# VIRGINIA REGISTER OF REGULATIONS

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# VIRGINIA REGISTER INFORMATION PAGE

**THE VIRGINIA REGISTER OF REGULATIONS** is an official state publication issued every other week throughout the year. Indexes are published quarterly, and are cumulative for the year. The *Virginia Register* has several functions. The new and amended sections of regulations, both as proposed and as finally adopted, are required by law to be published in the *Virginia Register*. In addition, the *Virginia Register* is a source of other information about state government, including petitions for rulemaking, emergency regulations, executive orders issued by the Governor, and notices of public hearings on regulations.

**ADOPTION, AMENDMENT, AND REPEAL OF REGULATIONS**

An agency wishing to adopt, amend, or repeal regulations must first publish in the *Virginia Register* a notice of intended regulatory action; a basis, purpose, substance and issues statement; an economic impact analysis prepared by the Department of Planning and Budget; the agency's response to the economic impact analysis; a summary; a notice giving the public an opportunity to comment on the proposal; and the text of the proposed regulation.

Following publication of the proposal in the Virginia Register, the promulgating agency receives public comments for a minimum of 60 days. The Governor reviews the proposed regulation to determine if it is necessary to protect the public health, safety and welfare, and if it is clearly written and easily understandable. If the Governor chooses to comment on the proposed regulation, his comments must be transmitted to the agency and the Registrar no later than 15 days following the completion of the 60-day public comment period. The Governor's comments, if any, will be published in the *Virginia Register*. Not less than 15 days following the completion of the 60-day public comment period, the agency may adopt the proposed regulation.

The Joint Commission on Administrative Rules (JCAR) or the appropriate standing committee of each house of the General Assembly may meet during the promulgation or final adoption process and file an objection with the Registrar and the promulgating agency. The objection will be published in the *Virginia Register*. Within 21 days after receipt by the agency of a legislative objection, the agency shall file a response with the Registrar, the objecting legislative body, and the Governor.

When final action is taken, the agency again publishes the text of the regulation as adopted, highlighting all changes made to the proposed regulation and explaining any substantial changes made since publication of the proposal. A 30-day final adoption period begins upon final publication in the *Virginia Register*.

The Governor may review the final regulation during this time and, if he objects, forward his objection to the Registrar and the agency. In addition to or in lieu of filing a formal objection, the Governor may suspend the effective date of a portion or all of a regulation until the end of the next regular General Assembly session by issuing a directive signed by a majority of the members of the appropriate legislative body and the Governor. The Governor's objection or suspension of the regulation, or both, will be published in the *Virginia Register*. If the Governor finds that changes made to the proposed regulation have substantial impact, he may require the agency to provide an additional 30-day public comment period on the changes. Notice of the additional public comment period required by the Governor will be published in the *Virginia Register*.

The agency shall suspend the regulatory process for 30 days when it receives requests from 25 or more individuals to solicit additional public comment, unless the agency determines that the changes have minor or inconsequential impact.

A regulation becomes effective at the conclusion of the 30-day final adoption period, or at any other later date specified by the promulgating agency, unless (i) a legislative objection has been filed, in which event the regulation, unless withdrawn, becomes effective on the date specified, which shall be after the expiration of the 21-day objection period; (ii) the Governor exercises his authority to require the agency to provide for additional public comment, in which event the regulation, unless withdrawn, becomes effective on the date specified, which shall be after the expiration of the period for which the Governor has provided for additional public comment; (iii) the Governor and the General Assembly exercise their authority to suspend the effective date of a regulation until the end of the next regular legislative session; or (iv) the agency suspends the regulatory process, in which event the regulation, unless withdrawn, becomes effective on the date specified, which shall be after the expiration of the 30-day public comment period and no earlier than 15 days from publication of the readopted action.

A regulatory action may be withdrawn by the promulgating agency at any time before the regulation becomes final.

**FAST-TRACK RULEMAKING PROCESS**

Section 2.2-4012.1 of the Code of Virginia provides an exemption from certain provisions of the Administrative Process Act for agency regulations deemed by the Governor to be noncontroversial. To use this process, Governor's concurrence is required and advance notice must be provided to certain legislative committees. Fast-track regulations will become effective on the date noted in the regulatory action if no objections to using the process are filed in accordance with § 2.2-4012.1.

**EMERGENCY REGULATIONS**

Pursuant to § 2.2-4011 of the Code of Virginia, an agency, upon consultation with the Attorney General, and at the discretion of the Governor, may adopt emergency regulations that are necessitated by an emergency situation. An agency may also adopt an emergency regulation when Virginia statutory law or the appropriation act or federal law or federal regulation requires that a regulation be effective in 280 days or less from its enactment. The emergency regulation becomes operative upon its adoption and filing with the Registrar of Regulations, unless a later date is specified. Emergency regulations are limited to no more than 18 months in duration; however, may be extended for six months under certain circumstances as provided for in § 2.2-4011 D. Emergency regulations are published as soon as possible in the *Register*.

During the time the emergency status is in effect, the agency may proceed with the adoption of permanent regulations through the usual procedures. To begin promulgating the replacement regulation, the agency must (i) file the Notice of Intended Regulatory Action with the Registrar within 60 days of the effective date of the emergency regulation and (ii) file the proposed regulation with the Registrar within 180 days of the effective date of the emergency regulation. If the agency chooses not to adopt the regulations, the emergency status ends when the prescribed time limit expires.

**STATEMENT**

The foregoing constitutes a generalized statement of the procedures to be followed. For specific statutory language, it is suggested that Article 2 (§ 2.2-4006 et seq.) of Chapter 40 of Title 2.2 of the Code of Virginia be examined carefully.

**CITATION TO THE *VIRGINIA REGISTER***

The *Virginia Register* is cited by volume, issue, page number, and date. **29:5 VA.R. 1075-1192 November 5, 2012,** refers to Volume 29, Issue 5, pages 1075 through 1192 of the *Virginia Register* issued on November 5, 2012.

*The Virginia Register of Regulations* is published pursuant to Article 6 (§ 2.2-4031 et seq.) of Chapter 40 of Title 2.2 of the Code of Virginia.

# PUBLICATION SCHEDULE AND DEADLINES

This schedule is available on the *Register*'s Internet home page (http://register.dls.virginia.gov).

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*Filing deadlines are Wednesdays unless otherwise specified.

# NOTICES OF INTENDED REGULATORY ACTION

## TITLE 1. ADMINISTRATION

### OFFICE OF THE STATE INSPECTOR GENERAL

#### Notice of Intended Regulatory Action

Notice is hereby given in accordance with § 2.2-4007.01 of the Code of Virginia that the Office of the State Inspector General intends to consider promulgating **1VAC42-30, Fraud and Abuse Whistle Blower Reward Fund Regulation**. The purpose of the proposed action is to establish the criteria for the Fraud and Abuse Whistle Blower Reward Program and Fund, including eligibility requirements, award distribution amount, and administration of the fund. The fund is intended to pay state employees and citizens of the Commonwealth who witness, have evidence of, or suspect fraud, waste, and abuse in state agencies and institutions and report the wrongdoing or abuse. The regulations define the Fraud and Abuse Whistle Blower Reward Program and Fund and their administration by the Office of the State Inspector General.

The agency does not intend to hold a public hearing on the proposed action after publication in the Virginia Register.

Statutory Authority: § 2.2-3014 of the Code of Virginia.

Public Comment Deadline: December 16, 2015.

Agency Contact: Julie C. Grimes, Communications Coordinator, Office of the State Inspector General, 101 North 14th Street, 7th Floor, Richmond, VA 23219, telephone (804) 625-3276, FAX (804) 371-0165, or email julie.grimes@osig.virginia.gov.

VA.R. Doc. No. R16-4186; Filed October 26, 2015, 3:39 p.m.

## TITLE 12. HEALTH

### STATE BOARD OF HEALTH

#### Notice of Intended Regulatory Action

Notice is hereby given in accordance with § 2.2-4007.01 of the Code of Virginia that the State Board of Health intends to consider amending **12VAC5-490, Virginia Radiation Protection Regulations: Fee Schedule**. The purpose of the proposed action is to update the regulation, including (i) amending registration fees for equipment inspected every three years; (ii) adding three categories and associated fees for the registration of nonmedical x-ray equipment, such as baggage, cabinet and analytical, and industrial x-ray equipment, and (iii) establish associated inspection frequencies.

The agency does not intend to hold a public hearing on the proposed action after publication in the Virginia Register.

Statutory Authority: § 32.1-229.1 of the Code of Virginia.

Public Comment Deadline: December 16, 2015.

Agency Contact: Steve Harrison, Director, Division of Radiological Health, Department of Health, 109 Governor Street, Richmond, VA 23219, telephone (804) 864-8151, FAX (804) 864-8155, or email steve.harrison@vdh.virginia.gov.

VA.R. Doc. No. R16-4550; Filed October 26, 2015, 11:02 a.m.

### DEPARTMENT OF MEDICAL ASSISTANCE SERVICES

#### Notice of Intended Regulatory Action

Notice is hereby given in accordance with § 2.2-4007.01 of the Code of Virginia that the Board of Medical Assistance Services intends to consider amending **12VAC30-120, Waivered Services**. The purpose of the proposed action is to update the regulation to accommodate changes in the industry and provide additional options to agencies and families, including (i) modifying the staff experience requirement by allowing providers to substitute a quality training program for nurses in place of the current six months of clinical experience; (ii) permitting families to use their authorized private duty nursing hours over the span of a week rather than limit them to 16 hours of private duty nursing services in a 24-hour period; and (iii) remove the current wording related to making up or rescheduling of missed hours.

The agency does not intend to hold a public hearing on the proposed action after publication in the Virginia Register.

Statutory Authority: § 32.1-325 of the Code of Virginia; 42 USC § 1396 et seq.

Public Comment Deadline: December 16, 2015.

Agency Contact: Emily McClellan, Regulatory Supervisor, Department of Medical Assistance Services, Policy Division, 600 East Broad Street, Suite 1300, Richmond, VA 23219, telephone (804) 371-4300, FAX (804) 786-1680, or email emily.mcclellan@dmas.virginia.gov.

VA.R. Doc. No. R16-4359; Filed October 23, 2015, 2:19 p.m.

## TITLE 18. PROFESSIONAL AND OCCUPATIONAL LICENSING

### BOARD OF DENTISTRY

#### Notice of Intended Regulatory Action

Notice is hereby given in accordance with § 2.2-4007.01 of the Code of Virginia that the Board of Dentistry intends to consider amending **18VAC60-20, Regulations Governing Dental Practice**. The purpose of the proposed action is to amend the requirements for initial licensure and renewal of licensure to require passage of an examination on the laws and regulations governing the practice of dentistry. The goal

of the planned regulatory action is to improve licensee familiarity with laws and regulations to facilitate compliance, reduce the number of complaints received, and eliminate some of the violations the board has found in adjudicating disciplinary matters.

The agency intends to hold a public hearing on the proposed action after publication in the Virginia Register.

Statutory Authority: §§ 54.1-2400, 54.1-2709, and 54.1-2729 of the Code of Virginia.

Public Comment Deadline: December 16, 2015.

Agency Contact: Sandra Reen, Executive Director, Board of Dentistry, 9960 Mayland Drive, Suite 300, Richmond, VA 23233-1463, telephone (804) 367-4538, FAX (804) 527-4428, or email sandra.reen@dhp.virginia.gov.

VA.R. Doc. No. R16-4392; Filed October 23, 2015, 2:20 p.m.

## DEPARTMENT OF HEALTH PROFESSIONS

### Notice of Intended Regulatory Action

Notice is hereby given in accordance with § 2.2-4007.01 of the Code of Virginia that the Department of Health Professions intends to consider amending **18VAC76-20, Regulations Governing the Prescription Monitoring Program**. The purpose of the proposed action is to update the required version for reporting data electronically to the Prescription Monitoring Program (PMP) and include several new data elements in the report that have been identified as useful in tracking information and providing prescriber feedback reports. The intent of the regulatory action is to make the PMP an even more useful tool in the effort against prescription drug abuse in the Commonwealth.

The agency intends to hold a public hearing on the proposed action after publication in the Virginia Register.

Statutory Authority: § 54.1-2520 of the Code of Virginia.

Public Comment Deadline: December 16, 2015.

Agency Contact: Ralph Orr, Program Manager, Department of Health Professions, 9960 Mayland Drive, Suite 300, Richmond, VA 23233-1463, telephone (804) 367-4523, FAX (804) 527-4470, or email ralph.orr@dhp.virginia.gov.

VA.R. Doc. No. R16-4370; Filed October 16, 2015, 1:12 p.m.

## BOARD OF PHARMACY

### Notice of Intended Regulatory Action

Notice is hereby given in accordance with § 2.2-4007.01 of the Code of Virginia that the Board of Pharmacy intends to consider amending **18VAC110-20, Regulations Governing the Practice of Pharmacy**. The purpose of the proposed action is to prohibit advertising or soliciting in a manner that may jeopardize the health, safety, and welfare of a patient, including incentivizing or inducing a patient to transfer a prescription absent professional rationale by use of coupons, rebates, etc. The proposed action responds to a petition for rulemaking based on a concern about medication safety and errors because of incomplete drug profiles and drug utilization reviews.

The agency intends to hold a public hearing on the proposed action after publication in the Virginia Register.

Statutory Authority: §§ 54.1-2400 and 54.1-3307 of the Code of Virginia.

Public Comment Deadline: December 16, 2015.

Agency Contact: Caroline Juran, RPh, Executive Director, Board of Pharmacy, 9960 Mayland Drive, Suite 300, Richmond, VA 23233-1463, telephone (804) 367-4416, FAX (804) 527-4472, or email caroline.juran@dhp.virginia.gov.

VA.R. Doc. No. R16-4549; Filed October 23, 2015, 2:24 p.m.

## BOARD OF VETERINARY MEDICINE

### Notice of Intended Regulatory Action

Notice is hereby given in accordance with § 2.2-4007.01 of the Code of Virginia that the Board of Veterinary Medicine intends to consider amending **18VAC150-20, Regulations Governing the Practice of Veterinary Medicine**. Pursuant to a periodic review of regulations, the purpose of the proposed action is to amend the regulation to organize requirements for greater clarity, update the descriptions and requirements for veterinary establishments consistent with current practices, and specify rules in accordance with board interpretation for ease of compliance. Amendments are intended to make licensure by endorsement less burdensome, ensure greater accountability and security for prescription drugs in the interest of public safety, and respond to public comment about the need for more informed consent in the performance of surgery and the use of preceptees in a veterinary establishment.

This Notice of Intended Regulatory Action serves as the report of the findings of the regulatory review pursuant to § 2.2-4007.1 of the Code of Virginia.

The agency intends to hold a public hearing on the proposed action after publication in the Virginia Register.

Statutory Authority: §§ 54.1-2400 and 54.1-3804 of the Code of Virginia.

Public Comment Deadline: December 16, 2015.

Agency Contact: Leslie L. Knachel, Executive Director, Board of Veterinary Medicine, 9960 Mayland Drive, Suite 300, Richmond, VA 23233, telephone (804) 367-4468, FAX (804) 527-4471, or email leslie.knachel@dhp.virginia.gov.

VA.R. Doc. No. R16-4496; Filed October 23, 2015, 2:25 p.m.

## TITLE 1. ADMINISTRATION

### OFFICE OF THE STATE INSPECTOR GENERAL

### Emergency Regulation

Title of Regulation: **1VAC42-30. Fraud and Abuse Whistle Blower Reward Fund (adding 1VAC42-30-10 through 1VAC42-30-110).**

Statutory Authority: § 2.2-3014 of the Code of Virginia.

Effective Dates: October 26, 2015, through April 25, 2017.

Agency Contact: Julie C. Grimes, Communications Coordinator, Office of the State Inspector General, 101 North 14th Street, 7th Floor, Richmond, VA 23219, telephone (804) 625-3276, FAX (804) 371-0165, or email julie.grimes@osig.virginia.gov.

Preamble:

*Without a regulation that establishes the criteria for the Fraud and Abuse Whistle Blower Reward Fund, including eligibility requirements, award distribution amount, and administration of the fund, persons who witness, have evidence of, or suspect fraud, waste, and abuse in state agencies and institutions may be reluctant and unable to report the wrongdoing or abuse. Such reluctance and inability to report a wrongdoing or abuse creates an emergency situation. Section 2.2-4011 of the Code of Virginia allows an agency to adopt regulations that may be necessitated by an emergency situation, upon consultation with the Attorney General, and at the sole discretion of the Governor.*

*The emergency regulations define the Fraud and Abuse Whistle Blower Reward Program and Fund and their administration by the Office of the State Inspector General, including (i) eligibility requirements; (ii) amount, distribution, and process for leftover moneys at the end of the fiscal year; and (iii) the Fund's establishment on the books of the Comptroller.*

CHAPTER 30
FRAUD AND ABUSE WHISTLE BLOWER REWARD FUND

**1VAC42-30-10. Policy.**

A. This chapter defines the Fraud and Abuse Whistle Blower Reward Fund (Fund) and its administration by the Office of the State Inspector General (OSIG), including the Fund's eligibility requirements, reward amount, and reward distribution; the process for leftover Fund moneys at the end of the fiscal year; and the Fund's establishment on the books of the Comptroller.

B. The Whistle Blower Protection Act (WBPA) Program and Fund were created to:

1. Encourage employees and Commonwealth citizens to report instances of fraud, abuse, or other wrongdoing committed within executive branch agencies and nonstate agencies.

2. Encourage employees and Commonwealth citizens to report instances of fraud, abuse, or other wrongdoing committed by independent contractors of state agencies.

3. Provide resources to pay monetary rewards to employees and Commonwealth citizens who provide relevant information to the OSIG resulting in recovery of funds on behalf of the Commonwealth.

4. Provide statutory protection for employees and Commonwealth citizens who report instances of abuse or wrongdoing from discrimination or retaliation by state agencies.

**1VAC42-30-20. Definitions.**

The following words and terms when used in this chapter shall have the following meanings unless the context clearly indicates otherwise:

"Abuse" means an employer's or employee's conduct or omissions that result in substantial misuse, destruction, waste, or loss of funds or resources belonging to or derived from federal, state, or local government sources.

"Commonwealth" means the Commonwealth of Virginia.

"Employee" means any person who is regularly employed full time on either a salaried or wage basis, whose tenure is not restricted as to temporary or provisional appointment, in the service of and whose compensation is payable, no more often than biweekly, in whole or in part, by a state agency.

"Employee Suggestion Program" or "ESP" is a Department of Human Resources Management (DHRM) program that encourages, recognizes, and rewards employees for suggestions proposed that are adopted and lead to reduction in state expenditures, improvement in productivity or quality of state services, increase in state revenues, or improved or safer working conditions. The ESP is a separate DHRM initiative and is not connected with the WBPA Program.

"Employer" means a person supervising one or more employees, including the employee filing a good faith report, a superior of that supervisor, or an agent of the state agency.

"Fraud" means the intentional deception perpetrated by an individual or individuals or an organization or organizations, either internal or external to state government, which could result in a tangible or intangible benefit to themselves, others,

or the Commonwealth, or could cause detriment to others or the Commonwealth. Fraud includes a false representation of the facts, whether by words or by conduct. Fraud also includes false or misleading statements, or by the concealment of essential information, or information or actions that deceive or are intended to deceive.

"Fraud and Abuse Whistle Blower Protection Act Program" or "WBPA Program" means the policy of the Commonwealth that Commonwealth citizens and employees of state government be freely able to report instances of wrongdoing or abuse committed by their employing agency, other state agencies, or independent contractors of state agencies.

"Fraud and Abuse Whistle Blower Reward Fund" or "Fund" means the fund used solely to provide monetary rewards to Commonwealth citizens who have disclosed information of wrongdoing or abuse under the WBPA Program for a disclosure that results in a savings of at least $5,000. The amount of the reward is equal to 10% of actual sums recovered by the Commonwealth as a result of the disclosed wrongdoing or abuse. The Office of the State Inspector General administers the Fund and defines the regulations for its operation.

"Good faith report" means a reported incident of possible wrongdoing or abuse made without malice, for which the person reporting has reasonable cause to believe wrongdoing or abuse occurred.

"Hotline coordinator" means a qualified employee, designated by a state agency director or chief administrator, responsible for conducting State Fraud, Waste, and Abuse Hotline investigations referred to the agency by the Office of the State Inspector General.

"Internal audit director" means a director of a state agency internal audit program.

"Misconduct" means conduct or behavior by an employee that is inconsistent with state or agency standards for which specific corrective or disciplinary action is warranted.

"Office of the State Inspector General" or "OSIG" means the state agency that conducts independent investigations, performance reviews, and other services designed to provide objective and useful information to the Commonwealth and those charged with its governance and promote efficiency and effectiveness in state government executive branch agencies. OSIG administers the Fund.

"Reward" means a monetary benefit payable from the Fund by the OSIG to an eligible whistle blower.

"Screening process" means OSIG's internal review to ensure reports of information or disclosures of wrongdoing fall within the authority of the WBPA Program.

"State agency" means any agency, institution, board, bureau, commission, council, or instrumentality of state government in the executive branch listed in the appropriation act.

"State Fraud, Waste, and Abuse Hotline" or "Hotline" means the program (i) that provides Commonwealth citizens with a confidential and anonymous method to report suspected occurrences of fraud, waste, and abuse in state agencies and institutions and (ii) that provides the Commonwealth a way to investigate such occurrences to determine their validity and make appropriate recommendations to address deficiencies.

"Whistle blower" means an employee or a Commonwealth citizen who witnesses or has evidence of wrongdoing or abuse and who makes a good faith, open, and public report of the wrongdoing or abuse to one of the employee's superiors, an agent of the employer, or an appropriate authority.

"Wrongdoing" means a violation, which is not of a merely technical or minimal nature, of a federal or state law or regulation or a formally adopted code of conduct or ethics of a professional organization designed to protect the interests of the public or employee.

**1VAC42-30-30. OSIG responsibilities.**

A. OSIG is responsible for administering the WBPA Program and Fund and the following tasks:

1. Notifying agencies of WBPA Program and Fund regulations and procedures for submitting information regarding abuse or wrongdoing.

2. Conducting appropriate investigations and preparing official reports.

3. Receiving and evaluating Fund claims.

4. Ensuring payment of approved Fund moneys to whistle blowers.

5. Submitting an annual report on WBPA Program activities to the Governor and General Assembly.

B. OSIG's Investigative and Law Enforcement Services Division is responsible for investigating alleged abuse, fraud, or other wrongdoing reported to the OSIG under the WBPA Program. OSIG may work with executive branch agency internal audit directors or with Hotline coordinators when performing WBPA Program investigations.

**1VAC42-30-40. WBPA Program and Fund notification.**

A. Annually, the State Inspector General will send a letter via the state email directory announcing and publicizing the WBPA Program and Fund to all state executive branch agency heads and notifying them of relevant statutory amendments or program changes.

B. January of each year, OSIG will publicize the WBPA Program and Fund through an electronic communication to all employees and Commonwealth citizens. The communication will:

1. Contain the requirements for reporting allegations to OSIG under the WBPA Program.

2. Clarify pertinent differences between the WBPA Program and the Hotline regarding the rules governing anonymity and confidentiality.

3. Explain that employees and Commonwealth citizens may be asked to decide whether they wish to report

information or concerns under the WBPA Program or via the Hotline.

**1VAC42-30-50. Reporting alleged fraud, abuse, or wrongdoing.**

A. An employee or a Commonwealth citizen with an allegation of fraud, abuse, or wrongdoing under the WBPA Program may contact OSIG by phone, email, United States Postal Service (USPS), or FAX.

B. OSIG staff is available to advise citizens whether to report the alleged abuse, fraud, or wrongdoing under the WBPA Program or the Hotline.

C. OSIG requires the whistle blower to provide his name and lawful residence if he intends to file a Fund claim under the WBPA Program.

D. Allegations of abuse or wrongdoing received by OSIG via email, USPS, or FAX that do not include the sender's name and personal contact information will be managed by the Hotline and will not be eligible for Fund moneys.

E. Individuals who report information or allegations under the WBPA Program and are determined by OSIG to meet Fund eligibility requirements will be assigned a whistle blower case number.

**1VAC42-30-60. OSIG receipt of an allegation.**

A. Allegations of fraud, abuse, or wrongdoing received by the OSIG undergo a two-step screening process.

1. Step one: The OSIG staff member will confirm (i) the name and identity of the individual who submits an allegation of abuse or wrongdoing, and (ii) that the individual is an employee or a Commonwealth citizen. The individual submitting the allegation will be asked if he intends to file a Fund claim. If the individual intends to file a Fund claim, he will need to disclose personal identity and contact information.

2. Step two: The OSIG will determine whether the allegation:

a. Meets the criteria of the WBPA Program as it relates to fraud, abuse, or wrongdoing.

b. Contains sufficient detail to initiate an investigation.

c. Was previously reported (i.e., within a one-year time frame).

d. Is serious or material enough to warrant dedication of OSIG's investigative resources.

B. Allegations submitted by an individual who is not an employee or Commonwealth citizen will be referred to the appropriate state agency or organization.

C. Allegations managed by the Hotline do not fall within the scope of the WBPA Program. Individuals reporting information under this program are not eligible for Fund moneys.

**1VAC42-30-70. Allegation investigative process.**

A. Detailed written summary and evaluation. The Hotline manager or designee will prepare a detailed written summary that describes the allegation or allegations of fraud, abuse, or wrongdoing submitted under the WBPA Program and will evaluate the information to ensure that circumstances meet WBPA Program requirements.

B. Confidential tracking number. The Hotline manager or designee will create a confidential tracking number for each WBPA Program case and assign the case to the OSIG Investigative and Law Enforcement Services Division for formal investigation.

C. Monitor progress and status updates. The Director of the Investigative and Law Enforcement Services Division will monitor the progress of each WBPA Program investigation and provide the State Inspector General with a status update within 90 days of assignment and every 90 days thereafter until completion.

D. Formal WBPA Program case report. Upon completion of an investigation, the investigator will prepare and submit a formal WBPA Program case report for management review and approval. When appropriate, recommendations for corrective action to address procedural deficiencies disclosed during the investigation will be included in the formal case report.

E. Financial recovery. Formal WBPA Program case reports will describe all financial recovery realized on behalf of the Commonwealth as a result of the information received from the whistle blower and the subsequent investigation.

F. Executive summary. Formal WBPA Program case reports will be forwarded to the State Inspector General for review. Upon authorization by the State Inspector General, the investigator will prepare an executive summary that recaps the findings of the investigation, recommendations, the recovery of funds, and the status of applicable Fund claims. Upon signature approval of the State Inspector General, the executive summary will be forwarded to the subject state executive branch agency's director or chief executive, respective Secretariat, and the Chief of Staff of the Governor.

**1VAC42-30-80. Nonreverting fund.**

A. OSIG will coordinate with the State Comptroller to establish a special nonreverting Fund.

B. The Fund will be established on the books of the State Comptroller and administered by the State Inspector General.

C. All moneys recovered by an OSIG investigation as a result of whistle blower activity and any alerts originating with the OSIG shall be deposited in the Fund.

D. Except for the moneys described in subsection F of this section, moneys remaining in the Fund at the end of each fiscal year, including interest, shall not revert to the General Fund, but shall remain in the Fund.

E. Moneys in the Fund shall solely be used to:

1. Provide monetary rewards to Commonwealth citizens who have disclosed information of fraud, wrongdoing, or abuse under the WBPA Program (§ 2.2-3009 et seq. of the Code of Virginia), and the disclosure resulted in a recovery of at least $5,000.

2. Support the administration of the Fund, defray Fund advertising costs, or subsidize the operation of the Hotline.

F. Per the State Inspector General's authorization by the end of each calendar quarter, 85% of all sums recovered by an OSIG investigation will be remitted to the institutions or agencies concerned, unless otherwise directed by a court of law.

**1VAC42-30-90. Fund payments to whistle blowers.**

A. Within 10 working days, excluding state holidays and weekends, of the closing of a WBPA Program investigation that verifies a final recovery of $5,000 or more, the State Inspector General will review and certify the Fund claim. Upon approval of the Fund claim, the State Inspector General will submit a written request to the State Comptroller to make a reward payment from the Fund to the whistle blower.

B. The State Treasurer will make reward payments from the Fund based on a warrant issued by the State Comptroller and a written request signed by the State Inspector General.

C. In the event that multiple whistle blowers have simultaneously reported the same Fund-eligible occurrence of fraud, abuse, or wrongdoing the Fund moneys may be split up to 10% among the whistle blowers, at the State Inspector General's discretion.

1. The amount of the Fund reward shall be up to 10% of the actual sums recovered by the Commonwealth as a result of the disclosure of the fraud, abuse, or wrongdoing.

2. The amount of the reward will not exceed the balance of the Fund, regardless of the sums recovered.

3. The State Inspector General's decision regarding the allocation of Fund moneys is final and binding upon all parties and cannot be appealed.

4. The request for payment will include the name and address of the whistle blower and the payment amount. OSIG will provide documentation supporting the amount of the payment to the State Comptroller.

5. Once approved, the State Comptroller shall forward the request to the Department of Accounts' (DOA) Finance and Administration, with a request that Finance and Administration process the payment to the whistle blower.

6. DOA will ensure the amount of the Fund reward is properly included in the whistle blower's federal and state tax records (i.e., W-2 for employees; 1099 for Commonwealth citizens).

7. OSIG will confirm that DOA processes the Fund request and that reward payment is made to the whistle blower for the amount approved by the State Inspector General.

8. Five percent of all sums recovered on behalf of the Commonwealth will be retained in the Fund to support the administration of the Fund, defray advertising costs, and subsidize the operation of the Hotline. Expenditures for administrative costs for management of the Fund will be approved by the State Inspector General.

**1VAC42-30-100. Whistle blower protections under the WBPA Program.**

A. Employee protections.

1. No employer may discharge, threaten, or otherwise discriminate or retaliate against a whistle blower, whether acting individually or under the direction of another individual.

2. No employer may discharge, threaten, or otherwise discriminate or retaliate against a whistle blower who is requested or subpoenaed by an appropriate authority to participate in an investigation, hearing, or inquiry.

3. Nothing in this chapter shall prohibit an employer from disciplining or discharging a whistle blower for misconduct or violation of criminal law.

4. If an employee has, in good faith, exhausted existing internal procedures for reporting and seeking recovery of falsely claimed sums through official channels, and if the Commonwealth failed to act on the information provided in a reasonable period of time, no court shall have jurisdiction over an action brought under § 8.01-216.5 of the Code of Virginia based on information discovered by a present or former employee of the Commonwealth during the course of his employment.

5. Any whistle blower covered by the state grievance procedure may initiate a grievance alleging retaliation for reporting fraud, abuse, or wrongdoing through the WBPA Program and may request relief throughout that procedure.

B. Commonwealth citizen protections.

1. No state agency may threaten or otherwise discriminate or retaliate against a citizen whistle blower because the whistle blower is requested or subpoenaed by an appropriate authority to participate in an investigation, hearing, or inquiry.

2. Except for the provisions of § 2.2-3011 E of the Code of Virginia, the WBPA Program does not limit the remedies provided by the Virginia Fraud Against Taxpayers Act (§ 8.01-216.1 et seq. of the Code of Virginia).

C. Protection against discrimination and retaliation - good faith required. To be protected by the provisions of this chapter, an employee or Commonwealth citizen who discloses information about suspected fraud, abuse, or wrongdoing shall do so in good faith and upon a reasonable belief information provided is accurate. Reckless disclosures or disclosures the employee or citizen know or should have known were false, confidential by law, or malicious are not deemed good faith reports and are not protected.

**1VAC42-30-110. WBPA Program and Fund annual report.**

A. OSIG shall submit an annual report to the Governor and the General Assembly of Virginia summarizing the activities of the Fund.

B. OSIG will provide a copy of the WBPA Program annual report to the Chief of Staff to the Governor, the Secretary of Finance, and the State Comptroller.

VA.R. Doc. No. R16-4186; Filed October 26, 2015, 3:39 p.m.

# TITLE 4. CONSERVATION AND NATURAL RESOURCES

## MARINE RESOURCES COMMISSION

### Final Regulation

REGISTRAR'S NOTICE: The Marine Resources Commission is claiming an exemption from the Administrative Process Act in accordance with § 2.2-4006 A 11 of the Code of Virginia; however, the commission is required to publish the full text of final regulations.

Title of Regulation: **4VAC20-620. Pertaining to Summer Flounder (amending 4VAC20-620-30, 4VAC20-620-40, 4VAC20-620-60).**

Statutory Authority: § 28.2-201 of the Code of Virginia.

Effective Date: November 1, 2015.

Agency Contact: Jennifer Farmer, Regulatory Coordinator, Marine Resources Commission, 2600 Washington Avenue, 3rd Floor, Newport News, VA 23607, telephone (757) 247-2248, or email jennifer.farmer@mrc.virginia.gov.

Summary:

*The amendments (i) modify the seasonal time periods for the commercial landing of summer flounder harvests from waters outside of Virginia, (ii) amend certain commercial summer flounder vessel possession and landing limits, and (iii) revise the description of 9VAC20-620-60 to clarify that it pertains to recreational possession limits.*

**4VAC20-620-30. Commercial harvest quota and allowable landings.**

A. During each calendar year, allowable commercial landings of Summer Flounder shall be limited to a quota in total pounds calculated pursuant to the joint Mid-Atlantic Fishery Management Council/Atlantic States Marine Fisheries Commission Summer Flounder Fishery Management Plan, as approved by the National Marine Fisheries Service on August 6, 1992 (50 CFR Part 625); and shall be distributed as described in subsections B through G of this section.

B. The commercial harvest of Summer Flounder from Virginia tidal waters for each calendar year shall be limited to 300,000 pounds of the annual quota described in subsection A of this section. Of this amount, 142,114 pounds shall be set aside for Chesapeake Bay-wide harvest.

C. From the first Monday in January through ~~November 30~~ October 31 the allowable landings of Summer Flounder harvested outside of Virginia shall be limited to an amount of pounds equal to 70.7% of the quota described in subsection A of this section after deducting the amount specified in subsection B of this section.

D. From ~~December~~ November 1 through December 31, allowable landings of Summer Flounder harvested outside of Virginia shall be limited to an amount of pounds equal to 29.3% of the quota, as described in subsection A of this section, after deducting the amount specified in subsection B of this section, and as may be further modified by subsection E of this section.

E. Should landings from the first Monday in January through ~~in November 30~~ October 31 exceed or fall short of 70.7% of the quota described in subsection A of this section, any such excess shall be deducted from allowable landings described in subsection D of this section, and any such shortage shall be added to the allowable landings as described in subsection D of this section. Should the commercial harvest specified in subsection B of this section be projected as less than 300,000 pounds, any such shortage shall be added to the allowable landings described in subsection D of this section.

F. The Marine Resources Commission will give timely notice to the industry of the calculated poundages and any adjustments to any allowable landings described in subsections C and D of this section. It shall be unlawful for any person to harvest or to land Summer Flounder for commercial purposes after the commercial harvest or any allowable landings as described in this section have been attained and announced as such. If any person lands Summer Flounder after the commercial harvest or any allowable landing have been attained and announced as such, the entire amount of Summer Flounder in that person's possession shall be confiscated.

G. It shall be unlawful for any buyer of seafood to receive any Summer Flounder after any commercial harvest or landing quota as described in this section has been attained and announced as such.

**4VAC20-620-40. Commercial vessel possession and landing limitations.**

A. It shall be unlawful for any person harvesting Summer Flounder outside of Virginia's waters to do any of the following, except as described in subsections B, C, and D of this section:

1. Possess aboard any vessel in Virginia waters any amount of Summer Flounder in excess of 10% by weight of Atlantic croaker or the combined landings, on board a

vessel, of black sea bass, scup, squid, scallops and Atlantic mackerel.

2. Possess aboard any vessel in Virginia waters any amount of Summer Flounder in excess of 1,500 pounds landed in combination with Atlantic croaker.

3. Fail to sell the vessel's entire harvest of all species at the point of landing.

B. From the second Wednesday in March through April 19, it shall be unlawful for any person harvesting Summer Flounder outside of Virginia waters to do any of the following:

1. Possess aboard any vessel in Virginia waters any amount of Summer Flounder in excess of the combined total of the Virginia landing limit described in subdivision 3 of this subsection and the amount of the legal North Carolina landing limit or trip limit.

2. Land Summer Flounder in Virginia for commercial purposes more than twice during each consecutive 20-day period, with the first 20-day period beginning on the second Wednesday in March.

3. Land in Virginia more than 7,500 pounds of Summer Flounder during each consecutive 20-day period, with the first 20-day period beginning on the second Wednesday in March.

4. Land in Virginia any amount of Summer Flounder more than once in any consecutive five-day period.

C. From ~~December~~ November 1 through December 31 of each year, or until it has been projected and announced that 85% of the allowable landings have been taken, it shall be unlawful for any person harvesting Summer Flounder outside of Virginia waters to do any of the following:

1. Possess aboard any vessel in Virginia waters any amount of Summer Flounder in excess of the combined total of the Virginia landing limit described in ~~subdivision~~ subdivisions 3 and 4 of this subsection and the amount of the legal North Carolina landing limit or trip limit.

2. Land Summer Flounder in Virginia for commercial purposes more than twice during each consecutive ~~20-day~~ 30-day period, with the first ~~20-day~~ 30-day period beginning on ~~December~~ November 1.

3. Land in Virginia more than a total of 10,000 pounds of Summer Flounder during ~~each consecutive 20-day period~~ the first 30-day period, with the first ~~20-day~~ 30-day period beginning on ~~December~~ November 1.

4. Land in Virginia more than a total of 5,000 pounds of Summer Flounder during the second 30-day period with the second 30-day period beginning on December 1.

~~4.~~ 5. Land in Virginia any amount of Summer Flounder more than once in any consecutive five-day period.

D. From January 1 through December 31 of each year, any boat or vessel issued a valid federal Summer Flounder moratorium permit and owned and operated by a legal Virginia Commercial Hook-and-Line Licensee that possesses a Restricted Summer Flounder Endorsement shall be restricted to a possession and landing limit of 200 pounds of Summer Flounder, except as described in 4VAC20-620-30 F.

E. Upon request by a marine police officer, the seafood buyer or processor shall offload and accurately determine the total weight of all Summer Flounder aboard any vessel landing Summer Flounder in Virginia.

F. Any possession limit described in this section shall be determined by the weight in pounds of Summer Flounder as customarily packed, boxed and weighed by the seafood buyer or processor. The weight of any Summer Flounder in pounds found in excess of any possession limit described in this section shall be prima facie evidence of violation of this chapter. Persons in possession of Summer Flounder aboard any vessel in excess of the possession limit shall be in violation of this chapter unless that vessel has requested and been granted safe harbor. Any buyer or processor offloading or accepting any quantity of Summer Flounder from any vessel in excess of the possession limit shall be in violation of this chapter, except as described by subsection I of this section. A buyer or processor may accept or buy Summer Flounder from a vessel that has secured safe harbor, provided that vessel has satisfied the requirements described in subsection I of this section.

G. If a person violates the possession limits described in this section, the entire amount of Summer Flounder in that person's possession shall be confiscated. Any confiscated Summer Flounder shall be considered as a removal from the appropriate commercial harvest or landings quota. Upon confiscation, the marine police officer shall inventory the confiscated Summer Flounder and, at a minimum, secure two bids for purchase of the confiscated Summer Flounder from approved and licensed seafood buyers. The confiscated fish will be sold to the highest bidder and all funds derived from such sale shall be deposited for the Commonwealth pending court resolution of the charge of violating the possession limits established by this chapter. All of the collected funds will be returned to the accused upon a finding of innocence or forfeited to the Commonwealth upon a finding of guilty.

H. It shall be unlawful for a licensed seafood buyer or federally permitted seafood buyer to fail to contact the Marine Resources Commission Operation Station prior to a vessel offloading Summer Flounder harvested outside of Virginia. The buyer shall provide to the Marine Resources Commission the name of the vessel, its captain, an estimate of the amount in pounds of Summer Flounder on board that vessel, and the anticipated or approximate offloading time. Once offloading of any vessel is complete and the weight of the landed Summer Flounder has been determined, the buyer shall contact the Marine Resources Commission Operations Station and report the vessel name and corresponding weight of Summer Flounder landed. It shall be unlawful for any person

to offload from a boat or vessel for commercial purposes any Summer Flounder during the period of 9 p.m. to 7 a.m.

I. Any boat or vessel that has entered Virginia waters for safe harbor shall only offload Summer Flounder when the state that licenses that vessel requests to transfer quota to Virginia, in the amount that corresponds to that vessel's possession limit, and the commissioner agrees to accept that transfer of quota.

J. After any commercial harvest or landing quota as described in 4VAC20-620-30 has been attained and announced as such, any boat or vessel possessing Summer Flounder on board may enter Virginia waters for safe harbor but shall contact the Marine Resources Commission Operation Center in advance of such entry into Virginia waters.

K. It shall be unlawful for any person harvesting Summer Flounder outside of Virginia waters to possess aboard any vessel, in Virginia, any amount of Summer Flounder, once it has been projected and announced that 100% of the quota described in 4VAC20-620-30 A has been taken.

**4VAC20-620-60. ~~Possession~~ Recreational possession limit.**

A. It shall be unlawful for any person fishing in any tidal waters of Virginia, except the Potomac River tributaries, with recreational hook and line, rod and reel, spear, gig or other recreational gear to possess more than four Summer Flounder. When fishing is from a boat or vessel where the entire catch is held in a common hold or container, the possession limit shall be for the boat or vessel and shall be equal to the number of persons on board legally eligible to fish multiplied by four. The captain or operator of the boat or vessel shall be responsible for any boat or vessel possession limit. Any Summer Flounder taken after the possession limit has been reached shall be returned to the water immediately.

B. It shall be unlawful for any person fishing in the Potomac River tributaries with recreational hook and line, rod and reel, spear, gig or other recreational gear to possess more Summer Flounder than the possession limit established by the Potomac River Fisheries Commission for the mainstem Potomac River. When fishing is from a boat or vessel where the entire catch is held in a common hold or container, the possession limit shall be for the boat or vessel and shall be equal to the number of persons on board legally eligible to fish multiplied by the possession limit established by the Potomac River Fisheries Commission for the mainstem Potomac River. The captain or operator of the boat or vessel shall be responsible for any boat or vessel possession limit. Any Summer Flounder taken after the possession limit has been reached shall be returned to the water immediately.

C. Possession of any quantity of Summer Flounder that exceeds the possession limit described in subsections A and B of this section shall be presumed to be for commercial purposes.

VA.R. Doc. No. R16-4530; Filed October 29, 2015, 1:49 p.m.

## Final Regulation

REGISTRAR'S NOTICE: The Marine Resources Commission is claiming an exemption from the Administrative Process Act in accordance with § 2.2-4006 A 11 of the Code of Virginia; however, the commission is required to publish the full text of final regulations.

Title of Regulation: **4VAC20-720. Pertaining to Restrictions on Oyster Harvest (amending 4VAC20-720-15, 4VAC20-720-40 through 4VAC20-720-80).**

Statutory Authority: § 28.2-201 of the Code of Virginia.

Effective Date: November 1, 2015.

Agency Contact: Jennifer Farmer, Regulatory Coordinator, Marine Resources Commission, 2600 Washington Avenue, 3rd Floor, Newport News, VA 23607, telephone (757) 247-2248 or email jennifer.farmer@mrc.virginia.gov.

Summary:

*This regulatory action (i) amends 4VAC20-720-15 to remove effort control measures, including the 20 days of harvest requirements to purchase the upcoming oyster hand scrape and dredge license; (ii) amends 4VAC20-720-80 to preclude anyone from harvesting oysters for commercial purposes unless that person obtains the required licenses and pays the oyster resource user fee; and (iii) opens the Pocomoke Sound - Public Ground 9 from November 16, 2015, through November 27, 2015, and updates day and time limits, gear restrictions, gear licenses, and quotas and harvest limits to reflect this change.*

**4VAC20-720-15. Control date~~, effort control,~~ and agents.**

A. The commission hereby establishes July 1, 2014, as the control date for management of all public oyster fisheries in Virginia. Participation by any individual in any public oyster fishery after the control date will not be considered in the calculation or distribution of oyster fishing rights should entry limitations be established. Any individual entering the public oyster fishery after the control date will forfeit any right to future participation in the public oyster fishery should further entry limitations be established by the commission.

