed 0.5 acre, including up to 250 linear feet of perennial stream and 1500 linear feet of intermittent stream.

54. **In-Lieu Fee Funds:** VDOT recommends adding in-lieu payments as meeting "no net loss" requirements to accompany preservation. The Nature Conservancy of Virginia and the USACE recommend that the Virginia Wetlands Restoration Trust Fund (VWRTF) be approved, in the proposed regulation, as an acceptable form of compensatory mitigation. The Nature Conservancy of Virginia recommends that DEQ participation in the VWRTF be limited to commenting on proposed fund expenditures. Further, the Nature Conservancy of Virginia recommends that compensation for wetland impacts in a given watershed by based upon acreage of wetlands and not the quantity of fund expenditures. The USACE suggests that in-lieu fee funds be pursued only after all practical avoidance and minimization measures and on-site or mitigation bank compensation have been explored. Further, the USACE suggests that in-lieu fee funds be expressed in terms of a net gain of wetland acreage/function policy rather than in terms of "no net loss".

CBF recommends adding the following language: "Any wetland compensation plan proposing to include contributions to in-lieu fee programs shall include proof of the willingness of the entity to accept the donation and the assumptions and/or documentation of how the amount of the contribution was calculated." Further, CBF recommends that the use of such funds for compensatory mitigation be restricted to impacts authorized by general permit. They believe this recommendation provides some assurance that compensation of larger impacts will place greater emphasis on in-kind, on-site, and in-watershed replacement of lost functions. CBF further recommends that DEQ replace the language in 9 VAC 25-210-115-3(b) to read: "Inclusion of DEQ as a signatory participant to a memorandum of agreement, which is noticed for public comment and review, dictating management and oversight of the fund." They believe that this language will provide DEQ the authority necessary to ensure that use of in-lieu fee funds complies with the new nontidal wetland state law.

***Response*:** Compensatory mitigation options are specified by statute. In-lieu fee payments, in combination with preservation, would only meet "no net loss" if there is specific proof that the payment is used to create or restore wetlands. By statute, the Board must approve any in-lieu fee fund after an opportunity for public comment. A provision has been added to the regulations giving DEQ the opportunity to consult with the USACE on sites selected for wetland restoration, and the provision including DEQ as a significant participant in the management of the VWRTF has been deleted. DEQ continues to request that expenditures for and acreages of wetland restoration both be tracked by watershed to meet the requirements of our program. This section has been revised to address the USACE'S concerns.

We have incorporated CBF's recommended language regarding proof of willingness into the general permit regulations. However, we believe that CBF's suggestion regarding the restriction of in-lieu fee funds to mitigate impacts authorized by a general permit exceeds our statutory authority. Further, we disagree with CBF's recommendation for DEQ's management of such a fund.

55. **Review of Endangered Species Issues under General Permits:** Several commentors — particularly DCR, USACE, USFWS, and environmental advocacy groups — support the prohibition of using general permits for activities that may result in the taking of threatened or endangered species. VDOT requests the acceptance of database search information from DGIF or VDOT's environmental review process as documentation for endangered species issues. VDOT believes that requiring written documentation for their projects would duplicate existing processes.

The USFWS recommends adding a prohibition to each general permit denying permit issuance for activities that affect those species or habitats identified under the federal Endangered Species Act. The USFWS recommends that an applicant contact both DGIF and DCR regarding endangered species information. The USFWS recommends that standard operating procedures be developed prior to the implementation of the general permits to facilitate coordination between them and DEQ. The USFWS recommends that the applicant document both the presence and absence of any federal or state protected species. HRPDC disagrees with the prohibition of using a general permit on sites with proposed threatened or endangered species. DCR recommends adding language that excludes using general permits for areas where an endangered or threatened species is located outside of the area of regulated activity.

DCR is concerned with the additional workload that these regulations will impose on their staff. Under the draft regulations, applicants must provide documentation from DGIF and DCR indicating the presence or absence of endangered or threatened species. DCR is concerned that its staff will be unable to provide timely responses to information requests. DCR requests that DEQ make revenues available to them to partially underwrite the costs of maintaining and updating DCR's database. DCR believes that the 45-day review period is insufficient time to provide adequate review and comment by regulatory agencies. DCR recommends adding a provision to the proposed regulations allowing a general permit to be denied if an activity has the potential to take an endangered or threatened species (emphasis

ours). DCR and CBF recommend that the Department of Agricultural and Consumer Services (DACS) be included in the list of agency contacts for protected species consultation, as they have regulatory authority over protected plant and insect species.

