

VWPP – WATER SUPPLY PERMITTING WORK GROUP

MEETING

AMENDMENTS

TO THE

VIRGINIA WATER PROTECTION PERMIT REGULATIONS

DEQ Piedmont Regional Office
Tuesday, June 21, 2005

Meeting Minutes

Meeting Attendees	
VWPP Water Supply Work Group	Interested Parties
Carlock, John	Hauger, Curt
Crowder, Charlie	*Lain, John (Darin Waylett)
Dunscumb, Judy	Land, Vernon
Foster, Larry	Mitchell, Becky
Hayes, Tim	*Pollard, Speaker (Paul Jacobs)
James, Eldon	Prelewiiz, Greg
Jennings, Ann	Reid, Terry
Kiernan, Brian	Thompson, Denise
Petrini, Art	Tinsley, Stephanie
Sanders, Frank	
Strickland, Wayne	Staff
*Taylor, Cathy (Jud White)	Gilinsky, Ellen (DEQ)
Weeks, Richard	Harold, Catherine (DEQ)
	Hassell, Joseph (DEQ)
	Hulburt, Barbara (The McCammon Group)
	Kudlas, Scott (DEQ) (Team Leader)
Resource Group	Linker, Rick (DEQ)
Bowman, Steve (VMRC)	Norris, William (DEQ)
Gray, Tom (VDH)	Rubin, Mark (The McCammon Group)
Kauffman, John (DGIF)	Wagner, Terry (DEQ)

- 1. Welcome/Introductions/Process for the Day:** Mark Rubin opened the meeting and asked for brief introductions from the meeting attendees. He noted that the process for the rest of the day would be to break into the working groups to review what has been done to date and to develop individual work group reports/presentation that will be given to the full group later in the day.

2. **Small Group Prep for Large Group Discussions/Work Group Meetings:** The Work Groups meet individually to prepare materials for the Large Group Discussions. Mark Rubin asked the groups to report back on their progress at the break so that the need for additional individual work group time could be determined.
3. **Reports to Large Group – Cumulative Impacts Work Group:** Frank Sanders presented the report from the Cumulative Impacts Work Group. The group had looked at a number of items and suggested the following changes and additions to the working of the VWP WSP Regulation:

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

B. Informational requirements.

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

- a. The drainage area, the average annual flow and the median monthly flows at the withdrawal point, and historical low flows if available;
- b. The average daily withdrawal, the maximum daily and instantaneous withdrawals and information on the variability of the demand by season;
- ~~e. Information on how the proposed withdrawal will impact flows in terms of flow reduction;~~
- ~~dc.~~ d. The consumptive use and the average daily return flow of the proposed project and the location of the return flow;
- ~~e. Information on the proposed use of and need for the surface water and information on how the demand for surface water was determined (e.g., per capita use, population growth rates, new uses, changes to service areas, and if applicable, acreage irrigated and evapotranspiration effects);~~
- ~~fd.~~ f. Information on flow dependent beneficial uses ~~at the proposed project location~~ along the affected stream reach; ~~and~~
- ~~ge.~~ g. Information on the aquatic life ~~at the proposed project location along the affected stream reach~~, including species and habitat requirements;
- ~~ef.~~ e. Information on how the proposed withdrawal will ~~impact~~ alter flows ~~in terms of flow reduction along the affected stream reach~~; and,

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

9VAC25-210-110. Establishing applicable standards, limitations or other VWP permit conditions.

In addition to the conditions established in 9VAC25-210-90 and 9VAC25-210-100, each VWP permit shall include conditions meeting the following requirements where applicable:

1. Instream flow conditions. Subject to the provisions of Chapter 24 (§62.1-242 et seq.) of Title 62.1 of the Code of Virginia, and subject to the authority of the State Corporation Commission over hydroelectric facilities contained in Chapter 7 (§62.1-80 et seq.) of Title 62.1 of the Code of Virginia, instream flow conditions may include but are not limited to conditions that limit the volume and rate at which water may be withdrawn at certain times and conditions that require water conservation and reductions in water use. In the development of conditions that limit the volume and rate at which water may be withdrawn, consideration shall be given to the seasonal needs of water users and the seasonal availability of surface water flow. Consideration shall also be given to the affected stream reach and the amount of water that is put to a consumptive use in the process.

The group also identified the need to address the specific concept of “cumulative impacts” into the instream flow language included above.

Frank Sanders noted that the group had looked at the following list of information items that were included in the proposed Water Supply Planning Regulation as a list that ought to be included in the informational requirements for the VWP.

9 VAC 25-780-90. Existing resource information.

A. A program shall include a description of existing geologic, hydrologic, and meteorological conditions within the planning area, and in proximity to the point of withdrawal if it is outside the planning area.