~~B. The sale of oyster hand scrape and oyster dredge licenses to individuals who have not previously held these licenses shall be suspended until the commission reinstates the sale of those licenses. The sale of oyster patent tong licenses to individuals who had not purchased that license during the period from July 1, 2013, through August 25, 2015, shall be suspended until the commission reinstates the sale of those licenses.~~

~~C. For any lawful open public oyster harvest season, commercial licenses for oyster hand scrape and oyster dredge shall only be sold to those registered commercial fishermen who have been determined by the commission to be eligible to purchase either of these licenses as of December 1, 2015,~~

~~for license year 2016, except as described in subsection D of this section.~~

~~D. After November 30, 2015, it shall be unlawful for any registered commercial fisherman who paid an oyster resource user fee for using one or more gear types from July 1, 2013, through June 30, 2015, but during that same time period reported less than 20 days of harvest for either the oyster hand scrape or oyster dredge, in one season or averaged over two seasons, to purchase the gear license associated with less than 20 harvest days.~~

~~E. Any registered commercial fisherman with an oyster harvest status, as described in subsection D of this section, may appeal his license ineligibility to the commission if that person can document that a medical hardship, active military duty, or a substantial error in his mandatory harvest reporting records prevented him from reporting at least 20 days of oyster harvest from using oyster dredge or oyster hand scrape gear.~~

~~F. Beginning January 1, 2016, valid oyster hand scrape and oyster dredge for commercial licenses may be transferred to an immediate family member of the licensee. In cases of death or incapacitation of a licensee, these same licenses may be transferred to a registered commercial fisherman who paid a current oyster resource user fee for one or more gear types. A registered commercial fisherman who holds a current oyster resource user fee for one or more gear types and is a current oyster hand scrape or oyster dredge licensee may transfer that oyster hand scrape or oyster dredge license. All such transfers shall be documented by the commission and shall be subject to the approval of the commission.~~

~~G.~~ B. No person shall serve as an agent for any public oyster gear licensee.

**4VAC20-720-40. Open oyster harvest season and areas.**

A. It shall be unlawful for any person to harvest oysters from public and unassigned grounds outside of the seasons and areas set forth in this section.

B. It shall be unlawful to harvest clean cull oysters from the public oyster grounds and unassigned grounds except during the lawful seasons and from the lawful areas as described in the following subdivisions of this subsection.

1. James River Seed Area, including the Deep Water Shoal State Replenishment Seed Area: October 1, 2015, through April 30, 2016.

2. Milford Haven: December 1, 2015, through February 29, 2016.

3. Rappahannock River Area 9: November 1, 2015, through December 31, 2015.

4. Little Wicomico River: October 1, 2015, through December 31, 2015.

5. Coan River: October 1, 2015, through December 31, 2015.

6. Yeocomico River: October 1, 2015, through December 31, 2015.

7. Nomini Creek: October 1, 2015, through December 31, 2015.

8. Mobjack Bay Area: January 1, 2016, through January 31, 2016.

9. Rappahannock River Rotation Area 5: October 1, 2015, through November 30, 2015.

10. Rappahannock River Rotation Area 3: November 1, 2015, through December 31, 2015.

11. Great Wicomico River Area: December 1, 2015, through January 31, 2016.

12. Upper Chesapeake Bay - Blackberry Hangs Area: December 1, 2015, through January 31, 2016.

13. James River Area and the Thomas Rock Area (James River): November 1 2015, through December 31, 2015, and March 1, 2016, through March 31, 2016.

14. Pocomoke and Tangier Sounds Rotation Area 1: December 1, 2015, through February 29, 2016.

15. Pocomoke Sound Area - Public Ground 10: November 2, 2015, through November 13, 2015.

16. Pocomoke Sound Area - Public Ground 9: November 16, 2015, through November 27, 2015.

~~16.~~ 17. Deep Rock Area: December 1, 2015, through February 29, 2016.

~~17.~~ 18. Seaside of the Eastern Shore (for clean cull oysters only): November 1, 2015, through March 31, 2016.

C. It shall be unlawful to harvest seed oysters from the public oyster grounds or unassigned grounds, except during the lawful seasons. The harvest of seed oysters from the lawful areas is described in the following subdivisions of this subsection.

1. James River Seed Area: October 1, 2015, through May 31, 2016.

2. Deep Water Shoal State Replenishment Seed Area: October 1, 2015, through May 31, 2016.

**4VAC20-720-60. Day and time limit.**

A. It shall be unlawful to take, catch, or possess oysters on Saturday and Sunday from the public oyster grounds or unassigned grounds in the waters of the Commonwealth of Virginia, for commercial purposes, except that this provision shall not apply to any person harvesting no more than one bushel per day by hand or ordinary tong for household use only during the season when the public oyster grounds or unassigned grounds are legally open for harvest.

B. From October 1, 2015, through December 31, 2015, it shall be unlawful to take, catch, or possess oysters on any Friday from the public oyster grounds or unassigned grounds described in 4VAC20-720-40 B 9 through B ~~15~~ 16.

C. It shall be unlawful for any person to harvest or attempt to harvest oysters prior to sunrise or after 2 p.m. from the

areas described in 4VAC20-720-40 B 1 through B ~~16~~ 17 and 4VAC20-720-40 C. In addition, it shall be unlawful for any boat with an oyster dredge aboard to leave the dock until one hour before sunrise or return to the dock after sunset, and it shall be unlawful for any boat with a hand scrape aboard to leave the dock until one-half hour before sunrise or return to the dock after sunset.

**4VAC20-720-70. Gear restrictions.**

A. It shall be unlawful for any person to harvest oysters in the James River Seed Area, including the Deep Water Shoal State Replenishment Seed Area, the Rappahannock River Area 9, Milford Haven, Little Wicomico River, Coan River, Nomini Creek and Yeocomico River, except by hand tong. It shall be unlawful for any person to have a hand scrape on board a boat that is harvesting or attempting to harvest oysters from public grounds by hand tong.

B. It shall be unlawful to harvest oysters from the seaside of the Eastern Shore area by any gear, except by hand.

C. It shall be unlawful to harvest oysters in the Rappahannock River Rotation Areas 3 and 5, James River Area, Thomas Rock Area, Upper Chesapeake Bay Blackberry Hangs Area, Mobjack Bay Area, Great Wicomico River Area, and Pocomoke Sound Area - Public Ground 9 and 10, by any gear except by hand scrape.

D. It shall be unlawful for any person to have more than one hand scrape on board any boat that is harvesting oysters or attempting to harvest oysters from public grounds. It shall be unlawful for any person to have a hand tong on board a boat that is harvesting or attempting to harvest oysters from public grounds by hand scrape.

E. It shall be unlawful to harvest oysters from the Pocomoke and Tangier Sounds Rotation Area 1, except by an oyster dredge.

F. It shall be unlawful to harvest oysters from the Deep Rock Area, except by an oyster patent tong.

**4VAC20-720-75. Gear license.**

A. It shall be unlawful for any person to harvest shellfish, from the hand scrape areas in the Rappahannock River, James River, Upper Chesapeake Bay, Mobjack Bay Area, Great Wicomico River, and Pocomoke Sound Area - Public Ground 9 and 10, unless that person has first obtained a valid hand scrape license.

B. It shall be unlawful for any person to harvest shellfish with an oyster dredge from the public oyster grounds in the Pocomoke and Tangier Sounds Rotation Area 1, unless that person has first obtained a valid oyster dredge license.

C. It shall be unlawful for any person to harvest shellfish with a patent tong from the public oyster grounds in the Deep Rock Area, unless that person has first obtained a valid oyster patent tong license.

D. It shall be unlawful for any person to harvest shellfish with a hand tong from the public oyster grounds, as described in 4VAC20-720-70 A, unless that person has first obtained a valid hand tong license.

E. It shall be unlawful for any person to harvest shellfish by hand from the public oyster grounds on the Seaside of the Eastern Shore, as described in 4VAC20-720-40 B ~~17~~ 18, unless that person has first obtained a valid oyster by hand license.

**4VAC20-720-80. Quotas and harvest limits.**

A. It shall be unlawful for any person who does not possess a valid commercial fisherman's registration license and a valid gear license required by harvest area, as described in 4VAC20-720-75, and has not paid the current year's oyster resource user fee to harvest or possess ~~more than eight bushels per day~~ any oysters for commercial purposes. Any individual who possesses the valid licenses and paid the oyster resource user fee as described in this subsection shall be limited to a maximum harvest of eight bushels per day. It shall be unlawful for any vessel to exceed a daily vessel limit of 24 bushels clean cull oysters harvested from the areas described in 4VAC20-720-40 B 8 through ~~15~~ 16.

B. It shall be unlawful for any person who does not possess a valid commercial fisherman's registration license and a valid gear license required by harvest area, as described in 4VAC20-720-75, and has not paid the current year's oyster resource user fee to harvest or possess ~~more than eight bushels per day~~ any oysters for commercial purposes. Any individual who possesses the valid licenses and paid the oyster resource user fee as described in this subsection shall be limited to a maximum harvest of eight bushels per day. It shall be unlawful for any vessel to exceed a daily vessel limit for clean cull oysters harvested from the areas described in 4VAC20-720-40 B 2 through 7 and ~~16~~ 17, whereby that vessel limit shall equal the number of registered commercial fisherman licensees on board the vessel who hold a valid gear license and who have paid the oyster resource user fee multiplied by eight.

C. It shall be unlawful for any vessel to exceed a daily vessel limit for clean cull oysters harvested from the areas described in 4VAC20-720-40 B 1, whereby that vessel limit shall equal the number of registered commercial fisherman licensees on board the vessel who hold a valid gear license and who have paid the oyster resource user fee multiplied by 12. It shall be unlawful for any person who does not possess a valid commercial fisherman's registration license and hold a valid gear license required by harvest area, as described in 4VAC20-720-75, and has not paid the current year's oyster resource user fee to harvest or possess ~~more than 12 bushels per day~~ any oysters for commercial purposes. Any individual who possesses the valid licenses and paid the oyster resource user fee as described in this subsection shall be limited to a maximum harvest of 12 bushels per day.

D. In the Pocomoke and Tangier Sounds Rotation Area 1, no blue crab bycatch is allowed. It shall be unlawful to possess on board any vessel more than 250 hard clams.

VA.R. Doc. No. R16-4520; Filed October 29, 2015, 2:12 p.m.

## Final Regulation

REGISTRAR'S NOTICE: The Marine Resources Commission is claiming an exemption from the Administrative Process Act in accordance with § 2.2-4006 A 11 of the Code of Virginia; however, the commission is required to publish the full text of final regulations.

Title of Regulation: **4VAC20-1090. Pertaining to Licensing Requirements and License Fees (amending 4VAC20-1090-30).**

Statutory Authority: § 28.2-201 of the Code of Virginia.

Effective Date: November 1, 2015.

Agency Contact: Jennifer Farmer, Regulatory Coordinator, Marine Resources Commission, 2600 Washington Avenue, 3rd Floor, Newport News, VA 23607, telephone (757) 247-2248 or email jennifer.farmer@mrc.virginia.gov.

Summary:

*The amendment separates the fish pot and eel pot license into two separate licenses to track the purchase of each license; the license fee is unchanged.*

**4VAC20-1090-30. License fees.**

The following listing of license fees applies to any person who purchases a license for the purposes of harvesting for commercial purposes, or fishing for recreational purposes, during any calendar year. The fees listed below include a $1.00 agent fee.

EDITOR'S NOTE: Subdivisions 1 through 8 and 10 through 16 of 4VAC20-1090-30 are not amended; therefore, the text of those subdivisions is not set out.

| 9. FINFISH HARVESTING LICENSES | |
|---|---|
| Each pound net | $41.00 |
| Each stake gill net of 1,200 feet in length or under, with a fixed location | $24.00 |
| All other gill nets up to 600 feet | $16.00 |
| All other gill nets over 600 feet and up to 1,200 feet | $24.00 |
| Each person using a cast net or throw net or similar device | $13.00 |
| Each fyke net head, weir, or similar device | $13.00 |
| For fish trotlines | $19.00 |
| Each person using or operating a fish dip net | $9.00 |
| On each haul seine used for catching fish, under 500 yards in length | $48.00 |
| On each haul seine used for catching fish, from 500 yards in length to 1,000 yards in length | $146.00 |
| For each person using commercial hook and line | $31.00 |
| For each person using commercial hook and line for catching striped bass only | $31.00 |
| For up to 100 fish pots ~~or eel pots~~ | $19.00 |
| For over 100 but not more than 300 fish pots ~~or eel pots~~ | $24.00 |
| For over 300 fish pots ~~or eel pots~~ | $62.00 |
| For up to 100 eel pots | $19.00 |
| For over 100 but not more than 300 eel pots | $24.00 |
| For over 300 eel pots | $62.00 |

VA.R. Doc. No. R16-4529; Filed October 29, 2015, 1:51 p.m.

## Final Regulation

REGISTRAR'S NOTICE: The Marine Resources Commission is claiming an exemption from the Administrative Process Act in accordance with § 2.2-4006 A 11 of the Code of Virginia; however, the commission is required to publish the full text of final regulations.

Title of Regulation: **4VAC20-1140. Prohibition of Crab Dredging in Virginia Waters (amending 4VAC20-1140-20).**

Statutory Authority: § 28.2-201 of the Code of Virginia.

Effective Date: November 1, 2015.

Agency Contact: Jennifer Farmer, Regulatory Coordinator, Marine Resources Commission, 2600 Washington Avenue, 3rd Floor, Newport News, VA 23607, telephone (757) 247-2248 or email jennifer.farmer@mrc.virginia.gov.

Summary:

*The amendment closes the crab dredging season from December 1, 2015, through March 31, 2016.*

**4VAC20-1140-20. Crab dredging prohibited.**

In accordance with the provisions of § 28.2-707 of the Code of Virginia, the crab dredging season of December 1, ~~2014~~ 2015, through March 31, ~~2015~~ 2016, is closed, and it shall be unlawful to use a dredge for catching crabs from the waters of the Commonwealth during that season.

VA.R. Doc. No. R16-4531; Filed October 29, 2015, 1:53 p.m.

# TITLE 9. ENVIRONMENT

## STATE WATER CONTROL BOARD

### Proposed Regulation

Title of Regulation: **9VAC25-210. Virginia Water Protection Permit Program Regulation (amending 9VAC25-210-10 through 9VAC25-210-70, 9VAC25-210-80 through 9VAC25-210-110, 9VAC25-210-116, 9VAC25-210-130 through 9VAC25-210-170, 9VAC25-210-180 through 9VAC25-210-230; adding 9VAC25-210-55, 9VAC25-210-65, 9VAC25-210-300 through 9VAC25-210-390, 9VAC25-210-500, 9VAC25-210-600, 9VAC25-210-610; repealing 9VAC25-210-75, 9VAC25-210-115, 9VAC25-210-175, 9VAC25-210-240, 9VAC25-210-250, 9VAC25-210-260).**

Statutory Authority: § 62.1-44.15 of the Code of Virginia; § 401 of the Clean Water Act (33 USC § 1251 et seq.).

Public Hearing Information:

January 11, 2016 - 1:30 p.m. - James City County Board of Supervisors Board Room, Building F, 101 Mounts Bay Road, Williamsburg, VA 23185

January 12, 2016 - 1:30 p.m. - Department of Environmental Quality, Northern Regional Office, 13901 Crown Court, Woodbridge, VA 22193

January 13, 2016 - 1:30 p.m. - Department of Environmental Quality, Blue Ridge-Roanoke Regional Office, 3019 Peters Creek Road, Roanoke, VA 24019

Public Comment Deadline: January 29, 2016.

Agency Contact: William K. Norris, Department of Environmental Quality, 629 East Main Street, P.O. Box 1105, Richmond, VA 23218, telephone (804) 698-4022, FAX (804) 698-4347, TTY (804) 698-4021, or email william.norris@deq.virginia.gov.

Basis: Subdivision 10 of § 62.1-44.15 of the Code of Virginia sets forth the board's authority for the adoption of regulations deemed necessary to enforce the general water quality management program of the board in all or part of the Commonwealth. The basis for this regulatory action is the State Water Control Law (Chapter 3.1 of Title 62.1 of the Code of Virginia) with specific provisions (§§ 62.1-44.15:20 through 62.1-44.15:23.1 of the Code of Virginia) mandating certain actions and allowing discretionary authority over certain matters to the board.

Purpose: The purpose of this proposed regulatory action is to change the overall organization of the regulation such that it may be more reader friendly; to incorporate policies and guidance developed in recent years; to incorporate certain federal regulatory provisions relative to the program; and to clarify and correct grammar, spelling, references, and errors. Other amendments to the regulation may be considered by the board based on comments received in response to the public comment and participation process. The proposed amendments will protect public health, safety, and welfare as the amendments are designed to clarify, update, and streamline the regulation to protect the Commonwealth's wetland and surface water resources, which are important for maintaining water quality and providing flood control and wildlife habitat.

Substance: The following proposed revisions, clarifications, and additions to this regulation are being considered and include, but are not limited to, language, information, and provisions pertaining to surface water withdrawals, as regulated under the program, as well as program policy and guidance developed in recent years:

1. Change the organization of the regulation to consolidate all surface water specific provisions under a new Part V. Other reorganization of the regulation includes: revising the order in which information is provided; moving existing information to new locations, in whole or in part; adding new sections to expand or clarify existing provisions or incorporate new provisions; deleting sections, in whole or in part, to remove obsolete information and duplication; revising references and citations made in the regulation; and correcting sentence structure, grammar, spelling, and typographical errors.

2. Revise, clarify, move, add, or delete definitions.

3. Revise, clarify, add, or delete the activities that require application for a permit and those activities that are excluded from the need to obtain a permit, including activities in specific water sources.

4. Revise or clarify the application process to include the list of administrative and technical information required to achieve a complete permit application, such as applicant contact information, information specific to certain types of activities or to certain types of state waters, compensation plans including avoidance and minimization efforts, monitoring, and reporting; the provisions for application review suspension and application withdrawal; and required drawings, diagrams, and maps.

5. Revise or clarify the compensatory mitigation requirements, such as the sequencing of acceptable compensatory mitigation actions and compensatory mitigation provisions; the requirements necessary for mitigation banks and in-lieu fee funds to become operational; the requirements for compensating impacts to open waters; or compensation necessary for temporary impacts.

6. Revise or clarify the process, informational requirements, or provisions for permit actions that occur after initial permit issuance, such as modification of permits and permit authorizations, continuation of coverage for general permit authorizations, reissuance of permits, permit and permit authorization revocation, termination, and permit transitioning.

7. Revise, clarify, add, or delete Virginia Water Protection (VWP) general permit authorization provisions as necessary to accommodate those revisions made to each of the existing VWP general permit regulations.

Issues:

1. Reorganization of 9VAC25-210: The Department of Environmental Quality identified a lack of clarity in the existing regulation, particularly for provisions for surface water withdrawal activities, that stems from the current structure of 9VAC25-210. To address this, the department proposes to consolidate the surface water withdrawal provisions in a new Part V of the regulation and reorder provisions within other sections of the regulation, such as for application completion and modifications. Advantages for the regulated community and general public are improved clarity and ease of reading. The disadvantage, for some, may be temporary difficulty in finding familiar language that has been relocated.

2. Definition of public water supply safe yield: The Department of Environmental Quality (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 was desirable as a matter of public policy for the definition to reside in DEQ's, not VDH's, regulation. At its core, safe yield is a measure of the maximum quantity of water that can be removed from a given source of supply. Recently, the Technical Advisory Committee reviewing VDH's waterworks regulations reached consensus on removing the definition from VDH's regulation and supports the inclusion of the definition into DEQ's regulation, acknowledging DEQ's role and long-term practice of the agencies in determining the limits of a water source. Through these discussions, the agencies have also agreed on the definition currently proposed through this regulatory process. 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. DEQ is the agency with sole statutory authority over water quantity and the rates and volumes that may be withdrawn from a water source. An advantage of locating the term within DEQ's regulation is that it more accurately reflects the responsibilities of DEQ as the agency authorized to determine the availability for a given water withdrawal. One disadvantage is the perception by the regulated community that the proposal results in a change in how safe yield is determined and causes uncertainty in what is authorized by their VDH waterworks permits. 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 before July 1, 1989.

3. Term "public water supply": The department proposes to revise the term "public surface water supply withdrawal" to "public water supply" without changing the definition to clarify the term applies to the use type of a withdrawal. The advantages are improved clarity and readability. One disadvantage may be the perception that the definition may, sometime in the future, limit a public water supply system that includes other uses from being considered a public water supply. While the emphasis of this definition is on domestic use, the department disagrees that such limitations could occur as the existing definition is not limited solely to domestic use and does not preclude other uses that may comprise a diverse public water supply system.

4. Tidal surface water withdrawal exclusion: The department proposes to revise the surface water withdrawal exclusions pertaining to tidal resources to address confusion identified as to the intent of tidal surface water exclusion of two million gallons per day (mgd) for consumptive tidal withdrawals. 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 two 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 advantage is improved readability and reduced confusion regarding the department's intent. No disadvantage is expected.

5. Application informational requirements for surface water withdrawals: The department proposes to clarify and reduce confusion as to the permit application requirements for surface water withdrawals by consolidating all requirements into one comprehensive set and removing a distinction between a minor surface water withdrawal and a major surface water withdrawal. This distinction was created during the 2007 regulation revisions in an attempt to identify a reasonable threshold for which withdrawals could be considered "minor," that is to not have an impact on beneficial uses. 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. Based upon the department's experience implementing the regulation and reviewing "minor" surface water withdrawal projects, the department found that this presumption was flawed because the size of the withdrawal volume is not always indicative of the impact. Rather, it's the relative size of the withdrawal volume to the size of the waterbody and the presence of other existing beneficial uses. Therefore, the same set of information is necessary for all withdrawals for staff to conduct a review of the proposed impacts to instream flow and associated downstream beneficial users. Additionally,

it is unclear that an alternatives analysis is currently required for any surface water withdrawal, regardless of withdrawal size, due to this set of requirements being located in a separate section of the regulation. Grouping together informational requirements necessary for staff to review an application for a surface water withdrawal is advantageous because it will provide clarity; reduce confusion to both staff and the regulated public; facilitate application review; and ensure statutory intent can be met in the protection of downstream beneficial uses. One disadvantage may be the perception that the department is removing a streamlined application process for smaller surface water withdrawals. The department believes the proposed revisions are the minimum necessary to review a surface water withdrawal and provides applicants with accurate portrayal of the information needed to assess their project.

6. Modification criteria for surface water withdrawals: The existing regulation lists what project changes may be considered under either major or minor modification of the permit, but only one of these pertains to 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 allowable 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 the criteria, which is consistent with the department's other permitting programs, for when minor and major modifications of the permit may occur that are specific to surface water withdrawal activities. The advantage is clarity to the regulated public. No disadvantage was identified.

7. 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 (2008 Mitigation Rule) regarding compensatory mitigation that essentially reversed the hierarchy of acceptable mitigation practices, thus causing the VWP permit regulations to be opposite that of the Corps' regarding the hierarchy. 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 advantage is consistency in what the public may reasonably expect regarding compensation requirements when obtaining permits from both the federal and state agencies. Both agencies retain discretion to approve proposals that do not follow the rule verbatim, which may be a disadvantage when federal and state permits are issued and the permit programs do not concur as to the best course of action regarding compensation.

8. Compensation for open water impacts: During the advisory group meetings, a suggestion was made that compensation for open water impacts be made discretionary and that there be a limit for any required compensation for open water impacts. The department noted that 9VAC25-210-116 C 4 allows for discretionary open water compensation as appropriate. Studies were noted to suggest that too much open water is being created with little environmental benefit as compensation for impacts. The department proposes to parse out those small open water areas where compensation may not be warranted. Coordination with sister natural resource agencies on project proposals is expected to continue. An advantage may be reduced costs of compensation to those seeking permits for impacts to surface waters. A disadvantage may be unintentional impacts to aquatic-dependent fauna.

9. Conditional requirement for assessment of wetland functions: 9VAC25-210 currently requires that applicants that 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 levels to support impact-to-loss ratios calculated for required compensatory mitigation for wetland impacts. 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. The advantages include less cost for applicants impacting wetlands and less review time by agency staff. A disadvantage may be the perception that adequate compensation is not being required to meet no-net-loss of wetland acreage and functions.

10. 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 to better evaluate compensatory mitigation proposals. Thus the department added the need to provide certain information via GIS shapefiles, unless waived by the agency. The department also proposes to: 1) reorganize the requirements for a complete application listed in 9VAC25-210-80; 2) revise the provisions regarding complete applications to reduce the timeline that these applications may linger; 3) make the application provisions consistent across all VWP regulations; 4) update the manuals and methods used in the process of delineating surface waters as a result of changes in federal regulations governing activities in waters of the United States; and 5) revise the VWP complete application requirements to reflect the need for the approved jurisdictional determination when one is available. An advantage of the proposed revisions is clarity in what the

agency expects for a complete application, potentially reducing the amount of time for staff to review an application and make a permitting decision. A disadvantage may be the availability of some information for some types of projects where minimal engineering takes place, or the cost of obtaining the information to some project proponents.

11. Adding provisions for administrative continuance: The department proposes to add the provision for administrative continuance, as allowed by subdivision 5 a of § 62.1-44.15 of the Code of Virginia, but which has not been previously included in the VWP regulations. While the provision exists in other department regulations, no timeframe exists for agency action. The advantage is that the regulated public is not penalized by the inability of the state to take a permit action. A disadvantage may be that the provision does not include a timeframe for the state to take action.

12. Permit modification procedures: The department proposes to 1) revise the existing additional impacts limits to be a percentage of original impacts, not to exceed one acre or 1,500 linear feet, under a minor modification process; 2) reorganize many of the provisions in 9VAC25-210-180 for better readability and to clarify program intent, such as for the transfer of a VWP individual permit from one permittee to another; 3) update the allowable substitution of compensatory mitigation options based on the 2008 Mitigation Rule; 4) move and clarify an existing provision for extending a VWP individual permit term if originally set at less than 15 years; 5) 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; and 6) 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. One advantage is that 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. Other advantages include earlier identification of temporary impacts for staff review; better clarity of what the agency may approve as a project modification; better consistency with the 2008 Federal Mitigation Rule; and better tracking and management of permits. Disadvantages may be that slightly more additional impacts are approved after permit issuance without an opportunity for public comment.

13. Revise, move, add, and delete definitions: 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. Other definitions needed to be revised based on current practices, the 2008 Federal Mitigation Rule, or the literature. Still other definitions have become obsolete over the last 10 years, or reflect widely accepted concepts in environmental science and engineering and are no longer needed. The department proposes to move, revise, and delete various definitions. The advantage is improved clarity and understanding of the agency's intentions. No disadvantage was identified.

14. Informational requirements: The department proposes to streamline the regulation language in some 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. The advantage is one location summarizing the responsibility of the VWP applicant or permittee to provide the information required to process an application or permit in a timely manner. No disadvantage was identified.

15. Permitting exclusions: Language is proposed to require applicants to demonstrate that any of the exclusions contained in 9VAC25-210-60 apply to the applicant's project. Also, 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 not only may be excluded from the need to obtain a VWP permit, but also from the need for compensation. The department proposes to revise the regulation language to reflect this. 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. Advantages include improved clarity and readability; time and resource savings for the department; and savings on project expenses for applicants. A disadvantage may be the perception that the agency is excluding less than was excluded from permitting previously.

16. Finalizing compensation plans: The department proposes to clarify what is required for a complete application regarding compensatory wetland and stream mitigation plans, including a draft of the intended protective mechanism to be placed over any permittee-responsible compensation site. The original regulation language gives 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 make the deadline to be prior to initiating impacts in surface waters that are authorized by the permit. Advantages identified are more time to record for some compensation options, where 120 days have proven inadequate; less confusion on the timeline in which to record in those cases where local planning and permitting requirements overlap the department's; and clarity regarding what information is required to be submitted and when. A disadvantage may be a delay in project

commencement due to availability of surveying professionals at the required time.

17. Approval of in-lieu fee programs as compensatory mitigation option: The department proposes to update the regulation to use of the term "program" instead of "fund" in reference to in-lieu fee funds, to be consistent with the 2008 Federal Mitigation Rule (Rule) choice of language. Other proposed revisions include changing the language to mimic the Rule; change the amount of time for which an approval is valid from the existing five years to 10 years; revise the language to address the new Wetland and Stream Replacement Fund that was mandated by the Virginia General Assembly in 2012; and revisions for wording choice, to remove duplicative language, and reorganize the language. The advantages include better clarity and understanding for the regulated public; bringing the regulation more in line with the Rule; and saving time and staff resources. No disadvantages were identified.

18. General permits: The department proposes to revise language in 9VAC25-210-130 of the VWP Permit Program Regulation to clarify the discussion of general permit terms and streamline provisions regarding compensation, both advantages of the proposed revisions. No disadvantage was identified.

19. 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 for clarity and to improve readability. No disadvantage was identified.

Department of Planning and Budget's Economic Impact Analysis:

Summary of the Proposed Amendments to Regulation. The State Water Control Board (Board) proposes to reorganize and amend the Virginia Water Protection Permit Program Regulation. The Board proposes to move all rules regarding surface water withdrawals into one part of this regulation (Part V). The Board also proposes to make many clarifying changes to regulatory text as well as making several substantive changes to the rules that permittees must follow. The substantive changes that the Board proposes include:

1. Adding a definition of public water supply safe yield to clarify for affected entities that safe yield for water supply means something different than the Virginia Department of Health's definition for safe yield which deals with the maximum capacity of water removing equipment,

2. Removing the distinction between minor surface water withdrawal and major surface water withdrawal,

3. Aligning the hierarchy of acceptable mitigation practices in this regulation as closely as practical to the hierarchy adopted in 2008 by the U.S. Army Corps of Engineers,

4. Changing the rule for compensation of open water impacts so that compensation is discretionary and not required at all "for permanent or temporary impacts open waters that are identified as palustrine[1] by the Cowardin classification method except when such open waters are located in areas of karst topography[2] in Virginia and are formed by the natural solution of limestone,"

5. Changing requirements for the assessment of functions lost so that applicants who are proposing to impact 1.01 acres or more of wetlands only have to complete an assessment if they plan to vary from the compensatory mitigation ratios[3] in the regulation,

6. Allowing administrative continuances of expiring permits for permittees who have submitted a timely and complete application for permit reissuance,

7. Adding a requirement that entities that are claiming their activities are excluded from permitting requirements demonstrate to the satisfaction of the Board that they qualify for the exclusions claimed,

8. Changing the requirement that permittees complete all agreed upon compensatory wetlands building and submit a record of the title instrument that will preserve the mitigation to the Department of Environmental Quality (DEQ) within 120 days of the issuance of the permit to only requiring that this work be done and a title instrument recorded with DEQ prior to breaking ground on any activities covered by the permit,

9. Changing the timeframe for approval of in-lieu fee programs from every five years to every 10 years, and

10. Requiring that all project location (mapping) information submitted to the Board as part of a permit application be in geographic information system (GIS) format but also allowing DEQ to waive this format requirement on a case-by-case basis.

Although it is not a specific change that needs to be analyzed in this proposed regulation, it is very important to note that this regulation underpins four other general permit regulations which expire August 1, 2016. If this proposed regulation does not become effective, and the four general permit regulations are not renewed before that date, affected permittees may experience considerable disruption in their projects and incur considerable costs on account of their permits expiring along with the general permit regulations.

Result of Analysis. Benefits likely outweigh costs for most proposed changes. For one proposed change, costs will likely outweigh benefits.

Estimated Economic Impact. Most of the changes that the Board is proposing for this regulation are either to consolidate all of the surface water withdrawal rules into one part (Part V) of the regulation (so that they are easier to find) or to modify language to eliminate confusion about what the rules are. For instance, the wording of rules for tidal surface water withdrawal have, according to Board staff, caused confusion

about permitting requirements for some individuals. The Board proposes to slightly reword these rules but does not propose to change the rules themselves in any substantive way. Affected entities are very unlikely to incur extra costs on account of changes such as these, but will benefit from the increased clarity of the regulatory text.

Currently, the Board regulates surface water withdrawal but the Virginia Department of Health (VDH) regulates the equipment that permittees use to withdraw water. As a consequence of this, permittees can become confused because the differing regulations have differing meanings for the same words. To alleviate this confusion, the Board proposes to add a definition for "public water supply safe yield" to make it clear that the Board is referring to how much water it is safe to withdraw from a given surface water source when they use the term safe yield rather than referring to, as VDH does when using the term safe yield, the maximum capacity of equipment to process the withdrawn water safely. No affected entity is likely to incur costs on account of this change. Interested parties who have occasion to read both the Board's and VDH's regulations are likely to benefit from this clarification.

During the 2007 revision of this regulation, the Board attempted to set up a simplified application and a streamlined process for minor surface water withdrawals so that entities completing minor projects would incur fewer costs. In subsequent practice, however, Board staff discovered that they needed approximately the same information to evaluate a minor surface water withdrawal as they needed to evaluate a major surface water withdrawal. This has led to situations where filing a streamlined application for minor water withdrawal causes delays and greater costs for applicants as Board staff had to contact them repeatedly to obtain information that would have been readily available on the longer, non-streamlined application. The Board now proposes to eliminate the process for application for minor surface water withdrawal and instead require all applicants to fill out the same application and provide the same information to the Board. Board staff estimates that this will save applicants who would currently use the streamlined application between four and eight hours of a consultant's time at $200 per hour. Board staff also reports that this change will save Board staff time because they will be able to analyze applications as they first come in rather than having to contact the applicant, sometime multiple times, to obtain further information that the Board must have.

Prior to 2008, the Board's hierarchy of acceptable compensatory mitigation practices matched the hierarchy enforced by the U.S. Army Corps of Engineers fairly closely. In 2008, however, the Corps of Engineers adopted new rules that, according to Board staff, essentially flipped the hierarchy of mitigation practices on the federal level. This change meant that some permit applicants who need both federal and state permits may incur extra costs associated with the federal and state hierarchies being very different from each other. These costs may be associated with the applicant having to complete both federal and state mitigation priorities or they may be associated with the time spent and costs incurred appealing one or both of the compensation requirements. The Board now proposes to amend its compensatory mitigation hierarchy to align it as closely as possible with the federal hierarchy. This change will minimize any extra associated costs that might be incurred by applicants. Board staff reports that it will not, however, eliminate these costs completely in all cases because the Board and the Army Corps of Engineers will still sometimes differ in the mitigation practice that they order. Nonetheless, affected applicants will benefit greatly from the aligning of the hierarchy in this regulation to that used by the federal government.

Currently, all permit holders whose activities cause open water impacts must engage in compensatory mitigation. Board staff reports that the current regulation already allows for Department of Environmental Quality (DEQ) discretion to vary from this rule, but also reports that advisory groups that met to discuss this regulation recommended that the Board formalize exemptions from this rule in situations where more mitigation was being required than necessary to protect Virginia's surface water. The Board now proposes to not require compensatory mitigation "for permanent or temporary impacts open waters that are identified as palustrine by the Cowardin classification method except when such open waters are located in areas of karst topography in Virginia and are formed by the natural solution of limestone." This change will benefit permittees in the Commonwealth as it will decrease their mitigation costs.

Current regulation requires that permit holders who propose to impact more than one acre of wetlands provide an assessment of functions that will be lost on account of their proposed activity. The Board now proposes to amend this requirement so that an assessment will only need to be done if the permittee wants to vary from the compensatory mitigation ratios in the regulation. For instance, a permittee that proposes to impact two acres of forest wetlands would only need to pay for an assessment if he wanted to provide less compensatory mitigation than the 2:1 ratio (two acres of wetlands built or restored for every acre disturbed or destroyed) but would not have to pay for an assessment if he followed that ratio. This change will benefit permittees as they will not have to pay for an assessment independently of the assessment made by the Board that the default appropriate level of mitigation are the ratios in the regulation. Board staff reports that permittee assessments can cost between $500 and $1,500 each.

Current regulation requires permittees who want to have their permits reissued by the Board to submit a complete application in a timeframe set by the Board but does not address extraordinary situations that might arise which would delay Board staff in evaluating those applications before the end date of the permit requested to be reissued. Because of

this, some permittees may suffer a permit lapse that could possible stop them from working on a project. The Board proposes to add an administrative continuance to this regulation so that Board staff can extend the expiration date of an existing permit so long as they have a completed application. This change will benefit permittees as it will eliminate the possibility of permitted work having to be stopped on account of an expiring permit even though the permit holder did everything he was supposed to in order to get the permit reissued in a timely fashion.

Current regulation contains numerous exclusions for activity that does not need to be permitted by the Board under this regulation. Board staff reports, however, that enforcement staff has many enforcement actions that start because individuals did not get permits that they were actually required to get because they thought that their activity was excluded. The Board now proposes to require that individuals who want to claim an exclusion demonstrate to the Board that the exclusion claimed is appropriate. Board staff reports that costs for this amendment will be minimal since staff will be working with affected individuals to both minimize those costs and to also minimize any need for enforcement against those individuals. The benefits of this change likely outweigh its costs.

Currently, permittees must complete compensatory mitigation wetlands creation and submit a record of the title instrument (deed restriction, etc.) that will preserve the mitigation to DEQ within 120 days of the issuance of a permit. This has led to situations where permittees incurred costs for either completing compensatory wetlands building or incurred costs for modifying their permits when their plans to engage in activities covered by the permit either were eliminated or were greatly delayed. For example, someone who planned to build a housing development might incur costs for mitigation required by his permit within 120 days of the issuing of his permit even if his plans to build are delayed for an extended time or if he never builds the development at all. The Board now proposes to amend this regulation to allow permit holders to complete their compensatory mitigation and submit their records to DEQ before they break ground on their project rather than within 120 days. This will benefit permittees as they will not incur costs for mitigation as soon or at all if they never engage in the permitted activities.

Current regulation requires organizations that run in-lieu fee compensatory mitigation programs to be re-approved by the Board every five years but allows the Board to remove approval at any time if the approved organization fails to follow Board rules. The Board proposes to only require program re-approval every ten years but will retain the ability to remove approval mid-cycle if that becomes necessary because the approved organization is failing to follow rules or doing a shoddy job. This change is unlikely to cause any entity to incur costs and is likely just as protective of the environment as the current rule is. Both Board staff and any approved organizations will benefit from their re-approval paperwork and costs only occurring half as often.

Currently, permit applicants are required to provide specific and detailed project location (mapping) information but the format that the information must be in is not currently specified. Board staff reports that, in order to support agency tracking initiatives, help support the goals and objectives identified by the Virginia Geographic Information Network and better evaluate compensatory mitigation proposals, the Board proposes to require that such information be provided in geographic information system (GIS) format. Board staff reports that the vast majority of permit applicants, including the 90% of applicants who hire a consultant to compile and submit permit application, already have access to GIS software (although only about 50% of applications are submitted with GIS format location information) and that several free drawing/mapping tools are available. Board staff further reports that conservation organizations have urged the Board to make this change so that they can more easily access permit application information that is subject to request under the Freedom of Information Act (FOIA).

Nonetheless, this change is likely to create a significant barrier for the dozen or so affected small permit applicants each year who do not currently have access to GIS software and who will either face a likely steep learning curve to utilize free GIS software or else will incur costs for easier to use, paid-for software or for hiring a consultant at $300-$500 per 3-4 hour time unit. Board staff reports that the Board will have the power to exempt applicants from this requirement but that the Board would likely only exempt a subset of the applicants who currently do not use GIS software. Because the applicants who are most likely to be affected by this requirement are the least likely to be able to easily absorb the costs of it, and because the Board's intent to offer exemptions indicates that not all applications need to be consistent, costs likely outweigh benefits for this proposed change.

Businesses and Entities Affected. Board staff reports that these proposed regulatory amendments will affect any entity whose activities would require a permit because those activities will affect surface waters. Such activities may include expansion of existing buildings, facilities or related appurtenances, new construction or changes to operational practices. The Board processes approximately 400 general permits and approximately 40 individual permits per year. Board staff reports that about 40% of those permits are obtained by the Virginia Department of Transportation. Small businesses will be affected by these proposed changes but Board staff does not have an estimate of how many permits per year are obtained by small businesses.

Localities Particularly Affected. No locality will be particularly affected by this proposed regulation.

Projected Impact on Employment. The GIS format requirement in the proposed regulation may lead to an increase in the utilization of permit consultants.

Effects on the Use and Value of Private Property. The GIS format requirement in the proposed regulation may increase the cost of developing private property.

Small Businesses: Costs and Other Effects. Some small businesses will likely be impacted by these proposed regulatory changes although the number of such entities is unknown. Some small businesses may incur time or money costs on account of being newly required to submit mapping information in GIS format.

Small Businesses: Alternative Method that Minimizes Adverse Impact. Given that the costs of requiring mapping information in GIS format will fall disproportionately on small permit applicants, including small business applicants, the Board may wish to eliminate this proposed requirement and allow applicants to submit mapping information as they do now.

Real Estate Development Costs. The GIS format requirement in the proposed regulation may increase the real estate development costs for some small permit applicants.

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[1] According to the United States Department of the Interior's Fish and Wildlife Service information found at http://www.na.fs.fed.us/spfo/pubs/n_resource/wetlands/wetlands3_classification.htm, "(t)he palustrine system includes freshwater wetlands not associated with stream channels, wetlands associated with lakes of less than 20 acres and other wetlands bounded by uplands. Most forested wetlands are in the palustrine system."

[2] According to information from the Virginia Department of Conservation and Recreation found at http://www.dcr.virginia.gov/environmental_education/underground.shtml, Karst topography is land area that includes sinkholes, springs, sinking streams and caves. This landscape features underground streams and aquifers that supply the wells and springs communities use for drinking water.

[3] Compensatory mitigation ratios in the regulation are 2:1 for forest, 1.5:1 for scrub-scrub and 1:1 for emergent or higher.

Agency's Response to Economic Impact Analysis: The department has reviewed the economic impact analysis prepared by the Department of Planning and Budget and has no comment.

Summary:

*The proposed regulatory action (i) reorganizes the regulation, including by consolidating the surface water withdrawal provisions in a new Part V; (ii) updates definitions, including by adding a definition of "public water supply safe yield" and by revising the term "public surface water supply withdrawal" to "public water supply," without changing the definition; (iii) revises the surface water withdrawal exclusions pertaining to tidal resources; (iv) removes a distinction between a minor surface water withdrawal and a major surface water withdrawal; (v) establishes the criteria for when minor and major modifications of the permit may occur that are specific to surface water withdrawal activities; (vi) aligns the regulation as closely as possible to the 2008 Mitigation Rule of the U.S. Army Corps of Engineers; (vii) makes compensation for certain open water impacts discretionary and establishes a limit for any required compensation; (viii) requires only an assessment of functions for certain situations; (ix) revises permit application requirements and permit modification procedures; (x) allows an administrative continuance of a permit application; (xi) revises permitting exclusions; (xii) clarifies the requirements for a complete application regarding compensatory wetland and stream mitigation plans; and (xiii) makes other clarifying, technical, and grammatical changes.*

Part I

VWP Permit Program Definitions, Exclusions, Prohibitions and Requirements

**9VAC25-210-10. Definitions.**

A. Definitions specific to surface water withdrawals are in 9VAC25-210-300.

B. Unless a different meaning is required by the context, the following terms as used in this chapter shall have the following meanings:

~~"Act" or "Clean Water Act" means 33 USC § 1251 et seq. as amended 1987.~~

"Adjacent" means bordering, contiguous, or neighboring~~;~~ wetlands separated from other surface water by man-made dikes or barriers, natural river berms, sand dunes, and the like ~~are adjacent wetlands~~.

"Administratively withdrawn" means a decision by the board that permanently discontinues the review or processing of a VWP permit application or request to modify a VWP permit.