Comments from CBF, JRA, USFWS, DCR, and DGIF all indicate that DEQ staff should perform endangered species data searches rather than having the applicant present such information.

***Response*:** As the federal Endangered Species Act is not enforceable by this state program, the USFWS comment is not relevant, but will be considered under the SPGP developed by the USACE. There is no need to add language requiring applicants to contact both DGIF and DCR, as DEQ consults with both agencies as well as DACS for endangered species concerns. DEQ is currently working with the USACE, DGIF, and DCR to develop standard operating procedures for coordinating endangered species issues.

DEQ has revised the procedures for documenting the presence or absence of protected species under the general permits. As originally proposed in the regulations, the applicant would have the burden of contacting DGIF and DCR for protected species information prior to submitting an application to DEQ. This language has now been revised such that DEQ staff will perform database searches of DGIF and DCR files for general permit applications. There will be no change to the process for individual permits. DCR and DGIF have committed to provide training to DEQ staff for implementing the agreed-upon procedures for evaluating potential impact to protected species. A general permit may be denied based upon our further consultation with the regulatory agencies. If, after consultation, a threatened or endangered species issue is identified, the applicant may withdraw the permit application until such time as these concerns are ameliorated, or the applicant may apply for an individual permit.

Finally, DCR's suggested language excluding the use of general permits for upland areas containing a threatened or endangered species that may be affected by a project is outside of DEQ's jurisdiction to enforce.

56. **Trout Memorandum of Agreement (MOA):** VDOT requests that DEQ approve the MOA between the USACE, DGIF, and VDOT as a means for meeting the notification requirements for projects involving trout streams.

***Response*:** We are already doing this under our existing program.

57. **FEMA Floodplain Maps:** VDOT requests that a FEMA map number be provided in the registration statement, rather than a copy of the map.

Response: We are interested in where the project site is located relative to floodplain features, not in the entire map. This provision will not be changed.

58. **Conservation Easements:** VDOT requests that DEQ finalize an agreement with them regarding conservation easements on highway rights-of-way. VDOT believes that

maintenance, operation and improvements of the highway system would be encumbered if conservation easements were required.

***Response*:** We will be happy to coordinate with VDOT on procedures for establishing conservation easements.

59. **Acquisition of Plant Material for Compensation Sites:** VDOT requests that the 200-mile maximum distance limitation for the acquisition of plant material for compensation sites be eliminated. VDOT believes that the competition for local plant material will exceed the supply.

***Response*:** Performance and success of compensation sites equates to location. Plant material must be acclimated to the climatological conditions of a given area to survive. This provision will not be changed.

60. **Confidential Information:** The City of Chesapeake and HRPDC believe that a confidentiality statement is needed in the regulations to protect real estate transactions associated with proposed mitigation sites for public projects.

***Response*:** Language regarding confidentiality is already included in the section of the regulation dealing with public access to information (9 VAC 25-210-150).

61. **Chain of Custody Requirement:** The City of Chesapeake believes that the requirement to provide a chain of custody for documenting sampling and monitoring is overly burdensome for applicants. Chesapeake requests that "water quality field procedures" replace the chain of custody requirement.

***Response*:** The chain of custody documentation is a requirement of all DEQ water programs to enhance enforceability.

62. **Shellfish Waters Condemnation:** The City of Chesapeake and HRPDC are concerned that the denial of a VWP permit for projects which would result in the conditional or seasonal condemnation of shellfish waters would stymie future waterfront redevelopment efforts. Chesapeake requests that VWP permit denial be based on the "indefinite condemnation" of shellfish waters and not seasonal condemnation.

***Response*:** No changes is proposed regarding this condition.

63. **Application Modifications:** The City of Chesapeake is concerned that the deletion of 9 VAC 25-210-230B may prevent applicants from effectively revising their denied permit applications to provide an acceptable project.

***Response*:** Information removed from this section has been placed in other portions of Section 230. DEQ does not preclude any applicants' intent or desire to apply or reapply for a VWP permit.

