COMMONWEALTH of VIRGINIA

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MEMORANDUM

TO: Board Members

FROM: David L. Davis, Manager, Office of Wetlands and Water Protection
Scott Kudlas, Manager, Office of Water Supply Programs

DATE: March 13, 2015

SUBJECT: Request to Proceed to Notice of Public Comment and Hearing on Proposed Regulatory Amendments to:
Virginia Water Protection Permit Program Regulation (9VAC25-210-10 et seq.);
Virginia Water Protection General Permit for Impacts Less Than One-Half Acre (9VAC-25-660-10 et seq.);
Virginia Water Protection General Permit for Facilities and Activities of Utility and Public Service Companies Regulated by the Federal Energy Regulatory Commission or the State Corporation Commission and Other Utility Line Activities (9VAC25-670-10 et seq.);
Virginia Water Protection General Permit for Linear Transportation Projects (9VAC25-680-10 et seq.); and
Virginia Water Protection General Permit for Impacts from Development and Certain Mining Activities (9VAC25-690-10 et seq.)

Introduction

At the March 30, 2015 State Water Control Board meeting, the Department of Environmental Quality (Department or DEQ) intends to bring before the Board a request to proceed to notice of public comment and hearing on the proposed amendments to the five regulations listed above.

These changes are being proposed to address desired and needed changes in the implementation of the VWP permit program after approximately 10 years of implementing the current regulations. 9VAC25-210 was last revised in 2006 for general wetland activities and in 2007 for surface water withdrawal activity provisions, but also serves as the base regulation for the four VWP general permit regulations. The four general permit regulations were last reissued in 2006 and expire in August 2016.

Note: The Virginia Registrar maintains the rules for developing regulatory documents, including the way in which proposed revisions are shown in a document (requires use of track-change tool in Microsoft Word software). In the track-change versions of the regulation texts provided to the Board, all revisions show as red font underline, and all deletions show as red font strike-through. The Department encountered problems with the consistency of the track-change tool in Microsoft Word when attempting to move existing text to a new location. At times, moves showed as green font double underline, and at other times, red font underline. For consistency, the Department chose to show all edits as red font underline. The Department found at least one internet source that recognizes this problem with the track-change tool at https://cybertext.wordpress.com/2014/04/03/word-track-changes-moves/.

Statutory Authority

The legal basis for all regulations noted herein is the State Water Control Law (Chapter 3.1 of Title 62.1 of the Code of Virginia). Virginia Code § 62.1-44.15 authorizes the State Water Control Board to promulgate regulations necessary to carry out its powers and duties. Specifically, §62.1-44.15:20 through §62.1-44.15:23.1 serves as the basis for protecting state waters, including wetlands.

Background

In October 2013, the Virginia Department of Environmental Quality (DEQ) began the process necessary to reissue the four Virginia Water Protection (VWP) general permit regulations prior to their expiration on August 1, 2016 and to revise the underlying base regulation, Virginia Water Protection Permit Program Regulation 9VAC25-210-10 et seq., which provides much of the overarching authority in administering the VWP general permits. Program staff across all regions identified internal practices described in guidance but not regulation; gathered staff comments and concerns based on experiences over time; held conference calls to discuss priority issues; reviewed program policies and guidance; developed internal work groups to research topics; and prepared a list of topics to serve as the basis for five Notices of Intended Regulatory Action (NOIRA).

In April 2014, the NOIRA for 9VAC25-210-10 et seq. was circulated for Executive Branch review; comments were received; and revisions made to the content. The remaining NOIRAs were exempt from Executive Review at that time. DEQ then submitted all five NOIRAs on May 13, 2014 to the Virginia Registrar for publication.

Notice of Intended Regulatory Action and Technical Advisory Committee

Five Notices of Intended Regulatory Intent (NOIRA) were published in the Virginia Register of Regulations for a 30-day comment period, beginning on June 2, 2014 and ending on July 2, 2014. DEQ utilized the participatory approach by forming an ad hoc Citizens Advisory Group (CAG) that held nine (9) public noticed meetings (August 7, 2014; August 25, 2014; September 9, 2014; September 22, 2014; *October 6, 2014*; October 15, 2014; *November 3, 2014*; December 8, 2014; and January 8, 2015). A list of the members of the CAG is attached to this memo (Attachment 1).

The Department developed a list of topics for the CAG to review and prioritize before staff made extensive efforts to draft proposed revisions to the regulatory language. No proposed language was presented to the CAG prior to the first CAG meeting so that the Department could obtain ideas and comments from CAG members early in the process. At the first CAG meeting, the members were provided with the guidelines for the process, including the roles and responsibilities of the members, an explanation of the participatory process, and the meaning of "consensus".

As the CAG meetings progressed, proposed language was introduced, and the Department requested comments from the CAG members. Many topics were addressed in more than one CAG meeting, particularly where comments were received on the topic or proposed language. Due to the nature of the activities regulated under the Virginia Water Protection Permit Program, the interests of the CAG members were divided into the broad categories of 'wetlands' and 'water supply', and thus, certain members of the CAG requested a separate advisory process be convened to focus on the water supply provisions being proposed for revision. DEQ held two additional CAG meetings, noted by italics above, where only the provisions related to surface water withdrawals were discussed.

CAG representatives from the Home Builders Association of Virginia (HBAV), the Virginia Association for Commercial Real Estate (VACRE), EEE Consulting, Inc. (EEE), and Virginia Manufacturers Association (VMA)/Mission H2O expressed concern about timeline for the CAG meetings. DEQ adhered initially to the timeline under Executive Order 17, as revised and reissued on July 1, 2014, but then added two additional meetings noted above to address the concerns.

The CAG came to consensus on most of the revisions proposed by the Department and/or CAG members, with the exceptions of general permit transition and term length applicable to each general permit regulation, and revisions to certain surface water withdrawal activity provisions in 9VAC25-210 Each of these issues are discussed in further detail in this memorandum.

The remaining proposed revisions fell into three categories: those achieving consensus, as defined in the advisory group guidelines; those achieving consensus but not achieving unanimity among the CAG members; and those achieving consensus with one or two dissenting opinions among the CAG members. The Department considered all suggestions and made decisions on further revisions to the regulation language accordingly. Additionally, revision efforts continued after the CAG process concluded to: 1) further address several CAG member comments submitted too late to review as a group, but which were posted online, and 2) to further edit language found to later be incorrect or inconsistent based on Department review. Not all of these additional revisions were distributed to the CAG members but will be made available online as part of the proposed regulation texts.

This memorandum summarizes the key issues discussed, the varying opinions and suggestions of the CAG, and how the issue was resolved in the draft regulation before you. A list of proposed revisions to each regulation is attached (Attachment 3).

Key Issues Addressed by the Proposed Regulatory Changes – 9VAC25-210

A. Reorganization of Chapter 210:

The Department identified a lack of clarity in the existing regulation, particularly for provisions for surface water withdrawal activities, that stems from the current structure of Chapter 210. To address this, the Department proposed to the CAG members the option of revising the entire structure of Chapter 210 or the option of a smaller scale effort focused on consolidating surface water withdrawal provisions into its own part under Chapter 210. The CAG members requested that the Department pursue the latter proposal due to the opinion this provides greater clarity to the regulated public regarding provisions applicable to 'water supply' versus for 'wetlands.' The Department presented the proposed surface water withdrawal part to CAG members that showed existing sections relocated in whole or in part. Some CAG members voiced concern the reorganization would appear as a substantive change. However, the benefits of the proposal were discussed and majority felt those outweighed discomfort associated with moving sections of regulation. The CAG members reached consensus on consolidating the surface water withdrawal provisions within its own part under Chapter 210.