~~"Affected stream reach" means the portion of a surface water body beginning at the location of a withdrawal and ending at a point where effects of the withdrawal are not reasonably expected to adversely affect beneficial uses.~~

~~"Agricultural surface water withdrawal" means a withdrawal of surface water in Virginia or from the Potomac River for the purpose of agricultural, silvicultural, horticultural, or aquacultural operations. Agricultural surface water withdrawals include withdrawals for turf farm operations, but do not include withdrawals for landscaping activities, or turf installment and maintenance associated with landscaping activities.~~

"Applicant" means a person applying for a VWP individual permit or for coverage under a VWP general permit ~~authorization~~.

"Aquatic environment" means surface waters and the habitat they provide, including both plant and animal communities.

"Avoidance" means not taking or modifying a proposed action or parts of an action so that there is no adverse impact to the aquatic environment.

"Beneficial use" means both instream and offstream uses. Instream beneficial uses include, but are not limited to~~:~~, the protection of fish and wildlife resources and habitat~~;~~, maintenance of waste assimilation~~;~~, recreation~~;~~, navigation~~;~~, and cultural and aesthetic values. The preservation of

instream flows for purposes of the protection of navigation, maintenance of waste assimilation capacity, the protection of fish and wildlife resources and habitat, recreation, and cultural and aesthetic values is an instream beneficial use of Virginia's waters. Offstream beneficial uses include, but are not limited to~~:~~, domestic uses (including public water supply)~~;~~, agricultural~~;~~ uses, electric power generation~~; and,~~ commercial uses, and industrial uses.

"Best management practices ~~(BMPs)~~" or "BMPs" means a schedule of activities, prohibition of practices, maintenance procedures, and other management practices that prevent or reduce the pollution of surface waters.

"Board" means the State Water Control Board.

"Channelization ~~of streams~~" means the alteration of a stream channel by widening, deepening, straightening, cleaning, or paving certain areas.

"Compensation" or "compensatory mitigation" means ~~actions taken that provide some form of substitute aquatic resource for the impacted aquatic resource~~ (i) the restoration (reestablishment or rehabilitation), establishment (creation), enhancement, or in certain circumstances preservation of aquatic resources or (ii) in certain circumstances an out-of-kind measure having a water quality, habitat, or other desirable benefit for the purposes of offsetting unavoidable adverse impacts to aquatic resources that remain after all appropriate and practicable avoidance and minimization has been achieved.

"Construction site" means any site where land-disturbing activity is conducted or physically located for the purpose of erecting buildings, roads, or other discrete structures, including on-site or off-site areas used for dependent, support facilities, such as quarries, mines, or temporary stormwater management or erosion control structures.

~~"Consumptive water use" means the withdrawal of surface waters, without recycle of said waters to their source of origin.~~

"Coverage" means authorization to conduct a project in accordance with a VWP general permit.

"Conversion" means those impacts to surface waters that permanently change an existing wetland or aquatic resource type to a different wetland or aquatic resource type.

"Cowardin classification" or "Cowardin classification method," unless otherwise specified in this chapter, means the waters classification system in Classification of Wetlands and Deepwater Habitats of the United States (Cowardin, Lewis M. II, et al., U.S. Fish and Wildlife Service, December 1979, Reprinted 1992).

"Creation" means the establishment of a wetland or other aquatic resource where one did not formerly exist.

"Cross-sectional ~~sketch"~~ drawing" means a scaled graph or plot that represents the plane made by cutting across an object at right angles to its length. For purposes of this regulation, objects may include, but are not limited to, a surface water body or a portion of it, a man-made channel, an above-ground structure, a below-ground structure, a geographical feature, or the ground surface itself.

"Department" or "DEQ" means the Department of Environmental Quality.

"Director" means the Director of the Department of Environmental Quality (DEQ) or an authorized representative.

"Discharge" means, when used without qualification, a discharge of a pollutant, or any addition of any pollutant or combination of pollutants, to state waters ~~or waters of the contiguous zone or ocean other than a discharge from a vessel or other floating craft when being used as a means of transportation~~.

"Draft VWP permit" means a document indicating the board's tentative decision relative to a VWP permit action.

"Draining" means human-induced activities such as ditching, excavation, installation of tile drains, hydrologic modification by surface water runoff diversion, pumping water from wells, or similar activities such that the activities have the effect of artificially dewatering the wetland or altering its hydroperiod.

"Dredged material" means material that is excavated or dredged from surface waters.

"Dredging" means a form of excavation in which material is removed or relocated from beneath surface waters.

~~"Drought" means that a Severe Intensity Drought (D2) has been declared by the weekly "U.S. Drought Monitor" for the location in which the withdrawal is located.~~

"Ecologically preferable" means capable of providing a higher likelihood than alternative proposals of replacing existing wetland ~~or~~ acreage or functions, stream functions ~~and values~~, water quality, and fish and wildlife resources ~~than alternative proposals~~.

~~"Emergency Virginia Water Protection Permit" means a Virginia Water Protection Permit issued pursuant to § 62.1-44.15:22 C of the Code of Virginia authorizing a new or increased surface water withdrawal to address insufficient public drinking water supplies that are caused by a drought and may result in a substantial threat to human health or public safety.~~

"Emergent wetland" means a class of wetlands dominated by erect, rooted, herbaceous plants growing in water or on a substrate, excluding mosses and lichens. This vegetation is present for most of the growing season in most years and is usually dominated by perennial plants.

"Enhancement" means activities conducted in existing wetlands or other portions of the aquatic environment that increase one or more aquatic functions ~~or values~~.

"Excavate" or "excavation" means ditching, dredging, or mechanized removal of earth, soil, or rock.

"Fill" means replacing portions of surface water with upland, or ~~changing~~ raising the bottom elevation of a surface water for any purpose, by placement of any pollutant or material including but not limited to rock, sand, earth, and man-made materials and debris.

"Fill material" means any pollutant ~~which~~ that replaces portions of surface water with dry land or ~~which changes~~ that raises the bottom elevation of a surface water for any purpose.

"Forested wetland" means a class of wetlands dominated by woody vegetation that is approximately 20 feet (six meters) tall or taller and three inches (7.6 centimeters) or larger in diameter at breast height (DBH). These areas typically possess an overstory of trees, an understory of trees or shrubs, and an herbaceous layer.

~~"General permit" means a permit authorizing a specified category of activities.~~

~~"Geographic area of a delineated wetland" means the area contained within and up to a wetland boundary determined by delineation methods consistent with this chapter.~~

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

"Impacts" means results caused by ~~human-induced~~ those activities ~~conducted in surface waters, as~~ specified in § 62.1-44.15:20 A of the Code of Virginia.

"Impairment" means the damage, loss, or degradation of the acreage or functions of wetlands or the functions ~~and values~~ of state waters.

"Independent utility" means a test to determine what constitutes a single and complete project. A project is considered to have independent utility if it would be constructed absent the construction of other projects in the project area. Portions of a phased development project that depend upon other phases of the project do not have independent utility. Portions of a phased development project that would be constructed even if the other phases are not built can be considered as separate single complete projects with independent public and economic utility.

"In-lieu fee ~~fund"~~ program" means a ~~monetary fund~~ program operated by a nonprofit organization or governmental agency ~~which~~ that receives ~~financial contributions~~ moneys from persons impacting wetlands or streams pursuant to an authorized, permitted activity and ~~which~~ that expends the moneys received to provide consolidated compensatory mitigation for permitted wetland or stream impacts.

~~"Intake structure" means any portion of a withdrawal system used to withdraw surface water that is located within the surface water, such as, but not limited to, a pipe, culvert, hose, tube, or screen.~~

"Isolated wetlands of minimal ecological value" means those wetlands that~~:~~ (i) do not have a surface water connection to other state waters~~;~~, (ii) are less than one-tenth of an acre (0.10 acre or 4,356 square feet) in size~~;~~, (iii) are not located in a Federal Emergency Management Agency designated 100-year floodplain~~;~~, (iv) are not identified by the Virginia Natural Heritage Program as a rare or state significant natural community~~;~~, (v) are not forested~~;~~, and (vi) do not contain listed federal or state threatened or endangered species.

"Joint Permit Application~~ (JPA)~~" or "JPA" means an application form that is used to apply for permits from the Norfolk District Army Corps of Engineers, the Virginia Marine Resources Commission, the Virginia Department of Environmental Quality, and local wetland boards for work in waters of the United States and in surface waters of Virginia.

"Law" means the State Water Control Law of Virginia.

"Legal name" means the full legal name of an individual, business, or other organization. For an individual, legal name means the first name, middle initial, last name, and suffix. For an entity authorized to do business in Virginia, the legal name means the exact name set forth in the entity's articles of incorporation, organization or trust, or formation agreement, as applicable.

~~"Major surface water withdrawal" means a surface water withdrawal of 90 million gallons per month (mgm) or greater.~~

"Minimization" means lessening impacts by reducing the degree or magnitude of the proposed action and its implementation.

~~"Minor surface water withdrawal" means a surface water withdrawal of less than 90 million gallons per month (mgm).~~

"Mitigation" means sequentially avoiding and minimizing impacts to the maximum extent practicable, and then compensating for remaining unavoidable impacts of a proposed action.

"Mitigation bank" means a site providing off-site, consolidated compensatory mitigation that is developed and approved in accordance with all applicable federal and state laws or regulations for the establishment, use, and operation of mitigation banks~~,~~ and is operating under a signed banking agreement.

"Mitigation banking" means compensating for unavoidable wetland or stream losses in advance of development actions through the sale~~,~~ or purchase ~~or use~~ of credits from a mitigation bank.

~~"Multi-project mitigation site" means an area of wetland restoration, creation, enhancement and, in appropriate circumstances, preservation of wetlands or streams or upland buffers adjacent to wetlands or other state waters, that is or has been utilized to meet compensation requirements for more than one project but that is not a mitigation bank.~~

"Nationwide permit" means a general permit issued by the ~~USACE~~ U.S. Army Corps of Engineers (USACE) under ~~40~~

~~CFR Part 241~~ 33 CFR Part 330 and, except where suspended by individual USACE Corps Districts, applicable nationwide.

"Nontidal wetland" means those wetlands other than tidal wetlands that are inundated or saturated by surface water or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions, as defined by the U.S. Environmental Protection Agency pursuant to § 404 of the federal Clean Water Act in 40 CFR 230.3(t). Wetlands generally include swamps, marshes, bogs, and similar areas.

"Normal agricultural activities" means those activities defined as an agricultural operation in § 3.2-300 of the Code of Virginia and any activity that is conducted as part of or in furtherance of such agricultural operation~~,~~ but shall not include any activity for which a permit would have been required as of January 1, 1997~~,~~ under 33 USC § 1344 or any regulations promulgated pursuant thereto.

"Normal residential gardening~~,~~ and lawn and landscape maintenance" means ongoing noncommercial residential activities conducted by or on behalf of an individual occupant, including mowing; planting; fertilizing; mulching; tilling; vegetation removal by hand or by hand tools; and placement of decorative stone, fencing~~,~~ and play equipment. Other appurtenant noncommercial activities, provided that they do not result in the conversion of a wetland to upland or to a different wetland type, may also be included.

"Normal silvicultural activities" means any silvicultural activity as defined in § 10.1-1181.1 of the Code of Virginia, and any activity that is conducted as part of or in furtherance of such silvicultural activity~~,~~ but shall not include any activity for which a permit would have been required as of January 1, 1997~~,~~ under 33 USC § 1344 or any regulations promulgated pursuant thereto.

"Notice of project completion" means a statement submitted by the permittee or authorized agent that the authorized activities and any required compensatory mitigation have been completed.

"Open water" means an area that, during a year with normal patterns of precipitation, has standing water for sufficient duration to establish an ordinary high water mark. The term "open water" includes lakes and ponds but does not include ephemeral waters, stream beds, or wetlands.

"Ordinary high water" or "ordinary high water mark" means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank; shelving; changes in the character of soil; destruction of terrestrial vegetation; the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

"Out-of-kind compensatory mitigation" or "out-of-kind mitigation" means ~~compensatory mitigation~~ a measure that does not replace the same type of wetland or surface water as was impacted~~,~~ but does replace lost wetland or surface water functions~~, values,~~ or ~~beneficial uses~~ provide a water quality, habitat, or other desirable benefit.

"Perennial stream" means a well-defined channel that contains water year round during a year of normal rainfall. Generally, the water table is located above the stream bed for most of the year and groundwater is the primary source for stream flow. A perennial stream exhibits the typical biological, hydrological, and physical characteristics commonly associated with the continuous conveyance of water.

"Permanent flooding or impounding" means a permanent increase in the duration or depth of standing water on a land surface, such as from a dam. Permanent increases in duration or depth of standing water that result from extended-detention basins and enhanced extended-detention basins, when designed, constructed, and maintained to function in accordance with Virginia Department of Conservation and Recreation (DCR) standards for such facilities (Virginia Stormwater Management Handbook, First Edition, 1999, Volume 1, Chapter 3), or when designed in accordance with local standards that, at a minimum, meet the DCR standards, are not considered to be permanent flooding and impounding.

"Permanent impacts" ~~are~~ means those impacts to surface waters, including wetlands~~,~~ that cause a permanent alteration of the physical, chemical, or biological properties of the surface waters or of the acreage or functions ~~and values~~ of a wetland.

"Permittee" means the person who holds a VWP individual or general permit.

"Permittee-responsible compensatory mitigation" or "permittee-responsible mitigation" means compensation or compensatory mitigation, as defined in this section, that is undertaken by the permittee, or an authorized agent or contractor, for which the permittee retains full responsibility.

"Person" means ~~one or more individuals, a~~ individual, corporation, ~~a~~ partnership, ~~an~~ association, ~~a~~ governmental body, ~~a~~ municipal corporation, or any other legal entity.

"Phased development" means more than one project proposed for a single piece of property or an assemblage of contiguous properties under consideration for development by the same person, or by related persons, that will begin and be completed at different times. Depending on the relationship between the projects, a phased development may be considered a single and complete project or each project may be considered a single and complete project if each project has independent utility, as defined in this section.

"Plan view ~~sketch~~" drawing" means a scaled graph or plot that represents the view of an object as projected onto orthogonal planes. For purposes of this ~~regulation~~ chapter, objects may include, but are not limited to, structures, contours, or boundaries.

"Pollutant" means any substance, radioactive material, or heat ~~which~~ that causes or contributes to~~,~~ or may cause or contribute to pollution.

"Pollution" means such alteration of the physical, chemical, or biological properties of any state waters as will or is likely to create a nuisance or render such waters~~:~~ (i) harmful or detrimental or injurious to the public health, safety, or welfare~~,~~ or to the health of animals, fish, or aquatic life; (ii) unsuitable with reasonable treatment for use as present or possible future sources of public water supply; or (iii) unsuitable for recreational, commercial, industrial, agricultural, or other reasonable uses; provided that (a) an alteration of the physical, chemical, or biological property of state waters, or a discharge or deposit of sewage, industrial wastes or other wastes to state waters by any owner which by itself is not sufficient to cause pollution, but which, in combination with such alteration of or discharge or deposit to state waters by other owners is sufficient to cause pollution; (b) the discharge of untreated sewage by any owner into state waters; and (c) contributing to the contravention of standards of water quality duly established by the board, are "pollution" for the terms and purposes of this chapter.

~~"Potomac River Low Flow Allocation Agreement" means the agreement among the United States of America, the State of Maryland, the Commonwealth of Virginia, the District of Columbia, the Washington Suburban Sanitation Commission, and the Fairfax County Water Authority dated January 11, 1978, consented to by Congress in § 181 of the Water Resources Development Act of 1976, Public Law 94-587, as modified on April 22, 1986.~~

"Practicable" means available and capable of being done after taking into consideration cost, existing technology and logistics in light of overall project purposes.

"Preservation" means the protection of resources in perpetuity through the implementation of appropriate legal and physical mechanisms.

"Profile ~~sketch"~~ drawing" means a scaled graph or plot that represents the side view of an object. For purposes of this ~~regulation~~ chapter, objects may include, but are not limited to, a surface water body or a portion of it, a man-made channel, an above-ground structure, a below-ground structure, a geographical feature, or the ground surface itself.

"Public hearing" means a fact finding proceeding held to afford interested persons an opportunity to submit factual data, views, and comments to the board pursuant to ~~the board's Procedural Rule No. 1 – Public and Formal Hearing Procedures (9VAC25-230)~~ § 62.1-44.15:02 of the Code of Virginia.

~~"Public surface water supply withdrawal" means a withdrawal of surface water in Virginia or from the Potomac River for the production of drinking water, distributed to the general public for the purpose of, but not limited to, domestic use.~~

~~"Public water supply emergency" means a substantial threat to public health or safety due to insufficient public drinking water supplies caused by drought.~~

"Regional permit" means a general permit issued by the ~~USACE~~ U.S. Army Corps of Engineers under ~~40 CFR Part 241~~ 33 CFR Part 330 and applicable within a specified geographic area.

"Restoration" means the reestablishment of a wetland or other aquatic resource in an area where it previously existed. Wetland restoration means the reestablishment of wetland hydrology and vegetation in an area where a wetland previously existed. Stream restoration means the process of converting an unstable, altered, or degraded stream corridor, including adjacent areas and floodplains, to its natural conditions.

"Riprap" means a layer of nonerodible material such as stone or chunks of concrete.

~~"Schedule of compliance" means a schedule of remedial measures including a sequence of enforceable actions or operations leading to compliance with the Act, the law, and the board regulations, standards and policies.~~

"Section 401" means § 401 of the Clean Water Act, or 33 USC § 1341, as amended in 1987.

~~"Section for Cooperative Water Supply Operations on the Potomac (CO-OP)" means a section of the Interstate Commission on the Potomac River Basin designated by the Water Supply Coordination Agreement as responsible for coordination of water resources during times of low flow in the Potomac River.~~

"Scrub-shrub wetland" means a class of wetlands dominated by woody vegetation, excluding woody vines, approximately three to 20 feet (one to six meters) tall. The species include true shrubs, young trees, and trees or shrubs that are small or stunted because of environmental conditions.

"Significant alteration or degradation of existing wetland acreage or function" means human-induced activities that cause either a diminution of the areal extent of the existing wetland or cause a change in wetland community type resulting in the loss or more than minimal degradation of its existing ecological functions.

"Single and complete project" means the total project proposed or accomplished by a person, which also has independent utility as defined in this section. For linear projects, the single and complete project (e.g., a single and complete crossing) will apply to each crossing of a separate surface water (e.g., a single water body) and to multiple crossings of the same water body at separate and distinct locations. Phases of a project that have independent utility may each be considered single and complete.

"State waters" means all water, on the surface and under the ground, wholly or partially within or bordering the Commonwealth or within its jurisdiction, including wetlands.

"Stream bed" or "stream channel" means the substrate of a stream, as measured between the ordinary high water mark along each side of a stream. The substrate may consist of organic matter, bedrock, or inorganic particles that range in size from clay to boulders, or a combination of both. Areas contiguous to the stream bed, but outside of the ordinary high water mark along each side of a stream, are not considered part of the stream bed.

"Surface water" means all state waters that are not ~~ground water~~ groundwater as groundwater is defined in § 62.1-255 of the Code of Virginia.

~~"Surface water supply project" means a project that withdraws or diverts water from a surface water body for consumptive or nonconsumptive purposes thereby altering the hydrologic regime of the surface water body. Projects that do not alter the hydrologic regime or that alter the hydrologic regime but whose sole purpose is flood control or storm water management are not included in this definition.~~

~~"Surface water withdrawal" means a removal or diversion of surface water from its natural water course in Virginia or from the Potomac River.~~

"Suspend" or "suspension" means a decision by the board that stops the review or processing of a permit application or request to modify a permit or permit coverage until such time that information requested by the board is provided, reviewed, and deemed adequate.

"Temporary impacts" means ~~those~~ impacts to wetlands or other surface waters~~, including wetlands,~~ that do not cause a permanent alteration of the physical, chemical, or biological properties of ~~the~~ surface ~~water~~ waters or ~~of the functions and values of a wetland~~ the permanent alteration or degradation of existing wetland acreage or functions. Temporary impacts include activities in which the ~~ground~~ impact area is restored to its preconstruction elevations and contours ~~and elevations,~~ with topsoil from the impact area where practicable, such that previous wetland acreage and functions ~~and values~~ or surface water functions are restored.

"Tidal wetland" means vegetated and nonvegetated wetlands as defined in § 28.2-1300 of the Code of Virginia.

"Toxic pollutant" means any agent or material including, but not limited to, those listed under § 307(a) of the Water Pollution Prevention and Control Act (33 USC § 1317(a)), which after discharge will, on the basis of available information, cause toxicity. Toxicity means the inherent potential or capacity of a material to cause adverse effects in a living organism, including acute or chronic effects to aquatic life, detrimental effects on human health, or other adverse environmental effects.

"Undesirable plant species" means any species that invades, naturally colonizes, or otherwise dominates a compensatory mitigation site or mitigation bank ~~and may cause~~, such that it causes or ~~contribute~~ contributes to the failure of the vegetative success criteria for a particular compensatory mitigation site ~~or,~~ mitigation bank, or in-lieu fee program project, or it otherwise prohibits the restoration of the same vegetation cover type that was originally present.

~~"USACE" means the United States Army Corps of Engineers.~~

~~"VMRC" means the Virginia Marine Resources Commission.~~

"VWP general permit" means the general permit text, terms, requirements, and conditions set forth in a regulation that constitutes a VWP permit ~~for a~~ authorizing a specified category of activities.

"VWP permit" means an individual or general permit issued by the board under § 62.1-44.15:20 of the Code of Virginia that authorizes activities otherwise unlawful under § 62.1-44.5 of the Code of Virginia or otherwise serves as the Commonwealth of Virginia's § 401 certification.

"Water quality standards" means water quality standards adopted by the board and approved by the administrator of the ~~EPA~~ U.S. Environmental Protection Agency under § 303 of the Clean Water Act as defined ~~at 9VAC25-260~~ in 9VAC25-260-10.

~~"Water Supply Coordination Agreement" means the agreement among the United States of America, the Fairfax County Water Authority, the Washington Suburban Sanitary Commission, the District of Columbia, and the Interstate Commission on the Potomac River Basin, dated July 22, 1982, which establishes agreement among the suppliers to operate their respective water supply systems in a coordinated manner and which outlines operating rules and procedures for reducing impacts of severe droughts in the Potomac River Basin.~~

"Watershed approach" means an analytical process for making compensatory mitigation decisions that support the sustainability or improvement of aquatic resources in a watershed and that ensures authorized impacts and mitigation have been considered on a watershed scale.

"Wetlands" means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

~~"Withdrawal system" means any device or combination of evices used to withdraw surface water, such as, but not limited to, a machine, pump, pipe, culvert, hose, tube, screen, or fabricated concrete or metal structure.~~

**9VAC25-210-45. ~~Wetland delineation~~ Surface waters delineations.**

A. Wetlands. Each wetland delineation, including those for isolated wetlands, shall be conducted in accordance with the ~~USACE~~ U.S. Army Corps of Engineers (USACE) "Wetland Delineation Manual, Technical Report Y-87-1, January 1987,

Final Report" (Federal Manual) and any regional wetland supplements approved for use by USACE. ~~The~~ These Federal ~~Manual~~ Manuals shall be interpreted in a manner consistent with USACE guidance and the requirements of this ~~regulation~~ chapter, and any delineation guidance adopted by the board as necessary to ensure consistency with the USACE implementation of delineation practices. USACE regulatory guidance letters or Department of Environmental Quality policy or guidance may be used to supplement preparation of wetlands delineations.

B. Other surface waters. Delineations for surface waters other than wetlands may be conducted in accordance with USACE or DEQ policy or USACE or DEQ guidance and shall take into consideration the location of an ordinary high water mark, if applicable.

**9VAC25-210-50. Prohibitions and requirements for VWP permits.**

A. Except in compliance with a VWP permit, unless the activity is otherwise exempted or excluded, no person shall dredge, fill, or discharge any pollutant into, or adjacent to surface waters~~;~~; withdraw surface water~~;~~; otherwise alter the physical, chemical, or biological properties of ~~surface~~ state waters regulated under this chapter and make them detrimental to the public health, ~~or~~ to animal or aquatic life, or to the uses of such waters for domestic or industrial consumption, ~~or~~ for recreation, or for other uses; excavate in wetlands; or on or after October 1, 2001, conduct the following activities in a wetland:

1. New activities to cause draining that significantly alters or degrades existing wetland acreage or functions;

2. Filling or dumping;

3. Permanent flooding or impounding; or

4. New activities that cause significant alteration or degradation of existing wetland acreage or functions.

B. No VWP permit shall be issued ~~for the following~~:

1. Where the proposed activity or the terms or conditions of the VWP permit do not comply with state law or regulations including but not limited to § 10.1-1408.5 of the Code of Virginia;

2. For the discharge of any radiological, chemical, or biological warfare agent or high level radioactive material into surface waters.

**9VAC25-210-55. Statewide information requirements..**

The board may request (i) such plans, specifications, and other pertinent information as may be necessary to determine the effect of an applicant's discharge on the quality of state waters or (ii) such other information as may be necessary to accomplish the purposes of this chapter. Any owner, permittee, or person applying for a VWP permit or general permit coverage shall provide the information requested by the board.

**9VAC25-210-60. Exclusions.**

~~A.~~ The ~~following~~ activities in this subsection do not require a VWP permit but may require other permits under state and federal law~~:~~. Upon request by the board, any person claiming one of these exclusions shall demonstrate to the satisfaction of the board that he qualifies for the exclusion. Exclusions pertaining to surface water withdrawals are established in 9VAC25-210-310.

1. Discharges of dredged or fill material into state waters, ~~excepting~~ except wetlands, which are addressed under a USACE Regional, General or Nationwide Permit, and for which no § 401 Water Quality Certificate is required.

~~2. Discharges of dredged or fill material into wetlands when addressed under a USACE Regional, General, or Nationwide Permit and that meet the provisions of subdivision 10 a of this subsection.~~

~~3.~~ 2. Any discharge~~, other than an activity in a surface water governed by § 62.1-44.15:20 of the Code of Virginia, permitted~~ of stormwater from municipal separate storm sewer systems or land disturbing activities authorized by 9VAC25-870, or the discharge of sewage, industrial wastes, or other wastes or any noxious or deleterious substances into surface waters that is authorized by a Virginia Pollutant Discharge Elimination System (VPDES) permit in accordance with 9VAC25-31 or a Virginia Pollution Abatement (VPA) permit in accordance with 9VAC25-32.

~~4. Any activity, other than an activity in a surface water governed by § 62.1-44.15:20 of the Code of Virginia, permitted by a Virginia Pollution Abatement (VPA) permit in accordance with 9VAC25-32.~~

~~5. Septic tanks, when authorized by a state Department of Health permit.~~

~~6.~~ 3. Any activity ~~permitted~~ governed under Chapter 13 (§ 28.2-1300 et seq.) of Title 28.2 of the Code of Virginia, unless state certification is required by § 401 of the Clean Water Act. State certification is waived if the activity meets the provisions of subdivision 10 a of this subsection. The activity does not require a VWP permit pursuant to § 62.1-44.15:21 ~~H~~ G of the Code of Virginia.

~~7.~~ 4. Normal residential gardening~~,~~ and lawn and landscape maintenance in a wetland, or other similar activity, that is incidental to an occupant's ongoing residential use of property and is of minimal ecological impact. The criteria governing this exclusion are set forth in the definition of "normal residential gardening and lawn and landscape maintenance" in 9VAC25-210-10.

5. Maintenance, including emergency reconstruction of recently damaged parts of currently serviceable structures, such as purpose-built stormwater and utility structures, transportation structures, dikes, groins, levees, dams, riprap breakwaters, causeways, or bridge abutments or approaches. Maintenance does not include modifications

that change the character, scope, or size of the original design. If the original design is not available, the permittee shall submit the best available information on the design for consideration and approval by the board. In order to quality for this exclusion, emergency reconstruction shall occur as soon as practicable after damage occurs.

6. Impacts to open waters that do not have a detrimental effect on public health, animal life, or aquatic life or to the uses of such waters for domestic or industrial consumption, recreation, or other uses.

7. Flooding or back-flooding impacts to surface waters resulting from the construction of temporary sedimentation basins on a construction site when such structures are necessary for erosion and sediment control or stormwater management purposes.

8. Normal agriculture and silviculture activities in a wetland such as plowing, seeding, cultivating, minor drainage, and harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices.

a. To fall under this exclusion, the activities specified in this subdivision 8 ~~of this section~~ must be part of an established (i.e., ongoing) agriculture or silviculture operation, and must be in accordance with applicable best management practices set forth in either Forestry Best Management Practices for Water Quality in Virginia Technical Guide (Fourth Edition, July 2002) or Virginia Agricultural BMP Manual (2000), which facilitate compliance with the § 404(b)(1) Guidelines (40 CFR Part 230). Activities on areas lying fallow as part of a conventional, rotational cycle are part of an established operation.

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

c. For the purposes of this subdivision 8 ~~of this section~~, cultivating, harvesting, minor drainage, plowing, and seeding are defined as follows:

(1) "Cultivating" means physical methods of soil treatment employed within established agriculture and silviculture lands on farm or forest crops to aid and improve their growth, quality, or yield.

(2) "Harvesting" means physical measures employed directly upon farm, forest, or crops within established agricultural and silviculture lands to bring about their removal from farm or forest land, but does not include the construction of farm or forest roads.

(3) "Minor drainage" means:

(a) The discharge of dredged or fill material incidental to connecting upland drainage facilities to surface waters, adequate to effect the removal of excess soil moisture from upland croplands. Construction and maintenance of upland (dryland) facilities, such as ditching and tiling, incidental to the planting, cultivating, protecting, or harvesting of crops;

(b) The discharge of dredged or fill material for the purpose of installing ditching or other water control facilities incidental to planting, cultivating, protecting, or harvesting of rice, or other wetland crop species, where these activities and the discharge occur in surface waters which are in established use for such agricultural and silviculture wetland crop production;

(c) The discharge of dredged or fill material for the purpose of manipulating the water levels of, or regulating the flow or distribution of water within, existing impoundments ~~which~~ that have been constructed in accordance with applicable requirements of the Clean Water Act, and ~~which~~ that are in established use for the production of rice, or other wetland crop species;

(d) The discharge of dredged or fill material incidental to the emergency removal of sandbars, gravel bars, or other similar blockages which are formed during flood flows or other events, where such blockages close or constrict previously existing drainageways and, if not promptly removed, would result in damage to or loss of existing crops or would impair or prevent the plowing, seeding, harvesting or cultivating of crops on land in established use for crop production. Such removal does not include enlarging or extending the dimensions of, or changing the bottom elevations of, the affected drainageway as it existed prior to the formation of the blockage. Removal must be accomplished within one year after such blockages are discovered in order to be eligible for exclusion; and

(e) Minor drainage in surface waters is limited to drainage within areas that are part of an established agriculture or silviculture operation. It does not include drainage associated with the immediate or gradual conversion of a wetland to a nonwetland (for example, wetland species to upland species not typically adapted to life in saturated soil conditions), or conversion from one wetland use to another (for example, silviculture to agriculture). In addition, minor drainage does not include the construction of any canal, ditch, dike or other waterway or structure which drains or otherwise significantly modifies a stream, lake, swamp, bog or any other wetland or aquatic area constituting surface water. Any discharge of dredged or fill material into surface water incidental to the construction of any such structure or waterway requires a VWP permit, unless otherwise excluded or exempted by this regulation.

(4) "Plowing" means all forms of primary tillage, including moldboard, chisel, or wide-blade plowing, discing, harrowing, and similar physical means used on farm or forest land for the breaking up, cutting, turning over, or stirring of soil to prepare it for the planting of crops. Plowing does not include the redistribution of soil, rock, sand, or other surficial materials in a manner which changes any area of surface water to dry land. For example, the redistribution of surface materials by blading, grading, or other means to fill in wetland areas is not plowing. Rock crushing activities which result in the loss of natural drainage characteristics, the reduction of water storage and recharge capabilities, or the overburden of natural water filtration capacities does not constitute plowing. Plowing as described above will never involve a discharge of dredged or fill material.

(5) "Seeding" means the sowing of seed and placement of seedlings to produce farm or forest crops and includes the placement of soil beds for seeds or seedlings on established farm and forest lands.

9. ~~Maintenance, including emergency reconstruction of recently damaged parts of currently serviceable structures, such as dikes, groins, levees, dams, riprap breakwaters, causeways, bridge abutments or approaches, and transportation and utility structures. Maintenance does not include modifications that change the character, scope, or size of the original design. In order to qualify for this exclusion, emergency reconstruction must occur within a reasonable period of time after damage occurs.~~ Discharges of dredged or fill material into wetlands when addressed under a U.S. Army Corps of Engineers Regional, General, or Nationwide Permit and that meet the provisions of subdivision 10 a of this section.

10. Construction or maintenance of farm ponds or impoundments, stock ponds or impoundments, or irrigation ditches, or the maintenance (but not construction) of drainage ditches.

a. The exclusion for the construction and maintenance of farm or stock ponds and farm or stock impoundments applies to those structures that are operated for normal agricultural or silvicultural purposes, and are less than 25 feet in height or create a maximum impoundment capacity smaller than 100 acre-feet.

b. The exclusion for the construction and maintenance of farm or stock ponds and farm or stock impoundments does not include the impacts associated with the withdrawal of surface water from, within, or behind such structures. A VWP permit may be required for the surface water withdrawal.

c. Discharge associated with siphons, pumps, headgates, wingwalls, weirs, diversion structures, and such other facilities as are appurtenant and functionally related to irrigation ditches are included in this exclusion.

d. The maintenance dredging of existing ditches is included in this exclusion provided that the final dimensions of the maintained ditch do not exceed the average dimensions of the original ditch. This exclusion does not apply to the construction of new ditches or to the channelization of streams.

~~11. Construction of temporary sedimentation basins on a construction site which does not include the placement of fill materials into surface waters or excavation in wetlands. The term "construction site" refers to any site involving the erection of buildings, roads, and other discrete structures and the installation of support facilities necessary for construction and utilization of such structures. The term "construction site" also includes any other land areas which involve land disturbing excavation activities, including quarrying or other mining activities, where an increase in run-off of sediment is controlled through the use of temporary sedimentation basins.~~

~~12.~~ 11. Construction or maintenance of farm roads, forest roads, or temporary roads for moving mining equipment, where such roads are constructed and maintained in accordance with applicable best management practices (BMPs) set forth in either Forestry Best Management Practices for Water Quality in Virginia, Technical Guide, Fourth Edition, July 2002, or Virginia Agricultural BMP Manual, 2000, to ensure that flow and circulation patterns and chemical and biological characteristics of surface waters are not impaired, that the reach of such waters is not reduced, and that any adverse effect on the aquatic environment will otherwise be minimized. The BMPs which must be applied to satisfy this provision include the following baseline provisions:

a. Permanent roads (for agriculture or forestry activities), temporary access roads (for mining, forestry, or farm purposes), and skid trails (for logging) in surface waters shall be held to the minimum feasible number, width, and total length consistent with the purpose of specific agriculture, silviculture or mining operations, and local topographic and climatic conditions;

b. All roads, temporary or permanent, shall be located sufficiently far from streams or other water bodies (except for portions of such roads which must cross water bodies) to minimize discharges of dredged or fill material into surface waters;

c. The road fill shall be bridged, piped, culverted, or otherwise designed to prevent the restriction of expected flood flows;

d. The fill shall be properly stabilized and maintained to prevent erosion during and following construction;

e. Discharges of dredged or fill material into surface waters to construct road fill shall be made in a manner which minimizes the encroachment of trucks, tractors, bulldozers, or other heavy equipment within state waters

(including adjacent wetlands) that lie outside the lateral boundaries of the fill itself;

f. In designing, constructing, and maintaining roads, vegetative disturbance in surface waters shall be kept to a minimum;

g. The design, construction and maintenance of the road crossing shall not disrupt the migration or other movement of those species of aquatic life inhabiting the water body;

h. Borrow material shall be taken from upland sources whenever feasible;

i. The discharge shall not take, or jeopardize the continued existence of a state- or federally-listed threatened or endangered species as defined under the Endangered Species Act (16 USC § 1531 et seq.), in § 29.1-566 of the Code of Virginia and in 4VAC15-20-130 B and C, except as provided in § 29.1-568 of the Code of Virginia, or adversely modify or destroy the critical habitat of such species;

j. Discharges into the nesting and breeding areas for migratory waterfowl, spawning areas, and wetlands shall be avoided if practical on-site or off-site alternatives exist;

k. The discharge shall not be located in proximity of a public water supply or intake;

l. The discharge shall not occur in areas of concentrated shellfish production;

m. The discharge shall not occur in a component to the National Wild and Scenic River System;

n. The discharge material shall consist of suitable material free from toxic pollutants in toxic amounts; and

o. All temporary fills shall be removed in their entirety and the area restored to its original elevation.

~~B. The following surface water withdrawals are excluded from VWP permit requirements. Activities, other than the surface water withdrawal, which are contained in 9VAC25-210-50 and are associated with the construction and operation of the surface water withdrawal, are subject to VWP permit requirements unless excluded by subsection A of this section. Other permits under state and federal law may be required.~~

~~1. Any surface 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, the surface 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 surface water withdrawal. A surface water withdrawal shall be deemed to be abandoned if the owner of the withdrawal system (i) notifies the DEQ in writing that the withdrawal has been abandoned or (ii) removes or disables the withdrawal system with the intent to permanently cease such withdrawal. Transfer of ownership or operational control of the withdrawal system, a change in use of the water, or temporary cessation of the withdrawal shall not be deemed evidence of abandonment. The notification 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.~~

~~b. Information to be furnished to the DEQ. Each owner or operator of a permanent withdrawal system engaging in a withdrawal that is subject to this exclusion 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 owner or operator of a temporary withdrawal system engaging in a withdrawal that is subject to this exclusion, where the purpose of the withdrawal is for agriculture, shall provide to the DEQ the maximum annual surface water withdrawal over the last 10 years. The information shall be provided within one year of the date that 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.~~

~~2. Any surface water withdrawal not in existence on July 1, 1989, if the person proposing to make the withdrawal received a § 401 certification before January 1, 1989, with respect to installation of any necessary withdrawal structures to make such withdrawal; however, a permit shall be required before any such withdrawal is increased beyond the amount authorized by the certification.~~

~~3. Any existing lawful unpermitted surface water withdrawal initiated between July 1, 1989, and July 25, 2007, which is not subject to other exclusions contained in this section. These withdrawals shall be excluded from permit requirements only if they comply with the conditions in this subdivision. Regardless of complying with the conditions of this subdivision, these withdrawals shall require a permit for any increased withdrawal amount.~~

~~a. Information to be furnished to the DEQ. Each owner or operator of a withdrawal system engaging in a withdrawal that is subject to this exclusion shall provide the DEQ with copies of water withdrawal reports required by Water Withdrawal Reporting Regulations (9VAC25-200) documenting the largest 12 consecutive month withdrawal that occurred in the 10 years prior to~~

~~July 25, 2007. In the case of unreported agricultural surface water withdrawals, estimates of withdrawals will be accepted that are based on one of the following:~~

~~(1) The area irrigated, depth of irrigation, and annual number of irrigations; pumping capacity and annual pumping time; annual energy consumption for pumps; number and type of livestock watered annually; number and type of livestock where water is used for cooling purposes; or~~

~~(2) Other methods approved by the board for the largest 12 consecutive month withdrawal that occurred in the 10 years prior to July 25, 2007. The board shall evaluate all estimates of surface water withdrawals based on projected water demands for crops and livestock as published by the Virginia Cooperative Extension Service, the United States Natural Resources Conservation Service, or other similar references and make a determination whether they are reasonable. In all cases only reasonable estimates will be used to document the excluded withdrawal amount.~~

~~b. The information noted in subdivision 3 a of this subsection shall be provided within 12 months of July 25, 2007. The information provided to the DEQ shall constitute a limit on the withdrawal that is excluded from permit requirements; any increase in that withdrawal above the limited amount shall require an application for a permit for the withdrawal system. Information regarding excluded withdrawal amounts shall be utilized by the DEQ and board to protect existing beneficial uses and shall be considered when evaluating applications for new withdrawal permits.~~

~~c. All owners and operators of surface water withdrawals excluded from permit requirements by this section shall annually report withdrawals as required by Water Withdrawal Reporting Regulations (9VAC25-200). Failure to file annual reports either reporting actual withdrawals or the fact that withdrawals did not occur may result in the owner or operator being required to file an application and receive a permit prior to resuming any withdrawal.~~

~~4. Agricultural surface water withdrawals from nontidal waters that total less than one million gallons in a single month.~~

~~5. Surface water withdrawals from nontidal waters for all other purposes that total less than 10,000 gallons per day.~~

~~6. Surface water withdrawals from tidal waters for nonconsumptive uses.~~

~~7. Agricultural surface water withdrawals from tidal waters that total less than 60 million gallons in a single month.~~

~~8. Surface water withdrawals from tidal waters for all other consumptive purposes that total less than two million gallons per day.~~

~~9. Surface water withdrawals for firefighting or for the training activities related to firefighting, such as dry hydrants and emergency surface water withdrawals.~~

~~10. Surface water withdrawals placed into portable containers by persons owning property on, or holding easements to, riparian lands.~~

~~11. Surface water withdrawals for the purposes of hydrostatic pressure testing of water tight containers, pipelines, and vessels.~~

~~12. Surface water withdrawals for normal single family home residential gardening, lawn, and landscape maintenance.~~

~~13. Surface water withdrawals that are located on a property, such that the withdrawal returns to the stream of origin; not more than half of the instantaneous flow is diverted; not more than 1,000 feet of stream channel separate the withdrawal point from the return point; and both banks of the affected stream segment are located within that property boundary.~~

~~14. Surface water withdrawals from quarry pits, such that the withdrawal does not alter the physical, biological, or chemical properties of surface waters connected to the quarry pit.~~

~~15. Surface water withdrawals from a privately owned agriculture pond, emergency water storage facility, or other water retention facility, provided that such pond or facility is not placed in the bed of a perennial or intermittent stream or wetland. Surface water withdrawals from such facilities constructed in beds of ephemeral streams are excluded from permit requirements.~~

~~C. DEQ may require any owner or operator of a withdrawal system excluded from permit requirements by subdivisions B 3 through 15 of this section to cease withdrawals and file an application and receive a permit prior to resuming any withdrawal when the board's assessment indicates that a withdrawal, whether individually or in combination with other existing or proposed projects:~~

~~1. Causes or contributes to, or may reasonably be expected to cause or contribute to, a significant impairment of the state waters or fish and wildlife resources;~~

~~2. Adversely impacts other existing beneficial uses; or~~

~~3. Will cause or contribute to a violation of water quality standards.~~

**9VAC25-210-65. Administrative continuance.**

A. Administrative continuance provisions shall apply to all VWP permits.

B. When the permittee has submitted a timely and complete application for reissuance of an existing VWP individual permit, but through no fault of the permittee, the board does not reissue or reissue with conditions a VWP individual permit, or the board does not provide notice of its tentative decision to deny the application before an existing VWP

individual permit, the conditions of the expiring VWP individual permit may be administratively continued in full force and effect until the effective date of a reissued permit. Complete application requirements for a VWP individual permit are located in 9VAC25-210-80 and 9VAC25-210-340. Timely application shall be a minimum of 180 days for an individual permit or a minimum of 270 days for an individual permit for a surface water withdrawal, unless otherwise specified in the existing permit.

C. Administrative continuance of a specific VWP general permit shall be in accordance with the corresponding VWP general permit regulation.

**9VAC25-210-70. Effect of a VWP permit.**

A. As to the permitted activity, compliance with a VWP permit constitutes compliance with the VWP permit requirements of the Law and regulations.

B. The issuance of a VWP permit does not convey any property rights in either real or personal property, or any exclusive privileges, nor does it authorize injury to private property or any invasion of personal rights or any infringement of federal, state, or local ~~law or regulation~~ laws or regulations.