64. **Waiver of VWP Permits:** To avoid the necessity of defining several new terms, such as nontidal surface waters, CBF recommends revising 9 VAC 25-210-220B to read as follows:

> "The Board may waive the requirements for a VWP individual permit when the impact to state waters is of minimal environmental consequence and limited to:
> (i) (a) those impacts to wetlands governed by a permit issued by the Virginia Marine Resources Commission pursuant to Chapter 13 of Title 28.2; or
> (b) those governed by a permit issued by the Virginia Marine Resources Commission pursuant to Chapter 12 of Title 28.2; and
> (ii) does not impact instream flows."

***Response*:** We will incorporate a reference to VMRC regulations in the section on waiver of VWP permits.

65. **Sufficient DEQ Staff and Staff Development:** Many commentors — particularly citizens, business associations, environmental advocacy groups, industry, state and federal agencies, and local governments — believe that sufficient DEQ staffing levels must be maintained to ensure that the proposed program meets its statutory time frames and is successful. Further, these commentors also believe that DEQ staff must be adequately trained in wetland identification methodologies and mitigation design to successfully work with applicants during project development and the permit review process. Also, DEQ staff should be adequately trained on the new regulations to provide consistent implementation and interpretation throughout all the regions of the Commonwealth to ensure fair and even-handed coordination with applicants.

A few commentors — particularly local governments and a few citizens — believe that DEQ staff should provide education and training to the consulting community and localities, in cooperation with the USACE, to ensure that the regulations and subsequent guidance are thoroughly understood by those who will regularly encounter these regulations. One citizen from Accomack County believes that DEQ should open an office with full time staff on the Eastern Shore to assist with permit applications and regulatory interpretations.

***Response*:** Funding for additional full time employees in the VWP program has been authorized, and hiring of these individuals has taken place or will take place in July 2001. These positions were not included in any budget reduction considerations. Further, the VWP program has applied to the USEPA for an education and training grant under their wetlands assistance program. This grant would provide wetland delineation and mitigation design training to all VWP staff. In addition, the USEPA grant application included a public outreach component, including the development of an abbreviated permit manual, information on the DEQ web site, and seminars for applicants. The VWP program is currently working on a comprehensive permit manual and workshops to train all staff on the new permitting program. DEQ does not propose to open any additional regional offices to specifically coordinate the VWP program. Projects occurring on the Eastern Shore are coordinated through the Tidewater Regional Office.

66. **Public Involvement in Review of General Permit Applications:** CBF recommends that public involvement in review of general permits be explored by DEQ. CBF suggests that DEQ provide a monthly notice of pending general permit applications by mail or electronic mail to citizens requesting such notice. Further, CBF suggests that if DEQ receives a specified number of substantial public comments on a proposed general permit action, that project will be elevated to the individual application review process.

    CBF recommends that the general permit regulations specify that DEQ will provide copies of project evaluations and general permit decisions to those that have provided written comments or recommendations. This provides an opportunity for the concerned public to remain fully informed of DEQ decisions. CBF recommends that 9 VAC 25-210-170C should include a brief description of the proposed impact to state waters and proposed compensation for notice of public hearings. In Subsection C(1), CBF recommends including the following language copied from 9 VAC25-210-170 Subsection C(2): "The precise location of such activity and the surface waters that will, or may, be affected. The location should be described, where possible, with reference to route numbers, road intersections, map coordinates or similar information." In Subsection C(6), CBF recommends the inclusion of a reference to "fish and wildlife resources" in addition to water quality issues.

    ***Response*:** DEQ will consider posting general permit authorizations on our web site for informational purposes only for the tracking of our "no net loss" commitments. With regard to notice for individual permit applications, the public notice contains the information requested and no further changes are needed to the regulations. We have added a reference to fish and wildlife resources in Subsection C(6).

67. **VWP General Permit Authorization Approval:** To insure consistency with the statute, CBF recommends that Section 30A of the general permits be revised to indicate that complete preconstruction applications shall be deemed approved if the Board fails to act within 45 days.

    ***Response*:** This language is included in Section 60D in the general permits.

68. **Stacking General Permits:** To avoid efforts by some to piecemeal projects and seek authorization for several, separate impacts totaling less than 2 acres individually but greater than 2 acres cumulatively, CBF recommends the following addition, similar to that provided for road segments, to Subsection A(2): "2.d. Where a proposed multi-phase project has multiple single and complete impacts to surface waters, the Board may at its discretion require an individual VWPP."