B. Surface water withdrawal revisions proposed under new part:

Significant portions of the surface water withdrawal provisions were incorporated into Chapter 210 in 2007. During that regulatory process, it was anticipated that the regulation would be revisited to evaluate the need for any further revisions based upon implementation of the surface water withdrawal provisions in the regulation. Since 2007, the Department has identified provisions in the regulation that are unclear based upon current application of the regulation. The revisions proposed by the Department, which received the most discussion by the CAG members and resulted in various degrees of nonconsensus, are discussed below.

Definition of Public Water Supply Safe Yield:

DEQ and the Virginia Department of Health (VDH) staffs have worked closely together over the past year on the topic of safe yield and concluded it desirable for the definition to reside in DEQ's, not VDH's, regulation. Recently, the Technical Advisory Committee reviewing VDH's water works regulations reached consensus on removing the definition from VDH's regulation and supports the inclusion of the definition into DEQ's regulation. Through these discussions, the agencies have also come to agreement on the definition currently proposed through this regulatory process.

The Department's proposal to add a definition for public water supply safe yield defines the term based upon its current implementation. Mission H20/Virginia Manufacturers Association (VMA), Dominion and Fairfax Water voiced the following concerns with the Department's proposal: the potential implication associated with moving the term from VDH water works regulation (12VAC5-590-830.A.2) to DEQ's regulation, viewed the proposed definition as a substantive change from the current VDH definition and one that would present uncertainty as to its application

in VDH permits, and questioned how the change affects grandfathered users (surface water withdrawals initiated prior to July 1, 1989). The City of Norfolk also provided comment and proposed revisions to the definition for DEQ's consideration.

DEQ is responsible for evaluating, in cooperation with VDH and local water supply managers, the current and future capability of public water systems to provide adequate quantity and quality of water, otherwise known as the safe yield of the system. This responsibility is assigned to DEQ as this is the agency with sole authority over water quantity and the volumes that may be withdrawn from a water source. DEQ is also responsible for protecting existing beneficial uses of state waters, as defined in Section 62.1-44.3 of the Code of Virginia that may be impacted by such activities. The Department believes the proposal is prospective in nature, applying only to new withdrawals or excluded withdrawals that need a new 401 certificate to increase the withdrawal beyond what it was in July 1, 1989. Locating the term within DEQ's regulation more accurately reflects the responsibilities of both agencies. Therefore, DEQ and VDH staffs agree that the placement of the definition should be within DEQ regulation as the agency authorized to determine the water withdrawal availability.

The definition for safe yield currently located in 12VAC5-590-830.A.2 of the VDH regulation has been unchanged since 1993 and therefore does not reflect the evolution of the term. Originally, safe yield was simple statistical calculation based on the probability of a given flow being available in a waterbody. The calculation did not take into consideration what additional water may be needed to ensure water users downstream also received the water to which they are entitled. In today's practice, the determination of available water has evolved to identify that other factors need to be considered, such as other existing beneficial uses and facility operations to provide a more adequate understanding of water source's safe yield. This information is considered to be critical by VDH to determine if the water source is the factor limiting a particular waterworks.

The Department considered the concerns raised during the CAG meetings and proposed a number of revisions in attempts to address those concerns. The term was revised from "safe yield" to "public water supply safe yield" to address the concern voiced by Dominion that the relocation of the definition would broaden its application to withdrawals other than water works. The Department also accepted the revisions provided by City of Norfolk. The Department met separately with Mission H20/VMA and proposed additional alternative revisions to the definition that included adding the existing definition for safe yield as a separate definition and revising the term of the proposed definition, but the proposal failed in reaching a compromise. The Department understands that their fundamental concern is any change to the existing VDH definition and its inclusion in the VWP regulation.

The Department appreciates the discomfort that arises when change such as that proposed with this definition is considered. Although the Department made efforts to reach a compromise regarding the proposal, the effort failed. The Department believes the proposed definition and location of safe yield under the DEQ regulation offers clarity on the roles and responsibility of DEQ and VDH and acknowledges the evolution of the term over the last 20 years. This definition was developed through coordination with VDH and both agencies concur with the proposal to this regulation. Despite the outstanding concerns voiced by a few CAG members, staff from both

agencies feels that this change is in the best interest of the agencies, effective resource management, and provides greater certainty of water availability to the regulated waterworks.

Definition of Public Water Supply:

The Department originally proposed revisions to this definition to provide clarity that the definition for "public water supply" characterizes the water use type and not a withdrawal type. The revisions proposed to the members of the CAG were to remove the word "withdrawal" from the definition to provide that clarity and included text revisions to improve readability.

The Department received comments from the City of Norfolk, an interested party during the CAG meetings, voicing concern that the definition of public water supply does not adequately define a system such as theirs. The City's system sells water to domestic users as well as industrial and commercial customers, who use the water in their processes. The City is concerned that the definition may sometime in the future limit a system like theirs from being considered a public water supply. Fairfax Water, a member of the CAG, agreed with the concerns raised by the City.

The focus of this definition is on domestic use because this is a primary component of a public water supply has typically been drinking water. The Department believes diverse systems that include other uses such as those described by the City are not excluded from being considered part of a "public water supply" due to the phrase "but not limited to" that is found in the following part of the definition "…for the production of drinking water, distributed to the general public for the purpose of, but not limited to, domestic use." The Department believes revising the term as proposed by the City may result in an unintentional substantive change, particularly when prioritizing water usage during times of drought. Public water supply has enjoyed the highest priority in those cases when reductions are necessary because of the large volume of drinking water use. By adding other uses explicitly, the priority, as stated in § 62.1-44.15:22 and § 62.1-243 of the Code of Virginia, becomes confused and exposes the agency to potential unnecessary legal risk in implementation.

Upon consideration of the City's comments, the revisions proposed are limited to revising the term from "public surface water supply withdrawal" to "public water supply" to clarify the term applies to the use type of a withdrawal, leaving the rest of the definition intact

Tidal surface water withdrawal exclusion:

Through discussions with CAG members regarding revisions proposed to the surface water withdrawal exclusion to improve readability, a misunderstanding was identified regarding the intent of the tidal surface water exclusion of 2 million gallons per day (mgd) for consumptive uses. It appears some of the confusion stems from the current structure and wording used for a set of the exclusions in the existing regulation, 9VAC25-210-60.B.4 through 15. Mission H2O/VMA believed the exclusion of 2 mgd pertained only to the consumptive portion of the cumulative volume withdrawn from tidal waters because there was a separate exclusion that states withdrawals from tidal waters for nonconsumptive uses were excluded.

The current and historical practice by the Department in applying thresholds for exclusions and permits is based upon the total volume of water proposed to be withdrawn. The distinction between consumptive and nonconsumptive components of that volume is distinguished to enable the Department to gain a better understanding of the water budget to facilitate project review. It would be a departure of practice to apply the 2 mgd limit to only the consumptive portion of the total withdrawal for this one exclusion and that was not intended when the language was added in 2007. The Department agrees the current structure of this set of exclusions causes confusion and proposed revisions to address the issue. Consensus was reached regarding restructuring this set of exclusions; however, Mission H2O/VMA did not concur with the intent of the 2 mgd tidal exclusion as discussed by staff.