B. A program shall include a description of existing environmental conditions that pertain to, or may affect, in-stream flow, in-stream uses, and sources that provide the current supply. This description of conditions may be provided in a distinct section of the plan document or as a part of the Existing Water Sources information required pursuant to 9VAC25-780-70. This information may be derived from existing, readily available information and additional detailed studies shall not be required. The description of conditions shall include the following items, as they are applicable:

1. State or federal listed threatened or endangered species or habitats of concern;
2. Anadromous, trout and other significant fisheries;
3. River segments that have recreational significance including state scenic river status;
4. Sites of historic or archaeological significance;
5. Unusual geologic formations or special soil types;
6. Wetlands;
7. Riparian buffers and conservation easements;
8. Land use and land coverage including items such as percentage of impervious cover within a watershed and areas where new development may impact water quality of the source;
9. The presence of impaired streams and the type of impairment;
10. The location of point source discharges; and
11. Potential threats to the existing water quantity and quality, other than those from above.

The Cumulative Impacts Group requested that DEQ look at the list of information items required by the Water Supply Planning Regulation to determine what was already asked for by the VWP application and what would be additional, useful information to include. DEQ staff will work on this task as they do a concordance of Section 80 of the VWP Regulation.

In addition, the group agreed to consider the following definition of “affected stream reach” as it was revised by the full group, be included in the VWP regulations:

“Affected stream reach” means the portion of a surface water beginning at the location of a withdrawal and ending at a point where effects of the withdrawal on beneficial uses become minimal.

- 4. Reports to the Large Group – Alternative Analysis and Permitting Work Group:** Larry Foster presented the work group’s report. He noted that the group had worked with the language of the Bolling Bill (Senate Bill No. 1248) to address the concept of a preapplication review panel and public notice requirements. The group proposed the following language to address these issues:

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

B. For Water Resource Projects:

1. Preapplication Review Panel. Prior to submission of a VWP application and upon request by an applicant the Department of Environmental Quality shall convene a preapplication review panel to assist applicants for water resource projects in the early identification of issues related to the protection of beneficial instream and offstream uses of state waters. The Department shall notify the Virginia Marine Resources Commission, the Virginia Institute of Marine Science, the Virginia Department of Game and Inland Fisheries, and

the Virginia Department of Conservation and Recreation and any other appropriate local, state, and federal agencies of the preapplication request. These agencies shall participate in the preapplication review panel by providing information and guidance on the potential natural resource impacts and regulatory implications of the options being considered by the applicant.

2. Public Scoping Meeting for Public Water Supply Projects. At the request of the Department of Environmental Quality and with the concurrence of the applicant, a public information meeting shall be held by the applicant in the affected locality for the purpose of presenting the water supply need, the range of alternatives being considered and to provide the opportunity for public input. The Department shall invite all appropriate agencies to attend.
3. Public Notice of application. The receipt of an application for water resources projects that require an individual Virginia Water Protection Permit and a Virginia Marine Resources permit under Section 28.2-1205 shall be advertised simultaneously by the Department of Environmental Quality and the Virginia Marine Resources Commission.

Concerns were raised over whether the wording in subsection 2 should be “may” or “shall”. It was noted that this would be putting a “best management practice” into the regulation. The question was raised as to why this hadn’t been raised as an issue during the Water Supply Planning Regulation discussions, it was the same concept. The need for item #2 dealing with Public Scoping Meeting for Public Water Supply Projects was also discussed. It was noted that the idea of the “scoping” meetings had been patterned after the VDOT Scoping Meetings and had been originally suggested by members of the regulated community. It was stressed that it was important to get early public input into the process and that holding a public scoping meeting was a way to obtain that input. It was noted as clarification that currently the locality has the authority to hold a scoping meeting and that DEQ does NOT have the ability to require the locality to do it by regulation.

Consensus of the Group was to refer this material back to the Alternative Analysis and Permitting Work Groups for further work and consideration of the identified concerns.

In addition the group also worked on the following additional regulation sections (chances as discussed and agreed to during the meeting have been incorporated into the text presented below):

9VAC25-210-115. Evaluation of ~~mitigation~~ project alternatives.

A. Avoidance and minimization opportunities shall be evaluated as follows: The applicant must demonstrate to the satisfaction of the board that practicable alternatives, including design alternatives, have been evaluated and that the proposed activity, in terms of impacts to water quality and fish and wildlife resources, is the least environmentally

damaging practicable alternative. The applicant must also demonstrate to the satisfaction of the board that all steps have been taken in accordance with the Guideline for Specification of Disposal Sites for Dredged or Fill Material, 40 CFR Part 230 (Federal Register, December 24, 1980) to first avoid and then minimize adverse impacts to surface waters to the maximum extent practicable. Measures, such as reducing the size, scope, configuration, or density of the proposed project, that would avoid or result in less adverse impact to surface waters shall be considered to the maximum extent practicable.