    ***Response*:** Language prohibiting the stacking of general permits above the upper threshold, as well as language allowing the Board at its discretion to require an individual permit is already contained in the regulations. No further changes are needed.

69. **Additional Prohibitions under General Permits:** CBF strongly recommends that we prohibit use of the development general permit in the 100-year floodplains and in nontidal wetlands adjacent to tidal waters similar to the 0.5-acre general permit. They believe this is

consistent with the federal nationwide permits and the rationale for including these prohibitions in the 0.5-acre permit should also apply to the development general permit. CBF fully supports the other specific prohibitions proposed under each general permit.

***Response*:** The prohibitions for use of each general permit were discussed at great length in the TAC. These exclusions were incorporated into the 0.5-acre general permit as all mitigation under this general permit is off-site, and hence, water quality functions will be lost on-site. This is not the case for the other general permits, and no changes are proposed.

70. **Nontidal State Waters:** CBF recommends deleting the reference to "nontidal state waters" in Subsection 40C and replace with "wetlands." As the permit does not apply in any instance to tidal wetlands, this reference is sufficient. In Subsection E, CBF recommends deleting "discharge or discharge-related" prior to "activities."

***Response*:** We do not believe these changes are necessary.

71. **Coverage for Recreational Facilities under the Development General Permit:** Under the development general permit, CBF recommends the following changes for activities covered. In Subsection A(4), CBF recommends deleting reference to "recreation facilities (such as playgrounds, playing fields and golf courses)" as attendant features. Such facilities are not typically necessary for the use and maintenance of a residential, commercial, or institutional structure. CBF recommends that DEQ clearly define "small support facilities" authorized under Subsection C(4). "Small" should be limited to structures 0.10 acre or less in size. And "small structures" should be defined, similar to attendant features, as "those structures that are necessary for the use and maintenance of the recreational facility."

To avoid confusion in the regulated community, CBF recommends that Subsection C(6) clearly specify what qualifies as an "adequate water quality management plan." To ensure that the water quality management plan protect state waters, we also recommend revising the language in Subsection C(6) to read: "to ensure that the recreational facility results in no ~~substantial~~ adverse effects to water quality and that there is no net increase in pollution."

***Response*:** No changes are necessary for this section as the wording is consistent with the USACE nationwide permit concerning recreational activities.

72. **Stormwater Management Facilities under the Development General Permit:** CBF recommends that DEQ revise the section on activities covered to reflect state law regarding construction and operation of stormwater management facilities. Some of the items listed in Subsection D(2) appear to conflict with the goals of stormwater management. Reference to compliance with the Virginia Department of Conservation and Recreation stormwater standards (Virginia Stormwater Management Handbook, First Edition, 1999, Volume 1, Chapter 3) may serve to address the intent of items "a" through "f."

***Response*:** It is beyond the authority of this regulation to address compliance under the stormwater regulations. No changes will be made.

73. **Compensatory Mitigation under General Permits:** CBF recommends that DEQ reference 9 VAC25-210-115 ("Evaluation of Mitigation Alternatives") in its entirety within the registration statement section. Subsection B (16)(e) should include reference to multi-project mitigation sites and the necessity to meet location requirements specified in 9 VAC25-210-115 (F), i.e. in the same or adjacent cataloging unit as the project impacts.

    Members of the northern Virginia development community and the USACE believe that the mitigation design and monitoring requirements are too complex to include in the regulations and that these requirements are more appropriate in guidance memoranda. Further, these commentors also believe that photographing the areas of impact during the 1st, 2nd, and 12th month of construction, then annually afterwards is not a useful requirement.

    CBF provided the following comments: While this section is entitled "Mitigation," there is no reference to regulatory requirements for avoidance and minimization of impacts to state waters. CBF recommends that DEQ provide a statement pertaining to their review of an applicant's efforts to avoid and minimize impacts and cross reference 9 VAC 25-210-115. Subsection A should reference use of multi-project mitigation sites as a form of compensatory mitigation. Subsection B should include the compensatory mitigation requirement for impacts to open water as found in 9 VAC25-690-30 A6. To provide some clarity to Subsection C, CBF recommends deleting "credits or" and inserting "mitigation bank" prior to "wetland" in the first line and deleting item 5. CBF recommends that Subsection F indicate that DEQ will investigate opportunities to compensate "in-kind" prior to authorizing "out-of-kind" replacement of stream impacts. This subsection should also be revised to provide greater consistency with 9 VAC25-690-30 A7.