Application informational requirements for surface water withdrawals:

Since the 2007 regulation revisions to expand surface water withdrawal provisions, the Department has become aware that the current permit application requirements lack clarity and are confusing to both staff and the regulated public. The reorganization of the provisions addresses a portion of this issue through clearly identifying and grouping together informational requirements necessary for staff to review an application for a surface water withdrawal. However, further clarification is necessary to address the specific information to be submitted.

Currently, the regulation identifies two categories of surface water withdrawal projects, minor surface water withdrawal and major surface water withdrawal. The distinction between the two categories is based upon a threshold of a maximum monthly withdrawal of 90 million gallons. This distinction was created during the 2007 regulation revisions in an attempt to indentify a reasonable threshold for which withdrawals could be considered “minor.” It was assumed that smaller withdrawal volumes result in less impact and thus, less information is needed to assess those impacts, providing a more streamlined process. The exception provided in the regulation pertained to any surface water withdrawal that involves instream flow requirements, which would then need to submit all the information requested for a major surface water withdrawal. However, the application section in the regulation does not identify the potential for this additional requirement to pertain to minor surface water withdrawal applications.

The regulations lack clarity in the information needed for water withdrawal applications as the information requirements are located in several different locations and clear linkages between those locations are not provided. As a result, applications are often incomplete because it is unclear as to the information needed. Therefore, the Department proposes to revise the regulation to reflect the current application of the regulation through removal of the distinction between “minor” and “major” surface water withdrawals and establish one comprehensive set of informational requirements for all withdrawals.

Based upon the Department’s experience from implementing the regulation and reviewing surface water withdrawal projects, it became apparent that the regulatory presumption that a smaller withdrawal resulted in smaller impacts and therefore less review was needed was flawed. The Department has found the size of the withdrawal volume is not always indicative of the impact to the surface water. Rather, it’s the relative size of the withdrawal volume to the size of the waterbody and the presence of other existing beneficial uses. For example a relatively small

withdrawal in a small watershed can have significant impacts. Therefore, staff conducts the same review and cumulative impact analysis for all surface water withdrawals to evaluate potential impacts to surface waters and other existing beneficial uses. To facilitate this review, the same set of information is necessary for all withdrawals. Additionally, the Department has found all withdrawals involve instream flow requirements as such limits are necessary to ensure sufficient downstream flows are provided to downstream beneficial uses.

While there was consensus among the CAG members regarding consolidating the informational requirements, there was concern of removing the appearance of a streamlined process for minor surface water withdrawals. While some members appreciated that the regulations currently require more information for such withdrawals than it appears, it was felt that while it lacked clarity, the proposal would appear to be a substantive change. The concern was voiced particularly by Virginia Agribusiness as the majority of their members would be considered minor surface water withdrawals. Mission H2O/VMA commented that small withdrawal projects should be subject to streamlined reviews and fewer informational requirements. While the Department appreciates the revisions appear to be a substantive change in practice, the Department does not agree the lack of clarity in the regulation is desirable as it does a disservice to applicants and results in incomplete applications and need for additional information requests. Based upon staff's experience in reviewing such projects, it appears to be very rare for surface water withdrawals to have a common set of project and environmental conditions that result in minimal impacts that would necessitate a streamlined review. The Department believes the proposed revisions are those necessary to review a surface water withdrawal and provides applicants with accurate portrayal of the information needed to assess their project.

Modification criteria for surface water withdrawals:

Permit modifications following issuance, through either a major or minor modification of the permit, are necessary if a permittee proposes changes that result in differences to the project than what was permitted. The major modification process differs from a minor modification process in that the former mimics a permit issuance process and includes a public notification, public comment period, coordination with state agencies, and more informational needs and thus is more costly to permittee and results in more staff time. Minor modifications are used to address project changes that propose minimal additional impacts or that do not result in addition impacts. Because most permittees want the certainty of a permitted withdrawal volume before they incur the expense of final project design, the majority of water withdrawal permits require modifications as final engineering is completed.

VWP Permit Program Regulation currently establishes in 9VAC25-210-180.D and F the project changes that may be considered under either major or minor modification of the permit. Only one of these, under the major modification subsection, addresses surface water withdrawals. This results in uncertainty for permittees, the public, and staff as to the type of changes specific to withdrawals that may be appropriate under a minor modification versus a major modification of the permit. As part of the reorganization of the regulation, the Department proposes to add a section under the new Part V that establishes criteria, which is consistent with DEQ's other permitting programs, for when minor and major modifications of the permit may occur that are

specific to surface water withdrawal activities. The proposed criteria are based upon staff's experience of changes that have been requested following permit issuance.

All of the CAG members concurred with the addition of the new section to provide clarity and certainty to modifications for surface water withdrawals. Discussions on the section resulted in revisions to clarify the intent of the proposal. The majority of the CAG members agreed on the new section, with the exception of Chesapeake Bay Foundation (CBF). CBF agreed with the concept of a new section for clarity, but also commented that major modifications should be required whenever an increase in impacts are proposed through a modification.

C. Consistency between VWP and federal rules governing compensatory mitigation:

While the Commonwealth has an independent nontidal wetlands regulatory program, it works closely with the U.S. Army Corps of Engineers (Corps) in its management of that program, including the required compensatory mitigation for impacts to surface waters, including wetlands. In 2008, the Corps adopted revised regulation 33 CFR 332, referred to as the '2008 Mitigation Rule', regarding compensatory mitigation (Attachment 2). Adoption of the 2008 Mitigation Rule essentially reversed the hierarchy of acceptable mitigation practices, causing the VWP permit regulations to be opposite that of the Corps' regarding the hierarchy. The VWP permit program accepts the scientific literature supporting the revisions made by the Corps to federal regulations, and thus, the Department proposes to revise the VWP regulation revisions to reflect the 2008 Mitigation Rule. Details are proposed to be revised in 9VAC25-210-10 et seq. regarding acceptable compensation options for impacts under the authority of the Commonwealth. Each of the four VWP general permit regulations will include a reference those applicable portions of 9VAC25-210, rather than repeat the entire detail in each of the four regulations.

While there was consensus among the CAG members that the VWP regulations should be in line with the 2008 Mitigation Rule, there were differing opinions on how to word the hierarchy and provide similar decision discretion as that which is afforded the Corps. Based on CAG and stakeholder input, the Department prepared two versions of revised language over the course of the CAG meetings. The Nature Conservancy and Chesapeake Bay Foundation representatives support language that reflects released credits from an in-lieu fee program being the equivalent to mitigation bank credits, since both are agency-approved following the federal standards. The Home Builders Association of Virginia (HBAV) and Mr. T. J. Mascia (general public) with interest in mitigation banks expressed the desire to have the VWP regulation language match the 2008 Mitigation Rule to the maximum extent possible. Virginia Agribusiness Council commented that DEQ should confer with the Corps about the versions to ensure both met the intent of the Rule. Representatives of the Virginia Association for Commercial Real Estate (VACRE) and EEE Consulting, Inc. (EEE) noted the VWP regulation should address enhancement as an option.

The Department proposed two versions of hierarchy language, both of which meet the intent of the 2008 Federal Mitigation Rule according to conversations with Corps management. The Department proposes to align its regulatory language as close as possible to the 2008 Mitigation Rule considering the existing State Water Control Law and regulatory framework in which the program must operate. The Department incorporated additional language at the request of the Nature Conservancy regarding the likelihood of project success when staff considers mitigation

proposals. The Department also clarified the existing language regarding enhancement based on the State Water Control Law. The existing language already provides for program discretion in making decisions on compensatory mitigation options.