Part II

VWP Permit Application and Development

**9VAC25-210-75. ~~Preapplication procedures for a new or expanded VWP permit for major surface water withdrawals.~~ (Repealed.)**

~~A. Preapplication review panel. At the request of an applicant for a surface water supply project, a preapplication review panel shall be convened prior to submission of a VWP application upon request by a potential applicant to the Department of Environmental Quality. The preapplication review panel shall assist potential applicants that are proposing surface water supply projects with the early identification of issues related to the protection of beneficial instream and offstream uses of state waters and the identification of the affected stream reach. The DEQ shall notify the Virginia Marine Resources Commission, the Virginia Institute of Marine Science, the Virginia Department of Game and Inland Fisheries, the Virginia Department of Conservation and Recreation, the Virginia Department of Health, the Corps of Engineers, the U.S. Fish and Wildlife Service, the Environmental Protection Agency and any other appropriate local, state, and federal agencies of the preapplication review panel request. These agencies shall participate to the extent practicable 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 and shall provide comments within 60 days of the initial meeting of the preapplication panel.~~

~~B. Preapplication public notice. For new or expanded surface water supply projects requiring an individual VWP permit, a potential applicant shall provide information on the project, shall provide an opportunity for public comment on the proposed project, and shall assist in identifying public concerns or issues prior to filing a VWP individual permit application.~~

~~1. Except as provided in this subsection, the potential applicant shall provide for publication of notice once a week for two consecutive weeks in a newspaper of general circulation serving the locality where the surface water supply project is proposed to be located.~~

~~2. If requested by any person, the potential applicant shall hold at least one public information meeting. Notice of any public information meeting held pursuant to this subsection shall be provided at least 14 days prior to the public information meeting date and shall be published in the same manner as required in subdivision 1 of this subsection. A potential applicant shall submit the notice to the DEQ for posting on the DEQ website. At a minimum, any notice required by this subsection shall include:~~

~~a. A statement of the potential applicant's intent to apply for a VWP permit for a surface water supply project;~~

~~b. The proposed location of the surface water supply project;~~

~~c. Information on how the public may request a public information meeting or in the alternative, the date, time and location of the public information meeting;~~

~~d. The name, address and telephone number of the potential applicant, or an authorized representative who can answer questions or receive comments on the proposed surface water supply project; and~~

~~e. A statement of how any oral or written public comments will be used.~~

~~3. In accordance with the provisions of 9VAC25-780-50 C 11 and 9VAC25-780-150, a potential applicant shall not be required to publish public notice or provide an opportunity for a public information meeting if a public meeting has been held within two years prior to the submittal of an application for a VWP permit on a local or regional water supply plan, which includes the proposed project.~~

~~4. The potential applicant shall maintain a list of persons and their addresses making comment and shall make a good faith effort to notify commenters, at the address provided by the commenter, when the public notice for the draft VWP individual permit is available.~~

**9VAC25-210-80. Application for a VWP permit.**

A. Application for a VWP Permit. Any person who is required to obtain a VWP permit, except those persons applying for ~~a VWP permit for a minor surface water withdrawal or~~ an emergency VWP permit for a public water supply emergency, shall submit a complete VWP permit application to ~~DEQ~~ the Department of Environmental Quality through the most current Joint Permit Application procedures~~,~~ ~~as~~ established within each type of Joint Permit Application

~~(JPA)~~. The Virginia Department of Transportation (VDOT) may use its ~~monthly~~ Interagency Coordination Meeting (IACM) process for submitting JPAs. There shall be no commencement of any activity subject to the VWP permit program regulation prior to the issuance of a VWP permit or granting VWP general permit ~~authorization~~ coverage.

B. Informational requirements for ~~a VWP Permit Application, except applications for minor surface water withdrawals or~~ all VWP individual permit applications are identified in this subsection with the exception of applications for emergency VWP permits to address a public water supply emergency, for which the information required in 9VAC25-210-340 C shall be submitted. In addition to the information in this subsection, applications involving a surface water withdrawal or a Federal Energy Regulatory Commission (FERC) license or relicense associated with a surface water withdrawal shall also submit the information required in 9VAC25-210-340 B.

1. A complete application for a VWP individual permit ~~application~~, at a minimum, consists of the following information:

a. ~~Name~~ Legal name, mailing address, telephone number, and if applicable, electronic mail address and fax number of applicant.

b. If different from applicant, legal name, mailing address, telephone number, and if applicable, electronic mail address and fax number of property owner.

c. If applicable, ~~name of~~ the authorized ~~agent~~ agent's name, mailing address, telephone number, and if applicable, fax number and electronic mail address.

~~d. Name of the impacted waterbody or waterbodies, or receiving waters, as applicable, at the project site.~~

~~e. Name of the city or county where the project occurs.~~

~~f. Project purpose, need and description. The purpose and need for the project shall be specified. A complete narrative description of the project shall include: the name of the project; the type of activity to be conducted; any physical alteration to surface waters; and all impacts, permanent and temporary, associated with the project. Wetland impacts should be quantified and identified according to their Cowardin classification or similar terminology. Conversion of one type of wetland to another type of wetland is considered to be a permanent impact. Stream impacts should be quantified and identified based on geomorphological types.~~

~~g. Amount of wetland impacts (by type in acres or square feet), stream impacts (in linear feet), and in square feet for purposes of calculating the permit application fee, when applicable, and open water impacts (by type in square feet or acres, as applicable).~~

~~h. Materials assessment. If dredged material from on-site areas or fill material from off-site areas is involved, the applicant must provide evidence or certification that the material is free from toxic contaminants prior to disposal, or that the material, if not free of contaminants, will be placed in an approved disposal area. If applicable, the applicant may be required to conduct grain size and composition analyses, tests for specific parameters or chemical constituents, or elutriate tests on the dredge material.~~

~~i. Proposed construction schedule. An estimate of the construction timeframe for the project will be used to determine the VWP permit term.~~

~~j. Signed and dated signature page. The application signature page, either on the copy submitted to VMRC or to the DEQ, must have an original signature. Electronic submittals containing the original signature page, such as that contained in a scanned document file, are acceptable.~~

~~k. The latitude and longitude (to the nearest second) at the center of the project, United States Geological Survey Hydrologic Unit Code for the project and compensatory mitigation site, DEQ stream classification, stream drainage area, functions and values assessment for wetlands impacts (if applicable), beneficial uses evaluation for instream flow and surface water withdrawal projects (if applicable), wetlands delineation information, state- and federally-listed threatened and endangered species information, mitigation plan (demonstrating avoidance and minimization to the maximum extent practicable, and compensation for unavoidable impacts).~~

~~(1) For wetland impacts greater than one acre (1.0 acre or 43,560 square feet), the assessment of functional values of the affected surface waters must include information on: surrounding land uses and cover types; nutrient, sediment, and pollutant trapping; flood control and flood storage capacity; erosion control and shoreline stabilization; groundwater recharge and discharge; aquatic and wildlife habitat; and unique or critical habitats. Functional values may also include: water quality, floodflow desynchronization, nutrient import or export, stormwater retention or detention, recreation, education, aesthetics, or other beneficial uses. These values shall be assessed using an acceptable method appropriate for the type of impacted resource. This information will be used to determine the type of compensatory mitigation required to ensure no net loss of wetland functions.~~

~~(2) Evaluation of beneficial uses for instream flow and surface water withdrawal projects includes both instream and offstream uses. Instream beneficial uses include, but are not limited to: the protection of fish and wildlife habitat; maintenance of waste assimilation; recreation; navigation; and cultural and aesthetic values. Offstream beneficial uses include, but are not limited to: domestic (including public water supply); agricultural; electric power generation; and commercial and industrial uses.~~

(3) The assessment of potential impacts to federally listed and state listed threatened or endangered species shall include correspondence or documentation from federal or state resource agencies addressing potential impacts to listed species.

(4) A delineation map must be provided of the geographic area of a delineated wetland for all wetlands on the site, in accordance with 9VAC25-210-45, including the wetlands data sheets, and the latitude and longitude (to the nearest second) of the center of the wetland impact area. Wetland types shall be noted according to their Cowardin classification or similar terminology. A copy of the USACE delineation confirmation, or other correspondence from the USACE indicating their approval of the wetland boundary, shall also be provided at the time of application, or if not available at that time, as soon as it becomes available during the VWP permit review. The delineation map should also include the location of all impacted and non-impacted streams, open water and other surface waters on the site. The approximate limits of any Chesapeake Bay Resource Protection Areas (RPAs) shall be shown on the map as additional state or local requirements may apply if the project is located within an RPA.

(5) The plan of mitigation for impacts to surface waters must include, in accordance with current federal regulations: measures taken to avoid impacts to the maximum extent practicable, the measures proposed to reduce the impacts to surface waters to the maximum extent practicable, and where impacts could not be avoided, the means by which compensation will be accomplished to achieve no net loss of wetland acreage and functions or stream functions and water quality benefits.

(a) A narrative description must be provided detailing the measures taken during project design and development both to avoid and minimize impacts to surface waters to the maximum extent practicable (see 9VAC25-210-115).

(b) In order for an application to be deemed complete, a conceptual wetland compensatory mitigation plan must be submitted for unavoidable permanent impacts to wetlands, unless dependent solely on mitigation banking or monetary contribution to an in-lieu fee fund, and shall include at a minimum: the goals and objectives in terms of replacement of wetland acreage and functions; a detailed location map (for example, a United States Geologic Survey topographic quadrangle map), including latitude and longitude (to the nearest second) and the hydrologic unit code (HUC) at the center of the site; a description of the surrounding land use; a hydrologic analysis, including a draft water budget based on expected monthly inputs and outputs which will project water level elevations for a typical year, a dry year and a wet year; groundwater elevation data, if available, or the proposed location of groundwater monitoring wells to collect these data; wetland delineation confirmation and data sheets and maps for existing surface water areas on the proposed site(s); a conceptual grading plan; a conceptual planting scheme, including suggested plant species and zonation of each vegetation type proposed; a description of existing soils, including general information on both topsoil and subsoil conditions, permeability, and the need for soil amendments; a draft design of any water control structures; inclusion of buffer areas; a description of any structures and features necessary for the success of the site; the schedule for compensatory mitigation site construction; and proposed deed restriction language for protecting the compensation site or sites, including all surface waters and buffer areas within its boundaries, in perpetuity.

(c) In order for an application to be deemed complete, a conceptual stream compensatory mitigation plan must be submitted for unavoidable permanent impacts to streams, unless dependent solely on mitigation banking or monetary contribution to an in-lieu fee fund, and shall include at a minimum: the goals and objectives in terms of water quality benefits and replacement of stream functions; a detailed location map (for example, a United States Geologic Survey topographic quadrangle map), including the latitude and longitude (to the nearest second) and the hydrologic unit code (HUC) at the center of the site; a description of the surrounding land use; the proposed stream segment restoration locations, including plan view and cross-section sketches; the stream deficiencies that need to be addressed; the proposed restoration measures to be employed, including channel measurements, proposed design flows, types of instream structures, and conceptual planting scheme; reference stream data, if available; inclusion of buffer areas; schedule for restoration activities; and proposed deed restriction language for protecting the compensation site or sites, including all surface waters and buffer areas within its boundaries, in perpetuity.

(d) Compensation for open water impacts may be required, as appropriate, to protect state waters and fish and wildlife resources from significant impairment.

(e) Any compensation plan shall include measures for the control of undesirable species.

(f) Any compensation plan proposing to include contributions to an in-lieu fee fund shall include proof of the willingness of the entity to accept the donation and documentation of how the amount of the contribution was calculated.

(g) Any compensation plan proposing the purchase or use of mitigation banking credits shall include: (i) the name of the proposed mitigation bank and the HUC in which it is located; (ii) the number of credits proposed to be

purchased or used; and (iii) certification from the bank owner of the availability of credits.

(h) Applicants proposing off-site compensatory mitigation, including purchase or use of mitigation bank credits, or contribution to an in-lieu fee fund shall first discuss the feasibility of on-site compensatory mitigation. If on-site compensatory mitigation is practicable, applicants must provide documentation as to why the proposed off-site compensatory mitigation is ecologically preferable (see 9VAC25-210-116 B).

l. Detailed project location map. The detailed location map (for example, a United States Geologic Survey topographic quadrangle map) including the project boundary. The map should be of sufficient detail such that the site may be easily located for site inspection.

m. Project plan view and cross-sectional sketches. All plan view sketches and cross-sectional sketches must include, at a minimum, north arrow, scale, existing structures, existing and proposed (if available) contours, limit of surface water areas, ebb and flood or direction of flow, ordinary high water elevation, impact limits, and location and dimension of all structures in impact areas. Profile sketches with the above information shall be required as appropriate to demonstrate minimization of impacts.

n. Application processing fee. The applicant will be notified by the board as to the appropriate fee for the project in accordance with 9VAC25-20. The board will continue to process the application, but the fee must be received prior to release of a draft VWP permit.

2. In addition to requirements of subdivision 1 of this subsection, applications involving instream flow requirements, major surface water withdrawals 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;

c. The consumptive use and the average daily return flow of the proposed project and the location of the return flow;

d. Information on flow dependent beneficial uses along the affected stream reach;

e. Information on the aquatic life along the affected stream reach, including species and habitat requirements;

f. Information on how the proposed withdrawal will alter flows along the affected stream reach;

g. Information on the proposed use of and need for the surface water and information on how demand for surface water was determined (for example, per capita use, population growth rates, new uses, changes to service areas, and if applicable; acreage irrigated and evapotranspiration effects). If during the water supply planning process, the need for the withdrawal was established, the applicant may submit said planning process information, provided that the submittal address all requirements of 9VAC25-210-115 B. The board shall deem such a submittal as meeting the requirements of this subsection. For public surface water supply withdrawal projects see also 9VAC25-780-100 and 9VAC25-780-130;

h. For new or expanded surface water supply projects, a summary of the steps taken to seek public input as required by 9VAC25-210-75 and an identification of the issues raised during the course of the public information meeting process; and

i. For surface water withdrawals, other than public water supplies, information to demonstrate that alternate sources of water supply are available to support the operation of the facility during times of reduced instream flow.

C. Applications for new or expanded minor surface water withdrawals, using the DEQ Application for New or Expanded Minor Surface Water Withdrawals Initiated On or After July 25, 2007, shall include:

1. Name, mailing address, telephone number, and if applicable, fax number and electronic mail address of applicant;

2. If different from applicant, name, mailing address, telephone number, and if applicable, fax number and electronic mail address of property owner;

3. If applicable, name of authorized agent, mailing address, telephone number, and if applicable, fax number and electronic mail address;

4. Name of waterbody or waterbodies, or receiving waters, as applicable;

5. Documentation of all withdrawals associated with the application, including, but not limited to, the amount of the requested surface water withdrawal, a description of the proposed intake structure, and a schedule of the proposed withdrawal that describes any seasonal variations in withdrawal patterns;

6. Locations of all withdrawals associated with the application shown on a detailed location map (for example, a United States Geological Survey 7.5 minute topographic map or similar maps of reasonable detail to show land and water features);

7. Name of the city or county where the project occurs;

8. Signed and dated signature page (electronic submittals containing the original signature page, such as that contained in a scanned document file are acceptable);

~~9. Application processing fee in accordance with 9VAC25; and~~

~~10. Any application for a minor surface water withdrawal for a public surface water supply withdrawal project shall provide an evaluation of project alternatives as required in 9VAC25-210-115.~~

~~D. Applications for an Emergency Virginia Water Protection Permit to address a public water supply emergency:~~

~~1. Applications for an Emergency Virginia Water Protection Permit shall include the information noted below in subdivisions a through o. The JPA may be used for emergency applications purposes, provided that all of the information below is included:~~

~~a. Name, mailing address, telephone number, and if applicable, fax number and electronic mail address of applicant;~~

~~b. If different from applicant, name, mailing address, telephone number, and if applicable, fax number and electronic mail address of property owner;~~

~~c. If applicable, name of authorized agent, mailing address, telephone number, and if applicable, fax number and electronic mail address;~~

~~d. Name of waterbody or waterbodies, or receiving waters, as applicable;~~

~~e. Name of the city or county where the project occurs;~~

~~f. Signed and dated signature page (electronic submittals containing the original signature page, such as that contained in a scanned document file are acceptable);~~

~~g. Application processing fee in accordance with 9VAC25-20;~~

~~h. The drainage area, the average annual flow and the median monthly flows at the withdrawal point, and historical low flows if available;~~

~~i. Information on the aquatic life along the affected stream reach, including species and habitat requirements;~~

~~j. Recent and current water use including monthly water use in the previous calendar year and weekly water use in the previous six months prior to the application. The application shall identify the sources of such water and also identify any water purchased from other water suppliers;~~

~~k. A description of the severity of the public water supply emergency, including for reservoirs, an estimate of days of remaining supply at current rates of use and replenishment; for wells, current production; for intakes, current streamflow;~~

~~l. A description of mandatory water conservation measures taken or imposed by the applicant and the dates when the measures were implemented; for the purposes of obtaining an Emergency Virginia Water Protection Permit, mandatory water conservation measures shall include, but not be limited to, the prohibition of lawn and landscape watering, vehicle washing, the watering of recreation fields, refilling of swimming pools, the washing of paved surfaces;~~

~~m. An estimate of water savings realized by implementing mandatory water conservation measures;~~

~~n. Documentation that the applicant has exhausted all management actions that would minimize the threat to public welfare, safety and health and will avoid the need to obtain an emergency permit, and that are consistent with existing permit limitations; and~~

~~o. Any other information that demonstrates that the condition is a substantial threat to public health or safety.~~

~~2. Within 14 days after the issuance of an Emergency Virginia Water Protection Permit, the permit holder shall apply for a VWP permit under the other provisions of this regulation.~~

~~E. Additional information. The board shall require additional information if needed to evaluate compliance with this chapter.~~

d. Project name and proposed project schedule. This schedule will be used to determine the VWP permit term.

e. The following information for the project site location, and any related permittee-responsible compensatory mitigation site, if applicable:

(1) The physical street address, nearest street, or nearest route number; city or county; zip code; and if applicable, parcel number of the site or sites.

(2) Name of the impacted water body or water bodies, or receiving waters, as applicable, at the site or sites.

(3) The latitude and longitude to the nearest second at the center of the site or sites.

(4) The fourth order subbasin, as defined by the hydrologic unit boundaries of the National Watershed Boundary Dataset, for the site or sites.

(5) A detailed map depicting the location of the site or sites, including the project boundary. The map (e.g., a United States Geologic Survey topographic quadrangle map) should be of sufficient detail to easily locate the site or sites for inspection.

(6) GIS-compatible shapefile or shapefiles of the project boundary and existing preservation areas on the site or sites, unless otherwise approved by of coordinated with DEQ. The requirement for a GIS-compatible shapefile or shapefiles may be waived by DEQ on a case-by-case basis.

f. A narrative description of the project, including project purpose and need.

g. An alternatives analysis for the proposed project detailing the specific on-site and off-site measures taken during project design and development to first avoid and then minimize impacts to surface waters to the maximum

extent practicable in accordance with the Guidelines for Specification of Disposal Sites for Dredged or Fill Material, 40 CFR Part 230. Avoidance and minimization includes, but is not limited to, the specific on-site and off-site measures taken to reduce the size, scope, configuration, or density of the proposed project, including review of alternative sites where required for the project, which would avoid or result in less adverse impact to surface waters, and documentation demonstrating the reason the applicant determined less damaging alternatives are not practicable. The analysis shall demonstrate to the satisfaction of the board that avoidance and minimization opportunities have been identified and measures have been applied to the proposed activity such that the proposed activity in terms of impacts to state waters and fish and wildlife resources is the least environmentally damaging practicable alternative.

h. A narrative description of all impacts proposed to surface waters, including the type of activity to be conducted in surface waters and any physical alteration to surface waters. Surface water impacts shall be identified as follows:

(1) Wetland impacts identified according to their Cowardin classification (i.e., emergent, scrub-shrub, or forested) and for each classification the individual impacts quantified in square feet to the nearest whole number, cumulatively summed in square feet, and then the sum converted to acres and rounded to two decimal places using commonly accepted arithmetic principles of rounding.

(2) Individual stream impacts quantified in linear feet to the nearest whole number and then cumulatively summed, and when compensatory mitigation is required, the impacts identified according to the assessed type using the United Stream Methodology.

(3) Open water impacts identified according to type; and for each type, the individual impacts quantified in square feet to the nearest whole number, cumulatively summed in square feet, and then the sum converted to acres and rounded to two decimal places using commonly accepted arithmetic principles of rounding.

(4) A copy of the approved jurisdictional determination, if available, or the preliminary jurisdictional determination from the U.S. Army Corps of Engineers (USACE), U.S. Department of Agriculture Natural Resources Conservation Service (NRCS), or DEQ, or other correspondence from the USACE, NRCS, or DEQ indicating approval of the boundary of applicable jurisdictional surface waters, including wetlands data sheets if applicable.

(5) A delineation map and GIS-compatible shapefile or shapefiles of the delineation map that depicts the geographic area or areas of all surface water boundaries delineated in accordance with 9VAC25-210-45 and confirmed in accordance with the jurisdictional determination process; identifies such areas in accordance with subdivisions 1 h (1) through 1 h (3) of this subsection; and quantifies and identifies any other surface waters according to their Cowardin classification (i.e., emergent, scrub-shrub, or forested) or similar terminology, if applicable. The requirement for a delineation map or GIS-compatible shapefile or shapefiles may be waived by DEQ on a case-by-case basis.

i. Plan view drawing or drawings of the project site sufficient to assess the project, including at a minimum the following:

(1) North arrow, graphic scale, and existing and proposed topographic or bathymetric contours.

(2) Limits of proposed impacts to surface waters.

(3) Location of all existing and proposed structures.

(4) All delineated wetlands and all jurisdictional surface waters on the site, including the Cowardin classification (i.e., emergent, scrub-shrub, or forested) for those surface waters and waterway name, if designated; ebb and flood or direction of flow; ordinary high water mark in nontidal areas; tidal wetlands boundary; and mean low water and mean high water lines in tidal areas.

(5) The limits of Chesapeake Bay Resources Protection Areas (RPAs) as field-verified by the applicant and, if available, the limits as approved by the locality in which the project site is located, unless the proposed use is exempt from the Chesapeake Bay Preservation Area Designation and Management Regulations (9VAC25-830).

(6) The limits of any areas that are under a deed restriction, conservation easement, restrictive covenant, or other land use protective instrument (i.e., protected areas).

j. Cross-sectional and profile drawing or drawings. Cross-sectional drawing or drawings of each proposed impact area includes at a minimum a graphic scale, existing structures, existing and proposed elevations, limits of surface water areas, ebb and flood or direction of flow (if applicable), ordinary high water mark in nontidal areas, tidal wetland boundary, mean low water and mean high water lines in tidal areas, impact limits, and location of all existing and proposed structures. Profile drawing or drawings with this information may be required on a case-by-case basis to demonstrate minimization of impacts. Any application that proposes piping or culverting stream flows shall provide a longitudinal profile of the pipe or culvert position and stream bed thalweg, or shall provide spot elevations of the stream thalweg at the beginning and end of the pipe

or culvert, extending to a minimum of 10 feet beyond the limits of the proposed impact.

k. Materials assessment. Upon request by the board, the applicant shall provide evidence or certification that the material is free from toxic contaminants prior to disposal or that the dredging activity will not cause or contribute to a violation of water quality standards during dredging. The applicant may be required to conduct grain size and composition analyses, tests for specific parameters or chemical constituents, or elutriate tests on the dredge material.

l. An assessment of potential impacts to federal or state listed threatened or endangered species, including any correspondence or documentation from federal or state resource agencies addressing potential impacts to listed species.

m. A compensatory mitigation plan to achieve no net loss of wetland acreage or functions or stream functions and water quality benefits.

(1) If permittee-responsible compensation is proposed for wetland impacts, a conceptual wetland compensatory mitigation plan shall be submitted in order for an application to be deemed complete and shall include at a minimum (i) the goals and objectives in terms of replacement of wetland acreage or functions; (ii) a detailed location map including latitude and longitude to the nearest second and the fourth order subbasin, as defined by the hydrologic unit boundaries of the National Watershed Boundary Dataset, at the center of the site; (iii) a description of the surrounding land use; (iv) a hydrologic analysis including a draft water budget for nontidal areas based on expected monthly inputs and outputs that will project water level elevations for a typical year, a dry year, and a wet year; (v) groundwater elevation data, if available, or the proposed location of groundwater monitoring wells to collect these data; (vi) wetland delineation confirmation, data sheets, and maps for existing surface water areas on the proposed site or sites; (vii) a conceptual grading plan; (viii) a conceptual planting scheme including suggested plant species and zonation of each vegetation type proposed; (ix) a description of existing soils including general information on both topsoil and subsoil conditions, permeability, and the need for soil amendments; (x) a draft design of water control structures; (xi) inclusion of buffer areas; (xii) a description of any structures and features necessary for the success of the site; (xiii) the schedule for compensatory mitigation site construction; and (xiv) measures for the control of undesirable species.

(2) If permittee-responsible compensation is proposed for stream impacts, a conceptual stream compensatory mitigation plan shall be submitted in order for an application to be deemed complete and shall include at a minimum (i) the goals and objectives in terms of water quality benefits and replacement of stream functions; (ii) a detailed location map including the latitude and longitude to the nearest second and the fourth order subbasin, as defined by the hydrologic unit boundaries of the National Watershed Boundary Dataset, at the center of the site; (iii) a description of the surrounding land use; (iv) the proposed stream segment restoration locations including plan view and cross-section drawings; (v) the stream deficiencies that need to be addressed; (vi) data obtained from a DEQ-approved, stream impact assessment methodology such as the Unified Stream Methodology; (vii) the proposed restoration measures to be employed including channel measurements, proposed design flows, types of instream structures, and conceptual planting scheme; (viii) reference stream data, if available; (ix) inclusion of buffer areas; (x) schedule for restoration activities; and (xi) measures for the control of undesirable species.

(3) For any permittee-responsible compensatory mitigation, the conceptual compensatory mitigation plan shall also include a draft of the intended protective mechanism or mechanisms, in accordance with 9VAC25-210-116 B 2, such as, but not limited to, a conservation easement held by a third party in accordance with the Virginia Conservation Easement Act (§ 10.1-1009 et seq. of the Code of Virginia) or the Virginia Open-Space Land Act (§ 10.1-7100 et seq. of the Code of Virginia), a duly recorded declaration of restrictive covenants, or other protective instrument. The draft intended protective mechanism shall contain the information in subdivisions (a), (b), and (c) of this subdivision B 1 m (3) or in lieu thereof shall describe the intended protective mechanism or mechanisms that contain or contains the information required as follows:

(a) A provision for access to the site;

(b) The following minimum restrictions: no ditching, land clearing, or discharge of dredge or fill material, and no activity in the area designated as compensatory mitigation area with the exception of maintenance; corrective action measures; or DEQ-approved activities described in the approved final compensatory mitigation plan or long-term management plan; and

(c) A long-term management plan that identifies a long-term steward and adequate financial assurances for long-term management in accordance with the current standard for mitigation banks and in-lieu fee program sites, except that financial assurances will not be necessary for permittee-responsible compensation provided by government agencies on government property. If approved by DEQ, permittee-responsible compensation on government property and long-term protection may be provided through federal facility management plans, integrated natural resources

management plans, or other alternate management plans submitted by a government agency or public authority.

(4) Any compensatory mitigation plan proposing the purchase of mitigation bank or in-lieu fee program credits shall include the number and type of credits proposed to be purchased and documentation from the approved bank or in-lieu fee program sponsor of the availability of credits at the time of application.

n. A written description and a graphical depiction identifying all upland areas including buffers, wetlands, open water, other surface waters, and compensatory mitigation areas located within the proposed project boundary or permittee-responsible compensatory mitigation areas, that are under a deed restriction, conservation easement, restrictive covenant, or other land use protective instrument (i.e., protected areas). Such description and a graphical depiction shall include the nature of the prohibited activities within the protected areas and the limits of Chesapeake Bay Resource Protection Areas (RPAs) as field-verified by the applicant, and if available, the limits as approved by the locality in which the project site is located, unless the proposed use is exempt from the Chesapeake Bay Preservation Area Designation and Management Regulations (9VAC25-830), as additional state or local requirements may apply if the project is located within an RPA.

o. Information for (i) all riparian landowners located within one-half mile downstream from each proposed impact area in nontidal areas and one-quarter mile upstream and downstream in tidal areas and (ii) all landowners located adjacent to proposed impact areas. The information must include, at a minimum, the following: property owner's name, mailing address (street name, city, state and zip code), property parcel number or numbers used by the locality, and a map depicting those property parcels. The requirements for riparian landowner information may be waived by DEQ on a case-by-case basis.

p. Signature page that has been signed, dated, and certified by the applicant in accordance with 9VAC25-210-100. If the applicant is a business or other organization, the signature must be made by an individual with the authority to bind the business or organization, and the title of the signatory must be provided. The application signature page, either on the copy submitted to the Virginia Marine Resources Commission or to DEQ, must have an original signature. Electronic submittals containing the original signature page, such as that contained in a scanned document file, are acceptable.

2. Reserved.

q. Permit application fee. The applicant will be notified by the board as to the appropriate fee for the project. The board will continue to process the application, but the fee must be received prior to release of a draft VWP permit.

C. An analysis of the functions of wetlands proposed to be impacted may be required by DEQ. When required, the method selected for the analysis shall assess water quality or habitat metrics and shall be coordinated with DEQ in advance of conducting the analysis.

1. No analysis shall be required when:

a. Wetland impacts per each single and complete project total 1.00 acre or less; or

b. The proposed compensatory mitigation consists of purchasing mitigation bank or in-lieu fee program credits at standard mitigation ratios of 2:1 forest, 1.5:1 scrub-shrub, and 1:1 emergent, or higher.

2. Analysis shall be required when wetland impacts per each single and complete project total 1.01 acres or more, and when any of the following applies:

a. The proposed compensatory mitigation consists of permittee-responsible compensatory mitigation, including water quality enhancements as replacement for wetlands; or

b. The proposed compensatory mitigation consists of purchasing mitigation bank or in-lieu fee program credits at less than the standard mitigation ratios of 2:1 forest, 1.5:1 scrub-shrub, and 1:1 emergent.

~~F.~~ D. Incomplete application. Where an application is not accepted as complete by the board within 15 days of receipt, the board shall require the submission of additional information from the applicant~~,~~ and may suspend processing of any application until such time as the applicant has supplied the requested information and the board considers the application complete. ~~Further, where~~ Where the applicant becomes aware that he omitted one or more relevant facts from a VWP permit application or submitted incorrect information in a VWP permit application or in any report to the board, the applicant shall immediately submit such facts or the correct information. A revised application with new information shall be deemed a new application for purpose of ~~reviews,~~ review but shall not require an additional notice or an additional permit application fee. An incomplete permit application may be administratively withdrawn from processing by the board for failure to provide the required information after ~~180~~ 60 days from the date ~~that~~ of the ~~original permit application was received~~ latest written information request made by the board ~~for failure to provide required information~~. An applicant may request a suspension of application review by the board. A submission by the applicant making such a request shall not preclude the board from administratively withdrawing an incomplete application. Resubmittal of a permit application for the same or similar project, after such time that the original permit application was administratively withdrawn, shall require submittal of an

additional permit application fee and may be subject to additional noticing requirements.

**9VAC25-210-90. Conditions applicable to all VWP permits.**

A. Duty to comply. The permittee shall comply with all conditions and limitations of the VWP permit. Nothing in this chapter shall be construed to relieve the permittee of the duty to comply with all applicable federal and state statutes, regulations, toxic standards, and prohibitions. Any VWP permit violation or noncompliance is a violation of the ~~law,~~ Clean Water Act and State Water Control Law and is grounds for enforcement action, VWP permit termination, VWP permit revocation, VWP permit modification, or denial of an application for a VWP permit extension or reissuance.

B. Duty to cease or confine activity. It shall not be a defense for a permittee in an enforcement action that it would have been necessary to halt or reduce the activity for which a VWP permit has been granted in order to maintain compliance with the conditions of the VWP permit.

C. Duty to mitigate. The permittee shall take all reasonable steps to minimize or prevent any impacts in violation of the VWP permit ~~which~~ that may have a reasonable likelihood of adversely affecting human health or the environment.

D. Inspection and entry. Upon presentation of credentials, the permittee shall allow the board or any duly authorized agent of the board, at reasonable times and under reasonable circumstances, to conduct the actions listed in this section. For the purpose of this section, the time for inspection shall be deemed reasonable during regular business hours. Nothing contained herein shall make an inspection time unreasonable during an emergency.

1. Enter upon permittee's property, public or private, and have access to, inspect and copy any records that must be kept as part of the VWP permit conditions;

2. Inspect any facilities, operations or practices (including monitoring and control equipment) regulated or required under the VWP permit; and

3. Sample or monitor any substance, parameter, or activity for the purpose of ensuring compliance with the conditions of the VWP permit or as otherwise authorized by law.

E. Duty to provide information. ~~1. The permittee shall furnish to the board any information which the board may request to determine whether cause exists for modifying, revoking, reissuing, or terminating the VWP permit, or to determine compliance with the VWP permit. The permittee shall also furnish to the board, upon request, copies of records required to be kept by the permittee. 2.~~ Plans, maps, conceptual reports, and other relevant information shall be submitted as required by the board prior to commencing construction.

F. Monitoring and records requirements.

1. Monitoring of parameters, other than pollutants, shall be conducted according to approved analytical methods as specified in the VWP permit. Analysis of pollutants will be conducted according to 40 CFR Part 136 (2000), Guidelines Establishing Test Procedures for the Analysis of Pollutants.

2. Samples and measurements taken for the purpose of monitoring shall be representative of the monitored activity.

3. The permittee shall retain records of all monitoring information, including all calibration and maintenance records and all original strip chart or electronic recordings for continuous monitoring instrumentation, copies of all reports required by the VWP permit, and records of all data used to complete the application for the VWP permit, for a period of at least three years from the date of ~~the~~ permit expiration ~~of a granted VWP permit~~. This period may be extended by request of the board at any time.

4. Records of monitoring information shall include as appropriate:

a. The date, exact place and time of sampling or measurements;

b. The name of the individuals who performed the sampling or measurements;

c. The date and time the analyses were performed;

d. The name of the individuals who performed the analyses;

e. The analytical techniques or methods supporting the information such as observations, readings, calculations and bench data used;

f. The results of such analyses; and

g. Chain of custody documentation.

G. Duty to reapply. Any permittee desiring to continue a previously permitted activity after the expiration date of the VWP permit shall apply for and obtain a new permit or, if applicable, shall request an extension in accordance with 9VAC25-210-180.

**9VAC25-210-100. Signatory requirements.**

A. Application. Any application for a VWP permit under this chapter ~~must~~ shall bear the applicant's signature or the signature of a person acting in the applicant's behalf, with the authority to bind the applicant. Electronic submittals containing the ~~original signature~~ original signature page, such as that contained in a scanned document file, are acceptable.

B. Reports. All reports required by VWP permits and other information requested by the board shall be signed by:

1. One of the persons described in subsection A of this section; or

2. A duly authorized representative of that person. A person is a duly authorized representative only if:

a. The authorization is made in writing by a person described in subsection A of this section; and

b. The authorization specifies either an individual or a position having responsibility for the overall operation of the regulated facility or activity, such as the position of plant manager, superintendent, or position of equivalent responsibility. A duly authorized representative may thus be either a named individual or any individual occupying a named position.

c. If an authorization is no longer accurate because a different individual or position has responsibility for the overall operation of the facility, a new authorization must be submitted to the board prior to or together with any separate information, or applications to be signed by an authorized representative.

C. Certification of application and reports. Any person signing a document under subsection A or B of this section shall make the following certification: "I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system or those persons directly responsible for gathering the information, the information submitted is to the best of my knowledge and belief true, accurate, and complete. I am aware that there are significant penalties for submitting false information including the possibility of fine and imprisonment for knowing violations."

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

A. In addition to the conditions established in 9VAC25-210-90 and 9VAC25-210-100, and for surface water withdrawals in 9VAC25-210-370, each VWP permit shall include conditions meeting the ~~following~~ requirements established in this section where applicable~~:~~.

~~A. Conditions applicable to surface water withdrawals:~~

~~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 surface water may be withdrawn at certain times and conditions that require water conservation and reductions in water use.~~

~~a. In the development of conditions that limit the volume and rate at which surface water may be withdrawn, consideration shall be given to the seasonal needs of water users and the seasonal availability of surface water flow.~~

~~b. 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.~~

~~c. In the development of instream flow conditions for new withdrawals, the board shall take into consideration the combined effect on the hydrologic regime within an affected stream reach due to consumptive water uses associated with:~~

~~(1) All existing permitted withdrawals;~~

~~(2) The total amount of withdrawals excluded from VWP permit requirements; and~~

~~(3) Any other existing lawful withdrawals.~~

~~d. VWP Permits for surface water withdrawals, other than public water supplies, shall identify how alternate sources of water supply will be made available to support the operation of the permitted facility during times when surface water withdrawals will be curtailed due to instream flow requirements or shall provide for modification of the operation of the facility to assure compliance with permit conditions. Such modifications may include, but are not limited to, termination or reduction of activities at the facility that are dependent on the permitted withdrawal, increase capacity to capture and store higher flows or implementation of other potential management options.~~

~~2. VWP permits issued for surface water withdrawals from the Potomac River between the Shenandoah River confluence and Little Falls shall contain a condition that requires the permittee to reduce withdrawals when the restriction or emergency stage is declared in the Washington Metropolitan Area under the provisions of the Potomac River Low Flow Allocation Agreement; or when the operating rules outlined by the Drought-Related Operations Manual for the Washington Metropolitan Area Water Suppliers, an attachment to the Water Supply Coordination Agreement, are in effect. The department, after consultation with the Section for Cooperative Water Supply Operations on the Potomac (CO-OP) shall direct the permittee as to when, by what quantity and for what duration withdrawals shall be reduced.~~

~~3. New or expanded minor surface water withdrawals. The board may issue permits for new or expanded minor surface water withdrawals after July 25, 2007, which are not excluded from the requirements of this chapter by 9VAC25-210-60, based on the following criteria:~~

~~a. The amount of the surface water withdrawal is limited to the amount of water that can be put to beneficial use.~~

~~b. Based on the size and location of the surface water withdrawal, the withdrawal is not likely to have a detrimental impact on existing instream or off-stream uses.~~

~~c. Based on an assessment by the board, this withdrawal, whether individually or in combination with other existing or proposed projects, does not cause or contribute to, or may not reasonably be expected to cause or contribute to:~~

~~(1) A significant impairment of the state waters or fish and wildlife resources;~~

~~(2) Adverse impacts on other existing beneficial uses; or~~

~~(3) A violation of water quality standards.~~

~~d. In cases where the board's assessment indicates that criteria contained subdivision 3 b or c of this subsection are not met, the board may:~~

~~(1) Issue a permit with any special conditions necessary to assure these criteria are met, or~~

~~(2) Require the applicant to apply for a VWP permit as described in 9VAC25-210-80 A and B. Such applications shall be subject to all applicable requirements contained in this regulation.~~

B. Water quality standards and state requirements. The VWP permit shall include requirements to comply with all appropriate provisions of state laws and regulations.

C. Toxic pollutants.

1. Where the board finds that appropriate limitations may not ensure compliance with the law or state water quality standards the board shall require the permittee to follow a program of biological or chemical toxics monitoring. The requirement may include a VWP permit reopener to allow the imposition of toxicity reduction or elimination measures determined to be necessary as a result of the board's evaluation of the results of the toxic monitoring and other available information. Based upon this determination, appropriate limitations will be included in the VWP permit to ensure the reduction or elimination of toxic pollutants and allow the board to ensure that the proposed project will comply with water quality standards and other appropriate requirements of the law.

2. Limitations will be included in the VWP permit to control all toxic pollutants which the board determines (based on information reported in a VWP permit application or a notification or on other information) are or may be discharged at a level which would adversely affect the beneficial use of the receiving waters.

D. Monitoring requirements as conditions of VWP permits may include but are not limited to:

1. Requirements concerning the proper use, maintenance and installation, when appropriate, of monitoring equipment or methods (including biological monitoring methods when appropriate) when required as a condition of the VWP permit;

2. Required monitoring including type, intervals, and frequency sufficient to yield data which are representative of the monitored activity and including, when appropriate, continuous monitoring and composite samples;

3. Applicable reporting requirements based upon the impact of the regulated activity on water quality; and

4. Requirements to report monitoring results with a frequency dependent on the nature and effect of the regulated activity.

E. Best ~~Management Practices~~ management practices (BMPs). The VWP permit may require the use of BMPs to control or abate the discharge of pollutants.

F. Reissued VWP permits. When a VWP permit is renewed or reissued, limitations, standards, or conditions must be in conformance with current limitations, standards, or conditions.

G. Reopening VWP permits. Each VWP permit shall have a condition allowing the reopening of the VWP permit for the purpose of modifying the conditions of the VWP permit to meet new regulatory standards duly adopted by the board. Cause for reopening VWP permits includes, but is not limited to when the circumstances on which the previous VWP permit was based have materially and substantially changed, or special studies conducted by the board or the permittee show material and substantial change, since the time the VWP permit was issued and thereby constitute cause for VWP permit modification or revocation and reissuance.

**9VAC25-210-115. ~~Evaluation of project alternatives.~~ (Repealed.)**

~~A. When a proposed activity involves a major surface water withdrawal, public surface water supply withdrawal project, or alteration of instream flows, the applicant shall first identify the purpose of the proposed project. In identifying the project purpose, the applicant shall provide a narrative describing the water supply issues that form the basis of the proposed project purpose.~~

~~B. When a proposed activity involves a major surface water withdrawal, a public surface water supply withdrawal project, or the alteration of instream flows, the applicant shall subsequently demonstrate to the satisfaction of the board that the project meets an established local water supply need. In establishing local need, the applicant shall provide the following information:~~

~~1. Existing supply sources, yields and demands, including:~~

~~a. Peak day and average daily withdrawal;~~

~~b. The safe yield and lowest daily flow of record;~~

~~c. Types of water uses; and~~

~~d. Existing water conservation measures and drought response plan, including what conditions trigger their implementation.~~

~~2. Projected demands over a minimum 30 year planning period, including the following:~~

~~a. Projected demand contained in the local or regional water supply plan developed in accordance with 9VAC25-780 or for the project service area, if such area is smaller than the planning area; or~~

~~b. Statistical population (growth) trends; and~~

~~c. Projected demands by use type; and~~

d. Projected demand without water conservation measures; and

e. Projected demands with long-term water conservation measures.

C. For all proposed projects, the applicant shall demonstrate to the satisfaction of the board that avoidance and minimization opportunities have been identified and applied to the proposed activity, that practicable alternatives, including design alternatives, have been evaluated for the proposed activity, and that the proposed activity, in terms of impacts to water quality and fish and wildlife resources, is the least environmentally damaging practicable alternative.

1. Avoidance and minimization includes, but is not limited to, steps 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.

2. Any alternatives analysis conducted specifically for public surface water supply withdrawal projects shall include:

a. The range of alternatives to be analyzed by the applicant as follows:

(1) All applicable alternatives contained in the local or regional water supply plan developed in accordance with 9VAC25-780;

(2) Alternatives that are practicable or feasible from both a technical and economic standpoint that had not been identified in the local or regional water supply plan developed in accordance with 9VAC25-780;

(3) Alternatives that are available to the applicant but not necessarily under the current jurisdiction of the applicant; and

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

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

c. The criteria used to evaluate each alternative for the purpose of establishing the least environmentally damaging practicable alternative, which includes but is not limited to:

(1) Demonstration that the proposed alternative meets the project purpose and project demonstrated need as documented pursuant to subsections A and B of this section;

(2) Availability of the alternative to the applicant;

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

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

(5) Evaluation of alternative safe yields;

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

(7) 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);

(8) Evaluation of effects on instream flow; and

(9) Water Quality Considerations, including:

(a) Land use within a watershed where the type of land use may impact the water quality of the source;

(b) The presence of impaired streams and the type of impairment;

(c) The location of point source discharges; and

(d) Potential threats to water quality other than those listed in subdivisions 2 c (9) (a) through (c) of this subsection.

3. Any alternatives analysis conducted for projects that involve a surface water withdrawal or alteration of instream flows, other than public surface water supply withdrawal projects shall include all applicable items included in subdivision 2 of this subsection.