    ***Response*:** We have made additions to this section and believe that it is complete. A discussion of multi-project mitigation sites is found elsewhere in the regulations and the reference is not appropriate here. We have removed many of the specific requirements for mitigation design and monitoring from the regulation. The regulation will reference the approved mitigation plan. Further, we find photographs helpful (especially when done with a digital camera) to document permit authorization compliance.

    Avoidance and minimization is explained elsewhere in the regulations and does not need to be repeated here. A multi-project mitigation site is a form of mitigation and does not need to be specifically referenced here. As requested by CBF, compensation for open water impacts has been clarified. Subsection C has been deleted in its entirety, as it is more appropriate for staff guidance in the permit manual. The sequence of looking at in-kind compensation opportunities first is discussed elsewhere and does not need to be repeated here.

74. **Notice of Termination:** CBF recommends adding the following sentence in Subsection 4: "I also understand that the submittal of this notice does not release me from responsibility for completing the conditions of this VWP general permit, including compensatory mitigation requirements." This statement will clarify that, while impact activities have ceased, permit requirements, especially those related to construction and monitoring of compensation sites, must still be met.

***Response*:** We do not believe that this change is necessary.

75. **General Permit Authorizations:** CBF recommends leaving the reference to acres and linear feet of impact blank in the second paragraph of the VWP general permit authorization until the DEQ project manager, prior to permit issuance, inserts the specific numbers. As written, this section implies that permit applicants will always receive authorization for impacts up to the general permit threshold. Also, CBF recommends that DEQ require permittees, upon receipt of their general permit, submit a statement indicating that the general permit was received and that all the permit conditions and requirements were read and understood.

***Response*:** We have clarified that the authorization is only for the impacts listed on the approved registration statement. We do not believe that it is necessary to ask the permittee to submit an additional statement that they have received their permit once the authorization has been issued.

76. **General Permit Special Conditions:** USACE recommends adding the phrase "including those species which normally migrate through the area, unless the activity's primary purpose is to impound water. Culverts placed in streams must be installed to maintain low-flow conditions" to the general permit special conditions.

***Response*:** We have incorporated the recommended language into all four of the general permits.

Under the special conditions section of the general permits, CBF recommends the following:

a. "Flowing" must be deleted prior to "surface" in Subsection C (3), as this has no regulatory or statutory meaning.

***Response*:** We do not agree with this change.

b. In Subsection C (10), CBF recommends substituting "surface waters" for "wetlands" throughout. Also, DEQ must delete "excavation or filling is" in the second sentence and replace with "activities are" to be consistent with the statute.

***Response*:** The suggested changes have been made.

c. CBF recommends the removal of stockpiles and the stabilization of disturbed areas in 14, rather than 30, days (Subsection C (12)).

***Response*:** 30-days is consistent with the USACE. No change will be made.

d. CBF strongly opposes the provision in Subsection E (2) allowing sidecasting of materials into wetlands for 90 to 180 days. A 6-month time period should not be considered

"temporary" and may result in additional impacts not assessed during permit issuance. CBF recommends removal of sidecasted materials in 30 days.

***Response*:** This provision is consistent with the USACE; however, we have limited the sidecasting to 90-days with no extension.

77. **Use of Stormwater Management Facilities for Compensatory Mitigation:** CBF strongly objects to the use of stormwater management facilities as compensatory mitigation (Subsection H (2)). Wetland fringes established within the fluctuating water level of a stormwater management pond, that is likely surrounded by intensive residential or commercial development, will not provide replacement of lost wetland functions. CBF believes this provision of the proposed regulations violates the requirement of the new nontidal wetland law for a "no net loss" of wetland function, in addition to acreage. CBF recommends elimination of Subsection H (2).