A provision for compensatory mitigation options that is related to the 2008 Mitigation Rule is the existing VWP regulatory language regarding multi-project mitigation sites. A multi-project mitigation site allows a permittee to essentially create more compensation capacity than that which would be required by a single permit action. This option was historically accepted in certain cases by the VWP permit program and the Corps, particularly for the Virginia Department of Transportation (VDOT) projects. Since the implementation of the hierarchy required by the 2008 Mitigation Rule, however, this option is curtailed due to the priority of other mitigation options. The Rule does not require existing multi-project mitigation sites to come into compliance with Rule, as no instrument for their operation exists. The sites that remain today would not likely be approved by either state or federal permitting agencies under today's standards, unless all other options were exhausted, and then by agency-discretion only. VDOT commented that the existing VWP regulation language should remain as is, while the HBAV, VACRE, and EEE commented that all language related to multi-project mitigation sites and use of credits should be stricken. The Department does not intend to require VDOT, and what few other sponsors of such sites remain, to retroactively change the requirements for existing multi-project sites. The Department also notes that any future multi-project mitigation sites proposed would be considered as permittee-responsible compensation and be subject to the 2008 Mitigation Rule requirements. The Department intends to address any special needs of VDOT in the Memorandum of Understanding between the agencies.

D. Compensation for open water impacts:

During the advisory group meetings, a suggestion was made that there be a section added to section 116 of 9VAC25-210 to address compensation for open water impacts. It was suggested that this should be discretionary. There was disagreement regarding the inclusion of language related to open waters. The Department noted that -116 C 4 allows for discretionary open water compensation as appropriate. The CAG also discussed the concept of having a limit for any required "compensation for open water impacts", as there have been experiences where differing compensation requirements were applied by different permitting agencies.

Home Builders Association of Virginia (HBAV) advocated for a cap on the amount of compensation required for open water impacts, and/or eliminating the need for compensation when impacts occurred in certain small ponds. The VWP regulations recognize that compensation is warranted in certain circumstances, and specifies a 1:1 ratio in each general permit regulation. Verbal comments were made by the HBAV representative at the last CAG meeting but additional written comments did not get distributed to the remaining CAG members due to timing. HBAV cited studies that show too much open water is being created with little environmental benefit as compensation for impacts. The Department worked with HBAV to identify the specific open water areas that were not typically of significant environmental value, and those areas that the Department has historically had concern over in past permitting experience. Proposed language is included in each regulation that attempts to parse out those small open water areas where compensation may not be warranted and to limit the maximum compensation ratio, when required,

to a 1:1 ratio. While the CAG did not have benefit of fully vetting the topic during the CAG process, no objections were heard when the topic was raised. However, the Department cannot determine consensus on the full scope of proposed revisions at this time.

E. Conditional requirement for assessment of wetland functions:

9VAC25-210 currently requires that applicants who propose to impact one acre or more of wetlands provide an assessment of functions being lost. Historically, such analysis was used at the state and federal to support impact-to-loss ratios calculated for required compensatory mitigation for wetland impacts.

CAG members representing VDOT and Home Builders Association of Virginia (HBAV) commented that no assessments should be required since standard mitigation ratios are widely expected and understood, and are in line with state and federal agency guidance and policy. Members of the Virginia Association for Commercial Real Estate (VACRE) and EEE Consulting, Inc. (EEE) supported assessments only when permittee-responsible mitigation is proposed. The Chesapeake Bay Foundation (CBF) commented that assessments should be required for all wetland impacts in order to ensure reduced loss of functions in determining mitigation requirements.

The Department originally desired, and still prefers, to delete the provision due to the change in most-commonly proposed compensation moving away from on the ground projects done by the permittee to the purchase of mitigation bank or in-lieu fee program credits, which are only available after a separate approval process at the state and federal levels. However, the Department proposes to revise the provision to only require as assessment of functions for certain situations, particularly when permittees desire, and can justify, conducting on the ground permittee-responsible compensation instead of purchasing bank or fee program credits.

F. Permit application requirements:

The Department identified a need to receive project location information in a geographic information system (GIS) format to support agency data tracking initiatives and better evaluate compensatory mitigation proposals. The CAG discussed the issues surrounding the use of GIS shapefiles and expressed concerns about the ability of certain applicants to provide them, the cost of producing them, and the accuracy necessary for permitting purposes. The majority of the CAG agreed to the inclusion of GIS shapefiles as part of the requirements for a complete application provided that the VWP permit program would develop guidance related to the expected accuracy of measurements included in such files, and provided that discretion was included for DEQ to waive the requirement. VDOT remains objectionable to the inclusion of GIS shapefiles as unattainable for certain projects and expensive. The Department maintained the proposed language as agreed to by the majority of CAG members and intends to address any special needs of VDOT in the Memorandum of Understanding between the agencies.

Revisions are proposed to the regulatory requirements in 9VAC25-210-45 for delineating surface waters to be impacted in order to update the manuals and methods used in the process as a result of changes in federal regulations governing activities in waters of the United States. As part of

this, the Department determined the need to be able to rely on information provided in an application to make permitting decisions and potentially save having to reverse or change those decisions after permit coverage or issuance. A jurisdictional determination, or JD, made by the Corps and typically accepted by DEQ for application purposes, has always been a requirement for VWP applications, but the Corps implemented a process in 2008 whereby a preliminary JD may be provided instead of, or in advance of, an approved JD. The Department proposes to revise the VWP complete application requirements to reflect the need for the approved JD when one is available in order to make sound permit decisions. The majority of CAG members agreed to the requirement, except for VDOT. VDOT commented that a preliminary JD should be acceptable for purposes of a complete application, rather than an approved JD and suggested revised language, and also noted that the Corps does not always issue or provide a "final approved jurisdictional determination". Instead, most of the JDs that VDOT receives are "preliminary" only. The Department believes that the preliminary JD may not provide confirmation of the true amount of impacts being proposed, potentially causing additional staff time to evaluate revisions to those amounts, either later in the application review phase or after the authorization is granted, and that compensation decisions are delayed without benefit of an approved JD on the type and amount of waters being impacted. However, the Department does propose the caveat 'if available' as part of the provision regarding the need for the approved JD to achieve a complete application. DEQ also intends to address any special needs of VDOT in the Memorandum of Understanding between the agencies.

Another informational requirement for a complete application is any applicable permit application fee. Fees are located in 9VAC25-20-10 et seq. ("fee regulation"). However, the fee regulation is not clear regarding VWP permit fees, and in one case there is a fee listed for anon-existent permit type. These discrepancies are not proposed for revision at this time. A related issue is the language in section 50 of the four VWP general permit regulations regarding notification procedures that staff finds unclear regarding what the VWP permit programs expects when determining fees, particularly for stream bed impacts, and what information requirements apply to which applicants. Therefore, the Department proposes to delete references to the fee regulation in the VWP permit regulations. There is no intent by DEQ at this time to apply fees differently to VWP permit actions as it has done in the past. The majority of the CAG members did not object to the revision in regulatory language, but VDOT commented that the regulations should state "in accordance with the fee schedule in 9VAC 25-20". The Department proposes to delete the reference in the VWP regulations, at least until the fee regulation can be revised to clarify the calculation of fees and correct other errors. The VWP permit program intends to continue its current practices regarding the way in which fees are calculated.

The Department also proposes to: 1) reorganize the requirements for a complete application listed in regulation section 80; 2) revise the provisions regarding complete applications to reduce the timeline that these applications may linger; and 3) make the application provisions consistent across all VWP regulations. The CAG came to consensus on these aspects of the proposed revisions and assisted the Department with developing new and revised language.