**9VAC25-210-116. Compensation.**

A. 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.

B. Practicable and ecologically preferable compensation alternatives.

1. An analysis shall be required to justify that ~~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~~ permittee-responsible compensatory mitigation is ~~more~~ ecologically preferable to ~~practicable on-site or in-kind compensation~~ the purchase of mitigation bank credits or in-lieu fee program credits, if such credits are available in sufficient quantity for the project at the projected time of need. The analysis shall address the ability of the permittee-responsible compensatory mitigation site or sites to replace lost wetland acreage and functions or lost stream functions and water quality benefits. The analysis comparing the

impacted and compensation site or sites may use a method that assesses water quality or habitat metrics, such as that required by 9VAC25-210-80 C, or a method that assesses such criteria as water quality benefits, distance from impacts, hydrologic source and regime, watershed, vegetation type, soils, constructability, timing of compensation versus impact, property acquisition; ,and cost.

2. ~~Such analysis shall include, but is not limited to, the following criteria, which shall be compared between the impacted and replacement sites: water quality benefits; acreage of impacts; distance from impacts; hydrologic source and regime; watershed; functions and values; vegetation type; soils; constructability; timing of compensation versus impact; property acquisition; and cost. The analysis shall compare the ability of each compensatory mitigation option to replace lost wetland acreage and functions or lost stream functions and water quality benefits.~~ The applicant shall demonstrate that permittee-responsible compensatory mitigation can be protected in perpetuity through a protective mechanism approved by the Department of Environmental Quality, such as, but not limited to, a conservation easement held by a third party in accordance with the Virginia Conservation Easement Act (§ 10.1-1700 et seq. of the Code of Virginia) or the Virginia Open-Space Act (§ 10.1-1009 et seq. of the Code of Virginia), a duly recorded declaration of restrictive covenants, or other protective instrument.

C. Compensatory mitigation proposals shall be evaluated as follows:

1. ~~On site, in kind compensatory mitigation,~~ The purchase of mitigation bank credits and in-lieu fee program credits, when available, shall in most cases 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~~ permittee-responsible compensatory mitigation may be considered~~. When~~ when the applicant ~~can demonstrate~~ satisfactorily demonstrates that ~~an off site or out of kind compensatory mitigation proposal~~ permittee-responsible compensatory mitigation is ~~practicable and~~ ecologically preferable~~, then such proposal may be deemed appropriate for compensation of project impacts~~ in accordance with subdivision B 1 of this section.

2. Compensatory mitigation for unavoidable wetland impacts may be met through the following options~~:~~, which are preferred in the following sequence: mitigation banking, in-lieu fee program, and permittee-responsible compensatory mitigation. However, the appropriate compensatory mitigation option for project impacts shall be evaluated on a case-by-case basis, in terms of replacement of wetland acreage or functions and the greatest likelihood of success. When considering options for providing the required compensatory mitigation, DEQ shall consider the type and location options in the following order:

a. ~~Wetland creation~~ Mitigation bank credits;

b. ~~Wetland restoration~~ In-lieu fee program credits;

c. ~~The purchase or use of credits from a mitigation bank, pursuant to § 62.1 44.15:23 of the Code of Virginia~~ Permittee-responsible mitigation under a watershed approach;

d. ~~A contribution to an approved in-lieu fee fund~~ Permittee-responsible mitigation through on-site and in-kind mitigation;

e. ~~Preservation of upland buffers adjacent to state waters, when utilized in conjunction with subdivision 2 a, b, or c of this subsection, and when consistent with subsection A of this section~~ Permittee-responsible mitigation through off-site or out-of-kind mitigation;

f. Restoration, enhancement, or preservation of upland buffers adjacent to ~~state waters,~~ wetlands when utilized in conjunction with ~~subsection a, b, or c,~~ subdivision 2 a, 2 b, 2 c, 2 d, or 2 e of this subsection and when consistent with subsection A of this section; and

g. Preservation of wetlands~~,~~ when utilized in conjunction with subdivision 2 a, 2 b, ~~or~~ 2 c, 2 d, or 2 e of this subsection and when consistent with subsection A of this section;

3. Compensatory mitigation for unavoidable stream impacts ~~to streams~~ may be met through the following options, ~~as appropriate to replace functions or water quality benefits~~ which are preferred in the following sequence: mitigation banking, in-lieu fee program, and permittee-responsible mitigation. However, the appropriate compensatory mitigation option for project impacts shall be evaluated on a case-by-case basis, in terms of replacement of stream functions and water quality benefits and the greatest likelihood of success. One factor in determining the required compensation shall be an analysis of stream impacts utilizing a stream impact assessment methodology ~~acceptable to the DEQ~~ approved by the board. When considering options for providing the required compensatory mitigation, DEQ shall consider the type and location options in the following order:.

a. ~~Stream channel restoration or enhancement~~ Mitigation bank stream credits;

b. ~~Riparian buffer restoration or enhancement~~ In-lieu fee program credits;

c. ~~Riparian buffer preservation, when consistent with subsection A of this section~~ Permittee-responsible mitigation under a watershed approach;

d. ~~A contribution to an approved in-lieu fee fund~~ Permittee-responsible mitigation through on-site and in-kind mitigation;

e. ~~The purchase or use of credits from a mitigation bank, pursuant to § 62.1-44.15:23 of the Code of Virginia~~ Permittee-responsible mitigation through off-site or out-of-kind mitigation;

f. Restoration, enhancement, or preservation of upland buffers adjacent to streams when utilized in conjunction with subdivision 3 a, 3 b, 3 c, 3 d, or 3 e of this subsection and when consistent with subsection A of this section; and

g. Preservation of stream channels and adjacent riparian buffers when utilized in conjunction with subdivision 3 a, 3 b, 3 c, 3 d, or 3 e of this subsection and when consistent with subsection A of this section.

4. ~~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 acreage and functions or stream functions and water quality benefits~~ Compensatory mitigation for open water impacts may be required to protect state waters and fish and wildlife resources from significant impairment, as appropriate. Compensation shall not be required for permanent or temporary impacts to open waters that are identified as palustrine by the Cowardin classification method, except when such open waters are located in areas of karst topography in Virginia and are formed by the natural solution of limestone.

D. In-lieu fee ~~fund~~ program 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 acreage and functions or stream functions and water quality benefits through the preservation, restoration and creation of wetlands or streams~~ The board may approve the use of a program by issuing a VWP permit for a specific project or by taking an enforcement action and following applicable public notice and comment requirements, or by granting approval of a program after publishing a notice of its intent in the Virginia Register of Regulations and accepting public comments on its approval for a minimum of 30 days.

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.~~ Where a program is mandated by the Code of Virginia to be implemented and such program is approved by the U.S. Army Corps of Engineers, the program may be used as deemed appropriate for any VWP permit or enforcement action.

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

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

b. ~~Consultation with DEQ on selection of sites for preservation, restoration, or creation~~ DEQ approval of each site for inclusion in the program;

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 compensatory 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 acreage ~~and~~ or functions or stream functions and water quality benefits lost in the impacted watershed; and

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

4. ~~Such approval~~ Approval may be granted for up to ~~five~~ 10 years and may be renewed by the board upon a demonstration that the ~~fund~~ program has ~~enhanced wetland acreage or functions or stream functions and water quality benefits through the preservation, creation or restoration of wetlands or streams. Such demonstration may be made with the reports submitted pursuant to~~ met the criteria in subdivision 3 ~~e~~ 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.~~

E. 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 § 62.1-44.15:23 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~~ 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; and

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.~~

F. ~~The~~ For permittee-responsible mitigation, the final compensatory mitigation plan ~~must~~ shall include complete information on all components of the conceptual compensatory mitigation plan detailed in 9VAC25-210-80 B 1 ~~k (5) (b) and (c)~~ m:

1. For wetlands, the final compensation plan for review and approval by DEQ shall also include a summary of the type and acreage of existing wetland impacts anticipated during the construction of the compensation site and the proposed compensation for these impacts; a site access plan; a monitoring plan, including proposed success criteria, monitoring goals, and the location of ~~photostations,~~ photo-monitoring stations, monitoring wells, vegetation sampling points, and reference wetlands or streams (if available); an abatement and control plan for undesirable plant species; an erosion and sedimentation control plan; a construction schedule; and the final protective mechanism for ~~protection of~~ the compensation site or sites, including all surface waters and buffer areas within its boundaries. ~~The final wetland compensation plan or plans shall include a mechanism for protection in perpetuity of the compensation sites to include all state waters within the compensation site boundary or boundaries. Such protections shall be in place within 120 days of final compensation plan approval. The restrictions, protections, or preservations, or similar instrument, shall state that no activity will be performed on the property in any area designated as a compensation area with the exception of maintenance or corrective action measures authorized by the board. Unless specifically authorized by the board through the issuance of a VWP individual or general permit, or waiver thereof, this restriction applies to ditching, land clearing or discharge of dredge or fill material. Such instrument shall contain the specific phrase "ditching, land clearing or discharge of dredge or fill material" in the limitations placed on the use of these areas. The protective instrument shall be recorded in the chain of title to the property, or an equivalent instrument for government-owned lands. Proof of recordation shall be submitted within 120 days of final compensation plan approval.~~ The approved protective mechanism shall be recorded in the chain of title to the property, or an equivalent instrument for government-owned lands, and proof of recordation shall be submitted to DEQ prior to commencing impacts in surface waters.

2. For streams, the final compensation plan for review and approval by DEQ shall also include a site access plan; an erosion and sedimentation control plan, if appropriate; an abatement and control plan for undesirable plant species; a monitoring plan, including~~,~~ a monitoring and reporting schedule, monitoring design, and methodologies for success; proposed success criteria; ~~and~~ location of photo-monitoring stations, vegetation sampling points, survey points, bank pins, scour chains, and reference streams; ~~the mechanism for the protection of the compensation site or sites, including all surface waters and buffer areas within its boundaries;~~ a plan view ~~sketch~~ drawing depicting the pattern and all compensation measures being employed; a profile ~~sketch~~ drawing; ~~and~~ cross-sectional ~~sketches~~ drawing or drawings of the proposed compensation stream; and the final protective mechanism for the compensation site or sites, including all surface waters and buffer areas within its boundaries. ~~The final stream compensation plan or plans shall include a mechanism for protection in perpetuity of the compensation sites to include all state waters within the compensation site boundary or boundaries. Such protections shall be in place within 120 days of final compensation plan approval. The restrictions, protections, or preservations, or similar instrument, shall state that no activity will be performed on the property in any area designated as a compensation area with the exception of maintenance or corrective action measures authorized by the board. Unless specifically authorized by the board through the issuance of a VWP individual or general permit, or waiver thereof, this restriction applies to ditching, land clearing or discharge of dredge or fill material. Such instrument shall contain the specific phrase "ditching, land clearing or discharge of dredge or fill material" in the limitations placed on the use of these areas. The protective instrument shall be recorded in the chain of title to the property, or an equivalent instrument for government-owned lands. Proof of recordation shall be submitted within 120 days of final compensation plan approval.~~ The approved protective mechanism shall be recorded in the chain of title to the property, or an equivalent instrument for government-owned lands, and proof of recordation shall be submitted to DEQ prior to commencing impacts in surface waters.

**9VAC25-210-130. VWP general permits.**

A. The board may issue VWP general permits by regulation for certain specified categories of activities as it deems appropriate.

B. When the board determines on a case-by-case basis that concerns for water quality and the aquatic environment so indicate, the board may require individual applications and VWP individual permits rather than approving coverage under a VWP general permit regulation. Cases where an individual VWP permit may be required include the following:

1. Where the activity may be a significant contributor to pollution;

2. Where the applicant or permittee is not in compliance with the conditions of the VWP general permit regulation or ~~authorization~~ coverage;

3. When an applicant or permittee no longer qualifies for coverage under the VWP general permit ~~regulation or authorization~~; and

4. When a permittee operating under ~~a~~ VWP general permit ~~authorization~~ coverage requests to be excluded from ~~the~~ coverage ~~of the VWP general permit regulation~~ by applying for a VWP individual permit.

C. When a VWP individual permit is issued to a permittee, the applicability of the VWP general permit ~~authorization~~ coverage to the individual permittee is automatically terminated on the effective date of the VWP individual permit.

D. When a VWP general permit regulation is issued which applies to a permittee that is already covered by a VWP individual permit, such person may request exclusion from the provisions of the VWP general permit regulation and subsequent coverage under a VWP individual permit.

E. ~~A~~ VWP general permit ~~authorization~~ coverage may be revoked from an individual permittee for any of the reasons set forth in 9VAC25-210-180 subject to appropriate opportunity for a hearing.

F. ~~When all permitted activities requiring notification have been completed, the~~ The permittee shall be required to submit a written notice of ~~termination unless the permittee has previously submitted a termination by consent request for the same permitted activities and such request has been approved by the board~~ project completion and request a permit termination by consent within 30 days following the completion of all activities in all permitted impact areas.

G. Activities authorized under a VWP general permit and general permit regulation shall be authorized for ~~a~~ the fixed term ~~based upon project length and duration. When a general permit regulation is amended or replaced, it shall contain provisions such that coverage authorized under the general permit existing as of the effective date of the amended or replacement VWP general permit regulation may continue under the amended or replacement VWP general permit and that all terms and conditions of the authorization may continue in full force and effect. Notwithstanding any other provision, a request for continuation of a VWP general permit authorization beyond the expiration date of such authorization in order to complete monitoring requirements shall not be considered a new application for coverage and no application fee will be charged~~ stated in the applicable VWP general permit and VWP general permit regulation.

H. The board may certify or certify with conditions a general, regional, or nationwide permit proposed by the ~~USACE~~ U.S. Army Corps of Engineers (USACE) in accordance with § 401 of the federal Clean Water Act as meeting the requirements of this ~~regulation~~ chapter and a VWP general permit, provided that the nationwide or regional permit and the certification conditions:

1. Require that wetland or stream impacts be avoided and minimized to the maximum extent practicable;

2. Prohibit impacts that cause or contribute to a significant impairment of state waters or fish and wildlife resources;

3. Require compensatory mitigation sufficient to achieve no net loss of existing wetland acreage ~~and~~ or functions or stream functions and water quality benefits; and

4. Require that compensatory mitigation for unavoidable wetland impacts be provided ~~through the following options, as appropriate to replace acreage and function:~~ in accordance with 9VAC25-210-116.

~~a. Wetland creation;~~

~~b. Wetland restoration;~~

~~c. The purchase or use of credits from a mitigation bank, pursuant to § 62.1-44.15:23 of the Code of Virginia;~~

~~d. A contribution to an approved in-lieu fee fund;~~

~~e. Preservation of upland buffers adjacent to state waters, when utilized in conjunction with subdivision 4 a, b, or c of this subsection, and when consistent with 9VAC25-210-116 A;~~

~~f. Restoration of upland buffers adjacent to state waters, when utilized in conjunction with subdivision 4 a, b, or c of this subsection, and when consistent with 9VAC25-210-116 A;~~

~~g. Preservation of wetlands, when utilized in conjunction with subdivision 4 a, b, or c of this subsection.~~

5. Require that compensatory mitigation for unavoidable stream impacts be ~~met through the following options as appropriate to replace functions or water quality benefits; one factor in determining the required compensation shall be~~ provided in accordance with 9VAC25-210-116, including but not limited to an analysis of stream impacts utilizing a stream impact assessment methodology approved by the board~~:~~

~~a. Stream channel restoration or enhancement;~~

~~b. Riparian buffer restoration or enhancement;~~

~~c. Riparian buffer preservation, when consistent with 9VAC25-210-116 A;~~

~~d. A contribution to an approved in-lieu fee fund;~~

~~e. The purchase or use of credits from a mitigation bank, pursuant to § 62.1-44.15:23 of the Code of Virginia~~.

I. The certifications allowed by subsection H of this section may be provided only after the board has advertised and accepted public comment on its intent to provide certification for at least 30 days.

J. Coverage under a general, regional, or nationwide permit promulgated by the USACE and certified by the board in

accordance with this section shall be deemed coverage under a VWP general permit regulation upon submission of proof of coverage under the general, regional, or nationwide permit and any other information required by the board through the certification process. Notwithstanding the provisions of ~~9VAC25-20-10~~ 9VAC25-20, no fee shall be required from applicants seeking coverage under this subsection.

Part III
Public Involvement

**9VAC25-210-140. Public notice of VWP ~~permit applications,~~ individual permit actions and public comment periods.**

~~A. The initial application for surface water supply projects that requires both an individual Virginia Water Protection Permit and a Virginia Marine Resources permit under § 28.2-1205 of the Code of Virginia shall be advertised concurrently by the Department of Environmental Quality and the Virginia Marine Resources Commission. Such advertising shall be paid for by the applicant.~~

~~B.~~ A. Every draft VWP individual permit, with the exception of ~~an~~ a VWP Emergency Virginia Water Protection Permit, shall be given public notice paid for by the applicant, by publication once in a newspaper of general circulation in the area affected by the proposed activity. The public notice must be published within 14 days of the applicant's receipt of a draft VWP permit, or the 120-day VWP permit processing timeframe will be suspended until such publication.

~~C.~~ B. The board shall provide a comment period of at least 30 days following the date of the public notice for interested persons to submit written comments on the tentative decision and to request a public hearing on the VWP permit. All written comments submitted during the comment period shall be retained by the board and considered during its final decision on the VWP permit.

~~D.~~ C. The contents of the public notice for a VWP permit application or proposed VWP permit action shall include:

1. Name and mailing address of the applicant;

2. The permit application number;

3. Project location. If the location of the activity differs from the address of the applicant the notice shall also state the location in sufficient detail such that the specific location may be easily identified;

4. Brief description of the business or activity to be conducted at the site of the proposed activity;

5. Description of the area affected. Information on the number of acres of wetlands and/or the number of linear feet of streams affected, as well as the name of the receiving waterway and the name of the affected watershed should be included;

6. Description of what the applicant plans to do to compensate for the affected area;

7. A statement of the tentative determination to issue or deny a VWP permit;

8. A brief description of the final determination procedure;

9. The address, e-mail address and phone number of a specific person or persons at the state office from whom further information may be obtained; and

10. A brief description on how to submit comments and request a public hearing.

~~E.~~ D. Public notice shall not be required for submission or approval of plans and specifications or conceptual engineering reports not required to be submitted as part of the application.

~~F.~~ E. When a VWP permit is denied, the board ~~will~~ shall do so in accordance with 9VAC25-210-230.

**9VAC25-210-150. Public access to information.**

All information (i) pertaining to VWP permit or VWP general permit coverage processing or (ii) in reference to any activity requiring a VWP permit or VWP general permit coverage under this chapter shall be available to the public, unless ~~the applicant has made a showing that the information is protected by the applicant as a trade secret covered~~ prohibited by § 62.1-44.21 of the Code of Virginia. All information claimed confidential must be identified as such at the time of submission to the board and ~~VMRC~~ the Virginia Marine Resources Commission.

**9VAC25-210-160. Public comments and hearing.**

A. The board shall consider all written comments and requests for a public hearing received during the VWP individual permit comment period~~,~~ and shall make a determination on the necessity of a public hearing in accordance with ~~Procedural Rule No. 1 (9VAC25-230-10 et seq.)~~ § 62.1-44.15:02 of the Code of Virginia. All proceedings, public hearings and decisions from it will be in accordance with ~~Procedural Rule No. 1 (9VAC25-230-10 et seq.)~~ § 62.1-44.15:02 of the Code of Virginia.

B. Should the board, in accordance with ~~Procedural Rule No. 1 (9VAC25-230-10 et seq.)~~ § 62.1-44.15:02 of the Code of Virginia, determine to dispense with the public hearing, it may grant the VWP individual permit~~,~~ or, at its discretion, transmit the application or request, together with all written comments from it and relevant staff documents and staff recommendations, if any, to the board for its decision.

C. Any applicant or permittee aggrieved by an action of the board taken without a public hearing, or inaction of the board, may request in writing a hearing pursuant to ~~Procedural Rule No. 1 (9VAC25-230-10 et seq.)~~ § 62.1-44.15:02 of the Code of Virginia.

**9VAC25-210-170. Public notice of hearing.**

A. Public notice of any public hearing held pursuant to 9VAC25-210-160 shall be circulated as follows:

1. Notice shall be published once in a newspaper of general circulation in the county or city where the activity is to occur; and

2. Notice of the public hearing shall be sent to all persons and government agencies that received a copy of the notice of VWP permit application and to those persons requesting a public hearing or having commented in response to the public notice.

B. Notice shall be effected pursuant to subdivisions A 1 and 2 of this section at least 30 days in advance of the public hearing.

C. The content of the public notice of any public hearing held pursuant to 9VAC25-210-160 shall include at least the following:

1. Name and mailing address of each person whose application will be considered at the public hearing and a brief description of the person's activities or operations including information on the number of acres of wetlands and/or the number of linear feet of streams affected, a description of the nature of the withdrawal and the amount of the withdrawal; as well as the name of the receiving waterway and the name of the affected watershed;

2. The precise location of the proposed activity and the surface waters that will, or may, be affected including, where possible, reference to route numbers, road intersections, map coordinates or similar information;

3. Description of what the applicant plans to do to compensate for the affected area;

4. A brief reference to the public notice issued for the VWP permit application or permit action, including the permit application number and date of issuance, unless the public notice includes the public hearing notice;

5. Information regarding the time and location for the public hearing;

6. The purpose of the public hearing;

7. A concise statement of the relevant water quality, or fish and wildlife resource issues raised by the persons requesting the public hearing;

8. Contact person and the mailing address, ~~e-mail~~ email address, name of the ~~DEQ~~ Department of Environmental Quality regional office and phone number of the DEQ office at which the interested persons may obtain further information or request a copy of the draft VWP permit prepared pursuant to 9VAC25-210-120; and

9. A brief reference to the rules and procedures to be followed at the public hearing.

D. Public notice of any ~~public~~ hearing held pursuant to 9VAC25-210-160 C shall be in accordance with ~~Procedural Rule No. 1 (9VAC25-230)~~ § 62.1-44.15:02 of the Code of Virginia.

Part IV
VWP Permit Variances; VWP Permit Modification, Revocation and Reissuance, Transfer, Termination and Denial

**9VAC25-210-175. ~~Variance from VWP permit conditions.~~ (Repealed.)**

~~A. For public water supplies. The board may grant a temporary variance to any condition of a VWP permit for a public surface water supply withdrawal that supports a public water supply to address a public water supply emergency during a drought. A permittee requesting such variance must provide all information required in the application for an Emergency Virginia Water Protection Permit identified in 9VAC25-210-80 D.~~

~~B. For all other water supplies. The board may grant a temporary variance to any condition of a VWP permit for a surface water withdrawal during a drought. A permittee requesting such variance must affirmatively demonstrate;~~

~~1. Public health and safety interests are served by the issuance of such variance; and~~

~~2. All management actions consistent with existing permits have been exhausted.~~

~~C. As a condition of any variance granted, the permittee shall:~~

~~1. Modify operations or facilities to comply with existing VWP permit conditions as soon as practicable; or~~

~~2. Provide new information to the board that alternate permit conditions are appropriate and either apply for a new VWP permit or a modification to their existing VWP permit. The board shall review any such application consistent with other sections of this regulation.~~

~~D. In addition, the board may require the permittee to take any other appropriate action to minimize adverse impacts to other beneficial uses.~~

~~E. Any variances issued by the board shall be of the shortest duration necessary for the permittee to gain compliance with existing permit conditions, apply for a new VWP permit, or request modification of existing permit conditions.~~

~~F. Public notice of any variance issued by the board shall be given as required for draft permits in 9VAC25-210-140 B, C, and D. Such notice shall be given concurrently with the issuance of any variance and the board may modify such variances based on public comment. Publication costs of all public notices shall be the responsibility of the permittee.~~

**9VAC25-210-180. Rules for modification, revocation and reissuance, extension, transfer, and termination of VWP individual permits.**

A. VWP individual permits ~~shall~~ may be modified in whole or in part, revoked and reissued, extended, transferred, or terminated only as authorized by this section.

~~B. A VWP permit may be modified in whole or in part, revoked and reissued, transferred or terminated.~~

~~C. VWP permit modifications shall not be used to extend the term of a VWP permit beyond 15 years from the date of original issuance. If the permittee wishes to continue one or more activities regulated by the VWP permit after the expiration date of the VWP permit, regardless of pending changes to the permitted activities, the permittee must apply for and obtain a new VWP permit or comply with the provisions of 9VAC25-210-185.~~

~~D. Modification, revocation and reissuance, or termination may be initiated by the board, upon the request of the permittee, or upon the request by another person at the board's discretion under applicable laws or the provisions of subsections D through H of this section. A~~ B. VWP ~~permit~~ permits may be modified~~, or revoked and reissued with permittee consent,~~ upon the request of the permittee or upon board initiative when any of the following developments occur:

~~1. When additions or alterations have been made to the affected facility or activity that require the application of VWP permit conditions that differ from those of the existing VWP permit or are absent from it;~~

~~2.~~ 1. When new information becomes available about the ~~operation~~ project or activity covered by the VWP permit, including project additions or alterations, that was not available at VWP permit issuance and would have justified the application of different VWP permit conditions at the time of VWP permit issuance;

~~3.~~ 2. When a change is made in the promulgated standards or regulations on which the VWP permit was based;

~~4. When it becomes necessary to change final dates in schedules due to circumstances over which the permittee has little or no control such as acts of God, materials shortages, etc. However, in no case may a compliance schedule be modified to extend beyond any applicable statutory deadline of the Act;~~

~~5.~~ 3. When changes occur that are subject to "reopener clauses" in the VWP permit; or

~~6. When the board determines that minimum instream flow levels resulting directly from the permittee's withdrawal of surface water are detrimental to the instream beneficial use, existing at the time of permit issuance, and the withdrawal of surface water should be subject to further net limitations or when an area is declared a surface water management area pursuant to §§ 62.1-242 through 62.1-253 of the Code of Virginia, during the term of the VWP permit~~

4. When developments applicable to surface water withdrawals as specified in 9VAC25-210-380 occur.

C. A request for a modification, except those addressed in subsection E of this section, shall include the applicable informational requirements of 9VAC25-210-80 B, updated to reflect the proposed changes to the project. The board may request additional information as necessary to review and prepare a draft permit. If the board tentatively decides to modify a permit, it shall prepare a draft permit incorporating the proposed changes in accordance with 9VAC25-210-120 and process the draft permit in accordance with 9VAC25-210-140 through 9VAC25-210-170.

D. During the drafting and authorization of a permit modification under this section, only those conditions to be modified shall be addressed with preparing a draft modified permit. VWP permit terms and conditions of the existing permit shall remain in full force and effect during the modification of the permit.

~~E. A VWP permit shall be transferred only if the VWP permit has been modified to reflect the transfer, has been revoked and reissued to the new permittee, or has been automatically transferred. Any individual VWP permit shall be automatically transferred to a new permittee if:~~

~~1. The current permittee notifies the board within 30 days of the proposed transfer of the title to the facility or property;~~

~~2. The notice to the board includes a written agreement between the existing and proposed permittee containing a proposed date of transfer of VWP permit responsibility, coverage and liability to the new permittee, or that the existing permittee will retain such responsibility, coverage, or liability, including liability for compliance with the requirements of any enforcement activities related to the permitted activity;~~

~~3. The board does not within the 30-day time period notify the existing permittee and the new permittee of its intent to modify or revoke and reissue the VWP permit; and~~

~~4. The permit transferor and the permit transferee provide written notice to the board of the actual transfer date.~~

~~F.~~ E. Upon request of the permittee, or upon board initiative with the consent of the permittee, minor modifications may be made in the VWP permit without following the public involvement procedures contained in 9VAC25-210-140, 9VAC25-210-160, or 9VAC25-210-170. Any request for a minor modification shall be in writing and shall contain the facts or reasons supporting the request. The board may request additional information as necessary to review a request for minor modification. The board, at its discretion, may require that the changes proposed under a minor modification to be processed as a modification in accordance with subsections B and C of this section. For VWP permits, a minor modification may only be processed to:

1. Correct typographical errors~~;~~.

2. Require monitoring and reporting by the permittee at a different frequency than required in the VWP permit, based on new information justifying the change in conditions~~;~~.

3. Change ~~an interim~~ a compliance date ~~in a schedule of compliance to no more than 180 days from the original compliance date and~~ provided it will not ~~interfere with the~~

~~final compliance date;~~ result in a net loss of wetland acreage or of functions in all surface waters.

4. Allow for a change in ~~ownership or operational control when the board determines that no other change in the VWP permit is necessary,~~ permittee provided that a written agreement containing a specific date for transfer of VWP permit responsibility, ~~coverage~~ authorization, and liability from the current to the new permittee has been submitted to the board~~;~~. A VWP permit shall be transferred only if the VWP permit has been modified to reflect the transfer, has been revoked and reissued to the new permittee, or has been automatically transferred. Any individual VWP permit shall be automatically transferred to a new permittee if the current permittee:

a. Notifies the board of the proposed transfer of the permit and provides a written agreement between the current and proposed permittees containing the date of transfer of VWP permit responsibility, authorization, and liability to the new permittee; and

b. The board does not within 15 days notify the current and new permittees of its intent to modify the VWP permit.

5. Change project plans or uses that do not result in ~~an increase~~ a change to permitted project impacts other than allowable by ~~9VAC25-210-180 F 8; 9VAC25-210-180 F 9; and 9VAC25-210-180 F 10;~~ subdivisions 6 and 7 of this subsection.

6. ~~Occur when facility expansion or production increases and modification will not cause significant change in the discharge of pollutants;~~ Reduce wetland or stream impacts. Compensatory mitigation requirements may be modified in relation to the adjusted impacts, provided that the adjusted compensatory mitigation meets the initial compensatory mitigation goals. The Department of Environmental Quality shall not be responsible for ensuring refunds for mitigation bank credit purchases or in-lieu fee program credit purchases.

7. ~~Delete VWP permit limitation or monitoring requirements for specific pollutants when the activities generating these pollutants are terminated;~~ Authorize additional impacts to surface waters that are proposed prior to impacting the additional areas. Proposed additional impacts shall meet the following requirements:

a. The proposed additional impacts are located within the project boundary as depicted in the application for permit issuance, or are located in areas of directly related off-site work.

b. The permittee has provided sufficient documentation that the board may reasonably determine that the additional impacts will not impact federal or state listed or proposed threatened or endangered species or proposed or designated critical habitat, or to be a taking of threatened or endangered species.

c. The cumulative, additional permanent wetland or open water impacts for one or more minor modifications do not exceed the greater of either (i) 0.25 acre or (ii) 10% of the acres of originally permitted permanent wetland or open water impacts, not to exceed 1.00 acre.

d. The cumulative, additional permanent stream impacts for one or more minor modifications do not exceed the greater of either (i) 100 linear feet or (ii) 10% of the linear feet of originally permitted permanent stream impacts, not to exceed 1,500 linear feet.

e. Documentation is provided demonstrating that the proposed surface water impacts have been avoided to the maximum extent practicable in accordance with the informational requirements of 9VAC25-210-80 B 1 g.

f. Compensatory mitigation for the proposed impacts, if required, meets the requirements of 9VAC25-210-80 B 1 m and 9VAC25-210-116. Prior to a minor modification approval, DEQ may require submission of a compensatory mitigation plan for the additional impacts.

g. Where such additional impacts are temporary, and prior to initiating the impacts, the permittee provides a written statement to the board that the area to be temporarily impacted will be restored to its preconstruction elevations and contours, with topsoil from the impact area where practicable, such that the previous acreage and functions are restored. The proposed temporary impacts shall be deemed approved if DEQ does not respond within 10 days of receipt of the request for authorization to temporarily impact additional surface waters.

8. ~~Occur when subsequent to issuance of a VWP individual or general permit authorization, the permittee determines that additional permanent wetland or stream impacts are necessary, provided that the additional impacts are associated with the previously authorized activities in authorized locations within the same phase of development or within logical termini, the unavoidable cumulative increase in the acreage of wetland or open water impacts is not greater than one-quarter of an acre (0.25 acre or 10,890 square feet) and the unavoidable cumulative increase in stream impacts is less than 100 linear feet, and also provided that the additional permanent impacts are fully mitigated at ratios not less than compensatory mitigation ratios for the original impacts. A modification is not required subsequent to issuance for additional temporary impacts to surface waters, provided DEQ is notified in writing regarding additional temporary impacts, and the area is restored to preexisting conditions;~~ Substitute a specific, DEQ-approved mitigation bank or in-lieu fee program with another DEQ-approved mitigation bank or in-lieu fee program, or substitute all or a portion of the prior authorized permittee-responsible compensatory mitigation with a purchase of mitigation credits in accordance with 9VAC25-210-116 C from a DEQ-

approved mitigation bank or in-lieu fee program. The amount of credits proposed to be purchased shall be sufficient to meet the compensatory mitigation requirement for which the compensatory mitigation is proposed to replace.

9. ~~Occur when, subsequent to issuance of a VWP individual or general permit authorization, the project results in less wetland or stream impacts. Compensation requirements may be modified in relation to the adjusted impacts at the request of the permittee, provided that the adjusted compensation meets the initial compensation goals. DEQ shall not be responsible for ensuring refunds for mitigation bank credit purchases, mitigation bank usage, or in lieu fee fund contributions;~~ Allow for extension of the expiration date of the VWP permit. Any permittee with an effective VWP permit for an activity that is expected to continue after the expiration date of the VWP permit, without any change in the activity authorized by the VWP permit other than as may be allowed under this section, shall submit written notification requesting an extension. The permittee must file the request 90 days prior to the expiration date of the VWP permit. VWP permit modifications shall not be used to extend the term of a VWP permit beyond 15 years from the date of original issuance.

10. ~~Occur when, subsequent to issuance of a VWP individual or general permit authorization, substitution of a specified, approved mitigation bank(s) with another specified, approved mitigation bank is necessary.~~ Activities or development applicable to surface water withdrawals as specified in 9VAC25-210-380 B.

~~G.~~ F. After notice and opportunity for a formal hearing pursuant to ~~Procedural Rule No. 1 (9VAC25-230-100)~~ § 62.1-44.15:02 of the Code of Virginia, a VWP permit can be terminated for cause. Reasons for termination for cause are as follows:

1. Noncompliance by the permittee with any condition of the VWP permit;

2. The permittee's failure in the application or during the VWP permit ~~issuance~~ process to disclose fully all relevant facts or the permittee's misrepresentation of any relevant facts at any time;

3. The permittee's violation of a special or judicial order;

4. A determination by the board that the permitted activity endangers human health or the environment and can be regulated to acceptable levels by VWP permit modification or termination;

5. A change in any condition that requires either a temporary or permanent reduction or elimination of any activity controlled by the VWP permit; ~~and~~ or

6. A determination that the permitted activity has ceased and that the ~~compensatory mitigation~~ compensation for unavoidable adverse impacts has been successfully completed.

G. The board may terminate the permit without cause when the permittee is no longer a legal entity due to death, dissolution, or when a company is no longer authorized to conduct business in the Commonwealth. The termination shall be effective 30 days after notice of the proposed termination is sent to the last known address of the permittee or registered agent, unless the permittee objects within that time. If the permittee does object during that period, the board shall follow the applicable procedures for termination under § 62.1-44.15:25 of the Code of Virginia and 9VAC25-230.

H. A VWP permit ~~can~~ may be terminated by consent, as initiated by the permittee~~, when all permitted activities have been completed or if the authorized impacts will not occur~~. The permittee shall submit a request for termination by consent within 30 days of ~~project completion or project cancellation~~ completing or canceling all permitted activities and all required compensatory mitigation requirements. When submitted for project completion, the request for termination by consent shall constitute a notice of project. The director may accept this termination on behalf of the board. The permittee shall submit the following information:

1. Name, mailing address and telephone number;

2. Name and location of the activity;

3. The VWP permit ~~authorization~~ number; and

4. One of the following certifications:

a. For project completion: "I certify under penalty of law that all activities and any ~~requested~~ required compensatory mitigation authorized by a VWP permit have been completed. I understand that by submitting this notice of termination that I am no longer authorized to perform activities in surface waters in accordance with the VWP permit, and that performing activities in surface waters is unlawful where the activity is not authorized by a VWP permit, unless otherwise excluded from obtaining a permit. I also understand that the submittal of this notice does not release me from liability for any violations of this VWP permit."

b. For project cancellation: "I certify under penalty of law that the activities and any required compensatory mitigation authorized by this VWP permit will not occur. I understand that by submitting this notice of termination~~,~~ that I am no longer authorized to perform activities in surface waters in accordance with the VWP permit, and that performing activities in surface waters is unlawful where the activity is not authorized by a VWP permit, unless otherwise excluded from obtaining a permit. I also understand that the submittal of this notice does not release me from liability for any violations of this VWP permit, nor does it allow me to resume the permitted activities without reapplication and issuance of another permit."

c. For events beyond permittee control, the permittee shall provide a detailed explanation of the events, to be approved by DEQ, and the following certification statement: "I certify under penalty of law that the activities or the required compensatory mitigation authorized by ~~a~~ this VWP permit have changed as the result of events beyond my control (see attached). I understand that by submitting this notice of termination that I am no longer authorized to perform activities in surface waters in accordance with the VWP permit, and that performing activities in surface waters is unlawful where the activity is not authorized by a VWP permit, unless otherwise excluded from obtaining a permit. I also understand that the submittal of this notice does not release me from liability for any violations of this VWP permit, nor does it allow me to resume the permitted activities without reapplication and issuance of another permit.

~~I. If a permittee files a request for VWP permit modification, revocation and reissuance, or termination, or files a notice of planned changes or anticipated noncompliance, the VWP permit terms and conditions shall remain effective until the request is acted upon by the board.~~

**9VAC25-210-185. Duration of VWP individual permits~~; extensions~~.**

~~A. Duration of VWP permits.~~ VWP permits issued under this chapter shall have an effective date and expiration date ~~that will determine the life of~~ specified in the permit. ~~VWP permits~~ The permit term shall be ~~effective for a fixed term~~ based upon the projected duration of the project, the length of any required monitoring, or other project operations or VWP permit conditions; however, the term shall not exceed 15 years ~~and will be specified in the conditions of the VWP permit~~, unless administratively continued. When a permit term, other than that of an Emergency Virginia Water Protection Permit, is less than 15 years, an extension of the permit terms and conditions may be granted in accordance with 9VAC25-210-180. Emergency Virginia Water Protection Permits shall not exceed a duration of one year or shall expire upon the issuance of a regular Virginia Water Protection Permit, whichever comes first.

~~B. VWP permit extension. Any permittee with an effective VWP permit for an activity that is expected to continue after the expiration date of the VWP permit, without any change in the activity authorized by the VWP permit, shall submit written notification requesting an extension. The permittee must file the request prior to the expiration date of the VWP permit. Under no circumstances will the original and the extended permit terms together exceed a total of 15 years. If the request for extension is denied, the VWP permit will expire on its original date and, therefore, the permittee should allow sufficient time for the board to evaluate the extension request and, in the case of denial of the request, to process a new VWP permit application or an application for a VWP permit modification, if applicable.~~

**9VAC25-210-220. Waiver of VWP permit or § 401 certification.**

A. The board may waive permitting requirements when the board determines that a proposed project impacts an isolated wetland that is of minimal ecological value as defined in 9VAC25-210-10. ~~Any~~ Upon request by the board, any person claiming this waiver ~~bears the burden to~~ shall demonstrate to the satisfaction of the board that he qualifies for the waiver.

B. The board may waive the requirement for a VWP individual permit when the proposed activity qualifies for a permit issued by the ~~USACE~~ U.S. Army Corps of Engineers and receives a permit from the ~~VMRC~~ Virginia Marine Resources Commission or wetlands boards, pursuant to Chapter 12 (§ 28.2-1200 et seq.) or Chapter 13 (§ 28.2-1300 et seq.) of Title 28.2 of the Code of Virginia, and the activity does not impact instream flows.

C. The board shall ~~waive the requirement for~~ not require coverage under a VWP general permit ~~authorization~~ or a VWP individual permit when the proposed activity meets the exclusion set forth in 9VAC25-210-60 A 10 a regardless of the issuance of ~~an individual~~ a permit by the ~~United States~~ U.S. Army Corps of Engineers.

**9VAC25-210-230. Denial of the VWP permit or variance request.**

A. The board shall make a decision to tentatively deny the VWP permit or variance request if the requirements of this chapter are not met. Basis for denial include, but are not limited to, the following:

1. The project will result in violations of water quality standards or will impair the beneficial uses of state waters.

2. As a result of project implementation, shellfish waters would be condemned in accordance with 9VAC25-260.

3. The project that the applicant proposed fails to adequately avoid and minimize impacts to state waters to the maximum extent practicable.

4. The proposed compensatory mitigation plan is insufficient or unsatisfactory for the proposed impacts and fails to achieve no net loss of existing wetland acreage ~~and~~ or function and no net loss of functions in all surface waters.

5. The Department of Game and Inland Fisheries indicates that natural or stockable trout waters would be permanently and negatively impacted by the proposed activity.

6. The proposed activity is prohibited by 9VAC25-210-50.

7. The effect of project impacts, together with other existing or proposed impacts to wetlands, will cause or contribute to a significant impairment of state waters or fish and wildlife resources.

8. Failure to submit the required permit fee in accordance with 9VAC25-210-80 B 1 ~~a, C 9~~ g or ~~D 1 g~~ or 9VAC25-210-340 C 1 g.

9. The board determines that the applicant for an Emergency Virginia Water Protection Permit has not demonstrated that there is a substantial threat to public health and safety, and that normal Virginia Water Protection Permit procedures, including public comment provisions, should be followed.

B. The applicant shall be notified by letter of the board's preliminary decision to tentatively deny the VWP permit requested.

C. Should the applicant withdraw his application, no VWP permit or variance will be issued.

D. Should the applicant elect to proceed as originally proposed, the board may deny the application and advise the applicant pursuant to ~~Procedural Rule No. 1 — Public and Formal Hearing Procedures (9VAC25-230)~~ § 62.1-44.15:02 of the Code of Virginia of his right to a public hearing to consider the denial.

~~Part V~~
~~Enforcement~~

**9VAC25-210-240. ~~Enforcement.~~ (Repealed.)**

~~The board may enforce the provisions of this chapter utilizing all applicable procedures under the law and § 10.1-1186 of the Code of Virginia.~~

~~Part VI~~
~~Miscellaneous~~

**9VAC25-210-250. ~~Delegation of authority.~~ (Repealed.)**

~~The director, or a designee acting for him, may perform any act of the board provided under this chapter, except as limited by § 62.1-44.14 of the Code of Virginia.~~

**9VAC25-210-260. ~~Transition.~~ (Repealed.)**

~~A. All applications received on or after July 25, 2007, will be processed in accordance with these new procedures.~~

~~B. VWP individual permits issued prior to July 25, 2007, will remain in full force and effect until such permits expire, are revoked, or are terminated.~~

~~C.~~ Modifications and all other types of modification that are received by the board prior to July 25, 2007, will be processed in accordance with the VWP permit regulations in effect at that time. Modifications and all other types of notification to the board that are received on or after July 25, 2007, will be processed in accordance with these new procedures.

~~D. Section 401 Water Quality Certificates issued prior to December 31, 1989, have the same effect as a VWP permit. Water Quality Certificates issued after this date will remain in effect until reissued as Virginia Water Protection Permits.~~

Part V
Surface Water Withdrawals

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

The following words and terms when used in this part shall have the following meanings:

"Affected stream reach" means the portion of a surface water body beginning at the location of a withdrawal and ending at a point where effects of the withdrawal are not reasonably expected to adversely affect beneficial uses.

"Agricultural surface water withdrawal" means a withdrawal of surface water in Virginia or from the Potomac River for the purpose of agricultural, silvicultural, horticultural, or aquacultural operations. Agricultural surface water withdrawals include withdrawals for turf farm operations, but do not include withdrawals for landscaping activities, or turf installment and maintenance associated with landscaping activities.

"Consumptive use" means any use of water withdrawn from a surface water other than a nonconsumptive use.