***Response*:** We do not agree with this comment. Our approach is consistent with the practice of allowing wetland benches to serve as part of the compensatory mitigation requirements, provided that these areas are not artificially maintained. All wetlands have fluctuating waters levels.

78. **Mitigation Monitoring and Reporting Requirements under the General Pemrits:** CBF recommends the following:
    a. CBF supports DEQ's commitment to review and provide comments on a compensatory mitigation plan within 30 days of receipt. However, requiring automatic approval of the plan if comments are not received by DEQ in 30 days is not appropriate. The compensatory mitigation plan should be considered a living document that may be adjusted and revised as necessary in response to new information regarding site conditions. Also, in Subsection A(3), recommend inserting "enforceable condition" and deleting "official component."

    ***Response*:** Automatic approval of a mitigation plan if comments are not received from DEQ within 30 days was a decision of the TAC and will not be changed. We have substituted the word “enforceable condition” for “official component”.

    b. Regarding Subsection A(3)(b), to ensure adequate long-term protection of mitigation sites, DEQ should require establishment of permanent conservation easements, held by DEQ, another state agency, or an appropriate private conservation organization, on compensatory mitigation sites. The conservation easement should restrict all future activities within the compensatory mitigation sites, including excavation, draining, filling, dumping, permanent flooding or impounding, and new activities that cause significant alteration or degradation of existing wetland acreage and function. Delete the language regarding, "unless specifically authorized by DEQ through the issuance of an individual permit."

***Response*:** We believe that the term "protection of state waters" covers either deed restrictions or conservation easements. The language concerning restrictions within easements has been utilized in the past and will not be changed.

c. Recommend rewording Subsection A(5) to read: "Compensatory mitigation site construction will commence concurrent with work in state waters. No impacts shall be allowed until commencement of compensatory mitigation." CBF objects to authorizing work in state waters 6 months prior to commencing construction of compensatory mitigation. Such authorization may allow completion of permitted activities prior to compliance with permit conditions leaving DEQ with little opportunity to halt impacts to state waters if the applicant fails to comply with the compensatory mitigation plan or problems arise with the plan.

***Response*:** This language represents a compromise reached in the TAC and will not be changed.

d. In Subsection A(10), recommend inserting "and that replaces degraded, damaged, and destroyed wetland acreage and function" after "plant communities."

***Response*:** We disagree that this change is necessary.

e. Regarding Subsection A(11), to ensure replacement of wetland acreage and function, the restored/created wetland hydrology should replicate the hydrologic regime of the degraded, damaged, and destroyed wetland. The goal of wetland compensation should not simply be to meet the three parameters in the USACE wetland delineation manual, but should be to provide comparable acreage, function and value via a no net loss of such. Simply meeting the delineation parameters falls far short of this goal. CBF recommends that DEQ require permittees establish wetland hydrology that is based upon a reference wetland site; a reference site that is comparable in Cowardin classification and Hydrogeomorphic (HGM) classification to the impacted wetland. For Subsection B(4), and as indicated above, to ensure replacement of wetland acreage and function, the restored/created wetland hydrology should replicate the hydrologic regime of the degraded, damaged, and destroyed wetland such that a no net loss of the impacted acreage and function is achieved. The use of reference wetlands providing comparable landscape position, water source, hydrologic regime, and vegetative type as the impacted wetland would insure "in-kind" replacement of wetland function.

***Response*:** These issues are part of DEQ's review of the compensatory mitigation plan and do not belong in the regulation.

f. In Subsection B(3), recommend requiring monitoring for years 1, 2, 3, 5, 7, and 10 following compensatory mitigation site construction.

***Response*:** The general permits will require monitoring in years 1, 2, 3, and 5 with subsequent monitoring only if the performance criteria have not been met.

g. In Subsection D(1) and in other sections, recommend replacing "jurisdictional areas" with "state waters" as the term "jurisdictional area" is irrelevant to the Virginia nontidal wetland program. In addition, this section should clearly indicate that monitoring is being required of the impact, not the compensatory mitigation, site.

***Response*:** We have replaced the term "jurisdictional area" with "surface waters". In this section, monitoring is being required for both the impact and the compensation site and there is no need to further clarify.