<u>G. Adding provisions for administrative continuance:</u>

The Department introduced the concept of administrative continuance of individual permits, as allowed by § 62.1-44.15(5a) of the Code of Virginia, but previously not included in VWP regulations. This provision allows the extension of an individual permit past its expiration date, due to no fault of a permittee applying for reissuance or modification, when the agency cannot process a new permit or modification before the existing permit expires. This may be a case where agency personnel experience an administrative hardship, such as furlough, a natural disaster, or human resource issues. This provision appears in other water program regulations under DEQ. The Chesapeake Bay Foundation (CBF) expressed concern with the addition of the provision without including some kind of end point. The Department does not agree that an end point is necessary due to the difficulty in predicting a reasonable time frame. No such end points exist in these provisions in other program regulations.

H. Permit modification procedures:

While the existing VWP Permit Program Regulation 9VAC25-210-10 et seq. already allows increases in impacts under a major modification of an individual permit, the Department proposes to allow such modification, when compliant with the specified criteria, to be accomplished under a minor modification. The minor modification process would greatly reduce the amount of staff time needed to process what staff has found to be largely insignificant additional impacts. In the existing VWP regulation, additional impacts of up to one-quarter acre of wetlands/open water or 100 linear feet of stream bed are allowable. The proposed revision allows these limits to be extended as a percentage of original impacts, or the existing limits, not to exceed 1 acre or 1,500 linear feet. The Department finds that the majority of requested additional impacts are of such low amount that no additional value is added by processing a request as a major modification, which includes a public comment process, and potential hearing. As originally proposed, a two-acre maximum was included, but upon objection from the Chesapeake Bay Foundation (CBF), the Department reduced the limit to one-acre. CBF remains concerned about any additional impacts being allowed without an opportunity for public comment, and that the sliding scale allows too high of additional impacts. The remaining CAG members did not express opposition to the proposed revisions.

The Department also proposes to clarify language related to the modification of permits for increases, or decreases, in the amount of temporary impacts incurred by a permittee once the project begins. Provisions for notifying DEQ prior to taking additional temporary impacts are proposed, as well as allowing such a permit revision to be processed as a minor modification if certain criteria are met. The CAG came to consensus on these revisions.

In addition, the Department proposes to: 1) reorganize many of the provisions in section 180 for better readability and to clarify program intent, such as for the transfer of a VWP individual permit from one permittee to another; 2) updating the allowable substitution of compensatory mitigation options based on the 2008 Mitigation Rule; 3) moving and clarifying an existing provision for extending a VWP individual permit term if originally set at less than 15 years; and 4) to add a provision for the termination of an individual permit without cause when there is a substantial change to the nature or existence of the permittee. The CAG came to consensus on these revisions.

I. Revise, move, add, and delete definitions:

The Department reviewed 9VAC25-210-10 et seq., the VWP general permit regulations, the Code of Virginia, the 2008 Mitigation Rule, and other literature to determine if the definitions that exist in the VWP Permit Program Regulation are current, still in use, or in need of clarifications. Because 9VAC25-210 is the over-arching program regulation, the Department determined that many definitions are unnecessarily duplicated in the VWP general permit regulations, while others may be duplicated for ease of reference or emphasis. Several such definitions are proposed to be moved, or moved and revised, between the various regulations. Other definitions needed to be revised based on current practices, the Rule, or the literature. Still other definitions have become obsolete over the last ten years, or reflect widely accepted concepts in environmental science and engineering and are no longer needed – the Department proposes to delete these.

The CAG members were in general agreement on the revisions, movements, and deletions proposed in 9VAC25-210 and the VWP general permit regulations. Discussion during the CAG meetings resulted in several revisions before resting on those in the proposed regulations attached herein.

J. Miscellaneous issues:

1. Informational requirements:

    The Department proposes to streamline the regulation language in places where additional information is requested or required by DEQ, and instead, add a new section entitled "Statewide information requirements". This provision is based in the Code of Virginia and appears in other regulations, such as those in Virginia Pollutant Discharge Elimination System permit program. While concerns were expressed during the CAG meetings that the provision is expanding the Department's discretion in asking for information beyond that which is reasonable, the CAG did achieve consensus on this revision. The Department believes the provision is already implemented under different wording in multiple places within the VWP regulations, and that the Code clearly provides the authority for requesting additional information when necessary to make permitting decisions. The intent of the provision is to clearly state that there is an expectation of the applicant or permittee to provide the information needed to issue permits or grant authorizations, and so that there is lower risk of unintentionally affecting human health and the environment through permit actions.

2. Permitting exclusions:

    Based on staff experiences reviewing and processing applications for small impacts to open waters in the Commonwealth, the Department determined that certain impacts to open waters should be excluded from the need to obtain a VWP permit if they do not have a detrimental effect on public health, animal or aquatic life, or beneficial uses, such as ponds in upland areas. The Department has spent considerable time, and applicants have incurred expenses, to process permits for these projects. Language is proposed to allow this exclusion, as well as language requiring the applicant to demonstrate that any of the

exclusions contained in 9VAC25-210-60 apply to his or her project. Other proposed revisions include reorganizing the order of some exclusions; clarifying language in some exclusions; consolidating some exclusions; and moving and revising the exclusions related to surface water withdrawal activities to a new Part in the regulation. The CAG came to consensus on the proposed revisions.

3. Reapplication:

   The Department proposes to add a provision that does not currently exist to specifically state that a VWP individual permit holder must reapply for a new VWP individual permit if he or she desires to continue an authorized activity beyond the permit expiration date. There was consensus among the CAG on this proposed provision.

4. Finalizing compensation plans:

   The Department proposes to clarify what is required for a complete application regarding compensatory wetland and stream mitigation plans. Contained in the existing section 80 is the requirement for a conceptual compensation plan and the information necessary to include in the plan, including a draft of the intended protective mechanism to be placed over any permittee-responsible compensation site(s). The mechanism remains in draft form until the final compensation plan is submitted, after permit issuance, which staff reviews, comments upon if necessary, and approves as final. The original regulation language then gave the permittee 120 days to record the mechanism, which usually entails a survey of compensation site boundaries at a minimum. The Department proposes to delete the 120 day requirement and replace the deadline to be prior to initiating impacts in surface waters that are authorized by the permit. The Department finds that the 120 day period is often too short for permittees to conduct this step of the compensation process, especially when the permittee-responsible compensation involves actual on-the-ground creation, restoration, or enhancement activities. Also, the original language is confusing to interpret relative to when the final compensation plan, detailed in section 116, is required to be submitted and what information it must contain compared to the conceptual compensation plan phase.

   During the CAG process, the Chesapeake Bay Foundation (CBF) objected to the deletion of the 120-day timeline unless language setting a deadline is included elsewhere. The Department believes that by setting the deadline to ‘prior to commencing impacts’, flexibility is provided in-lieu of a hard date while maintaining a precise moment in which to expect the submittal of required information. Failing to do so may result in the permittee having to request a permit modification, and/or delay the beginning of work in surface waters.

5. Approval of in-lieu fee programs as compensatory mitigation option:

   9VAC25-210-116 D sets forth the provisions for approval of the use of in-lieu fee programs as a means to provide compensatory mitigation. The section was revised to update the use of the term ‘program’ instead of ‘fund’ to be consistent with the 2008 Federal Mitigation

Rule choice of language. Other revisions brought before the Citizens Advisory Group (CAG) were changing the sequencing of options noted in the original text to mimic the same revisions in subsection C of section 116, and to change the amount of time for which an approval was valid from the existing five years to a proposal of 10 years. The majority of the CAG was in agreement with the proposed revisions presented, except the Chesapeake Bay Foundation objected to the approval period of every 10 years as too long for staff review of in-lieu fee program operations and performance. The Home Builder's Association of Virginia suggested a 20-year period. The Department has found the approval process every five years to be unproductive and unnecessary, and thus, propose 10 years as a possible compromise between five and 20.