B. In addition to §115. A above, public water supply projects shall:

1. The applicant must identify the purpose of the proposed project. In identifying the project purpose, the applicant shall provide the following information:

a. A narrative describing the water supply issues and problems that form the basis of the project purpose.

2. The applicant must demonstrate to the satisfaction of the board that the project meets an established water supply need. In establishing need, the applicant shall provide the following information on existing and projected demand:

a. Existing supply sources, yields and demands.

(1) Peak day and average daily demand;

(2) The safe yield and lowest daily flow of record;

(3) Types of water uses; and,

(4) Existing water conservation measures and drought response plan, including what conditions trigger their implementation.

b. Projected demands over a minimum 30 year planning period.

(1) Statistical population (growth) trends;

(2) Projected demands by use type;

(3) Projected demand without water conservation measures;

(4) Projected demands with long-term water conservation measures; or;

(5) Projected demand contained in the local or regional water supply plan developed in accordance with 9 VAC 25-780, et. seq.

3. Alternatives analysis for public water supply projects:

a. The range of alternatives to be analyzed by the applicant shall include:

(1) All reasonable alternatives that are practicable or feasible from both a technical and economic standpoint;

(2) All applicable alternatives contained in the local or regional water supply plan developed in accordance with 9 VAC 25-780, et. seq.;

(3) Alternatives must be available to the applicant but not necessarily under the current jurisdiction of the applicant; and,

(4) Water conservation shall be considered as a means to reduce demand for each alternative considered by the applicant.

(5) The applicant shall provide a narrative description that outlines the opportunities and status of regionalization efforts undertaken by the applicant.

b. Criteria used to evaluate each alternative for the purpose of establishing the least environmentally damaging practicable alternative shall include:

(1) Availability of the alternative to the applicant;

(2) Evaluation of interconnectivity of water supply systems (both existing and proposed);

(3) Evaluation of the cost of the alternative on an equivalent basis;

(4) Evaluation of alternative safe yields;

(5) Presence and potential impact of alternative on state and federally listed threatened and endangered species;

(6) Presence and potential impact of alternative on wetlands and streams (based on maps and aerial photos for all alternatives, field delineation required for preferred alternative);

(7) Evaluation of effects on in-stream flow; and,

(8) Presence and potential impact of alternative on historic resources.

In addition, the group proposed moving the Compensation information into a separate section as identified below:

9 VAC 25-210-116 Compensation

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

~~DB. Alternatives analysis~~ Practicable and ecologically preferable compensation alternatives.

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

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

~~BC.~~ Compensatory mitigation proposals shall be evaluated as follows:

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

2. Compensatory mitigation for unavoidable project impacts may be met through ~~wetland or stream creation or restoration, the purchase or use of mitigation bank credits, or a contribution to an approved in-lieu fee fund.~~ Compensation may

~~incorporate preservation of wetlands or streams or preservation or restoration of upland buffers adjacent to state waters when utilized in conjunction with creation, restoration or mitigation bank credits as appropriate to ensure protection or enhancement of state waters or fish and wildlife resources and their habitat any one or combination of the following: creation, restoration, the purchase or use of mitigation bank credits, or a contribution to an approved in-lieu fee fund. For wetlands, compensation may incorporate preservation of wetlands, or preservation or restoration of upland buffers adjacent to state waters, when utilized in conjunction with creation, restoration or mitigation bank credits. Compensation for unavoidable impacts to streams shall be provided and shall include as practicable and appropriate, stream restoration, riparian buffer restoration or enhancement, or preservation or enhancement of stream corridors. The purchase or use of stream mitigation bank credits or contribution to an in-lieu fee fund that includes watershed enhancements is also acceptable.~~

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

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

~~D. Alternatives analysis Practicable and ecologically preferable compensation alternatives.~~

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

~~2. An alternatives Such analysis shall include, but is not limited to, the following criteria, which shall be compared between the impacted and replacement sites: water quality benefits; acreage of impacts; distance from impacts; hydrologic source; hydrologic regime; watershed; functions and values; vegetation type; soils; constructability; timing; property acquisition; and cost. The alternatives analysis shall compare the ability of each compensatory mitigation option to~~

~~replace lost wetland acreage and function or lost stream water quality benefits and functions.~~

ED. In-lieu fee fund approval.

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

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

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

b. Granting approval of a fund at a board meeting.