79. **Conditions Applicable to all VWP Pemits:** CBF recommends requiring compliance with local ordinances/regulations as well as state and federal statutes (Subsection A). CBF again recommends that DEQ rename "Duty to Mitigate" (Subsection B) to avoid any confusion with the sequential mitigation (avoidance, minimization, and compensation) requirements under the new nontidal wetland law. For Subsection J (5), CBF again recommends that DEQ revise the language to allow termination of a VWP permit only after all permit requirements and conditions have been completed.

80. **Limits on Channelization for Stream Crossings:** VDOT requests eliminating the condition that limits channelization to within 100 feet up or drown stream of a crossing, instead using 500 feet of perennial stream and 1500 feet of intermittent stream. VDOT believes that elimination of this condition will cover approximately 80% of their projects. Further, VDOT requests eliminating the length of structure in determining the length of channelization since structures must be countersunk six inches to reestablish stream flow and stream bottom.

***Response*:** We do not believe any of these changes are necessary.

81. Comments on Utility Line General Permit: **CBF recommends the following:**

a. DEQ should specify in the first paragraph of 9 VAC 25-670-20 that temporary impacts associated with the maintenance, operation, and repair of utility lines do not require notification or authorization from DEQ. They believe that this statement would serve to assure the regulated public that application for a utility general permit is not necessary for such activities. While DEQ references temporary impact requirements in 9 VAC25-670-50 (Notification), it may be useful to clarify the requirements for utility line temporary impacts early and often.

***Response*:** This statement is contained elsewhere in this general permit regulation and does not need to be repeated.

b. CBF recommends that DEQ require construction of utility lines, particularly those that require crossing a wetland or stream, perpendicular to surface waters and at the narrowest width in the water body to the maximum extent practicable.

***Response*:** This is part of the demonstration of avoidance.

c. CBF recommends that DEQ clarify the language regarding multiple use of general permits in Subsection B of prohibitions. The proposed language suggests that a utility construction impact, authorized by general permit, may exceed 1 acre of permanent impact as long as it is authorized in conjunction with a development or linear transportation general permit and does not exceed 2 acres. We suggest that DEQ consider the following substitute language: "The use of more than one VWP General Permit WP2 for a project is prohibited, except when the cumulative permanent impact to surface waters from utility line construction does not exceed the acreage limit of WP2."

***Response*:** This language has been clarified in all general permits to prevent stacking for increasing threshold limits

d. CBF recommends that DEQ expand Subsection E of prohibitions to include prohibition of 1) any stormwater management facility that is located in perennial streams or in waters designated as oxygen or temperature impaired; 2) the pouring of wet concrete or the use of tremie concrete or grout bags in state waters, unless the area is contained within a cofferdam(s) and the work is performed in the dry; 3) return flow discharges from dredge disposal sites; 4) overboard disposal of dredged material; and 5) dredging of shellfish areas, submerged aquatic vegetation beds or other highly productive areas. These additions will provide consistency with the prohibitions found in the development general permit but are limited to only those prohibitions that may have application to utility line construction.

***Response*:** This section has been expanded so that it is similar to the other general permits.

e. It is unclear why mechanized land clearing in forested wetlands is referenced specifically in Subsection B of the notification section. Those planning to conduct mechanized land clearing that will result in permanent impact to surface waters must seek authorization from DEQ. If permanent impacts from mechanized land clearing are expected to exceed 0.10 acre, the entire registration statement must be submitted as required in Subsection C.

***Response*:** The intent of this subsection has been clarified through rewording. This notification is consistent with the USACE's nationwide permit 12 which does not require the reporting of temporary impacts associated with utility lines, unless the clearing of forested wetlands is involved.

f. CBF recommends that DEQ require disclosure of both permanent and temporary impacts in a registration statement. This will provide consistency with application requirements under the development general permit. While temporary impacts will not require separate authorization or compensation, DEQ should evaluate temporary impacts when considering authorization of permanent impacts under the utility general permit.

***Response*:** This notification is consistent with the USACE's nationwide permit 12 which does not require the reporting of temporary impacts associated with utility lines, unless the clearing of forested wetlands is involved. No changes to this section will be made.

g. Regarding mitigation, Subsection A should indicate that preservation of wetlands or streams or preservation or restoration of upland buffers adjacent to state waters is acceptable only when utilized in conjunction with creation, restoration or mitigation bank credits. It is not clear as written. CBF recommends this section provide information on the compensatory requirements for stream impacts consistent with that found in the development general permit.