"Drought" means the declaration of a drought stage by the Virginia Drought Coordinator or the Governor of Virginia for a particular area or locality within Virginia. Drought stage declarations include watch, warning, and emergency, depending upon severity, as defined by the Virginia Drought Assessment and Response Plan dated March 28, 2003.

"Drought of record" means the time period during which the most severe drought conditions occurred for a particular area or location, as indicated by the available hydrologic and meteorologic data.

"Emergency Virginia Water Protection Permit" means a Virginia Water Protection Permit issued pursuant to § 62.1-44.15:22 C of the Code of Virginia authorizing a new or increased surface water withdrawal to address insufficient public drinking water supplies that are caused by a drought and may result in a substantial threat to human health or public safety.

"Human consumption" means the use of water to support human survival and health, including drinking, bathing, showering, cooking, dishwashing, and maintaining hygiene.

"Instream flow" means the existing volume of water flowing in a stream or water body including any seasonal variations of water levels and flow.

"Intake structure" means any portion of a surface water withdrawal system used to withdraw surface water that is located within the surface water, such as, but not limited to, a pipe, culvert, hose, tube, or screen.

"Major river basin" means the Potomac-Shenandoah River Basin, the Rappahannock River Basin, the York River Basin, the James River Basin, the Chowan River Basin, the Roanoke River Basin, the New River Basin, or the Tennessee-Big Sandy River Basin.

"Nonconsumptive use" means the use of water withdrawn from a surface water in such a manner that it is returned to the surface water without substantial diminution in quantity at or near the point from which it was taken and would not result in or exacerbate low flow conditions.

"Potomac River Low Flow Allocation Agreement" means the agreement among the United States of America, the State of Maryland, the Commonwealth of Virginia, the District of Columbia, the Washington Suburban Sanitation Commission, and the Fairfax County Water Authority dated January 11, 1978, consented to by the United States Congress in § 181 of the Water Resources Development Act of 1976, Public Law 94-587, as modified on April 22, 1986.

"Public water supply" means a withdrawal of surface water in Virginia or from the Potomac River for the production of drinking water, distributed to the general public for the purpose of, but not limited to, domestic use.

"Public water supply emergency" means a substantial threat to public health or safety due to insufficient public drinking water supplies caused by drought.

"Public water supply safe yield" means the highest volumetric rate of water that can be withdrawn by a surface water withdrawal during the drought of record since 1930, including specific operational conditions established in a Virginia Water Protection permit, when applicable.

"Section for Cooperative Water Supply Operations on the Potomac" means a section of the Interstate Commission on the Potomac River Basin designated by the Water Supply Coordination Agreement as responsible for coordination of water resources during times of low flow in the Potomac River.

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

"Surface water withdrawal system" means any device or combination of devices used to withdraw surface water such as, but not limited to, a machine, pump, culvert, hose, tube, screen, or fabricated concrete or metal structure.

"Variance" means a mechanism that allows temporary waiver of the generally applicable withdrawal limitation requirements or instream flow conditions of a VWP permit during a drought.

"Water Supply Coordination Agreement" means the agreement among the United States of America, the Fairfax County Water Authority, the Washington Suburban Sanitary Commission, the District of Columbia, and the Interstate Commission on the Potomac River Basin, dated July 22, 1982, which establishes agreement among the suppliers to operate their respective water supply systems in a coordinated manner and which outlines operating rules and procedures for reducing impacts of severe droughts in the Potomac River Basin.

"Water supply plan" means a document developed in compliance with 9VAC25-780.

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

A. The following surface water withdrawals are excluded from VWP permit requirements. Activities, other than the surface water withdrawal, that are contained in 9VAC25-210-50 and are associated with the construction and operation of the surface water withdrawal are subject to VWP permit requirements unless excluded by 9VAC25-210-60. Other permits under state and federal law may be required.

1. Any surface 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, the surface 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 surface water withdrawal. A surface water withdrawal shall be deemed to be abandoned if the owner of the surface water withdrawal system (i) notifies the Department of Environmental Quality in writing that the withdrawal has been abandoned or (ii) removes or disables the surface water withdrawal system with the intent to permanently cease such withdrawal. Transfer of ownership or operational control of the surface water withdrawal system, a change in use of the water, or temporary cessation of the withdrawal shall not be deemed evidence of abandonment. The notification shall be signed by the owner of record or shall include evidence satisfactory to 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.

b. Information to be furnished to DEQ. Each owner or operator of a permanent surface water withdrawal system engaging in a withdrawal that is subject to this exclusion shall provide 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 owner or operator of a temporary surface water withdrawal system engaging in a withdrawal that is subject to this exclusion, where the purpose of the withdrawal is for agriculture, shall provide to DEQ the maximum annual surface water withdrawal over the last 10 years. The information shall be provided within one year of the date that notice of such request is received from DEQ and shall be updated when the maximum capacity of the existing intake structure changes. The information provided to DEQ shall not

constitute a limit on the exempted withdrawal. Such information shall be utilized by DEQ and board to protect existing beneficial uses and shall be considered when evaluating applications for new withdrawal permits.

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

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

a. The largest 12-consecutive month surface water withdrawal that occurred in the 10 years prior to July 25, 2007, shall constitute a limit on the withdrawal that is excluded from permit requirements. For agricultural surface water withdrawals that did not report annually as required by the Water Withdrawal Reporting regulations (9VAC25-200) prior to July 25, 2007, the limit excluded from permit requirements was established for the operations that were in existence during the 10 years prior to July 25, 2007, by estimating the largest 12-consecutive month withdrawal based upon the following information associated with that timeframe: the area irrigated, depth of irrigation, and annual number of irrigations; pumping capacity and annual pumping time; annual energy consumption for pumps; number and type of livestock watered annually; and number and type of livestock where water is used for cooling purposes.

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

4. Agricultural surface water withdrawals that total less than:

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

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

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

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

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

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

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

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

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

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

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

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

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

b. Two million gallons per day from tidal waters.

B. DEQ may require any owner or operator of a surface water withdrawal system excluded from permit requirements by subdivisions A 3 through A 11 of this section to cease withdrawals and file an application and receive a permit prior to resuming any withdrawal when the board's assessment indicates that a withdrawal, whether individually or in combination with other existing or proposed projects:

1. Causes or contributes to, or may reasonably be expected to cause or contribute to, a significant impairment of the state waters or fish and wildlife resources;

2. Adversely impacts other existing beneficial uses; or

3. Will cause or contribute to a violation of water quality standards.

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

A. Preapplication review panel. At the request of a potential applicant for a surface water withdrawal proposing to the Department of Environmental Quality to withdraw 90 million gallons a month or greater, a preapplication review panel shall be convened prior to submission of a VWP application. The preapplication review panel shall assist potential applicants that are proposing surface water withdrawals with the early identification of issues related to the protection of beneficial instream and offstream uses of state waters and the identification of the affected stream reach. DEQ shall notify the Virginia Marine Resources Commission, the Virginia Institute of Marine Science, the Virginia Department of Game and Inland Fisheries, the Virginia Department of Conservation and Recreation, the Virginia Department of Health, the U.S. Army Corps of Engineers, the U.S. Fish and Wildlife Service, the U.S. Environmental Protection Agency, and other appropriate local, state, and federal agencies of the preapplication review panel request. These agencies shall participate to the extent practicable 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 and shall provide comments within 60 days of the initial meeting of the preapplication panel.

B. Preapplication public notice. For new or expanded surface water withdrawals requiring an individual VWP permit and proposing to withdraw 90 million gallons a month or greater, a potential applicant shall provide information on the project, shall provide an opportunity for public comment on the proposed project, and shall assist in identifying public concerns or issues prior to filing a VWP individual permit application.

1. Except as provided in this subsection, the potential applicant shall provide for publication of notice once a week for two consecutive weeks in a newspaper of general circulation serving the locality where the surface water withdrawal is proposed to be located.

2. If requested by any person, the potential applicant shall hold at least one public information meeting. Notice of any public information meeting held pursuant to this subsection shall be provided at least 14 days prior to the public information meeting date and shall be published in the same manner as required in subdivision 1 of this subsection. A potential applicant shall submit the notice to DEQ for posting on the DEQ website. At a minimum, any notice required by this subsection shall include:

a. A statement of the potential applicant's intent to apply for a VWP permit for a surface water withdrawal;

b. The proposed location of the surface water withdrawal;

c. Information on how the public may request a public information meeting or, in the alternative, the date, time, and location of the public information meeting;

d. The name, address, and telephone number of the potential applicant, or an authorized representative who can answer questions or receive comments on the proposed surface water withdrawal; and

e. A statement of how oral or written public comments will be used.

3. In accordance with the provisions of 9VAC25-780-50 C 11 and 9VAC25-780-150, a potential applicant shall not be required to publish public notice or provide an opportunity for a public information meeting if a public meeting has been held within two years prior to the submittal of an application for a VWP permit on a local or regional water supply plan, which includes the proposed project.

4. The potential applicant shall maintain a list of persons making comment and their addresses and shall make a good faith effort to notify commenters at the address provided by the commenter when the public notice for the draft VWP individual permit is available.

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

A. The Department of Environmental Quality shall coordinate the review of an application for surface water withdrawals that also requires a Virginia Marine Resources Commission (VMRC) permit under Chapter 12 (§ 28.2-1200 et seq.) of Title 28.2 of the Code of Virginia with the VMRC in accordance with § 62.1-44.15:5.01 of the Code of Virginia.

B. The initial application for surface water withdrawals that requires both an individual Virginia Water Protection Permit and a VMRC permit shall be advertised concurrently by DEQ and VMRC. When appropriate, such advertisement may be in the form of a joint public notice of the application, prepared by VMRC with the assistance of DEQ, published once in a newspaper of general circulation in the area affected by the proposed activity in accordance with VMRC regulations and policy. Such advertising shall be paid for by the applicant.

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

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

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

1. As part of identifying the project purpose, a narrative describing the water supply issues that form the basis of the proposed project purpose.

2. The drainage area, the average annual flow and the median monthly flows at the withdrawal point, and historical low flows if available;

3. The average daily withdrawal; the maximum daily, monthly, annual, and instantaneous withdrawals; and information on the variability of the demand by season. If the project has multiple intake structures, provide for each individual intake structure and the cumulative volumes for the entire surface water withdrawal system.

4. The monthly consumptive use volume in million gallons and the average daily return flow in million gallons per day of the proposed project and the location of the return flow, including the latitude and longitude and the drainage area in square miles at the discharge point.

5. Information on flow dependent beneficial uses along the affected stream reach. For projects that propose a transfer of water resources from a major river basin to another major river basin, this analysis should include both the source and receiving basins.

a. Evaluation of the flow dependent instream and offstream beneficial uses. Instream beneficial uses include, but are not limited to, the protection of fish and wildlife habitat, maintenance of waste assimilation, recreation, navigation, and cultural and aesthetic values. Offstream beneficial uses include, but are not limited to, domestic (including public water supply); agricultural; electric power generation; and commercial and industrial uses.

b. The aquatic life, including species and habitat requirements.

c. How the proposed withdrawal will alter flows.

6. Information on the proposed use of and need for the surface water and information on how 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). If during the water supply planning process, the need for the withdrawal was established, the applicant may submit the planning process information, provided that the submittal address all requirements of 9VAC25-210-360. The board shall deem such a submittal as meeting the requirements of this subsection. For surface water withdrawals for public water supply, see also 9VAC25-780-100 and 9VAC25-780-130.

7. Information describing the intake structure, to include intake screen mesh size, and intake velocity.

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

a. Description of the flow or release control structures, including the minimum rate of flow, in cubic feet per second, size and capacity of the structure, and the mechanism to control the release.

b. Surface area in acres, maximum depth in feet, normal pool elevation, total storage capacity, and unusable storage volume in acre-feet.

c. The stage-storage relationship. For example, the volume of water in the impoundment at varying stages of water depth.

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

10. An alternatives analysis for the proposed surface water withdrawal, including at a minimum, the criteria in 9VAC25-210-360.

11. For new or expanded surface water withdrawals proposing to withdraw 90 million gallons a month or greater, a summary of the steps taken to seek public input as required by 9VAC25-210-320 and an identification of the issues raised during the course of the public information meeting process.

12. For new or expanded surface water withdrawals that involve a transfer of water between major river basins that may impact a river basin in another state, a plan describing procedures to notify potentially affected persons, both in and outside of Virginia, of the proposed project.

13. For surface water withdrawals, other than for public water supply, information to demonstrate that alternate sources of water supply are available to support the operation of the facility during times of reduced instream flow.

C. Applications for an Emergency Virginia Water Protection Permit.

1. Applications for an Emergency Virginia Water Protection Permit to address a public water supply emergency shall include the information noted in subdivisions 1 a through 1 o of this subsection. The JPA may be used for emergency applications purposes, provided that all of the information in subdivisions a through o of this subdivision C 1 is included:

a. Name, mailing address, telephone number, and if applicable, fax number and electronic mail address of applicant;

b. If different from applicant, name, mailing address, telephone number, and if applicable, fax number and electronic mail address of property owner;

c. If applicable, authorized agent's name, mailing address, telephone number, and, if applicable, fax number and electronic mail address;

d. Name of water body or water bodies, or receiving waters, as applicable;

e. Name of the city or county where the project occurs;

f. Signed and dated signature page (electronic submittals containing the original signature page, such as that contained in a scanned document file are acceptable);

g. Permit application fee in accordance with 9VAC25-20;

h. The drainage area, the average annual flow and the median monthly flows at the withdrawal point, and historical low flows if available;

i. Information on the aquatic life along the affected stream reach, including species and habitat requirements;

j. Recent and current water use including monthly water use in the previous calendar year and weekly water use in the previous six months prior to the application. The application shall identify the sources of such water and also identify any water purchased from other water suppliers;

k. A description of the severity of the public water supply emergency, including (i) for reservoirs, an estimate of days of remaining supply at current rates of use and replenishment; (ii) for wells, current production; and (iii) for intakes, current streamflow;

l. A description of mandatory water conservation measures taken or imposed by the applicant and the dates when the measures were implemented; for the purposes of obtaining an Emergency Virginia Water Protection Permit, mandatory water conservation measures shall include, but not be limited to, the prohibition of lawn and landscape watering, vehicle washing, watering of recreation fields, refilling of swimming pools, and washing of paved surfaces;

m. An estimate of water savings realized by implementing mandatory water conservation measures;

n. Documentation that the applicant has exhausted all management actions that would minimize the threat to public welfare, safety, and health and will avoid the need to obtain an emergency permit, and that are consistent with existing permit limitations; and

o. Any other information that demonstrates that the condition is a substantial threat to public health or safety.

2. Within 14 days after the issuance of an Emergency Virginia Water Protection Permit, the permit holder shall apply for a VWP permit under the other provisions of this chapter.

**9VAC25-210-350. Duty to reapply for a permit for a continuation of a surface water withdrawal.**

A. Any permittee with an effective permit for a surface water withdrawal shall submit a new permit application at least 270 days before the expiration date of an effective permit unless permission for a later date has been granted by the board. The Department of Environmental Quality may administratively continue an expiring permit in accordance with 9VAC25-210-65.

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

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

The applicant shall demonstrate to the satisfaction of the board that the project meets an established local water supply need. In establishing local need, the applicant shall provide the following information:

1. Existing supply sources, yields, and demands, including:

a. Peak day and average daily withdrawal;

b. The safe yield and lowest daily flow of record;

c. Types of water uses; and

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

2. Projected demands over a minimum 30-year planning period, including the following:

a. Projected demand contained in the local or regional water supply plan developed in accordance with 9VAC25-780 or for the project service area, if such area is smaller than the planning area; or

b. Statistical population (growth) trends; projected demands by use type; projected demand without water conservation measures; and projected demands with long-term water conservation measures.

3. Any alternatives analysis conducted specifically for withdrawals for public water supply shall include:

a. The range of alternatives to be analyzed by the applicant as follows:

(1) All applicable alternatives contained in the local or regional water supply plan developed in accordance with 9VAC25-780;

(2) Alternatives that are practicable or feasible from both a technical and economic standpoint that had not been identified in the local or regional water supply plan developed in accordance with 9VAC25-780;

(3) Alternatives that are available to the applicant but not necessarily under the current jurisdiction of the applicant; and

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

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

c. The criteria used to evaluate each alternative for the purpose of establishing the least environmentally damaging practicable alternative, which includes but is not limited to:

(1) Demonstration that the proposed alternative meets the project purpose and project demonstrated need as documented pursuant to this section;

(2) Availability of the alternative to the applicant;

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

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

(5) Evaluation of alternative safe yields;

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

(7) 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);

(8) Evaluation of effects on instream flow; and

(9) Water quality considerations, including:

(a) Land use within a watershed where the type of land use may impact the water quality of the source;

(b) The presence of impaired streams and the type of impairment;

(c) The location of point source discharges; and

(d) Potential threats to water quality other than those listed in this subdivision 3 (c) (9).

4. Any alternatives analysis conducted for surface water withdrawals other than for public water supply shall include all applicable items included in this subdivision 3 of this section.

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

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

B. 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 surface water may be withdrawn at certain times, the public water supply safe yield, and conditions that require water conservation and reductions in water use.

1. In the development of conditions that limit the volume and rate at which surface water may be withdrawn, consideration shall be given to the seasonal needs of water users and the seasonal availability of surface water flow.

2. 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.

3. In the development of instream flow conditions for new withdrawals, the board shall take into consideration the combined effect on the hydrologic regime of the surface water within an affected stream reach due to consumptive water uses associated with:

a. All existing permitted withdrawals;

b. The total amount of withdrawals excluded from VWP permit requirements; and

c. Any other existing lawful withdrawals.

4. VWP permits for surface water withdrawals, other than for public water supply, shall identify how alternate sources of water supply will be made available to support the operation of the permitted facility during times when surface water withdrawals will be curtailed due to instream flow requirements or shall provide for modification of the operation of the facility to ensure compliance with permit conditions. Such modifications may include, but are not limited to, termination or reduction of activities at the facility that are dependent on the permitted withdrawal, increase capacity to capture, and store higher flows or implementation of other potential management options.

C. VWP permits issued for surface water withdrawals from the Potomac River between the Shenandoah River confluence and Little Falls shall contain a condition that requires the permittee to reduce withdrawals when the restriction or emergency stage is declared in the Washington Metropolitan Area under the provisions of the Potomac River Low Flow Allocation Agreement or when the operating rules outlined by the Drought-Related Operations Manual for the Washington Metropolitan Area Water Suppliers, an attachment to the Water Supply Coordination Agreement, are in effect. The department, after consultation with the Section for Cooperative Water Supply Operations on the Potomac (CO-OP), shall direct the permittee as to when, by what quantity, and for what duration withdrawals shall be reduced.

D. The board may issue permits for new or expanded surface water withdrawals that are not excluded from the requirements of this chapter by 9VAC25-210-310 based on the following criteria:

1. The amount of the surface water withdrawal is limited to the amount of water that can be put to beneficial use.

2. Based on the size and location of the surface water withdrawal, the withdrawal is not likely to have a detrimental impact on existing instream or offstream uses.

3. Based on an assessment by the board, this withdrawal, whether individually or in combination with other existing or proposed projects, does not cause or contribute to, or may not reasonably be expected to cause or contribute to:

a. A significant impairment of the state waters or fish and wildlife resources;

b. Adverse impacts on other existing beneficial uses; or

c. A violation of water quality standards.

4. In cases where the board's assessment indicates that criteria contained in subdivisions 2 and 3 of this subsection are not met, the board may issue a permit with special conditions necessary to assure these criteria are met.

**9VAC25-210-380. Modifications to surface water withdrawal permits.**

A. In addition to the requirements of 9VAC25-210-180 B, VWP permits for surface water withdrawals may be modified when any of the following developments occur:

1. When the board determines that minimum instream flow levels resulting directly from the permittee's withdrawal of surface water are detrimental to the instream beneficial use, existing at the time of permit issuance, and the withdrawal of surface water should be subject to further net limitations or when an area is declared a surface water management area pursuant to §§ 62.1-242 through 62.1-253 of the Code of Virginia, during the term of the VWP permit.

2. Significant changes to the location of the surface water withdrawal system are proposed such that the Department of Environmental Quality determines a new review is warranted due to the potential effect of the surface water withdrawal to existing beneficial uses of the new location.

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

4. A revision to the purpose of the surface water withdrawal that proposes to include a new use or uses that were not identified in the permit application or a modification of the existing authorized use or uses such that the use description in the permit application and permit is no longer applicable.

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

1. Minor changes to the location of the surface water withdrawal system, as determined by DEQ, and thus not warranting a new review of the effect of the surface water withdrawal to existing beneficial uses.

2. Allow for temporary changes to instream flow requirements or operational permit requirements to address situations such as surface water withdrawal system improvements, environmental studies, or as otherwise determined appropriate by DEQ.

3. Changes to the permitted project that do not cause more than a minimal change to the instream flow requirements and do not have the potential to result in a detrimental effect to existing beneficial uses.

4. Changes to the monitoring methods or locations of monitoring sites for instream flow requirements or surface water withdrawal requirements.

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

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

B. For all other water supplies. The board may grant a temporary variance to any condition of a VWP permit for a surface water withdrawal during a drought. A permittee requesting such variance must affirmatively demonstrate:

1. Public health and safety interests are served by the issuance of such variance; and

2. All management actions consistent with existing permits have been exhausted.

C. As a condition of any variance granted, the permittee shall:

1. Modify operations or facilities to comply with existing VWP permit conditions as soon as practicable; or

2. Provide new information to the board that alternate permit conditions are appropriate and either apply for a new VWP permit or a modification to its existing VWP permit. The board shall review any such application consistent with other sections of this chapter.

D. In addition, the board may require the permittee to take any other appropriate action to minimize adverse impacts to other beneficial uses.

E. Any variances issued by the board shall be of the shortest duration necessary for the permittee to gain compliance with existing permit conditions, apply for a new VWP permit, or request modification of existing permit conditions.

F. Public notice of any variance issued by the board shall be given as required for draft permits in 9VAC25-210-140 A, B, and C. Such notice shall be given concurrently with the issuance of any variance and the board may modify such variances based on public comment. Publication costs of all public notices shall be the responsibility of the permittee.

Part VI
Enforcement

**9VAC25-210-500. Enforcement.**

The board may enforce the provisions of this chapter utilizing all applicable procedures under the law and § 10.1-1186 of the Code of Virginia.

Part VII
Miscellaneous

**9VAC25-210-600. Delegation of authority.**

The director, or a designee acting for him, may perform any act of the board provided under this chapter, except as limited by § 62.1-44.14 of the Code of Virginia.

**9VAC25-210-610. Transition.**

A. All applications received on or after (insert effective date of regulation), will be processed in accordance with these new procedures.

B. VWP individual permits issued prior to (insert effective date of regulation), will remain in full force and effect until such permits expire, are revoked, or are terminated and during any period of administrative continuance in accordance with 9VAC25-210-65.

C. Section 401 Water Quality Certificates issued prior to December 31, 1989, have the same effect as a VWP permit. Water Quality Certificates issued after this date will remain in effect until reissued as Virginia Water Protection Permits.

NOTICE: The following forms used in administering the regulation were filed by the agency. The forms are not being published; however, online users of this issue of the Virginia Register of Regulations may click on the name of a form with a hyperlink to access it. The forms are also available from the agency contact or may be viewed at the Office of the Registrar of Regulations, General Assembly Building, 2nd Floor, Richmond, Virginia 23219.

FORMS (9VAC25-210)

Department of Environmental Quality Water Division Permit Application Fee Form (rev. 10/14)

~~Standard Joint Permit Application for Activities in Waters and Wetlands of the Commonwealth of Virginia (eff. 7/08)~~

~~Joint Permit Application for Projects in Tidewater Virginia (eff. 10/04)~~

Standard Joint Permit Application for Activities in Waters and Wetlands of the Commonwealth of Virginia (eff. 3/2014)

Tidewater Joint Permit Application for Projects Involving Tidal Waters, Tidal Wetlands and/or Dunes and Beaches in Virginia (eff. 3/2014)

Virginia Department of Transportation, Inter-Agency Coordination Meeting Joint Permit Application~~, IACM Coordination Form~~ (eff. 6/08)

Monthly Reporting of Impacts Less than or Equal to One-Tenth Acre Statewide (eff. 8/07)

~~DEQ Application for New or Expanded Minor Surface Water Withdrawals Initiated on or after July 25, 2007~~

DOCUMENTS INCORPORATED BY REFERENCE (9VAC25-210)

~~Virginia Stormwater Management Handbook, First Edition, 1999, Volume I, Chapter 3, Department of Conservation and Recreation.~~

Classification of Wetlands and Deepwater Habitats of the United States, Cowardin, Lewis M. II, et al., United States Fish and Wildlife Service, December 1979, Reprinted 1992.

Corps of Engineers Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Eastern Mountains and Piedmont Region (Version 2.0), April 2012.

Corps of Engineers Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Atlantic and Gulf Coastal Plain Region (Version 2.0), November 2010.

Corps of Engineers Wetlands Delineation Manual, Technical Report Y-87-1, January 1987, Final Report.

Forestry Best Management Practices for Water Quality in Virginia Technical Guide, Fourth Edition, 2002, Department of Forestry.

Guidelines for Specification of Disposal Sites for Dredged or Fill Material, 40 CFR Part 230.

Hydric Soils of the United States, updated annually, United States Department of Agriculture, Natural Resources Conservation Service.

Potomac River Low Flow Allocation Agreement, January 11, 1978, § 181 of the Water Resources Development Act of 1976, Public Law 94-587, as modified on April 22, 1986.

Virginia Agricultural Best Management Practices (BMP) Manual, Revised June 2000, Department of Conservation and Recreation.

Virginia Drought Assessment and Response Plan, March 28, 2003, Drought Response Technical Advisory Committee.

Virginia Erosion and Sediment Control Handbook, Third Edition, 1992, Department of Conservation and Recreation.

Virginia Stormwater Management Handbook, First Edition, 1999, Volume I, Chapter 3, Department of Conservation and Recreation.

~~Guideline for Specification of Disposal Sites for Dredged of Fill Material, 40 CFR Part 230 (Federal Register December 24, 1980).~~

~~Potomac River Low Flow Allocation Agreement, January 11, 1978, § 181 of the Water Resources Development Act of 1976, Public Law 94-587, as modified on April 22, 1986.~~

Water Supply Coordination Agreement, July 22, 1982, an attachment to the Drought-Related Operations Manual for the Washington Metropolitan Area Water Suppliers.

VA.R. Doc. No. R14-4015; Filed October 23, 2015, 9:33 a.m.

## Proposed Regulation

REGISTRAR'S NOTICE: The State Water Control Board is claiming an exemption from Article 2 of the Administrative Process Act in accordance with § 2.2-4006 A 8 of the Code of Virginia, which exempts general permits issued by the State Water Control Board pursuant to the State Water Control Law (§ 62.1-44.2 et seq. of the Code of Virginia) if the board (i) provides a Notice of Intended Regulatory Action in conformance with the provisions of § 2.2-4007.01; (ii) following the passage of 30 days from the publication of the Notice of Intended Regulatory Action forms a technical advisory committee composed of relevant stakeholders, including potentially affected citizens groups, to assist in the development of the general permit; (iii) provides notice and receives oral and written comment as provided in § 2.2-4007.03; and (iv) conducts at least one public hearing on the proposed general permit.

Title of Regulation: **9VAC25-660. Virginia Water Protection General Permit for Impacts Less Than One-Half of an Acre (amending 9VAC25-660-10 through 9VAC25-660-100; adding 9VAC25-660-15, 9VAC25-660-25, 9VAC25-660-27, 9VAC25-660-35; repealing 9VAC25-660-95).**

Statutory Authority: § 62.1-44.15 of the Code of Virginia; § 401 of the Clean Water Act (33 USC § 1251 et seq.).

Public Hearing Information:

January 11, 2016 - 1:30 p.m. - James City County Board of Supervisors, Board Room, Building F, 101 Mounts Bay Road, Williamsburg, VA 23185

January 12, 2016 - 1:30 p.m. - Department of Environmental Quality, Northern Regional Office, 13901 Crown Court, Woodbridge, VA 22193

January 13, 2016 - 1:30 p.m. - Department of Environmental Quality, Blue Ridge-Roanoke Regional Office, 3019 Peters Creek Road, Roanoke, VA 24019

Public Comment Deadline: January 29, 2016.

Agency Contact: Brenda Winn, Department of Environmental Quality, 629 East Main Street, P.O. Box 1105, Richmond, VA 233218, telephone (804) 698-4516, FAX (804) 698-4032, or email brenda.winn@deq.virginia.gov.

Summary:

*The regulatory action reissues the existing general permit that expires on August 1, 2016. The proposed amendments (i) revise or clarify which activities in specific water sources require application for a permit authorization and which activities are excluded; (ii) revise and clarify the application process, including the administrative and technical information required to achieve a complete permit application; (iii) revise and clarify the compensatory mitigation requirements, including the sequencing of acceptable compensatory mitigation actions and compensatory mitigation provisions, the requirements for compensating impacts to open waters, or the compensation necessary for temporary impacts; (iv) modify provisions related to application processing, informational requirements, or actions occurring post-permit authorization for coverage; (v) modify permit authorization transitions between general permit cycles; (vi) delete the authorization term of three years and provisions for continuation of permit authorization coverage; (vii) incorporate certain federal regulatory provisions; (viii) clarify and update definitions; (ix) reorganize the regulation; and (x) clarify and correct grammar, spelling, and references.*

CHAPTER 660

VIRGINIA WATER PROTECTION GENERAL PERMIT FOR IMPACTS LESS THAN ONE-HALF ~~OF AN~~ ACRE

**9VAC25-660-10. Definitions.**

The words and terms used in this chapter shall have the meanings defined in the State Water Control Law (§ 62.1-44.2 et seq. of the Code of Virginia) and the Virginia Water Protection ~~(VWP)~~ Permit Program Regulation (9VAC25-210) unless a different meaning is required by the context ~~clearly indicates otherwise~~ or ~~unless otherwise~~ is indicated below.

"Bank protection" means measures employed to stabilize channel banks and combat existing erosion problems. Such measures may include the construction of riprap revetments, sills, rock vanes, beach nourishment, breakwaters, bulkheads, groins, spurs, levees, marsh toe stabilization, anti-scouring devices, and submerged sills.

"Bioengineering method" means a biological measure incorporated into a facility design to benefit water quality and minimize adverse effects to aquatic resources, to the maximum extent practicable, for long-term aquatic resource protection and improvement.

~~"Channelization" means the alteration of a stream channel by widening, deepening, straightening, cleaning or paving certain areas.~~

"Coverage" means authorization to conduct a project in accordance with a VWP general permit.

~~"Cross sectional drawing" means a graph or plot of ground elevation across a waterbody or a portion of it, usually along a line perpendicular to the waterbody or direction of flow.~~

~~"Emergent wetland" means a class of wetlands characterized by erect, rooted, herbaceous plants growing in water or on a substrate that is at least periodically deficient in oxygen as a result of excessive water content, excluding mosses and lichens. This vegetation is present for most of the growing season in most years and is usually dominated by perennial plants.~~

~~"FEMA" means the Federal Emergency Management Agency.~~

~~"Forested wetland" means a class of wetlands characterized by woody vegetation that is six meters (20 feet) tall or taller. These areas typically possess an overstory of trees, an understory of trees or shrubs, and an herbaceous layer.~~

"DEQ" means the Department of Environmental Quality.

"Histosols" means organic soils that are often called mucks, peats, or mucky peats. The list of histosols in the Commonwealth includes, but is not limited to, the following soil series: Back Bay, Belhaven, Dorovan, Lanexa, Mattamuskeet, Mattan, Palms, Pamlico, Pungo, Pocaty, and Rappahannock. Histosols are identified in the Hydric ~~soils list~~ Soils of the United States lists generated by the ~~United States~~ U.S. Department of Agriculture's Natural Resources Conservation Service.

~~"Impacts" means results caused by human-induced activities conducted in surface waters as specified in § 62.1-44.15:20 A of the Code of Virginia.~~

"Independent utility" means a test to determine what constitutes a single and complete project. A project is considered to have independent utility if it would be constructed absent the construction of other projects in the project area. Portions of a phased project that depend upon other phases of the project do not have independent utility. Portions of a phased project that would be constructed even if the other phases are not built can be considered as separate single and complete projects with independent public and economic utility.

~~"Isolated Wetland of Minimal Ecological Value (IWOMEV)" means a wetland that (i) does not have a surface water connection to other state waters; (ii) is less than one-tenth of an acre in size; (iii) is not located in a Federal Emergency Management Agency designated 100-year floodplain; (iv) is not identified by the Virginia Natural Heritage Program as a rare or state significant natural community; (v) is not forested; and (vi) does not contain listed federal or state threatened or endangered species.~~

"Less than one-half ~~of an~~ acre" means ~~0.49~~ less than 0.50 acre ~~(21,779 square feet) or less~~ (21,780 square feet).

"Notice of project completion" means a statement signed by the permittee or authorized agent that the authorized activities and any required compensatory mitigation have been completed.

~~"Open water" means an area that, during a year with normal patterns of precipitation, has standing water for sufficient duration to establish an ordinary high water mark. The term "open water" includes lakes and ponds but does not include ephemeral waters, stream beds, or wetlands.~~

~~"Ordinary high water" or "ordinary high water mark" means the line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank; shelving; changes in the character of soil; destruction of terrestrial vegetation; the presence of litter and debris; or other appropriate means that consider the characteristics of the surrounding areas.~~

~~"Perennial stream" means a well-defined channel that contains water year-round during a year of normal rainfall. Generally, the water table is located above the streambed for most of the year and groundwater is the primary source for stream flow. A perennial stream exhibits the typical biological, hydrological, and physical characteristics commonly associated with the continuous conveyance of water.~~

~~"Permanent impacts" means those impacts to surface waters, including wetlands, that cause a permanent alteration of the physical, chemical, or biological properties of the surface waters, or of the functions and values of a wetland.~~

~~"Person" means an individual, corporation, partnership, association, governmental body, municipal corporation, or any other legal entity.~~

~~"Riprap" means a layer of nonerodible material such as stone or chunks of concrete.~~

"Single and complete project" means the total project proposed or accomplished by a person, which also has independent utility, as defined in this section. For linear projects, the "single and complete project" (e.g., a single and complete crossing) will apply to each crossing of a separate surface water (e.g., a single ~~waterbody)~~ water body) and to multiple crossings of the same ~~waterbody~~ water body at separate and distinct locations. Phases of a project that have independent public and economic utility may each be considered single and complete.

"State program general permit (SPGP)" means a general permit that is issued by the Department of the Army in accordance with ~~33 USC 1344(e), 33 CFR 325.2(e)(2),~~ 33 USC § 1344 and ~~33 CFR 325.3(b)~~ 33 CFR 325.5(c)(3) and that is founded on a state program. The SPGP is designed to avoid duplication between the federal and state programs.

~~"Stream bed" means the substrate of a stream, as measured between the ordinary high water marks along a length of stream. The substrate may consist of organic matter, bedrock or inorganic particles that range in size from clay to boulders, or a combination of both. Areas contiguous to the stream bed, but outside of the ordinary high water marks, are not considered part of the stream bed.~~

~~"Surface waters" means all state waters that are not ground water as defined in § 62.1-255 of the Code of Virginia.~~

~~"Temporary impacts" are those impacts to surface waters, including wetlands, that do not cause a permanent alteration of the physical, chemical, or biological properties of the surface water, or of the functions and values of a wetland. Temporary impacts include activities in which the ground is restored to its preconstruction conditions, contours, or elevations, such that previous functions and values are restored.~~

"Up to 300 linear feet" means ~~>0.00 to~~ 300.00 linear feet or less, as measured along the center of the main channel of the stream segment.

"Up to one-tenth ~~of an~~ acre" means 0.10 acre (4,356 square feet) or less.

"Utility line" means a pipe or pipeline for the transportation of a gaseous, liquid, liquefiable or slurry substance, for any purpose, and a cable, line, or wire for the transmission for any purpose of electrical energy, telephone, and telegraph messages and radio and television communication. The term "utility line" does not include activities that drain a surface water to convert it to an upland, such as drainage tiles or french drains; however, it does apply to pipes conveying drainage from another area.

**9VAC25-660-15. Statewide information requirements.**

The board may request (i) such plans, specifications, and other pertinent information as may be necessary to determine the effect of an applicant's discharge on the quality of state waters or (ii) such other information as may be necessary to accomplish the purposes of this chapter. Any owner, permittee, or person applying for a VWP permit or general permit coverage shall provide the information requested by the board.

**9VAC25-660-20. Purpose; delegation of authority~~; effective date of VWP general permit~~.**

A. The purpose of this regulation is to establish VWP General Permit Number WP1 under the VWP permit program regulation to govern permanent and temporary impacts to less than one-half ~~of an~~ acre of nontidal wetlands or open water and up to 300 linear feet of nontidal stream bed. Applications for coverage by this VWP general permit shall be processed for approval, approval with conditions, or denial by the board. ~~Authorization, authorization~~ Coverage, coverage with conditions, or application denial by the board shall constitute the VWP general permit action~~. Each VWP general permit action~~ and shall follow all provisions in the State Water Control Law (§ 62.1-44.2 et seq. of the Code of Virginia), except for the public comment and participation provisions, from which each VWP general permit action is exempt.

B. The director~~,~~ or his designee~~,~~ may perform any act of the board provided under this chapter, except as limited by § 62.1-44.14 of the Code of Virginia.

~~C. This VWP general permit regulation will become effective on August 1, 2006, and will expire on August 1, 2016.~~

~~D. Authorization to impact surface waters under this VWP general permit is effective upon compliance with all the provisions of 9VAC25-660-30. Notwithstanding the expiration date of this general permit regulation, authorization to impact surface waters under this VWP general permit will continue for three years.~~

**9VAC25-660-25. Authorization for coverage under VWP general permit effective August 1, 2006.**

A. All complete applications or notifications received by the board through 11:59 p.m. on August 1, 2016, shall be processed in accordance with the VWP general permit regulation in effect August 1, 2006, through August 1, 2016. If the application or notification is incomplete or if there is not adequate time as allowed by § 62.1-44.15:21 of the Code of Virginia to make a completeness determination, the applicant shall reapply for coverage under the VWP general permit effective August 2, 2016, or apply for a VWP individual permit, including payment of any required permit application fee. No refund of permit application fees shall be made.

B. VWP general permit authorizations granted through 11:59 p.m. on August 1, 2016, shall remain in full force and effect until 11:59 p.m. on the expiration date stated on the VWP authorization cover page, unless otherwise revoked or terminated or unless a notice of project completion is received by the board on or before that date. Any permittee that desires to continue an authorized activity beyond the stated expiration date must reapply for coverage under the VWP general permit effective August 2, 2016, pursuant to its terms, standards, and conditions, or apply for a VWP individual permit, including payment of any required permit application fee. This section shall only apply to permittees holding valid authorizations for coverage granted under the VWP general permit effective August 1, 2006, through August 1, 2016.

**9VAC25-660-27. VWP general permit coverage; transition; continuation.**

A. All applications or notifications received on or after August 2, 2016, will be processed in accordance with the VWP general permit regulation effective August 2, 2016.

B. The general permit in 9VAC25-660-100 is effective August 2, 2016, and expires August 1, 2031. Any coverage that is granted pursuant to 9VAC25-660-30 shall remain in full force and effect until 11:59 p.m. on August 1, 2031, unless the general permit coverage is terminated or revoked or unless a notice of project completion is received by the board on or before this date. Where a permittee that has received general permit coverage desires to continue or complete the authorized activities beyond August 1, 2031, the permittee shall reapply for new general permit coverage or for a VWP individual permit, including payment of any required permit application fee. Activities in surface waters requiring a permit shall not commence or continue until VWP general permit coverage is granted or a VWP individual permit is issued by the board.

C. Application may be made at any time for a VWP individual permit in accordance with 9VAC25-210. Activities in surface waters requiring a permit shall not commence or continue until VWP general permit coverage is granted or a VWP individual permit is issued by the board.

**9VAC25-660-30. Authorization to impact surface waters.**

A. Any person ~~governed by this~~ granted coverage under the VWP general permit ~~is authorized to~~ effective August 2, 2016, may permanently or temporarily impact less than one-half ~~of an~~ acre of nontidal wetlands or open water and up to 300 linear feet of nontidal stream bed, provided that:

1. The applicant submits notification as required in 9VAC25-660-50 and 9VAC25-660-60.

2. The applicant remits ~~the~~ any required permit application ~~processing~~ fee ~~in accordance with 9VAC25-20~~.

3. The applicant receives general permit coverage from the Department of Environmental Quality and complies with the limitations and other requirements of ~~9VAC25-660-100~~ the VWP general permit; the general permit coverage; the Clean Water Act, as amended; and the State Water Control Law and attendant regulations.

~~4. The applicant receives approval from the Virginia Department of Environmental Quality.~~

~~5.~~ 4. The applicant has not been required to obtain a VWP individual permit under the VWP permit regulation (9VAC25-210) for the proposed project impacts. The applicant, at his discretion, may seek a VWP individual permit~~,~~ or coverage under another applicable VWP general permit~~,~~ in lieu of coverage under this VWP general permit.

~~6.~~ 5. Impacts, both temporary and permanent, result from a single and complete project, including all attendant features.

a. Where a road segment (e.g., the shortest segment of a road with independent utility that is part of a larger project) has multiple crossings of surface waters (several single and complete projects), the board may, at its discretion, require a VWP individual permit.

b. For the purposes of this chapter, when an interchange has multiple crossings of surface waters, the entire interchange shall be considered the single and complete project.

~~7.~~ 6. The stream impact criterion applies to all components of the project, including structures and stream channel manipulations.

~~8.~~ 7. When required, compensation for unavoidable impacts is provided in ~~the form of the purchase or use of credits from an approved mitigation bank or a contribution to an approved in-lieu fee fund~~ accordance with 9VAC25-660-70 and the associated provisions of 9VAC25-210-116.

~~B. Only activities in nontidal waters may qualify for coverage under this VWP general permit.~~

~~C.~~ B. The board waives the requirement for coverage under a VWP general permit for activities that occur in an isolated wetland of minimal ecological value, as defined in ~~9VAC25-660-10~~ 9VAC25-210-10. ~~Any~~ Upon request by the board, any person claiming this waiver ~~bears the burden to~~ shall demonstrate to the satisfaction of the board that he qualifies for the waiver.

~~D.~~ C. ~~Receipt of~~ Coverage under this VWP general permit does not relieve the permittee of the responsibility to comply with any other applicable federal, state, or local statute, ordinance, or regulation.

~~E. In issuing this VWP general permit, the board has not taken into consideration the structural stability of the proposed structure or structures.~~

~~F.~~ D. Coverage under a nationwide or regional permit promulgated by the U.S. Army Corps of Engineers (USACE), and for which the board has issued § 401 certification ~~existing~~ in accordance with 9VAC25-210-130 H as of ~~August 1, 2006~~ August 2, 2016, shall constitute coverage under this VWP general permit unless a state program general permit (SPGP) is ~~approved~~ required and granted for the ~~covered~~ activity or impact. ~~Notwithstanding any other provision, activities authorized under a nationwide or regional permit promulgated by the USACE and certified by the board in accordance with 9VAC25-210-130 do not need to obtain coverage under this VWP general permit unless a state programmatic general permit is approved for the covered activity or impact.~~

~~G.~~ E. When the board determines on a case-by-case basis that concerns for water quality and the aquatic environment so indicate, the board may require ~~individual applications and~~ a VWP individual ~~permits~~ permit in accordance with 9VAC25-210-130 B rather than ~~approving~~ granting coverage under this VWP general permit.

**9VAC25-660-35. Administrative continuance.**

Beginning on August 2, 2016, in any case where an existing permittee has submitted a timely and complete notification or application for coverage under the next consecutive VWP general permit, in accordance with 9VAC25-660-50 and 9VAC25-660-60 and the board, through no fault of the permittee, does not issue the next consecutive VWP general permit with an effective date on or before the expiration date of the expiring VWP general permit, the conditions of that expiring VWP general permit and any requirements of coverage granted under it shall continue in force until the effective date of the next consecutive VWP general permit.