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

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

b. Consultation with DEQ on selection of sites for preservation, restoration, or creation;

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

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

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

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

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

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

1. The bank or multi-project mitigation site meets the criteria and conditions found in §62.1-44.15:5 E of the Code of Virginia;
2. The bank or multi-project mitigation site is ecologically preferable to practicable on-site and off-site individual compensatory mitigation options;
3. For mitigation banks only, the banking instrument, if approved after July 1, 1996, has been approved by a process that involved public review and comment in accordance with federal guidelines;
4. The applicant provides verification to DEQ of purchase of the required amount of credits; and
5. For multi-project mitigation sites, the VWP permit shall include conditions sufficient to ensure long term monitoring and maintenance of surface water functions and values.

5. Reports to Large Group – Exemptions Work Group: Rick Linker presented the proposed regulation language changes from the Exemptions Work Group. Proposed revisions include the addition of an Item #12 and Item #13 to the following section:

9VAC25-210-60. Exclusions.

The following do not require a VWP permit but may require other permits under state and federal law:

12. Any water withdrawal in existence on July 1, 1989; however, a permit shall be required if a new § 401 certification is required to increase a withdrawal. To qualify for this exclusion, a water withdrawal shall be deemed to be in existence on July 1, 1989 if there was an actual withdrawal on or before that date that has not been abandoned.

a. Abandonment of a water withdrawal. A withdrawal shall be deemed to be abandoned if the owner of the withdrawal structure (i) notifies the DEQ in writing that it has abandoned the withdrawal or (ii) removes or disables the withdrawal structure with the intent to permanently cease such withdrawal. Transfer of ownership or operational control of the withdrawal structure, a change in use of the water, or temporary cessation of the withdrawal shall not be deemed evidence of abandonment. The notice shall be signed by the owner of record or shall include evidence satisfactory to the DEQ that the signatory is authorized to submit the notice on behalf of the owner of record. Evidence may include, but shall not be limited to a resolution of the governing body of the owner or corporate minutes. Where a question arises regarding an owner's intent to abandon a withdrawal, the DEQ may request that the owner voluntarily provide information regarding its intent to abandon the withdrawal.

b. Information to be furnished to the DEQ. Each owner or operator of a permanent withdrawal structure engaging in a withdrawal subject to the exclusion of this section shall provide the DEQ the estimated maximum capacity of the intake structure, the location of the existing intake structure and any other information that may be required by the Board. Each person engaging in a withdrawal subject to the exclusion of this section for agricultural purposes that is an owner or operator of a temporary withdrawal structure shall provide to the DEQ the maximum annual water withdrawal over the last ten years. The information shall be provided within one year of the date notice of such request is received from the DEQ and shall be updated when the maximum capacity of the existing intake structure changes. The information provided to the DEQ shall not constitute a limit on the exempted withdrawal. Such information shall be utilized by the DEQ and Board to protect existing beneficial uses and shall be considered when evaluating applications for new withdrawal permits.

13. Any water withdrawal not in existence on July 1, 1989, if the person proposing to make the withdrawal received a § 401 certification before January 1, 1989, with respect to installation of any necessary withdrawal structures to make such withdrawal; however, a permit shall be required before any such withdrawal is increased beyond the amount authorized by the certification.

Questions were raised over the use of the word “any” which could have multiple meanings from “one of many” to “all”. It was noted that the language proposed does NOT and could NOT put limits on change of use of a water withdrawal. The idea of including a definition for “exempted withdrawal” was raised. It was noted that basically the purpose of these revisions was to amend the regulation to implement the statute.

- 6. Meeting Wrap-Up:** Mark Rubin thanked the meeting attendees for their input and noted that the following items needed to be worked on prior to the next meeting:
- The Alternatives Analysis and Permitting Work Groups will need to meet to discuss the input from the Group.
 - The Cumulative Impacts Work Group will need to look at rewording of the instream flow language to include the concept of “cumulative impacts”. (Joe Hassell will be working on draft language for this section.)
 - The Cumulative Impacts Work Group will need to consider the definition of “affected stream reach” as it was revised by the full group.
 - Section 80 needs to be revised to clarify language and information requirements and to work out any duplication of data needs or any consistence issues. (Scott Kudlas, Bill Norris, Brenda Winn and Joe Hassell will be working to address the Section 80 issues.)

He noted that the intent was to develop the proposed revisions into a full version of the regulations that could be reviewed by the Work Group prior to the next meeting.

7. Remaining Meeting Schedule:

- a. July 14, 2005 – DEQ Piedmont Regional Office
- b. August 25, 2005 – DEQ Piedmont Regional Office
- c. September – Draft Regulation to SWCB

8. Adjournment: Meeting adjourned at 3:10 P.M.