***Response*:** This section has been standardized with the other general permits.

h. Regarding special conditions, in Subsection C (6), CBF recommends inserting "and width" following "length" so that permit applicants are aware that both the access road width and length should be held to the minimum necessary to construct the utility. Regarding Subsection C (18), CBF recommends that DEQ provide specific time-of-year restrictions as a condition to a general permit authorization. DEQ should not require the permit applicant to contact the Virginia Department of Game and Inland Fisheries or the Virginia Marine Resources Commission following receipt of the general permit to determine appropriate time-of-year restrictions. The current language is not consistent with that found in the development general permit.

***Response*:** These changes have been made.

82. **Comments on the Transportation General Permit:** CBF recommends the following:

a. CBF recommends that DEQ require construction of linear transportation projects, particularly those that require crossing a wetland or stream, perpendicular to surface waters and at the narrowest width in the water body to the maximum extent practicable.

***Response*:** This is part of the demonstration of avoidance and minimization.

b. Regarding prohibitions, CBF recommends removing those items found in Subsection G that are not applicable to this general permit, such as, but not limited to, items 2, 4, 10, and 12.

***Response*:** This section has been revised, but many of these items remain for clarification purposes.

c. Regarding special conditions, CBF recommends removing Subsections E, F, and G, unless the activities specified (utility lines, shoreline stabilization, and dredging, respectively) are authorized by the linear transportation general permit. The USACE has similar concerns.

***Response*:** Many of these activities can be authorized as attendant features under the transportation general permit. These subsections will not be removed.

83. **Registration Statement:** The USACE is concerned that the registration statement information requirements are too exhaustive and that some of the required information may be unavailable to the "average" applicant.

***Response*:** We have revised and clarified the information requirements for registration statements.

84. **Typographic and Grammatical Revisions:** Many commentors, from several constituencies, recommended that typographic errors be corrected. Other commentors — particularly CBF, VDOT, the USACE, business associations and industry — recommended various grammatical changes, semantic and syntacual revisions, and word substitutions.

***Response*:** Typographic errors have been corrected. The recommended grammatical changes, semantic and syntax revisions, and word substitutions were thoroughly reviewed before any of the suggested changes were made. Staff gave detailed attention to the context, clarity, and intent of the original language prior to making these revisions. Many of these annotations have provided clarity and precision to the regulations. Furthermore, all cross-references were checked for consistency.

LIST OF ACRONYMS AND ABBREVIATIONS

CBF	Chesapeake Bay Foundation
CBLAD	Chesapeake Bay Local Assistance Department
CFR	Code of Federal Regulations
DACS	Department of Agriculture and Consumer Services
DCR	Department of Conservation and Recreation
DEQ	Department of Environmental Quality
DGIF	Department of Game and Inland Fisheries
FEMA	Federal Emergency Management Agency
HBAV	Home Builders Association of Virginia
HRCC	Hampton Roads Chamber of Commerce
HRPDC	Hampton Roads Planning District Commission
JRA	James River Association
LOP	Local Operating Procedures
MOA	Memorandum of Agreement
MOU	Memorandum of Understanding
NMFS	National Marine Fisheries Service (U.S. Department of Commerce)
NRCS	Natural Resources Conservation Service (U.S. Department of Agriculture)
NWI	National Wetland Inventory
OAG	Office of the Attorney General
RPA	Resource Protection Area (Chesapeake Bay Preservation Act designation)
SELC	Southern Environmental Law Center
SPGP	State Programmatic General Permit
TAC	Technical Advisory Committee
USACE	U.S. Army Corps of Engineers, Norfolk District Regulatory Branch
USEPA	United States Environmental Protection Agency
USFWS	United States Fish & Wildlife Service
VAC	Virginia Administrative Code
VACRE	Virginia Association of Commercial Real Estate
VAMWA	Virginia Association of Municipal Wastewater Agencies
VDOT	Virginia Department of Transportation
VIMS	Virginia Institute of Marine Science
VMRC	Virginia Marine Resources Commission

VPDES	Virginia Pollution Discharge Elimination System
VWP	Virginia Water Protection (program)
VWPP	Virginia Water Protection Permit
VWRTF	Virginia Wetlands Restoration Trust Fund