In addition to the proposed changes brought before the CAG, the Department determined that other revisions to the original language were necessary to address the new Wetland and Stream Replacement Fund that was mandated by the Virginia General Assembly in 2012. DEQ is an approving agency to all in-lieu fee programs, but has waived its approval to the Corps for this program due to the potential conflict of interest. Therefore, a new provision was added to 9VAC25-210-116 D allowing the use of this program, and any future state-sponsored programs, when such is mandated by the Code of Virginia. Additionally, subsection D was further edited for wording choice, to remove duplicative language, and reorganize the language. The need for these revisions was not recognized prior to the conclusion of the CAG process and thus have not yet been reviewed or commented upon by the CAG. The CAG will have an opportunity to comment during the proposed regulation comment period.

6. General permits:

   The Department proposes to revise language in section 130 of the VWP Permit Program Regulation to clarify the discussion of general permit terms and streamline provisions regarding compensation by replacing language with references to section 116 of the same regulation. The CAG came to consensus on these proposed revisions.

7. Forms and documents:

   The Department proposes to update, correct, and revise the forms and documents incorporated by reference at the end of the VWP Permit Program Regulation to reflect the 2008 Mitigation Rule, changes in the Joint Application process, changes in program guidance and policy, and overall consistency between VWP regulations. The CAG came to consensus on these proposed revisions.

Key Issues Addressed by the Proposed Regulatory Changes – 9VAC25-660; 9VAC25-670; 9VAC25-680; 9VAC25-690

A. Provisions for the expiration of general permits, transitioning permit authorizations between general permit cycles, and administratively continuing general permits:

The four VWP general permit regulations were initially issued in 2001 for a five-year term, and then reissued in 2006 for a 10-year term. The four VWP general permit regulations expire on August 1, 2016, and thus, this regulatory action before you has been initiated to revise and reissue the regulations and the four VWP general permits contained therein.

The VWP general permit regulations are authorized by the Virginia Water Protection Permit Regulation 9VAC25-210-10 et seq., as well as the Code of Virginia. Thus, the Department has implemented the revision of that regulation simultaneously with the four general permit regulations.

As the four VWP general permit regulations exist today, each contains a regulation expiration date, a general permit expiration date, and a term for the authorization of coverage. The Department believes that the current provisions contained in the four regulations were negotiated between the Department and stakeholders in good faith to allow a framework in which the authorization for coverage may expire but could be continued in certain cases beyond that expiration, such as when monitoring needed to continue. This may have meant that an authorization existed for seven years plus up to seven more years, during which time the general permit would have expired.

Some members of the stakeholder's advisory group expressed their desire to keep the current frame work as is, such that an applicant may receive a permit authorization and be able to rely on its terms and conditions for a specified amount of time through project completion. While the Department understands this argument, the Code does not support this type of framework for general permits. Based on the Department's current interpretation, the Code of Virginia allows a maximum of 15 years for any kind of VWP permit, after which, a new permit must be applied for.

Currently, the general permit terms are 10 years, but the provisions within each regulation allow a general permit authorization length of 3 years for WP1 and 7 years for general permits WP2, WP3, and WP4. The Department proposes to revise all four general permit terms to 15 years, making the general permits before the Board effective on August 2, 2016 and expire on August 1, 2031, and to eliminate the separate authorization period. If permittees cannot complete the authorized impacts within the allotted time, reapplication must occur for either new general permit coverage or an individual permit. The Department believes that the general permit authorization and the general permit term should expire simultaneously in order to simplify the permitting process and be consistent with the Code limit of 15 years (§62.1-44.15(5a)).

Regulation language proposed to address the situation did not gain consensus in the CAG, primarily because of differing opinions about the length of the general permit term and the best way in which existing permittees could extend coverage in order to continue unfinished projects under the same terms and conditions as originally authorized. The Chesapeake Bay Foundation (CBF) suggested that a 10-year general permit term was too long but that seven years may be reasonable, and that organization has historically been opposed to a term longer than 10 years. CBF further expressed concern that projects would drag on with no incentive for completion if an authorization was allowed to continue unchanged up to the maximum 15-year limit. The Home Builders Association of Virginia (HBAV) and Virginia Department of Transportation (VDOT) supported a five-year term, provided that the authorization rolled over to the next general permit

cycle in order to complete the project under the same conditions. HBAV expressed the desire to be able to receive an authorization, begin work, and complete a project under the same set of conditions and requirements regardless of when a general permit term ends and a new one begins. HBAV, the Virginia Association for Commercial Real Estate (VACRE), and EEE Consulting, Inc. (EEE), the three representatives of the regulated community on the advisory group, agreed that the proposal to change the framework would jeopardize project planning and development and increase the costs of development.

The Department reminded CAG members of the public's ability to apply for an individual permit at any time. This would remove uncertainty because individual permits may be issued for up to 15 years from the date of issuance, which varies, unlike that of the general permits, which are issued through regulation at a defined beginning point. The Department is concerned that a 5-year term would create a significant administrative burden, given that the necessary regulation reissuance process could require 9 months to well over one year each time, expending valuable staff resources more frequently than the typical rate of significant changes to program guidance, policy, regulation, or law. The Department also believes that there are existing provisions that allow the general permits to be reopened, revoked, or modified should the need arise during their term due to a change in state or federal policy or law regarding activities in surface waters. The Department feels confident that if any such change or shift in law or policy were to occur, there is an established process by which to address it.

The Department continued to work internally and with the Attorney General's office to revise the proposed language in order to address the comments and suggestions made by the CAG, within the constraints of the Code of Virginia. The Department believes the language currently proposed allows transition between general permit cycles with as little disruption as is possible, while being consistent with the intent of the Code.

In addition to the change from the current general permit framework, the Department introduced the concept of administrative continuance of general permits, as allowed by § 62.1-44.15(5a) of the Code of Virginia, but previously not included in VWP regulations. This provision allows the extension of a general permit past its expiration date, due to no fault of a permittee reapplying for coverage, when the agency cannot process a new general permit before the existing one expires. This may be a case where agency personnel experience an administrative hardship, such as furlough, a natural disaster, or human resource issues. This provision appears in other water program regulations under DEQ. The Chesapeake Bay Foundation (CBF) expressed concern with the addition of the provision without including some kind of end point. The Department does not agree that an end point is necessary due to the difficulty in predicting a reasonable time frame. No such end points exist in these provisions in other Water Program regulations, and these provisions have worked well without them.

In summary, the CAG did not reach consensus on the various provisions contained in the four general permit regulations regarding the general permit term, transitioning between general permit cycles, and the details on how to manage each possible application scenario. The Department developed the proposed language based on the Department's current interpretation of the Code and the advice provided by the Attorney General's office, which includes provisions to bring existing permittees into the new framework; provisions that provide a method for completing

projects during general permit transition periods; and provisions to provide staff the necessary mechanism of administrative continuance in the case of unforeseen events.

B. Permit application requirements:

The Department included in each VWP general permit regulation the same proposed revisions regarding the informational requirements needed to achieve a complete application as that which is proposed for the base regulation 9VAC25-210-80. The same discussion regarding application requirements as noted in the individual permit section F applies to the VWP general permit regulations.