**9VAC25-660-40. Exceptions to coverage.**

A. ~~Authorization for coverage~~ Coverage under this VWP general permit ~~will not apply in the following areas:~~ is not required if the activity is excluded from permitting in accordance with 9VAC25-210-60.

~~1. Wetlands composed of 10% or more of the following species (singly or in combination) in a vegetative stratum: Atlantic white cedar (Chamaecyparis thyoides), bald~~

~~cypress (Taxodium distichum), water tupelo (Nyssa aquatica), or overcup oak (Quercus lyrata). Percentages shall be based on either basal area or percent areal cover in the area of impact.~~

~~2. Wetlands underlain by histosols.~~

~~3. Nontidal wetlands adjacent to tidal waters.~~

~~4. 100-year floodplains as identified by FEMA's flood insurance rate maps or FEMA approved local floodplain maps.~~

~~5. Surface waters where the proposed activity will impact federal or state listed or proposed threatened or endangered species or proposed or designated critical habitat.~~

B. ~~Authorization for coverage~~ Coverage under this VWP general permit cannot be used in combination with ~~authorizations for~~ coverage under other VWP general permits in order to impact greater than one-half ~~of an~~ acre of nontidal wetlands or open water or greater than 300 linear feet of nontidal stream bed. ~~More than one authorization for~~ Granting coverage under this VWP general permit more than once for a single and complete project is prohibited, except when the cumulative impact to surface waters does not exceed the limits specified here.

C. The activity to impact surface waters shall not have been prohibited by state law or regulations, nor shall it contravene applicable Water Quality Standards (9VAC25-260).

D. The board shall deny application for coverage under this VWP general permit to any applicant ~~for~~ conducting activities that cause, may reasonably be expected to cause, or may be contributing to a violation of water quality standards, including discharges or discharge-related activities that are likely to significantly affect aquatic life, or for activities that together with other existing or proposed impacts to wetlands will cause or contribute to a significant impairment of state waters or fish and wildlife resources.

E. This VWP general permit does not authorize activities that cause more than minimal changes to the peak hydraulic flow characteristics, that significantly increase flooding, or that cause more than minimal degradation of the water quality of a stream.

F. ~~This~~ Coverage under this VWP general permit ~~may~~ shall not be ~~used~~ granted for:

1. ~~Any~~ Construction of a stormwater management facility ~~that is located~~ in perennial streams or in waters designated as ~~oxygen~~ oxygen-impaired or ~~temperature impaired~~ temperature-impaired (does not include wetlands).

2. The construction of an irrigation impoundment on a perennial stream.

3. Any water withdrawal activities.

4. The location of animal feeding operations or waste storage facilities in state waters.

5. The pouring of wet or uncured concrete ~~or the use of tremie concrete or grout bags~~ in state waters, unless the area is contained within a cofferdam or the work is performed in the dry or unless approved by the Department of Environmental Quality.

6. Dredging or maintenance dredging.

7. Return flow discharges from dredge disposal sites.

8. The construction of new ski areas or oil and gas wells.

9. ~~The~~ Any activity in surface waters that will impact federal or state listed or proposed threatened or endangered species or proposed or designated critical habitat, or be the taking of threatened or endangered species in accordance with the following:

a. As pursuant to § 29.1-564 of the Code of Virginia, the taking, transportation, processing, sale, or offer for sale within the Commonwealth of any fish or wildlife appearing on any list of threatened or endangered species published by the United States Secretary of the Interior pursuant to the provisions of the federal Endangered Species Act of 1973 ~~(P.L.~~ Public Law 93-205), or any modifications or amendments thereto, is prohibited except as provided in § 29.1-568 of the Code of Virginia.

b. As pursuant to § 29.1-566 of the Code of Virginia and 4VAC15-20-130 B and C, the taking, transportation, processing, sale, or offer for sale within the Commonwealth of any state-listed endangered or threatened species is prohibited except as provided in § 29.1-568 of the Code of Virginia.

10. Any activity in 100-year floodplains, as identified by the Federal Emergency Management Agency's (FEMA) flood insurance rate maps or FEMA-approved local floodplain maps.

11. Any activity in wetlands composed of 10% or more, singularly or in combination, based upon either basal area or percent areal cover in the area of impact, in a vegetative stratum: Atlantic white cedar (Chamaecyparis thyoides), bald cypress (Taxodium distichum), water tupelo (Nyssa aquatica), or overcup oak (Quercus lyrata).

12. Any activity in wetlands underlain by histosols.

13. Any activity in tidal waters or in nontidal wetlands adjacent to tidal waters.

**9VAC25-660-50. Notification.**

A. Notification to the board will be required prior to commencing construction, as follows:

1. An application for ~~authorization of~~ coverage for proposed, permanent nontidal wetland or open water impacts greater than one-tenth ~~of an~~ acre~~,~~ or ~~of~~ for proposed, permanent nontidal stream bed impacts greater than 300 linear feet shall include all information pursuant to 9VAC25-660-60 B~~, except for 9VAC25-660-60 B 20 when the application is for a Virginia Department of Transportation (VDOT) administered project. VDOT shall provide the information in 9VAC25-660-60 B 20 through the VDOT State Environmental Review Process, the~~

~~National Environmental Policy Act (42 USC § 4321 et seq.) (for federal actions), or the VDOT Geographic Information System~~. Compensatory mitigation may be required for all permanent impacts ~~in accordance with Parts I, II, and III of this VWP general permit regulation. All temporary impacts shall be restored to preexisting conditions, as per Parts I, II, and III of this VWP general permit regulation~~.

2. An application for ~~the authorization of~~ coverage for proposed, permanent nontidal wetland or open water impacts up to one-tenth ~~of an~~ acre~~,~~ or of proposed, permanent nontidal stream bed impacts up to 300 linear feet~~,~~ shall be submitted ~~as follows~~ in accordance with either subdivision 2 a or 2 b of this subsection:

a. ~~For a proposed VDOT-administered project that is not subject to subdivision 2 c of this subsection, the application shall include the information required by subdivisions 1 through 8, 13, 15, and 21 of 9VAC25-660-60 B. The VDOT Quarterly Reporting of Impacts Less Than One-Tenth Acre application may be used, provided that it contains the required information. Compensatory mitigation may be required for all permanent impacts once the notification limits of one-tenth acre wetlands or open water, or 300 linear feet of stream bed, are exceeded. All temporary impacts, regardless of amount, shall be restored to preexisting conditions, as per Parts I and III of this VWP general permit regulation.~~ For any proposed project in wetlands, open water, streams, or compensatory mitigation sites that are under a deed restriction, conservation easement, declaration of restrictive covenant, or other land use protective instrument (hereafter "protected areas"), when such restriction, easement, covenant, or instrument is the result of a federal or state permit action and is specific to activities in wetlands and compensatory mitigation sites, the application shall include all of the information required by 9VAC25-660-60 B. Compensatory mitigation may be required for all permanent impacts.

b. For all other projects ~~that are not subject to subdivision 2 c of this subsection~~, the application shall include the information required by subdivisions ~~1 through 9, 13, 15, 20, and 21~~ 1 through 7, 10, 11, 15, and 16 of 9VAC25-660-60 B~~,~~ and documentation that verifies the quantity and type of impacts. Compensatory mitigation may be required for all permanent impacts once the notification limits of one-tenth acre wetlands or open water, or 300 linear feet of stream bed, are exceeded, and if required, the application shall include the information in 9VAC25-660-60 B 12. ~~All temporary impacts, regardless of amount, shall be restored to preexisting conditions, as per Parts I and III of this VWP general permit regulation.~~

~~c. For any proposed project in wetlands, open water, streams, or compensatory mitigation sites that are under a deed restriction, conservation easement, restrictive covenant, or other land use protective instrument (hereafter protected areas), when such restriction, easement, covenant, or instrument is the result of a federal or state permit action and is specific to activities in wetlands and compensatory mitigation sites, the application shall include all of the information required by 9VAC25-660-60 B, and documentation that verifies the quantity and type of impacts. Application for a VDOT-administered project shall provide the required information in 9VAC25-660-60 B 20 through the VDOT State Environmental Review Process, the National Environmental Policy Act (for federal actions), or the VDOT Geographic Information System. Compensatory mitigation may be required for all permanent impacts, regardless of amount. All temporary impacts, regardless of amount, shall be restored to preexisting conditions, as per Parts I and III of this VWP general permit regulation.~~

B. ~~A Joint Permit Application (JPA), a Virginia Department of Transportation Interagency Coordination Meeting Joint Permit Application (VDOT IACM JPA), or a VDOT Quarterly Reporting of Impacts Less Than One-Tenth Acre~~ The Department of Environmental Quality-approved application forms shall serve as an application ~~under this regulation~~ for a VWP permit or VWP general permit coverage.

C. The board will determine whether the proposed activity requires coordination with the ~~United States~~ U.S. Fish and Wildlife Service, the Virginia Department of Conservation and Recreation, the Virginia Department of Agriculture and Consumer Services, and the Virginia Department of Game and Inland Fisheries regarding the presence of federal or state proposed or listed threatened and endangered species or proposed or designated critical habitat. Based upon consultation with these agencies, the board may deny application for coverage under this general permit. The applicant may also consult with these agencies prior to submitting an application. Species or habitat information that the applicant provides will assist ~~DEQ~~ the Department of Environmental Quality in reviewing and processing the application.

**9VAC25-660-60. Application.**

A. ~~Applications shall be filed with the board as follows: 1.~~ The applicant shall file a complete application in accordance with 9VAC25-660-50 and this section for ~~a~~ coverage under this VWP ~~General Permit WP1~~ general permit for impacts to nontidal wetlands or open water of less than one-half ~~of an~~ acre and up to 300 linear feet of nontidal stream bed~~, which will serve as a notice of intent for coverage under this VWP general permit~~.

~~2. The VDOT may use its monthly IACM process for submitting applications.~~

B. ~~The required~~ A complete application ~~shall contain~~ for VWP general permit coverage, at a minimum, consists of the following information~~,~~ if applicable to the project:

1. The applicant's legal name, mailing address, ~~and~~ telephone number, and~~,~~ if applicable, electronic mail address and fax number.

2. If different from the applicant, legal name, mailing address, telephone number, and if applicable, electronic mail address and fax number of property owner.

~~2. The~~ 3. If applicable, the authorized agent's ~~(if applicable)~~ name, mailing address, telephone number, and~~,~~ if applicable, fax number and electronic mail address.

~~3.~~ 4. The existing VWP general permit tracking number ~~(if applicable)~~, if applicable.

~~4. The name of the project, narrative description of project purpose, and a description of the proposed activity in surface waters.~~

~~5. The name of the water body or water bodies or receiving stream, as applicable.~~

~~6. The hydrologic unit code (HUC) for the project area.~~

~~7. The name of the city or county where the project is located.~~

~~8. Latitude and longitude (to the nearest second) from a central location within the project limits.~~

~~9. A detailed location map (e.g., a United States Geologic Survey topographic quadrangle map) of the project area, including the project boundary. The map shall be of sufficient detail such that the site may be easily located for site inspection.~~

~~10. (Reserved.)~~

~~11. The project plan view. Plan view sketches shall include, at a minimum, north arrow, scale, existing structures, existing contours, proposed contours (if available), limit of surface water areas, direction of flow, ordinary high water, impact limits, and location and dimension of all proposed structures in impact areas. In addition, cross sectional or profile sketches with the above information may be required to detail impact areas.~~

~~12. (Reserved.)~~

~~13. Surface water impact information (wetlands, streams, or open water) for both permanent and temporary impacts, including a description of the impact, the areal extent of the impact (area of wetland in square feet and acres; area of stream, length of stream, and average width); the location (latitude and longitude) at the center of the impact, or at the center of each impact for linear projects; and the type of surface water impact (open water; wetlands according to the Cowardin classification or similar terminology; or perennial and nonperennial for streams). The board encourages applicants to coordinate the determination of perennial or nonperennial streams with the appropriate local government agency in Tidewater Virginia.~~

~~14. (Reserved.)~~

~~15. A description of the specific on-site measures considered and taken during project design and development both to avoid and minimize impacts to surface waters to the maximum extent practicable.~~

~~16. A conceptual plan for the intended compensation for unavoidable impacts, including:~~

~~a. Applicants proposing compensation involving contributions to an in-lieu fee fund shall state such as their conceptual compensation plan. Written documentation of the willingness of the entity to accept the donation and documentation of how the amount of the contribution was calculated shall be submitted prior to issuance of this VWP general permit authorization; and~~

~~b. Applicants proposing compensation involving the purchase or use of mitigation banking credits shall include as their conceptual compensation plan:~~

~~(1) The name of the proposed mitigation bank and the HUC in which it is located;~~

~~(2) The number of credits proposed to be purchased or used; and~~

~~(3) Certification from the bank owner of the availability of credits.~~

~~17. A delineation map of the geographic area of a delineated wetland for all wetlands on the site, in accordance with 9VAC25-210-45, including the wetlands data sheets. The delineation map shall also include the on-site location of streams, open water, and the approximate limits of Chesapeake Bay Resource Protection Areas (RPAs), as other state or local requirements may apply if the project is located within an RPA. Wetland types shall be noted according to their Cowardin classification or similar terminology. A copy of the USACE delineation confirmation, or other correspondence from the USACE indicating their approval of the wetland boundary, shall be provided at the time of application, or if not available at that time, as soon as it becomes available during the VWP permit review.~~

~~18. A copy of the FEMA flood insurance rate map or FEMA approved local floodplain map for the project site (impacts that include linear feet of stream bed must be converted to a square footage or acreage using the stream width in order to calculate the permit application fee).~~

~~19. The appropriate application processing fee for a VWP general permit in accordance with 9VAC25-20. The permit application fee for VWP permit authorizations is based on acres only. Therefore, impacts that include linear feet of stream bed must be converted to an acreage in order to calculate the permit application fee.~~

~~20. A written disclosure identifying all wetlands, open water, streams, and associated upland buffers within the proposed project or compensation areas that are under a deed restriction, conservation easement, restrictive~~

~~covenant, or other land use protective instrument (protected areas). Such disclosure shall include the nature of the prohibited activities within the protected areas.~~

~~21. The following certification:~~

~~"I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system or those persons directly responsible for gathering the information, the information submitted is to the best of my knowledge and belief true, accurate, and complete. I am aware that there are significant penalties for submitting false information including the possibility of fine and imprisonment for knowing violations."~~

~~C. The application shall be signed in accordance with 9VAC25-210-100. If an agent is acting on behalf of an applicant, the applicant shall submit an authorization of the agent that includes the signatures of both the applicant and the agent.~~

5. Project name and proposed project schedule.

6. The following information for the project site location, if applicable:

a. The physical street address, nearest street, or nearest route number; city or county; zip code; and if applicable, parcel number of the site or sites.

b. Name of the impacted water body or water bodies, or receiving waters, as applicable, at the site or sites.

c. The latitude and longitude to the nearest second at the center of the site or sites.

d. The fourth order subbasin, as defined by the hydrologic unit boundaries of the National Watershed Boundary Dataset, for the site or sites.

e. A detailed map depicting the location of the site or sites, including the project boundary. The map (e.g., a United States Geologic Survey topographic quadrangle map) should be of sufficient detail to easily locate the site or sites for inspection.

f. GIS-compatible shapefile or shapefiles of the project boundary and all existing preservation areas on the site or sites, unless otherwise approved by or coordinated with DEQ. The requirement for a GIS-compatible shapefile or shapefiles may be waived by DEQ on a case-by-case basis.

7. A narrative description of the project, including project purpose and need.

8. Plan-view drawing or drawings of the project site sufficient to assess the project, including at a minimum the following:

a. North arrow, graphic scale, and existing and proposed topographic or bathymetric contours.

b. Limits of proposed impacts to surface waters.

c. Location of all existing and proposed structures.

d. All delineated wetlands and all jurisdictional surface waters on the site, including the Cowardin classification (i.e., emergent, scrub-shrub, or forested) for those surface waters and waterway name if designated; ebb and flood or direction of flow; and ordinary high water mark in nontidal areas.

e. The limits of Chesapeake Bay Resource Protection Areas (RPAs) as field-verified by the applicant and if available, the limits as approved by the locality in which the project site is located unless the proposed use is exempt from the Chesapeake Bay Preservation Area Designation and Management Regulations (9VAC25-830).

f. The limits of areas that are under a deed restriction, conservation easement, restrictive covenant, or other land use protective instrument (i.e., protected areas).

9. Cross-sectional and profile drawing or drawings. Cross-sectional drawing or drawings of each proposed impact area shall include at a minimum a graphic scale, existing structures, existing and proposed elevations, limits of surface water areas, ebb and flood or direction of flow (if applicable), ordinary high water mark in nontidal areas, impact limits, and location of all existing and proposed structures. Profile drawing or drawings with this information may be required on a case-by-case basis to demonstrate minimization of impacts. Any application that proposes piping or culverting stream flows shall provide a longitudinal profile of the pipe or culvert position and stream bed thalweg, or shall provide spot elevations of the stream thalweg at the beginning and end of the pipe or culvert, extending to a minimum of 10 feet beyond the limits of proposed impact.

10. A narrative description of all impacts proposed to surface waters, including the type of activity to be conducted in surface waters and any physical alteration to surface waters. Surface water impacts shall be identified as follows:

a. Wetland impacts identified according to their Cowardin classification (i.e., emergent, scrub-shrub, or forested), and for each classification, the individual impacts quantified in square feet to the nearest whole number, cumulatively summed in square feet, and then the sum converted to acres and rounded to two decimal places using commonly accepted arithmetic principles of rounding.

b. Individual stream impacts quantified in linear feet to the nearest whole number and then cumulatively summed, and when compensatory mitigation is required, the impacts identified according to the assessed type using the Unified Stream Methodology.

c. Open water impacts identified according to their Cowardin classification, and for each type, the individual impacts quantified in square feet to the nearest whole number, cumulatively summed in square feet, and then the sum converted to acres and rounded to two decimal places using commonly accepted arithmetic principles of rounding.

d. A copy of the approved jurisdictional determination, if available, or the preliminary jurisdictional determination from the U.S. Army Corps of Engineers (USACE), U.S. Department of Agriculture Natural Resources Conservation Service (NRCS), or DEQ, or other correspondence from the USACE, NRCS, or DEQ indicating approval of the boundary of applicable jurisdictional surface waters, including wetlands data sheets if applicable.

e. A delineation map and GIS-compatible shapefile or shapefiles of the delineation map that depicts the geographic area or areas of all surface water boundaries delineated in accordance with 9VAC25-210-45 and confirmed in accordance with the jurisdictional determination process; identifies such areas in accordance with subdivisions 10 a, 10 b, and 10 c of this subsection; and quantifies and identifies any other surface waters according to their Cowardin classification (i.e., emergent, scrub-shrub, or forested) or similar terminology, if applicable. The requirements for a delineation map or GIS-compatible shapefile or shapefiles may be waived by DEQ on a case-by-case basis.

11. An alternatives analysis for the proposed project detailing the specific on-site measures taken during project design and development to first avoid and then minimize impacts to surface waters to the maximum extent practicable in accordance with the Guidelines for Specification of Disposal Sites for Dredged or Fill Material, 40 CFR Part 230. Avoidance and minimization includes, but is not limited to, the specific on-site measures taken to reduce the size, scope, configuration, or density of the proposed project, including review of alternative sites where required for the project, which would avoid or result in less adverse impact to surface waters, and documentation demonstrating the reason the applicant determined less damaging alternatives are not practicable. The analysis shall demonstrate to the satisfaction of the board that avoidance and minimization opportunities have been identified and measures have been applied to the proposed activity such that the proposed activity in terms of impacts to state waters and fish and wildlife resources is the least environmentally damaging practicable alternative.

12. A compensatory mitigation plan to achieve no net loss of wetland acreage or functions or stream functions and water quality benefits. Any compensatory mitigation plan proposing the purchase of mitigation bank or in-lieu fee program credits shall include the number and type of credits proposed to be purchased and documentation from the approved bank or in-lieu fee program sponsor of the availability of credits at the time of application.

13. A copy of the FEMA flood insurance rate map or FEMA-approved local floodplain map depicting any 100-year floodplains.

14. Permit application fee. The applicant will be notified by the board as to the appropriate fee for the project.

15. A written description and a graphical depiction identifying all upland areas including buffers, wetlands, open water, other surface waters, and compensatory mitigation areas located within the proposed project boundary that are under a deed restriction, conservation easement, restrictive covenant, or other land use protective instrument (i.e., protected areas). Such description and a graphical depiction shall include the nature of the prohibited activities within the protected areas and the limits of Chesapeake Bay Resource Protection Areas (RPAs) as field-verified by the applicant and if available, the limits as approved by the locality in which the project site is located, unless the proposed use is exempt from the Chesapeake Bay Preservation Area Designation and Management Regulations (9VAC25-830), as additional state or local requirements may apply if the project is located within an RPA.

16. Signature page that has been signed, dated, and certified by the applicant in accordance with 9VAC25-210-100. If the applicant is a business or other organization, the signature must be made by an individual with the authority to bind the business or organization, and the title of the signatory must be provided. The application signature page, either on the copy submitted to the Virginia Marine Resources Commission or to DEQ, must have an original signature. Electronic submittals containing the original signature page, such as that contained in a scanned document file, are acceptable.

~~D.~~ C. Upon receipt of an application from the Department of Transportation for a road or highway construction project by the appropriate DEQ office, the board has 10 business days, pursuant to § 33.2-258 of the Code of Virginia, to review the application and either determine the information requested in subsection B of this section is complete or inform the Department of Transportation that additional information is required to make the application complete ~~(pursuant to § 33.1 19.1 of the Code of Virginia)~~. Upon receipt of an application from other applicants for any type of project, the board has 15 days to review the application and either determine that the information requested in subsection B of this section is complete or inform the applicant that additional information is required to make the application complete. ~~For Department of Transportation road or highway construction projects,~~ Pursuant to § 33.2-258 of the Code of Virginia, application for coverage under this VWP general permit for

Department of Transportation road or highway construction projects shall be approved, approved with conditions, or denied within 30 business days of receipt of a complete application ~~(pursuant to § 33.1-19.1 of the Code of Virginia)~~. For all other projects, application for coverage under this VWP general permit shall be approved, approved with conditions, or denied within 45 days of receipt of a complete application. If the board fails to act within the applicable 30 or 45 days on a complete application, coverage under this VWP general permit shall be deemed ~~approved~~ granted.

1. In evaluating the application, the board shall make an assessment of the impacts associated with the project in combination with other existing or proposed impacts. ~~Coverage~~ Application for coverage under this VWP general permit shall be denied if the cumulative impacts will cause or contribute to a significant impairment of state waters or fish and wildlife resources.

2. The board may place additional ~~conditions~~ requirements on a project in order to ~~approve authorization~~ grant coverage under this VWP general permit. However, ~~these conditions~~ the requirements must be consistent with the VWP general permit program regulation.

~~E.~~ D. Incomplete application. Where an application is ~~incomplete~~ not accepted as complete by the board within the applicable 10 or 15 days of receipt, the board ~~may~~ shall require the submission of additional information from the applicant and may suspend processing ~~the~~ of any application until such time as the applicant has supplied the requested information and the application is complete. Where the applicant becomes aware that he omitted one or more relevant facts from an application, or submitted incorrect information in an application or in ~~reports~~ any report to the board, the applicant shall immediately submit such facts or the correct information. A revised application with new information shall be deemed a new application~~,~~ for the purposes of review but shall not require an additional permit application fee. An incomplete permit application may be administratively withdrawn from processing by the board for failure to provide the required information after ~~180~~ 60 days from the date ~~that~~ of the ~~original permit application was received~~ latest written information request made by the board. An applicant may request a suspension of application review by the board, but requesting a suspension shall not preclude the board from administratively withdrawing an incomplete application. Resubmittal of a permit application for the same or similar project, after such time that the original permit application was administratively withdrawn, shall require submittal of an additional permit application fee.

**9VAC25-660-70. Compensation.**

A. ~~In accordance with 9VAC25-660-50 A, compensatory~~ Compensatory mitigation may be required for ~~all~~ permanent, nontidal surface water impacts as specified in 9VAC25-660-50 A. All temporary, nontidal surface water impacts shall be restored to preexisting conditions in accordance with the VWP general permit in 9VAC25-660-100.

B. ~~Generally, the sequence of preferred compensation options shall be restoration, then creation, then mitigation banking, and then in-lieu fee fund. Also, 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, for~~ For the purposes of this VWP general permit chapter, the board shall assume that the purchase ~~or use~~ of mitigation bank credits or ~~a contribution to an~~ the purchase of in-lieu fee ~~fund~~ program credits is ecologically preferable to practicable on-site or other off-site surface water compensation options~~, and no further demonstration is necessary~~. Compensatory mitigation and any compensatory mitigation proposals shall be in accordance with this section and the associated provisions of 9VAC25-210-116.

~~C. In order for contribution to an in-lieu fee fund to be an acceptable form of compensation, the fund must be approved for use by the board according to the provisions of 9VAC25-210-116 D. The applicant shall provide proof of contribution to DEQ prior to commencing activities in impact areas.~~

~~D. In order for purchase or use of bank credits to be an acceptable form of compensation, the bank shall be operating in accordance with the provisions of § 62.1-44.15:23 of the Code of Virginia and 9VAC25-210-116 E. The applicant shall provide proof of purchase, use, or debit to DEQ prior to commencing activities in impact areas.~~

~~E. Compensation~~ C. When required, compensatory mitigation for unavoidable, permanent wetland impacts shall be provided at a 2:1 ~~compensation to impact~~ mitigation ratio, as calculated on an area basis.

~~F. Compensation~~ D. When required, compensatory mitigation for stream bed impacts shall be appropriate to replace lost functions and water quality benefits. One factor determining the required stream compensation shall be an analysis of stream impacts utilizing a stream impact assessment methodology acceptable to ~~DEQ~~ the Department of Environmental Quality.

~~G.~~ E. Compensation for permanent open water impacts, other than to streams, may be required at ~~a~~ an in-kind or out-of-kind mitigation ratio of 1:1 ~~replacement to impact ratio~~ or less, as calculated on an area basis, to offset impacts to state waters and fish and wildlife resources ~~from significant impairment~~. Compensation shall not be required for permanent or temporary impacts to open waters identified as palustrine by the Cowardin classification method, except when such open waters are located in areas of karst topography in Virginia and are formed by the natural solution of limestone.

~~H. Compensation~~ F. When conversion results in a permanent alteration of the functions of a wetland, compensatory mitigation for conversion impacts to wetlands shall be required at a 1:1 ~~compensation to impact~~ mitigation ratio, as

calculated on an area basis~~, when such conversion results in a permanent alteration of the functions and values of the wetland~~. For example, the permanent conversion of a forested wetland to an emergent wetland is considered to be a permanent impact for the purposes of this regulation. Compensation for conversion of other types of surface waters may be required, as appropriate, to offset impacts to state waters and fish and wildlife resources ~~from significant impairment~~.

**9VAC25-660-80. Notice of planned changes; modifications to coverage.**

A. The permittee shall notify the board in advance of ~~the~~ a planned change, and ~~the planned change~~ an application or request ~~will~~ for modification to coverage shall be reviewed according to all provisions of this ~~regulation~~ chapter. Coverage shall not be modified if (i) the cumulative total of permanent and temporary impacts equals or exceeds one-half acre of nontidal wetlands or open water or exceeds 300 linear feet of nontidal stream bed or (ii) the criteria in subsection B of this section are not met. The applicant may submit a new permit application for consideration under a VWP individual permit.

~~B. Authorization under this VWP general permit may be modified subsequent to issuance if the permittee determines that additional permanent wetland, open water, or stream impacts are necessary, provided that the additional impacts are associated with the previously authorized activities in authorized locations within the same phase of development, the cumulative increase in acreage of wetland or open water impacts is not greater than 1/4 acre, the cumulative increase in stream bed impacts is not greater than 100 linear feet, and the additional impacts are fully mitigated. Prior to a planned change approval, DEQ may require submission of a compensatory mitigation plan for the additional impacts. In cases where the original impacts totaled less than 1/10 acre of wetlands or open water, or less than 300 linear feet of stream bed, and the additional impacts result in these limits being exceeded, the notice of planned change will not be approved. However, the applicant may submit a new permit application and permit application fee for the total impacts to be considered under this VWP general permit, another VWP general permit, or a VWP individual permit.~~

~~C. Authorization under this VWP general permit may be modified after issuance if the project results in less wetland or stream impacts. Compensation requirements may be modified in relation to the adjusted impacts at the request of the permittee, provided that the adjusted compensation meets the initial authorization compensation goals. DEQ shall not be responsible for ensuring refunds for mitigation bank credit purchases, mitigation bank usage, or in-lieu fee fund contributions.~~

~~D. Authorization under this VWP general permit may be modified after issuance for a change in project plans that does not result in a change in project impacts.~~

~~E. Authorization under the VWP general permit may be modified for a change to the mitigation bank at which credits are purchased or used, provided that the same amount of credits are purchased or used and all criteria for use in 9VAC25-210-116 E are met.~~

~~F. Authorization under the VWP general permit may be modified after issuance for typographical errors.~~

~~G. A Notice of Planned Change is not required after authorization issuance for additional temporary impacts to surface waters, provided that DEQ is notified in writing regarding additional temporary impacts, and the area is restored to preexisting conditions in accordance with Part I C 11 of this general permit. In no case can the additional temporary impacts exceed the general permit threshold for use.~~

~~H. In no case can this authorization be modified to exceed the general permit threshold for use.~~

~~I. A notice of planned change shall be denied if fish and wildlife resources are significantly impacted or if the criteria in subsection B of this section are not met. However, the original VWP general permit authorization shall remain in effect. The applicant may submit a new permit application and permit application fee for consideration under a VWP individual permit.~~

B. VWP general permit coverage may be modified subsequent to issuance under the following circumstances:

1. Additional impacts to surface waters are necessary, provided that:

a. The additional impacts are proposed prior to impacting those additional areas.

b. The proposed additional impacts are located within the project boundary as depicted in the application for coverage or are located in areas of directly-related off-site work unless otherwise prohibited by this VWP general permit regulation.

c. The permittee has provided sufficient documentation that the board may reasonably determine that the additional impacts will not impact federal or state listed or proposed threatened or endangered species or proposed or designated critical habitat, or be the taking of threatened or endangered species.

d. The cumulative, additional permanent wetland or open water impacts for one or more notices of planned change do not exceed 0.25 acre.

e. The cumulative, additional permanent stream impacts for one or more notices of planned change do not exceed 100 linear feet.

f. Documentation is provided demonstrating that the proposed surface water impacts have been avoided to the maximum extent practicable in accordance with the informational requirements of 9VAC25-660-60 B 11.

g. Compensatory mitigation for the proposed impacts, if required, meets the requirements of 9VAC25-660-70 and the associated provisions of 9VAC25-210-116. Prior to a planned change approval, the Department of Environmental Quality may require submission of a compensatory mitigation plan for the additional impacts.

h. Where such additional impacts are temporary, and prior to initiating the impacts, the permittee provides a written statement to the board that the area to be temporarily impacted will be restored to its preconstruction elevations and contours, with topsoil from the impact area where practicable, such that the previous acreage and functions are restored, in accordance with Part I A 3 and B 11 of 9VAC25-660-100. The additional temporary impacts shall not cause the cumulative total impacts to exceed the general permit threshold for use. The proposed temporary impacts shall be deemed approved if DEQ does not respond within 10 days of receipt of the request for authorization to temporarily impact additional surface waters.

i. The additional proposed impacts do not change the category of the project, based on the original impact amounts as specified in 9VAC25-660-50 A 2. However, the applicant may submit a new permit application for the total impacts to be considered under this VWP general permit, another VWP general permit, or a VWP individual permit.

2. A reduction in wetland or stream impacts. Compensatory mitigation requirements may be modified in relation to the adjusted impacts, provided that the adjusted compensatory mitigation meets the initial compensatory mitigation goals. DEQ shall not be responsible for ensuring refunds for mitigation bank credit purchases or in-lieu fee program credit purchases.

3. A change in project plans or use that does not result in a change to authorized project impacts other than those allowed by subdivisions 1 and 2 of this subsection.

4. Substitute a specific, DEQ-approved mitigation bank or in-lieu fee program with another DEQ-approved mitigation bank or in-lieu fee program in accordance with 9VAC25-210-116 C. The amount of credits proposed to be purchased shall be sufficient to meet the compensatory mitigation requirement for which the compensatory mitigation is proposed to replace.

5. Correct typographical errors.

**9VAC25-660-90. Termination of ~~authorization by consent~~ coverage.**

~~When all permitted activities requiring notification under 9VAC25-660-50 A and all compensatory mitigation requirements have been completed, or if the authorized impacts will not occur, the~~ A. The permittee shall submit a request for termination by consent within 30 days of ~~project completion or project cancellation~~ completing or canceling all authorized activities requiring notification under 9VAC25-660-50 A and all compensatory mitigation requirements. When submitted for project completion, the request for termination by consent shall constitute a notice of project completion in accordance with 9VAC25-210-130 F. The director may accept this termination of ~~authorization~~ coverage on behalf of the board. The permittee shall submit the following information:

1. Name, mailing address, and telephone number of the permittee;

2. Name and location of the activity;

3. The VWP general permit ~~authorization~~ tracking number; and

4. One of the following certifications:

a. For project completion:

"I certify under penalty of law that all activities and any required compensatory mitigation authorized by ~~a~~ the VWP general permit and general permit coverage have been completed. I understand that by submitting this notice of termination I am no longer authorized to perform activities in surface waters in accordance with the VWP general permit and general permit coverage, and that performing activities in surface waters is unlawful where the activity is not authorized by ~~a~~ the VWP permit or coverage, unless otherwise excluded from obtaining coverage. I also understand that the submittal of this notice does not release me from liability for any violations of ~~this~~ the VWP general permit ~~authorization~~ or coverage."

b. For project cancellation:

"I certify under penalty of law that the activities and any required compensatory mitigation authorized by ~~this~~ the VWP general permit and general permit coverage will not occur. I understand that by submitting this notice of termination I am no longer authorized to perform activities in surface waters in accordance with the VWP general permit and general permit coverage, and that performing activities in surface waters is unlawful where the activity is not authorized by ~~a~~ the VWP permit or coverage, unless otherwise excluded from obtaining coverage. I also understand that the submittal of this notice does not release me from liability for any violations of ~~this~~ the VWP general permit ~~authorization~~ or coverage, nor does it allow me to resume the ~~permitted~~ authorized activities without reapplication and ~~reauthorization~~ coverage."

c. For events beyond permittee control, the permittee shall provide a detailed explanation of the events, to be approved by the Department of Environmental Quality, and the following certification statement:

"I certify under penalty of law that the activities or the required compensatory mitigation authorized by ~~a~~ the VWP general permit and general permit coverage have

changed as the result of events beyond my control (see attached). I understand that by submitting this notice of termination I am no longer authorized to perform activities in surface waters in accordance with the VWP general permit and general permit coverage, and that performing activities in surface waters is unlawful where the activity is not authorized by ~~a~~ the VWP permit or coverage, unless otherwise excluded from obtaining coverage. I also understand that the submittal of this notice does not release me from liability for any violations of ~~this~~ the VWP general permit ~~authorization~~ or coverage, nor does it allow me to resume the ~~permitted~~ authorized activities without reapplication and ~~reauthorization~~ coverage."

B. VWP general permit coverage may be terminated for cause in accordance with 9VAC25-210-180 F and 9VAC25-230 or without cause in accordance with 9VAC25-210-180 G and 9VAC25-230.

**9VAC25-660-95. ~~Transition.~~ (Repealed.)**

~~A. All applications received on or after August 1, 2006, will be processed in accordance with these new procedures.~~

~~B. VWP general permit authorizations issued prior to August 1, 2006, will remain in full force and effect until such authorizations expire, are revoked, or are terminated.~~

~~C. Notices of planned change and all other types of notification that are received by the board prior to August 1, 2006, will be processed in accordance with the VWP general permit regulation in effect at that time. Notices of planned change and all other types of notification to the board that are received on or after August 1, 2006, will be processed in accordance with these new procedures.~~

**9VAC25-660-100. VWP general permit.**

~~Any applicant whose application has been accepted by the board shall be subject to the following requirements:~~

~~VWP General Permit No. WP1~~
~~Authorization expiration date:~~
~~Authorization Note(s):~~

~~VWP GENERAL PERMIT FOR IMPACTS LESS THAN ONE HALF OF AN ACRE UNDER THE VIRGINIA WATER PROTECTION PERMIT AND THE VIRGINIA STATE WATER CONTROL LAW~~

~~Based upon an examination of the information submitted by the applicant and in~~

VWP GENERAL PERMIT NO. WP1 FOR IMPACTS LESS THAN ONE-HALF ACRE UNDER THE VIRGINIA WATER PROTECTION PERMIT AND THE VIRGINIA STATE WATER CONTROL LAW

Effective date: August 2, 2016
Expiration date: August 1, 2031

In compliance with § 401 of the Clean Water Act, as amended (33 USC § 1341) and the State Water Control Law and regulations adopted pursuant thereto, the board has determined that there is a reasonable assurance that ~~the activity authorized by~~ this VWP general permit, if ~~conducted in accordance with the conditions set forth herein~~ complied with, will protect instream beneficial uses ~~and~~, will not violate applicable water quality standards~~. The board finds that the effect of the impact, together with other existing or proposed impacts to wetlands~~, and will not cause or contribute to a significant impairment of state waters or fish and wildlife resources. In issuing this VWP general permit, the board has not taken into consideration the structural stability of any proposed activities.

~~Subject~~ The permanent or temporary impact of less than one-half acre of nontidal wetlands or open water and up to 300 linear feet of nontidal stream bed shall be subject to the provisions of the VWP general permit set forth herein, any requirements in coverage granted under this VWP general permit; the Clean Water Act, as amended~~,~~; and ~~pursuant to~~ the State Water Control Law and regulations adopted pursuant to it~~, the permittee is authorized to permanently or temporarily impact less than one-half of an acre of nontidal wetlands or open water and up to 300 linear feet of nontidal stream bed~~.

~~Permittee:~~

~~Address:~~

~~Activity Location:~~

~~Activity Description:~~

~~The authorized activity shall be in accordance with this cover page, Part I Special Conditions, Part II Compensation, Monitoring, and Reporting, and Part III Conditions Applicable to All VWP General Permits, as set forth herein.~~

~~Director, Department of Environmental Quality~~ ~~Date~~

Part I. Special Conditions.

A. Authorized activities.

1. ~~This permit authorizes~~ The activities authorized by this chapter shall not cause more than the permanent or temporary impacts to less than one-half ~~of an~~ acre of nontidal wetlands or open water and up to 300 linear feet of nontidal stream bed~~, according to the information provided in the approved and complete application~~.

2. Any changes to the authorized permanent impacts to surface waters ~~associated with this project~~ shall require ~~either~~ a notice of planned change in accordance with 9VAC25-660-80. An application or request for modification to coverage or another VWP permit application may be required.

3. Any changes to the authorized temporary impacts to surface waters ~~associated with this project~~ shall require written notification to ~~DEQ~~ and approval from the Department of Environmental Quality in accordance with 9VAC25-660-80 prior to initiating the impacts and

restoration to preexisting conditions in accordance with the conditions of this permit ~~authorization~~.

4. Modification to compensation requirements may be approved at the request of the permittee when a decrease in the amount of authorized surface waters impacts occurs, provided that the adjusted compensation meets the initial ~~authorization~~ compensation goals.

~~5. The activities authorized by this VWP general permit must commence and be completed within three years of the date of this authorization.~~

~~B. Continuation of coverage. Reapplication for continuation of coverage under this VWP general permit or a new VWP permit may be necessary if any portion of the authorized activities or any VWP general permit requirement (including compensation) has not been completed within three years of the date of authorization. The request for continuation of coverage must be made no less than 60 days prior to the expiration date of this VWP general permit authorization, at which time the board will determine if continuation of the VWP general permit authorization is necessary.~~

~~C.~~ B. Overall ~~project~~ conditions.

1. The activities authorized by this VWP general permit shall be executed in a manner so as to minimize adverse impacts on instream beneficial uses as defined in § 62.1-10 (b) of the Code of Virginia.

2. No activity may substantially disrupt the movement of aquatic life indigenous to the water body, including those species that normally migrate through the area, unless the primary purpose of the activity is to impound water. ~~Culverts~~ Pipes and culverts placed in streams must be installed to maintain low flow conditions~~.~~ and shall be countersunk at both inlet and outlet ends of the pipe or culvert unless otherwise specifically approved by the Department of Environmental Quality on a case-by-case basis, and as follows: The requirement to countersink does not apply to extensions or maintenance of existing culverts that are not countersunk, floodplain pipes and culverts being placed above ordinary high water, pipes and culverts being placed on bedrock, or pipes and culverts required to be placed on slopes 5.0% or greater. ~~No activity may cause more than minimal adverse effect on navigation. Furthermore, the activity must not impede the passage of normal or expected high flows and the structure or discharge must withstand expected high flows.~~ Bedrock encountered during construction must be identified and approved in advance of a design change where the countersunk condition cannot be met. Pipes and culverts 24 inches or less in diameter shall be countersunk three inches below the natural stream bed elevations, and pipes and culverts greater than 24 inches shall be countersunk at least six inches below the natural stream bed elevations. Hydraulic capacity shall be determined based on the reduced capacity due to the countersunk position. In all stream crossings appropriate measures shall be implemented to minimize any disruption of aquatic life movement.

3. Wet or uncured concrete shall be prohibited from entry into flowing surface waters unless the area is contained within a cofferdam and the work is performed in the dry or unless otherwise approved by the Department of Environmental Quality. Excess or aste concrete shall not be disposed of in flowing surface waters or washed into flowing surface waters.

4. All fill material shall be clean and free of contaminants in toxic concentrations or amounts in accordance with all applicable laws and regulations.

5. Erosion and sedimentation controls shall be designed in accordance with the Virginia Erosion and Sediment Control Handbook, Third Edition, 1992. These controls shall be placed prior to clearing and grading and maintained in good working order to minimize impacts to state waters. These controls shall remain in place until the area is stabilized and shall then be removed.

6. Exposed slopes and streambanks shall be stabilized immediately upon completion of work in each permitted impact area. All denuded areas shall be properly stabilized in accordance with the Virginia Erosion and Sediment Control Handbook, Third Edition, 1992.

7. All construction, construction access (e.g., cofferdams, sheetpiling, and causeways) and demolition activities associated with ~~this~~ the project shall be accomplished in a manner that minimizes construction or waste materials from entering surface waters to the maximum extent practicable, unless authorized by this VWP general permit.

8. No machinery may enter flowing waters, unless authorized by this VWP general permit or approved prior to entry by the Department of Environmental Quality.

9. Heavy equipment in temporarily impacted wetland areas shall be placed on mats, geotextile fabric, or other suitable material to minimize soil disturbance to the maximum extent practicable. Equipment and materials shall be removed immediately upon completion of work.

10. All nonimpacted surface waters and compensatory mitigation areas within 50 feet of ~~permitted~~ authorized activities and within the project or right-of-way limits shall be clearly flagged or marked for the life of the construction activity at that location to preclude unauthorized disturbances to these surface waters and compensatory mitigation areas during construction. The permittee shall notify contractors that no activities are to occur in these marked surface waters.

11. Temporary disturbances to surface waters during construction shall be avoided and minimized to the maximum extent practicable. All temporarily disturbed wetland areas shall be restored to preexisting conditions within 30 days of completing work at each respective temporary impact area, which shall include reestablishing

preconstruction elevations and contours~~,~~ with topsoil from the impact area where practicable and planting or seeding with appropriate wetland vegetation according to cover type (i.e., emergent, ~~scrub/shrub~~ scrub-shrub, or forested). The permittee shall take all appropriate measures to promote and maintain revegetation of temporarily disturbed wetland areas with wetland vegetation through the second year post-disturbance. All temporarily impacted streams and streambanks shall be restored to their ~~original~~ preconstruction elevations and contours with topsoil from the impact area where practicable within 30 days following the construction at that stream segment~~, and the banks~~. Streambanks shall be seeded or planted with the same vegetation cover type originally present ~~along the streambanks~~, including supplemental erosion control grasses if necessary~~, except for invasive~~. Invasive species identified on ~~DCR's~~ the Department of Conservation and Recreation's Virginia Invasive ~~Alien~~ Plant Species ~~of Virginia list~~ List shall not be used to the maximum extent practicable or without prior approval from the Department of Environmental Quality.