In addition, the Department proposed revising the requirements for notification in section 50 of each VWP general permit regulation, where such requirements are dependent upon the amount of impacts the applicant proposes. The majority of CAG members were in agreement with the proposed revisions. The Virginia Department of Transportation (VDOT), however, noted that the revised list of application information now contains items that are not currently required in 9VAC25-680-50, particularly for its linear transportations projects incurring less than one-tenth acre of wetland/open water impacts or up to 300 linear feet of stream impacts. The items include: property owner names/addresses; proposed project schedule; the physical address, location map, and GIS shapefile of project boundary; project need rather than just the project purpose; jurisdictional determination; delineation map and GIS shapefile; and alternatives analysis.

Upon review of the applicable regulation sections, the Department determined that while there are several informational items that are not currently required of VDOT, these items should be readily available, and where unavailable and not already excused by DEQ discretion, such exceptions or special needs may be addressed in the Memorandum of Understanding between the agencies. The Department believes that the inclusion of these exceptions in the regulatory language makes the regulation harder to understand what information is required to be provided to DEQ. The Department proposes to remove VDOT-specific language in 9VAC25-680-50 and 9VAC25-660-50.

The Department also proposes to: 1) reorganize the requirements for a complete application listed in regulation section 60; 2) revise the provisions regarding complete applications to reduce the timeline that these applications may linger; and 3) make the application provisions consistent across all VWP regulations. The CAG came to consensus on these aspects of the proposed revisions and assisted the Department with developing new and revised language.

C. Allowable changes to a general permit authorization for coverage:

In each VWP general permit regulation, provisions exist for handling changes in a project after an authorization is granted. One of the existing allowable changes is an increase of impacts within the limits of one-quarter acre of wetland/open water or 100 linear feet of stream bed. The Home Builders Association of Virginia (HBAV) commented that changing the maximum allowable increase to stream impacts under a Notice of Planned Change from 100 to 300 linear feet would benefit applicants. Some examples were discussed in the last CAG meeting such as pipe or culvert adjustments that regularly require just over the 100-foot limit, thus causing costly design

alternatives or require additional permits. Representatives of the Virginia Association for Commercial Real Estate (VACRE) and EEE Consulting, Inc. (EEE) noted the change would be consistent with the 'minor' impact limits of one-tenth acre and 300 linear feet. The Department notes that these limits are notification limits, used for determining which informational items should be submitted, rather than limits used to identify potential adverse effects on the environment. The Chesapeake Bay Foundation (CBF) commented that no change to the 100-foot limit should occur.

The Department did not originally propose a revision to the linear foot limit and doing so may have ramifications in the need for compensatory mitigation, and/or revising other provisions in the regulations which have not been fully considered at this time.

In addition, the Department proposes to: 1) clarify language related to increases or decreases in the amount of temporary impacts incurred by a permittee once the project begins; 2) add provisions for notifying DEQ prior to taking additional temporary impacts and for DEQ approval of such; 3) reorganize many of the provisions in section 80 for better readability and to clarify program intent, such as for the transfer of a VWP general permit authorization for coverage from one permittee to another; 4) updating the allowable substitution of compensatory mitigation options based on the 2008 Mitigation Rule; and 5) to add a provision to section 90 for the termination of a general permit authorization without cause when there is a substantial change to the nature or existence of the permittee. The CAG came to consensus on these revisions.

D. Monitoring and reporting requirements:

In October 2013, the VWP permit program implemented a new Construction Monitoring and Reporting (CMR) initiative that changed how project construction and compensation site monitoring are to be conducted by holders of VWP individual permits. After more than one year after implementation, the Department has made adjustments to the monitoring requirements and forms to address comments from the regulated community. The Department proposes to revise the existing monitoring conditions contained in the VWP general permits to make these consistent with the implemented requirements for individual permits. The CAG reached consensus on the proposed revisions for the VWP general permits.

E. Revise, move, add, and delete definitions:

The Department reviewed the existing VWP permit regulations, the Code of Virginia, the 2008 Mitigation Rule, and other literature to determine if the definitions that exist in the VWP general permit regulations are current, still in use, or in need of clarifications. Because 9VAC25-210 is the over-arching program regulation, the Department determined that many definitions are unnecessarily duplicated in the VWP general permit regulations, while others may be duplicated for ease of reference or emphasis. Several such definitions are proposed to be moved, or moved and revised, between the various regulations. Other definitions needed to be revised based on current practices, the Rule, or the literature. Still other definitions have become obsolete over the

last ten years, or reflect widely accepted concepts in environmental science and engineering and are no longer needed – the Department proposes to delete these.

The CAG members were in general agreement on the revisions, movements, and deletions proposed in 9VAC25-210 and the VWP general permit regulations. Discussion during the CAG meetings resulted in several revisions before resting on those in the proposed regulations attached herein.

F. Consistency between VWP and federal rules governing compensatory mitigation:

The discussion provided above in this memorandum regarding compensatory mitigation, including the consensus results, also applies to each VWP general permit regulation, except that instead of repeating the specific revisions proposed in 9VAC25-116, section 70 of each regulation refers back to 9VAC25-116. The Department believes this provides an opportunity to simplify the language in the general permit regulations.

In addition, section 100 Part II A of each VWP general permit is proposed to be revised to reorganize and clarify existing provisions and to delete provisions regarding specific compensation site monitoring criteria. The later is proposed due to uncertainty in the scientific community on any criteria as an alternative to that which is typically applied by DEQ and Corps. HBAV noted during the last CAG meeting that criteria for hydrology, for example, is being debated in scientific circles but no clear, alternative direction can be decided upon. The VWP Permit Program intends to continue applying the same requirements for successful permittee-responsible mitigation as it has applied while developing program guidance to address the latest research. The CAG reached consensus on these revisions.

In order to be consistent with the 2008 Mitigation Rule regarding financial assurances and long-term management, the Department also proposes to revise the applicable VWP general permit conditions to allow a third party to hold easement or protection in perpetuity over permittee-responsible compensation sites and thus assume these responsibilities. Public comment at the last CAG meeting indicated that state law may be changed regarding easements and tax credits, and thus, the program may want to consider flexible language in its regulations. The Department has not been made aware of any state law changes to date that would affect the proposed revisions. The CAG reached consensus on the proposed revisions as they were proposed during the CAG meeting process.

G. Conditional requirement for assessment of wetland functions:

The discussion provided above in this memorandum regarding assessment of wetland functions, including the consensus results, also applies to each VWP general permit regulation, except 9VAC25-660. The proposed revisions do not apply to -660 because the allowable general permit threshold is only up to one-half acre of wetland impacts, and thus, the proposed revisions do not apply.

H. Miscellaneous issues:

1. Authorized activities:

   The VWP general permit regulation 9VAC25-690 allows stormwater management activities and the maintenance of structures thereof. Currently the regulation limits excavation to the facility's 'original contours'. The Department proposes to revise the language to 'original design' to match a similar revision proposed in 9VAC25-210-60. The majority of CAG members agree with the revision. The Virginia Department of Transportation (VDOT) commented that 'contours' should be kept, as the facility may not have been constructed as designed, and because the concept of design includes more than just contouring. The Department proposes to use 'original design' for consistency purposes and is proposing another provision clarifying what is acceptable when original designs are not available.

2. Prohibited activities:

   Revisions are proposed to reorder the list of prohibited activities under each VWP general permit (section 40) and include the prohibition of activities in tidal waters, as is stated in 9VAC25-660-40 but not in the remaining three VWP general permit regulations. The VWP Permit Program purposefully does not authorize coverage under a general permit for projects in tidal waters, as a result of Technical Advisory Group negotiations and discussion that occurred when the general permits were first developed. The Home Builders Association of Virginia (HBAV) asked DEQ to reconsider this long-standing regulatory prohibition at the last CAG meeting for the current intended regulatory action; however, upon review, the Department concluded that the issue had far-reaching implications that could not be fully considered at this time. Other revisions being proposed include clarifying language in some prohibitions and consolidating some exclusions. The CAG came to consensus on the proposed revisions.

   The Department also received comment to revise the VWP general permit regulations to delete the prohibition of heavy equipment in streams or for working in streams with use of stone or similar material. HBAV and VDOT requested consideration of allowing road crossings to be completed in the wet using surge stone or other materials of low silt or clay content. HBAV also noted that DEQ has already allowed work in the wet in certain circumstances. The Department proposes to allow DEQ discretion in the general permit conditions as to when equipment use may be allowable in streams for restoration purposes without revising those existing conditions prohibiting such in wetlands, and without contradicting prohibitions for in-stream mining in 9VAC25-690. Research sources have shown that there is a temporal component to the effects on water quality from the use of in-stream equipment in certain circumstances. The Department does not propose to allow surge stone or other materials as temporary or permanent fill in surface waters due to concerns for water quality.

3. Monitoring and compliance:

   The Department received comment from the Home Builders Association of Virginia (HBAV) to allow permittees to end inspections once an authorized surface water impact

has occurred. While this comment was discussed during the last CAG meeting, the Department is not proposing any revisions at this time. Based on a past legal challenge, the Department believes that allowing inspections to cease in an impact area once the impact has occurred is inconsistent with compliance policy, and inconsistent with the Department's jurisdiction over certain activities. Also, the Department believes that this is contrary to the purpose of the inspections to catch subsequent problems that may affect water quality, such as paving, curb and gutter installation, landscaping, etc.

4. Informational requirements:

   The Department proposes to streamline the regulation language in places where additional information is requested or required by DEQ, and instead, add a new section entitled "Statewide information requirements". This provision is based in the Code of Virginia and appears in other regulations, such as those in Virginia Pollutant Discharge Elimination System permit program. While concerns were expressed during the CAG meetings that the provision is expanding the Department's discretion in asking for information beyond that which is reasonable, the CAG did achieve consensus on this revision. The Department believes the provision is already implemented under different wording in multiple places within the VWP regulations, and that the Code clearly provides the authority for requesting additional information when necessary to make permitting decisions. The intent of the provision is to clearly state that there is an expectation of the applicant or permittee to provide the information needed to issue permits or grant authorizations, and so that there is lower risk of unintentionally affecting human health and the environment through permit actions.

5. Forms and documents:

   The Department proposes to update, correct, and revise the forms and documents incorporated by reference at the end of each VWP general permit regulation to reflect the 2008 Mitigation Rule, changes in the Joint Application process, changes in program guidance and policy, and overall consistency between VWP regulations. The CAG came to consensus on these proposed revisions.

Staff Recommendation

After making a presentation on the above issues, and answering any questions the Board may have, staff will be asking the Board for approval to proceed to notice of public comment and hearing on the draft regulatory changes proposed for the five VWP regulations.

Attachments

1. Virginia Water Protection Permit Program Citizen Advisory Committee Members
2. Excerpts from the 2008 Federal Mitigation Rule 33 CFR 332
3. Draft Regulations and Summary of Revisions:
   a. 9VAC25-210 VWP Permit Program Regulation
   b. 9VAC25-660 Virginia Water Protection General Permit for Impacts Less Than

One-Half Acre

c. 9VAC25-670 Virginia Water Protection General Permit for Facilities and Activities of Utility and Public Service Companies Regulated by the Federal Energy Regulatory Commission or the State Corporation Commission and Other Utility Line Activities
d. 9VAC25-680 Virginia Water Protection General Permit for Linear Transportation Projects
e. 9VAC25-690 Virginia Water Protection General Permit for Impacts from Development and Certain Mining Activities

Contact Information

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ATTACHMENT 1

Virginia Water Protection Permit Regulation
Regulatory Advisory Panel (RAP)/Technical Advisory Committee (TAC)
Advisory Group
(9VAC25-210/9VAC25-660/9VAC25-670/9VAC25-680/9VAC25-690)

Regulatory Advisory Group Members

1. Greg Prelewicz - **Fairfax Water** – Chief, Source Water Protection and Planning (Nominated by Charles M. Murray – Fairfax Water);
2. Bob Kerr - **Virginia Association for Commercial Real Estate (VACRE)** – President, Kerr Environmental Services Corp (Nominated by Phil Abraham – VECTRE CORP/VACRE);
3. Steven E. Begg - **Virginia Department of Transportation** – Central Office Environmental Division;
4. Mike Rolband - **Home Builders Association of Virginia** – Vice-President of Operations – Wetlands Studies and Solutions, Inc. (Nominated by Mike Toalson – HBA of Virginia; Nomination Supported by Phil Abraham – VECTRE CORP/VACRE);
5. Beth Silverman Sprenkle - **EEE Consulting, Inc.** – Senior Environmental Scientist;
6. Nina Butler – **VMA/Mission H2O/RockTenn**;
7. Jason P. Ericson - **Dominion Resources Services, Inc.** – Dominion Environmental Policy Environmental Consultant (Nominated by Pamela F. Faggert, Chief Environmental Office and Vice President-Corporate Compliance – Dominion Resources Services, Inc.);
8. Margaret L. (Peggy) Sanner - **Chesapeake Bay Foundation (CBF) –** VA Assistant Director and Senior Attorney;
9. Karen Johnson - **The Nature Conservancy –** Mitigation Program Manager (Nominated by Nikki Rovner, Director of State Government Relations – The Nature Conservancy);
10. Skip Stiles - **Wetlands Watch;**
11. Katie Frazier - **Virginia Agribusiness Council;** &
12. William T. (Tom) Walker - **US Army CORPs of Engineers**

Alternates

1. Traci Kammer Goldberg – **Fairfax Water** – Manager, Planning (Nominated by Charles M. Murray – Fairfax Water) – Alternate for Greg Prelewicz;
2. Phil Abraham – **Virginia Association for Commercial Real Estate (VACRE)** - Vectre Corp. – Alternate for Bob Kerr;
3. Tracey Harmon – **Virginia Department of Transportation** – Central Office Environmental Division – Alternate for Steven E. Begg;

4. Nikki Rovner – **The Nature Conservancy –** Director of State Government Relations – Alternate for Karen Johnson;
5. Brad Copenhaver – **Virginia Agribusiness Council –** Alternate for Katie Frazier;
6. Andrea Wortzel – **VMA/Mission H2O** – Alternate for Nina Butler;
7. Dan Lucey – **Wetland Solutions** – Alternate for Mike Rolband;
8. Oula Shehab-Dandan – **Dominion Resources Services, Inc.** – Alternate for Jason Ericson; &
9. Cassidy Rasnick - **Virginia Manufacturers Association** – Alternate for Nina Butler

Interested Parties

1. Thaddeus J. Kraska – Townes Site Engineering;
2. Adrienne Kotula – James River Association

ATTACHMENT 2

33 CFR 332 – COMPENSATORY MITIGATION FOR LOSSES OF AQUATIC RESOURCES

ATTACHMENT 3
PROPOSED DRAFT VWP REGULATIONS AND SUMMARY OF REVISIONS

9VAC25-210
9VAC25-660
9VAC25-670
9VAC25-680
9VAC25-690