12. Materials (including fill, construction debris, and excavated and woody materials) temporarily stockpiled in wetlands shall be placed on mats or geotextile fabric, immediately stabilized to prevent entry into state waters, managed such that leachate does not enter state waters, and completely removed within 30 days following completion of that construction activity. Disturbed areas shall be returned to ~~original~~ preconstruction elevations and contours~~,~~ with topsoil from the impact area where practicable; restored within 30 days following removal of the stockpile~~,~~; and restored with the same vegetation cover type originally present, including supplemental erosion control grasses if necessary~~, except for invasive~~. Invasive species identified on ~~DCR's~~ the Department of Conservation and Recreation's Virginia Invasive ~~Alien~~ Plant Species ~~of Virginia list~~ List shall not be used to the maximum extent practicable or without prior approval from the Department of Environmental Quality.

13. Continuous flow of perennial springs shall be maintained by the installation of spring boxes, french drains, or other similar structures.

14. The permittee shall employ measures to prevent spills of fuels or lubricants into state waters.

15. The permittee shall conduct his activities in accordance with the time-of-year restrictions recommended by the Virginia Department of Game and Inland Fisheries, the Virginia Marine Resources Commission, or other interested and affected agencies, as contained, when applicable, in a Department of Environmental Quality VWP general permit coverage, and shall ensure that all contractors are aware of the time-of-year restrictions imposed.

16. Water quality standards shall not be violated as a result of the construction activities~~, unless allowed by this permit authorization~~.

17. If stream channelization or relocation is required, all work in surface waters shall be done in the dry, unless otherwise authorized by ~~this VWP general permit~~ the Department of Environmental Quality, and all flows shall be diverted around the channelization or relocation area until the new channel is stabilized. This work shall be accomplished by leaving a plug at the inlet and outlet ends of the new channel during excavation. Once the new channel has been stabilized, flow shall be routed into the new channel by first removing the downstream plug and then the upstream plug. The rerouted stream flow must be fully established before construction activities in the old stream channel can begin.

~~D.~~ C. Road crossings.

1. Access roads and associated bridges ~~or~~, pipes, and culverts shall be constructed to minimize the adverse effects on surface waters to the maximum extent practicable. Access roads constructed above preconstruction elevations and contours ~~and elevations~~ in surface waters must be bridged, piped, or culverted to maintain surface flows.

2. Installation of road crossings shall occur in the dry via the implementation of cofferdams, sheetpiling, stream diversions, or other similar structures.

~~E.~~ D. Utility lines.

1. All utility line work in surface waters shall be performed in a manner that minimizes disturbance, and the area must be returned to its ~~original~~ preconstruction elevations and contours with topsoil from the impact area where practicable and restored within 30 days of completing work in the area, unless otherwise authorized by ~~this VWP general permit~~ the Department of Environmental Quality. Restoration shall be the seeding or planting of the same vegetation cover type originally present, including supplemental erosion control grasses if necessary~~, except for invasive~~. Invasive species identified on ~~DCR's~~ the Department of Conservation and Recreation's Virginia Invasive ~~Alien~~ Plant Species ~~of Virginia list~~ List shall not be used to the maximum extent practicable or without prior approval from the Department of Environmental Quality.

2. Material resulting from trench excavation may be temporarily sidecast into wetlands not to exceed a total of 90 days, provided the material is not placed in a manner such that it is dispersed by currents or other forces.

3. The trench for a utility line cannot be constructed in a manner that drains wetlands (e.g., backfilling with extensive gravel layers creating a french drain effect). For example, utility lines may be backfilled with clay blocks to ensure that the trench does not drain surface waters through which the utility line is installed.

~~F.~~ E. Stream modification and stream bank protection.

1. Riprap bank stabilization shall be of an appropriate size and design in accordance with the Virginia Erosion and Sediment Control Handbook, Third Edition, 1992.

2. Riprap apron for all outfalls shall be designed in accordance with the Virginia Erosion and Sediment Control Handbook, Third Edition, 1992.

3. For stream bank protection activities, the structure and backfill shall be placed as close to the stream bank as practicable. No material shall be placed in excess of the minimum necessary for erosion protection.

4. All stream bank protection control structures shall be located to eliminate or minimize impacts to vegetated wetlands to the maximum extent practicable.

5. Asphalt and materials containing asphalt or other toxic substances shall not be used in the construction of submerged sills or breakwaters.

6. Redistribution of existing stream substrate for the purpose of erosion control is prohibited.

7. No material removed from the stream bottom shall be disposed of in surface waters, unless otherwise authorized by this VWP general permit.

~~G.~~ F. Stormwater management facilities.

1. Stormwater management facilities shall be installed in accordance with best management practices and watershed protection techniques (e.g., vegetated buffers, siting considerations to minimize adverse effects to aquatic resources, bioengineering methods incorporated into the facility design to benefit water quality and minimize adverse effects to aquatic resources) that provide for long-term aquatic resources protection and enhancement, to the maximum extent practicable.

2. Compensation for unavoidable impacts shall not be allowed within maintenance areas of stormwater management facilities.

3. Maintenance activities within stormwater management facilities shall not require additional permit ~~authorization~~ coverage or compensation, provided that the maintenance activities do not exceed the original contours of the facility, as approved and constructed, and are accomplished in designated maintenance areas as indicated in the facility maintenance or design plan or when unavailable, an alternative plan approved by the Department of Environmental Quality.

Part II. Construction and Compensation Requirements, Monitoring, and Reporting.

A. Minimum compensation requirements.

1. The permittee shall provide ~~appropriate and practicable~~ any required compensation for ~~all~~ impacts ~~meeting~~ in accordance with the conditions ~~outlined~~ in this VWP general permit and the chapter promulgating the general permit.

2. The types of compensation options that may be considered for activities covered under this VWP general permit include the purchase ~~or use~~ of mitigation bank credits or ~~a contribution to an~~ the purchase of in-lieu fee ~~fund~~ program credits in accordance with 9VAC25-660-70 and the associated provisions of 9VAC25-210-116 ~~and 9VAC25-660-70, provided that all impacts are compensated at a 2:1 ratio~~.

3. ~~A written statement that conveys the applicant's proposal to use a mitigation bank or in-lieu fee fund for compensation shall be submitted with the application and shall constitute the final compensation plan for the approved project.~~ The final compensation plan shall be submitted to and approved by the board prior to a construction activity in permitted impacts areas. The board shall review and provide written comments on the final plan within 30 days of receipt or it shall be deemed approved. The final ~~compensation~~ plan as approved by the board shall be an enforceable requirement of any coverage under this VWP general permit ~~authorization~~. Deviations from the approved final plan ~~must~~ shall be submitted and approved in advance by the board.

~~4. The permittee shall not initiate work in permitted impact areas until documentation of the mitigation bank credit purchase or usage or of the fund contribution has been submitted to and received by DEQ.~~

B. Impact site construction monitoring.

1. Construction activities authorized by this permit that are within impact areas shall be monitored and documented. The monitoring shall ~~document the preexisting conditions, activities during construction, and post-construction conditions. Monitoring shall~~ consist of ~~one of the following options~~:

~~a. Photographs shall be~~ taken ~~during construction at the end of the first, second and third months after commencing construction, and then every six months thereafter, for the remainder of the construction project. Photos are not required during periods of no activity within impact areas.~~

~~b. An ortho-rectified photograph shall be taken prior to construction, and then annually thereafter until all impacts are taken. All photos shall clearly show the delineated surface waters and authorized impact areas.~~

~~c. In lieu of photographs, and with prior approval from DEQ, the permittee may submit a written narrative that summarizes site construction activities in impact areas. The narrative shall be submitted at the end of the first, second, and third months after commencing construction, and then every six months thereafter, for the remainder of the construction activities. Narratives are not required during periods of no activity within the impact areas.~~

~~2. As part of construction monitoring, photographs taken at the photo stations or the narrative shall document site~~

~~activities and conditions, which may include installation and maintenance of erosion and sediment controls; surface water discharges from the site; condition of adjacent nonimpact surface waters; flagged nonimpact surface waters; construction access and staging areas; filling, excavation, and dredging activities; culvert installation; dredge disposal; and site stabilization, grading, and associated restoration activities. With the exception of the preconstruction photographs, photographs at an individual impact site shall not be required until construction activities are initiated at that site. With the exception of the post-construction photographs, photographs at an individual impact site shall not be required once the site is stabilized following completion of construction at that site.~~

~~3. Each photograph shall be labeled to include the following information: permit number, impact area and photo station number, date and time of the photograph, name of the person taking the photograph, photograph orientation, and photograph subject description.~~

a. Preconstruction photographs taken at each impact area prior to initiation of activities within impact areas. Photographs remain on the project site and shall depict the impact area and the nonimpacted surface waters immediately adjacent to and downgradient of each impact area. Each photograph shall be labeled to include the following information: permit number, impact area number, date and time of the photograph, name of the person taking the photograph, photograph orientation, and photograph subject description.

b. Site inspections shall be conducted by the permittee or the permittee's qualified designee once every calendar month during activities within impact areas. Monthly inspections shall be conducted in the following areas: all authorized permanent and temporary impact areas; all avoided surface waters, including wetlands, stream channels, and open water; surface water areas within 50 feet of any land disturbing activity and within the project or right-of-way limits; and all on site permanent preservation areas required under this permit. Observations shall be recorded on the inspection form provided by the Department of Environmental Quality. The form shall be completed in its entirety for each monthly inspection and shall be kept on site and made available for review by the Department of Environmental Quality staff upon request during normal business hours. Inspections are not required during periods of no activity within impact areas.

~~4.~~ 2. Monitoring of water quality parameters shall be conducted during permanent relocation of perennial streams through new channels in the manner noted below. The permittee shall report violations of water quality standards to ~~DEQ~~ the Department of Environmental Quality in accordance with the procedures in ~~Part II E~~ 9VAC25-660-100 Part II C. Corrective measures and additional monitoring may be required if water quality standards are not met. Reporting shall not be required if water quality standards are not violated.

a. A sampling station shall be located upstream and immediately downstream of the relocated channel.

b. Temperature, pH and dissolved oxygen (D.O.) measurements shall be taken every 30 minutes for at least two hours at each station prior to opening the new channels and immediately before opening new channels.

c. Temperature, pH and D.O. readings shall be taken after opening the channels and every 30 minutes for at least three hours at each station.

C. Reporting.

1. Written communications required by this VWP general permit shall be submitted to the appropriate Department of Environmental Quality ~~(DEQ)~~ office. The VWP general permit ~~authorization~~ tracking number shall be included on all correspondence.

2. ~~DEQ~~ The Department of Environmental Quality shall be notified in writing ~~at least 10 days~~ prior to the start of construction activities at the first ~~permitted site~~ authorized ~~by this VWP general permit authorization so that inspections of the project can be planned, if deemed necessary by DEQ. The notification shall include a projected schedule for initiation and completion of work at each permitted~~ impact area.

~~3. Construction monitoring reports shall be submitted to DEQ no later than the 10th day of the month following the month in which the monitoring event specified in Part II B takes place. The reports shall include the following, as appropriate:~~

~~a. For each permitted impact area, a written narrative stating whether work was performed during the monitoring period, and if work was performed, a description of the work performed, when the work was initiated, and expected date of completion.~~

~~b. Photographs labeled with the permit number, the photo station number, the photo orientation, the date and time of the photo, the name of the person taking the photograph, and a brief description of the construction activities. The first construction monitoring report shall include the photographs taken at each impact site prior to initiation of construction in a permitted impact area. Written notification and photographs demonstrating that all temporarily disturbed wetland and stream areas have been restored in compliance with the permit conditions shall be submitted within 30 days of restoration. The post-construction photographs shall be submitted within 30 days of documenting post-construction conditions.~~

~~c. Summary of activities conducted to comply with the permit conditions.~~

~~d. Summary of permit noncompliance events or problems encountered, subsequent notifications, and corrective actions.~~

~~e. Summary of anticipated work to be completed during the next monitoring period and an estimated date of construction completion at all impact areas.~~

~~f. Labeled site map depicting all impact areas and photo stations.~~

3. A construction status update form provided by the Department of Environmental Quality shall be completed and submitted to the Department of Environmental Quality twice per year for the duration of coverage under a VWP general permit. Forms completed in June shall be submitted by or on July 10, and forms completed in December shall be submitted by or on January 10. The form shall include reference to the VWP permit tracking number and one of the following statements for each authorized surface water impact location:

a. Construction activities have not yet started;

b. Construction activities have started;

c. Construction activities have started but are currently inactive; or

d. Construction activities are complete.

4. ~~DEQ~~ The Department of Environmental Quality shall be notified in writing within 30 days following the completion of all activities in all ~~permitted~~ authorized impact areas ~~authorized under this permit~~.

5. The permittee shall notify ~~DEQ~~ the Department of Environmental Quality in writing when unusual or potentially complex conditions are encountered that require debris removal or involve a potentially toxic substance. Measures to remove the obstruction, material, or toxic substance or to change the location of a structure are prohibited until approved by ~~DEQ~~ the Department of Environmental Quality.

6. The permittee shall report fish kills or spills of oil or fuel immediately upon discovery. If spills or fish kills occur between the hours of 8:15 a.m. to 5 p.m., Monday through Friday, the appropriate ~~DEQ~~ the Department of Environmental Quality regional office shall be notified; otherwise, the Department of Emergency Management shall be notified at 1-800-468-8892.

7. Violations of state water quality standards shall be reported ~~within 24 hours~~ to the appropriate ~~DEQ~~ Department of Environmental Quality office no later than the end of the business day following discovery.

8. The permittee shall notify the Department of Environmental Quality no later than the end of the third business day following the discovery of additional impacts to surface waters including wetlands, stream channels, and open water that are not authorized by the Department of Environmental Quality or to any required preservation areas. The notification shall include photographs, estimated acreage or linear footage of impacts, and a description of the impacts.

~~8.~~ 9. Submittals required by this VWP general permit shall contain the following signed certification statement:

"I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violation."

Part III. Conditions Applicable to All VWP General Permits.

A. Duty to comply. The permittee shall comply with all conditions, limitations, and other requirements of the VWP general permit; any requirements in coverage granted under this VWP general permit; the Clean Water Act, as amended; and the State Water Control Law and regulations adopted pursuant to it. Any VWP general permit violation or noncompliance is a violation of the Clean Water Act and State Water Control Law and is grounds for (i) enforcement action, (ii) VWP general permit coverage termination for cause, (iii) VWP general permit coverage revocation, (iv) denial of application for coverage, or (v) denial of an application for a modification to VWP general permit coverage. Nothing in this VWP general permit shall be construed to relieve the permittee of the duty to comply with all applicable federal and state statutes, regulations ~~and~~, toxic standards, and prohibitions. ~~VWP general permit noncompliance is a violation of the Clean Water Act and State Water Control Law, and is grounds for enforcement action, VWP general permit authorization termination for cause, VWP general permit authorization revocation, or denial of a continuation of coverage request.~~

B. Duty to mitigate. The permittee shall take all reasonable steps to minimize or prevent impacts in violation of the VWP general permit which may have a reasonable likelihood of adversely affecting human health or the environment.

C. Reopener. This VWP general permit ~~authorization~~ may be reopened to modify its conditions when the circumstances on which the previous VWP general permit ~~authorization~~ was based have materially and substantially changed, or special studies conducted by the board or the permittee show material and substantial change since the time the VWP general permit ~~authorization~~ was issued and thereby constitute cause for revoking and reissuing the VWP general permit ~~authorization revocation and reissuance~~.

D. Compliance with state and federal law. Compliance with this VWP general permit constitutes compliance with the

VWP permit requirements of the State Water Control Law. Nothing in this VWP general permit shall be construed to preclude the institution of any legal action under or relieve the permittee from any responsibilities, liabilities, or other penalties established pursuant to any other state law or regulation or under the authority preserved by § 510 of the Clean Water Act.

E. Property rights. Coverage under this VWP general permit does not convey property rights in either real or personal property~~, or~~ any exclusive privileges, nor does it authorize injury to private property ~~or~~, any invasion of personal property rights, ~~nor~~ or any infringement of federal, state, or local laws or regulations.

F. Severability. The provisions of this VWP general permit ~~authorization~~ are severable.

G. ~~Right of~~ Inspection and entry. ~~The~~ Upon presentation of credentials, the permittee shall allow the board or ~~its agents, upon the presentation of credentials~~ any duly authorized agent of the board, at reasonable times and under reasonable circumstances, to enter upon the permittee's property, public or private, and have access to~~,~~ inspect and copy any records that must be kept as part of the VWP general permit conditions; to inspect any facilities, operations, or practices (including monitoring and control equipment) regulated or required under the VWP general permit; and to sample or monitor any substance, parameter, or activity for the purpose of assuring compliance with the conditions of the VWP general permit or as otherwise authorized by law. For the purpose of this section, the time for inspection shall be deemed reasonable during regular business hours. Nothing contained herein shall make an inspection time unreasonable during an emergency.

H. Transferability of VWP general permit ~~authorization~~ coverage. ~~This~~ VWP general permit ~~authorization~~ coverage may be transferred to another ~~person by a~~ permittee when all of the criteria listed ~~below~~ in this subsection are met. On the date of the VWP general permit ~~authorization~~ coverage transfer, the transferred VWP general permit ~~authorization~~ coverage shall be as fully effective as if it had been ~~issued~~ granted directly to the new permittee.

1. The current permittee notifies the board of the proposed transfer of the ~~title to the facility or property. 2. The notice to the board includes~~ general permit coverage and provides a written agreement between the current and new permittees containing a specific date of transfer of VWP general permit ~~authorization~~ responsibility, coverage, and liability to the new permittee, or that the current permittee will retain such responsibility, coverage, or liability, including liability for compliance with the requirements of enforcement activities related to the ~~permitted~~ authorized activity.

~~3.~~ 2. The board does not within 15 days notify the current and new permittees of its intent to modify or revoke and reissue the VWP general permit ~~authorization within 15 days~~.

I. Notice of planned change. ~~Authorization under this~~ VWP general permit coverage may be modified subsequent to issuance in ~~one or more of the cases listed below~~ accordance with 9VAC25-660-80. ~~A notice of planned change is not required if the project results in additional temporary impacts to surface waters, provided that DEQ is notified in writing, the additional temporary impacts are restored to preexisting conditions in accordance with Part I C 11 of this general permit, and the additional temporary impacts do not exceed the general permit threshold for use. The permittee shall notify the board in advance of the planned change, and the planned change request will be reviewed according to all provisions of this regulation.~~

~~1. The permittee determines that additional permanent wetland, open water, or stream impacts are necessary, provided that the additional impacts are associated with the previously authorized activities in authorized locations within the same phase of development, the cumulative increase in acreage of wetland or open water impacts is not greater than 1/4 acre, the cumulative increase in stream bed impacts is not greater than 100 linear feet, and all additional impacts are fully compensated.~~

~~2. The project results in less wetland or stream impacts, in which case compensation requirements may be modified in relation to the adjusted impacts at the request of the permittee, provided that the adjusted compensation meets the initial authorization compensation goals.~~

~~3. There is a change in the project plans that does not result in a change in project impacts.~~

~~4. There is a change in the mitigation bank at which credits are purchased or used, provided that the same amount of credits are purchased or used and all criteria for use are met, as detailed in 9VAC25-210-116 E.~~

~~5. Typographical errors need to be corrected.~~

J. VWP general permit ~~authorization~~ coverage termination for cause. ~~This~~ VWP general permit ~~authorization~~ coverage is subject to termination for cause by the board after public notice and opportunity for a hearing pursuant to 9VAC25-230. Reasons for termination for cause are as follows:

1. Noncompliance by the permittee with any provision of the VWP general permit regulation, any condition of the VWP general permit ~~authorization~~, or any requirement in general permit coverage;

2. The permittee's failure in the application or during the ~~VWP general permit authorization issuance~~ process of granting VWP general permit coverage to disclose fully all relevant facts or the permittee's misrepresentation of any relevant facts at any time;

3. The permittee's violation of a special or judicial order; ~~and~~

4. A determination by the board that the ~~permitted~~ authorized activity endangers human health or the environment and can be regulated to acceptable levels by a modification to the VWP general permit ~~authorization planned change~~ coverage or a termination ~~for cause.~~;

5. A change in any condition that requires either a temporary or permanent reduction or elimination of any activity controlled by the VWP general permit; or

6. A determination that the authorized activity has ceased and that the compensation for unavoidable adverse impacts has been successfully completed.

K. The board may terminate VWP general permit coverage without cause when the permittee is no longer a legal entity due to death or dissolution or when a company is no longer authorized to conduct business in the Commonwealth. The termination shall be effective 30 days after notice of the proposed termination is sent to the last known address of the permittee or registered agent, unless the permittee objects within that time. If the permittee does object during that period, the board shall follow the applicable procedures for termination under § 62.1-44.15:25 of the Code of Virginia and 9VAC25-230.

~~K.~~ L. VWP general permit ~~authorization~~ coverage termination by consent. ~~This VWP general permit authorization may be terminated by consent when all permitted activities requiring notification under 9VAC25-660-50 A and all compensatory mitigation have been completed or when the authorized impacts will not occur.~~ The permittee shall submit a request for termination by consent within 30 days of ~~project completion or project cancellation~~ completing or canceling all authorized activities requiring notification under 9VAC25-660-50 A and all compensatory mitigation requirements. When submitted for project completion, the request for termination by consent shall constitute a notice of project completion in accordance with 9VAC25-210-130 F. The director may accept this termination of ~~authorization~~ coverage on behalf of the board. The ~~request for termination by consent~~ permittee shall ~~contain~~ submit the following information:

1. Name, mailing address, and telephone number ~~of the permittee~~;

2. Name and location of the activity;

3. The VWP general permit ~~authorization~~ tracking number; and

4. One of the following certifications:

a. For project completion:

"I certify under penalty of law that all activities and any required compensatory mitigation authorized by ~~a~~ the VWP general permit and general permit coverage have been completed. I understand that by submitting this notice of termination I am no longer authorized to perform activities in surface waters in accordance with the VWP general permit and general permit coverage, and that performing activities in surface waters is unlawful where the activity is not authorized by ~~a~~ the VWP permit or coverage, unless otherwise excluded from obtaining coverage. I also understand that the submittal of this notice does not release me from liability for any violations of ~~this~~ the VWP general permit ~~authorization~~ or coverage."

b. For project cancellation:

"I certify under penalty of law that the activities and any required compensatory mitigation authorized by ~~this~~ the VWP general permit and general permit coverage will not occur. I understand that by submitting this notice of termination I am no longer authorized to perform activities in surface waters in accordance with the VWP general permit and general permit coverage, and that performing activities in surface waters is unlawful where the activity is not authorized by ~~a~~ the VWP permit or coverage, unless otherwise excluded from obtaining coverage. I also understand that the submittal of this notice does not release me from liability for any violations of ~~this~~ the VWP general permit ~~authorization~~ or coverage, nor does it allow me to resume the ~~permitted~~ authorized activities without reapplication and ~~reauthorization~~ coverage."

c. For events beyond permittee control, the permittee shall provide a detailed explanation of the events, to be approved by ~~DEQ~~ the Department of Environmental Quality, and the following certification statement:

"I certify under penalty of law that the activities or the required compensatory mitigation authorized by ~~a~~ the VWP general permit and general permit coverage have changed as the result of events beyond my control (see attached). I understand that by submitting this notice of termination I am no longer authorized to perform activities in surface waters in accordance with the VWP general permit and general permit coverage, and that performing activities in surface waters is unlawful where the activity is not authorized by ~~a~~ the VWP permit or coverage, unless otherwise excluded from obtaining coverage. I also understand that the submittal of this notice does not release me from liability for any violations of ~~this~~ the VWP general permit ~~authorization~~ or coverage, nor does it allow me to resume the ~~permitted~~ authorized activities without reapplication and ~~reauthorization~~ coverage."

~~L.~~ M. Civil and criminal liability. Nothing in this VWP general permit shall be construed to relieve the permittee from civil and criminal penalties for noncompliance.

~~M.~~ N. Oil and hazardous substance liability. Nothing in this VWP general permit shall be construed to preclude the institution of legal action or relieve the permittee from any responsibilities, liabilities, or penalties to which the permittee is or may be subject under § 311 of the Clean Water Act or

§§ 62.1-44.34:14 through 62.1-44.34:23 of the State Water Control Law.

~~N.~~ O. Duty to cease or confine activity. It shall not be a defense for a permittee in an enforcement action that it would have been necessary to halt or reduce the activity for which ~~a~~ VWP general permit coverage has been granted in order to maintain compliance with the conditions of the VWP general permit or coverage.

~~O.~~ P. Duty to provide information.

1. The permittee shall furnish to the board information ~~which~~ that the board may request to determine whether cause exists for modifying, revoking ~~and reissuing, and~~, or terminating ~~the~~ VWP permit ~~authorization,~~ coverage or to determine compliance with the VWP general permit ~~authorization~~ or general permit coverage. The permittee shall also furnish to the board, upon request, copies of records required to be kept by the permittee.

2. Plans, maps, conceptual reports, and other relevant information shall be submitted as required by the board prior to commencing construction.

~~P.~~ Q. Monitoring and records requirements.

1. Monitoring of parameters, other than pollutants, shall be conducted according to approved analytical methods as specified in the VWP general permit. Analysis of pollutants will be conducted according to 40 CFR Part 136 (2000), Guidelines Establishing Test Procedures for the Analysis of Pollutants.

2. Samples and measurements taken for the purpose of monitoring shall be representative of the monitored activity.

3. The permittee shall retain records of all monitoring information, including all calibration and maintenance records and all original strip chart or electronic recordings for continuous monitoring instrumentation, copies of all reports required by the VWP general permit, and records of all data used to complete the application for coverage under the VWP general permit, for a period of at least three years from the date of ~~the~~ general permit expiration ~~of a granted VWP permit~~. This period may be extended by request of the board at any time.

4. Records of monitoring information shall include, as appropriate:

a. The date, exact place, and time of sampling or measurements;

b. The name of the individuals who performed the sampling or measurements;

c. The date and time the analyses were performed;

d. The name of the individuals who performed the analyses;

e. The analytical techniques or methods supporting the information such as observations, readings, calculations, and bench data used;

f. The results of such analyses; and

g. Chain of custody documentation.

~~Q.~~ R. Unauthorized discharge of pollutants. Except in compliance with this VWP general permit, it shall be unlawful for the permittee to:

1. Discharge into state waters sewage, industrial wastes, other wastes, or any noxious or deleterious substances;

2. Excavate in a wetland;

3. Otherwise alter the physical, chemical, or biological properties of state waters and make them detrimental to the public health, to animal or aquatic life, or to the uses of such waters for domestic or industrial consumption, for recreation, or for other uses; or

4. On and after October 1, 2001, conduct the following activities in a wetland:

a. New activities to cause draining that significantly alter or degrade existing wetland acreage or functions;

b. Filling or dumping;

c. Permanent flooding or impounding; or

d. New activities that cause significant alteration or degradation of existing wetland acreage or functions.

S. Duty to reapply. Any permittee desiring to continue a previously authorized activity after the expiration date of the VWP general permit shall comply with the provisions in 9VAC25-660-27.

NOTICE: The following forms used in administering the regulation were filed by the agency. The forms are not being published; however, online users of this issue of the Virginia Register of Regulations may click on the name of a form with a hyperlink to access it. The forms are also available from the agency contact or may be viewed at the Office of the Registrar of Regulations, General Assembly Building, 2nd Floor, Richmond, Virginia 23219.

FORMS (9VAC25-660)

Department of Environmental Quality Water Division Permit Application Fee Form (rev. 10/14)

~~Joint Permit Application for Activities in Waters and Wetlands of the Commonwealth of Virginia (eff. 10/04)~~

Joint Permit Application for Projects in Tidewater, Virginia ~~(eff. 10/04)~~ (eff. 3/2014)

Monthly Reporting of Impacts Less than or Equal to One-Tenth Acre Statewide (eff. 8/2007)

Standard Joint Permit Application for Activities in Waters and Wetlands of the Commonwealth of Virginia (eff. 3/2014)

Virginia Department of Transportation Inter-Agency Coordination Meeting Joint Permit Application ~~(eff. 10/02)~~ (eff. 6/2008)

~~Quarterly Reporting of Impacts Less than One-Tenth Acre (insert reporting period) Statewide (eff. 4/03)~~

DOCUMENTS INCORPORATED BY REFERENCE (9VAC25-660)

Classification of Wetlands and Deepwater Habitats of the United States, Cowardin, Lewis M. II, et al., United States Fish and Wildlife Service, December 1979, Reprinted 1992

Guidelines for Specification of Disposal Sites for Dredged of Fill Material, 40 CFR Part 230

Virginia Erosion and Sediment Control Handbook, Third Edition, 1992, Department of Conservation and Recreation.

Virginia Invasive Plant Species List, Natural Heritage Technical Document 14-11, Department of Conservation and Recreation, Division of Natural Heritage (2014)

VA.R. Doc. No. R14-4057; Filed October 23, 2015, 9:58 a.m.

## Proposed Regulation

REGISTRAR'S NOTICE: The State Water Control Board is claiming an exemption from Article 2 of the Administrative Process Act in accordance with § 2.2-4006 A 8 of the Code of Virginia, which exempts general permits issued by the State Water Control Board pursuant to the State Water Control Law (§ 62.1-44.2 et seq. of the Code of Virginia) if the board (i) provides a Notice of Intended Regulatory Action in conformance with the provisions of § 2.2-4007.01; (ii) following the passage of 30 days from the publication of the Notice of Intended Regulatory Action forms a technical advisory committee composed of relevant stakeholders, including potentially affected citizens groups, to assist in the development of the general permit; (iii) provides notice and receives oral and written comment as provided in § 2.2-4007.03; and (iv) conducts at least one public hearing on the proposed general permit.

Title of Regulation: **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 (amending 9VAC25-670-10 through 9VAC25-670-100; adding 9VAC25-670-15, 9VAC25-670-25, 9VAC25-670-27, 9VAC25-670-35; repealing 9VAC25-670-95).**

Statutory Authority: § 62.1-44.15 of the Code of Virginia; § 401 of the Clean Water Act (33 USC § 1251 et seq.).

Public Hearing Information:

January 11, 2016 - 1:30 p.m. - James City County Board of Supervisors, Board Room, Building F, 101 Mounts Bay Road, Williamsburg, VA 23185

January 12, 2016 - 1:30 p.m. - Department of Environmental Quality, Northern Regional Office, 13901 Crown Court, Woodbridge, VA 22193

January 13, 2016 - 1:30 p.m. - Department of Environmental Quality, Blue Ridge-Roanoke Regional Office, 3019 Peters Creek Road, Roanoke, VA 24019

Public Comment Deadline: January 29, 2016.

Agency Contact: Brenda Winn, Department of Environmental Quality, 629 East Main Street, P.O. Box 1105, Richmond, VA 233218, telephone (804) 698-4516, FAX (804) 698-4032, or email brenda.winn@deq.virginia.gov.

Summary:

*The regulatory action reissues the existing general permit that expires on August 1, 2016. The proposed amendments (i) revise or clarify which activities in specific water sources require application for a permit authorization and which activities are excluded; (ii) revise and clarify the application process, including the administrative and technical information required to achieve a complete permit application; (iii) revise and clarify the compensatory mitigation requirements, such as the sequencing of acceptable compensatory mitigation actions and compensatory mitigation provisions, the requirements for compensating impacts to open waters, or the compensation necessary for temporary impacts; (iv) modify provisions related to application processing, informational requirements, or actions occurring post-permit authorization for coverage; (v) modify permit authorization transitions between general permit cycles; (vi) delete authorization term of seven years and provisions for continuation of permit authorization coverage; (vii) incorporate certain federal regulatory provisions; (viii) clarify and update definitions; (ix) reorganize the regulation; and (x) clarify and correct grammar, spelling, and references.*

**9VAC25-670-10. Definitions.**

The words and terms used in this chapter shall have the meanings defined in the State Water Control Law (§ 62.1-44.2 et seq. of the Code of Virginia) and the Virginia Water Protection ~~(VWP)~~ Permit Program Regulation (9VAC25-210) unless a different meaning is required by the context ~~clearly indicates otherwise~~ or ~~unless otherwise~~ is indicated below.

"Bank protection" means measures employed to stabilize channel banks and combat existing erosion problems. Such measures may include the construction of riprap revetments, sills, rock vanes, beach nourishment, breakwaters, bulkheads, groins, spurs, levees, marsh toe stabilization, anti-scouring devices, and submerged sills.

~~"Channelization" means the alteration of a stream channel by widening, deepening, straightening, cleaning or paving certain areas.~~

"Coverage" means authorization to conduct a project in accordance with a VWP general permit.

~~"Cross sectional sketch" means a graph or plot of ground elevation across a waterbody or a portion of it, usually along a line perpendicular to the waterbody or direction of flow.~~

~~"Emergent wetland" means a class of wetlands characterized by erect, rooted, herbaceous plants growing in water or on a substrate that is at least periodically deficient in oxygen as a result of excessive water content, excluding mosses and~~

~~lichens. This vegetation is present for most of the growing season in most years and are usually dominated by perennial plants.~~

~~"FEMA" means Federal Emergency Management Agency.~~

~~"Forebay" means a deeper area at the upstream end of a stormwater management facility that would be maintained through excavation.~~

~~"Forested wetland" means a class of wetlands characterized by woody vegetation that is six meters (20 feet) tall or taller. These areas normally possess an overstory of trees, an understory of trees or shrubs, and an herbaceous layer.~~

~~"Greater than one acre" means more than 1.00 acre (43,560 square feet).~~

~~"Impacts" means results caused by human induced activities conducted in surface waters, as specified in § 62.1-44.15:20 A of the Code of Virginia.~~

"DEQ" means the Department of Environmental Quality.

"Independent utility" means a test to determine what constitutes a single and complete project. A project is considered to have independent utility if it would be constructed absent the construction of other projects in the project area. Portions of a phased project that depend upon other phases of the project do not have independent utility. Portions of a phased project that would be constructed even if the other phases are not built can be considered as separate single and complete projects with independent public and economic utility.

~~"Isolated Wetland of Minimal Ecological Value (IWOMEV)" means a wetland that: (i) does not have a surface water connection to other state waters; (ii) is less than one tenth of an acre in size; (iii) is not located in a Federal Emergency Management Agency designated 100 year floodplain; (iv) is not identified by the Virginia Natural Heritage Program as a rare or state significant natural community; (v) is not forested; and (vi) does not contain listed federal or state threatened or endangered species.~~

~~"Less than one half of an acre" means 0.49 acre (21,779 square feet) or less.~~

"Notice of project completion" means a statement submitted by the permittee or authorized agent that the authorized activities and any required compensatory mitigation have been completed.

~~"Open water" means an area that, during a year with normal patterns of precipitation, has standing water for sufficient duration to establish an ordinary high water mark. The term "open water" includes lakes and ponds but does not include ephemeral waters, stream beds, or wetlands.~~

~~"Ordinary high water" or "ordinary high water mark" means the line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank; shelving; changes in the character of soil; destruction of terrestrial vegetation; the presence of litter and debris; or other appropriate means that consider the characteristics of the surrounding areas.~~

~~"Perennial stream" means a well defined channel that contains water year round during a year of normal rainfall. Generally, the water table is located above the streambed for most of the year and groundwater is the primary source for stream flow. A perennial stream exhibits the typical biological, hydrological, and physical characteristics commonly associated with the continuous conveyance of water.~~

~~"Permanent impacts" means those impacts to surface waters, including wetlands, that cause a permanent alteration of the physical, chemical, or biological properties of the surface waters, or of the functions and values of a wetland.~~

~~"Person" means an individual, corporation, partnership, association, governmental body, municipal corporation, or any other legal entity.~~

~~"Riprap" means a layer of nonerodible material such as stone or chunks of concrete.~~

~~"Scrub shrub wetland" means a class of wetlands dominated by woody vegetation less than six meters (20 feet) tall. The species include tree shrubs, young trees, and trees or shrubs that are small or stunted because of environmental conditions.~~

"Single and complete project" means the total project proposed or accomplished by a person, which also has independent utility, as defined in this section. For linear projects, the "single and complete project" (e.g., a single and complete crossing) will apply to each crossing of a separate surface water (e.g., a single ~~waterbody)~~ water body) and to multiple crossings of the same ~~waterbody~~ water body at separate and distinct locations. Phases of a project that have independent public and economic utility may each be considered single and complete.

"State program general permit (SPGP)" means a general permit issued by the Department of the Army in accordance with ~~33 USC 1344(e), 33 CFR 325.2(e)(2),~~ 33 USC § 1344 and ~~33 CFR 325.3(b)~~ 33 CFR 325.5(c)(3) that is founded on a state program. The SPGP is designed to avoid duplication between the federal and state programs.

~~"Stream bed" means the substrate of a stream, as measured between the ordinary high water marks along a length of stream. The substrate may consist of organic matter, bedrock or inorganic particles that range in size from clay to boulders, or a combination of both. Areas contiguous to the stream bed, but outside of the ordinary high water marks, are not considered part of the stream bed.~~

~~"Surface waters" means all state waters that are not ground water as defined in § 62.1-255 of the Code of Virginia.~~

~~"Temporary impacts" are those impacts to surface waters, including wetlands, that do not cause a permanent alteration of the physical, chemical, or biological properties of the surface water, or of the functions and values of a wetland. Temporary impacts include activities in which the ground is~~

~~restored to its preconstruction conditions, contours, or elevations, such that previous functions and values are restored.~~

"Up to 300 linear feet" means ~~>0.00 to~~ 300.00 linear feet or less, as measured along the center of the main channel of the stream segment.

"Up to ~~1500~~ 1,500 linear feet" means ~~>0.00 to 1500.00~~ 1,500.00 linear feet or less, as measured along the center of the main channel of the stream segment.

"Up to one-tenth ~~of an~~ acre" means 0.10 acre (4,356 square feet) or less.

"Up to ~~two acres"~~ one acre" means ~~2.00 acres (87,120 square feet)~~ 1.00 acre (43,560 square feet) or less.

"Utility line" means a pipe or pipeline for the transportation of a gaseous, liquid, liquefiable or slurry substance, for any purpose, and a cable, line, or wire for the transmission for any purpose of electrical energy, telephone, and telegraph messages and radio and television communication. The term utility line does not include activities which drain a surface water to convert it to an upland, such as drainage tiles or french drains; however, it does apply to pipes conveying drainage from another area.

**9VAC25-670-15. Statewide information requirements.**

The board may request (i) such plans, specifications, and other pertinent information as may be necessary to determine the effect of an applicant's discharge on the quality of state waters or (ii) such other information as may be necessary to accomplish the purposes of this chapter. Any owner, permittee, or person applying for a VWP permit or general permit coverage shall provide the information requested by the board.

**9VAC25-670-20. Purpose; delegation of authority~~; effective date of VWP general permit~~.**

A. The purpose of this regulation is to establish VWP General Permit Number WP2 under the VWP permit program regulation to govern permanent and temporary impacts related to the construction and maintenance of utility lines. Applications for coverage under this VWP general permit shall be processed for approval, approval with conditions, or denial by the board. ~~Authorization, authorization~~ Coverage, coverage with conditions, or application denial by the board shall constitute the VWP general permit action~~. Each VWP general permit action~~ and shall follow all provisions in the State Water Control Law (§ 62.1-44.2 et seq. of the Code of Virginia), except for the public comment and participation provisions, from which each VWP general permit action is exempt.

B. The director~~,~~ or his designee~~,~~ may perform any act of the board provided under this chapter, except as limited by § 62.1-44.14 of the Code of Virginia.

~~C. This VWP general permit regulation will become effective on August 1, 2006, and will expire on August 1, 2016.~~

~~D. Authorization to impact surface waters under this VWP general permit is effective upon compliance with all the provisions of 9VAC25-670-30. Notwithstanding the expiration date of this general permit regulation, authorization to impact surface waters under this VWP general permit will continue for seven years.~~

**9VAC25-670-25. Authorization for coverage under VWP general permit effective August 1, 2006.**

A. All complete applications or notifications received by the board through 11:59 p.m. on August 1, 2016, shall be processed in accordance with the VWP general permit regulation in effect August 1, 2006, through August 1, 2016. If the application or notification is incomplete or if there is not adequate time as allowed by § 62.1-44.15:21 of the Code of Virginia to make a completeness determination, the applicant shall reapply for coverage under the VWP general permit effective August 2, 2016, or apply for a VWP individual permit, including payment of any required permit application fee. No refund of permit application fees shall be made.

B. VWP general permit authorizations granted through 11:59 p.m. on August 1, 2016, shall remain in full force and effect until 11:59 p.m. on the expiration date stated on the VWP authorization cover page, unless otherwise revoked or terminated or unless a notice of project completion is received by the board on or before that date. Any permittee that desires to continue an authorized activity beyond the stated expiration date must reapply for coverage under the VWP general permit effective August 2, 2016, pursuant to its terms, standards, and conditions, or apply for a VWP individual permit, including payment of any required permit application fee. This section shall only apply to permittees holding valid authorizations for coverage granted under the VWP general permit effective August 1, 2006, through August 1, 2016.

**9VAC25-670-27. VWP general permit coverage; transition; continuation.**

A. All applications or notifications received on or after August 2, 2016, will be processed in accordance with the VWP general permit regulation effective August 2, 2016.

B. The general permit in 9VAC25-670-100 is effective August 2, 2016, and expires August 1, 2031. Any coverage that is granted pursuant to 9VAC25-670-30 shall remain in full force and effect until 11:59 p.m. on August 1, 2031, unless the general permit coverage is terminated or revoked or unless a notice of project completion is received by the board on or before this date. Where a permittee that has received general permit coverage desires to continue or complete the authorized activities beyond August 1, 2031, the permittee shall reapply for new general permit coverage or for a VWP individual permit, including payment of any required permit application fee. Activities in surface waters requiring a permit shall not commence or continue until VWP general permit coverage is granted or a VWP individual permit is issued by the board.

C. Application may be made at any time for a VWP individual permit in accordance with 9VAC25-210. Activities in surface waters requiring a permit shall not commence or continue until VWP general permit coverage is granted or a VWP individual permit is issued by the board.

**9VAC25-670-30. Authorization to impact surface waters.**

A. Any person ~~governed by this~~ granted coverage under the VWP general permit ~~is authorized to~~ effective August 2, 2016, may permanently or temporarily impact up to one acre of nontidal wetlands or open water and up to 1,500 linear feet of nontidal stream bed for facilities and activities of utilities and public service companies regulated by the Federal Energy Regulatory Commission or the State Corporation Commission and other utility line activities, provided that:

1. The applicant submits notification as required in 9VAC25-670-50 and 9VAC25-670-60.

2. The applicant remits ~~the~~ any required permit application ~~processing~~ fee ~~in accordance with 9VAC25-20~~.

3. The applicant receives general permit coverage from the Department of Environmental Quality and complies with the limitations and other requirements of ~~9VAC25-670-100~~ the VWP general permit; the general permit coverage; the Clean Water Act, as amended; and the State Water Control Law and attendant regulations.

~~4. The applicant receives approval from the Virginia Department of Environmental Quality.~~

~~5.~~ 4. The applicant has not been required to obtain a VWP individual permit under the VWP permit regulation (9VAC25-210) for the proposed project impacts. The applicant, at his discretion, may seek a VWP individual permit or coverage under another applicable VWP general permit in lieu of this VWP general permit.

~~6.~~ 5. Impacts, both temporary and permanent, result from a single and complete project, including all attendant features.

a. Where a utility line has multiple crossings of surface waters (several single and complete projects) with more than minimal impacts, the board may at its discretion require a VWP individual permit for the project.

b. Where an access road segment (e.g., the shortest segment of a road with independent utility that is part of a larger project) has multiple crossings of surface waters (several single and complete projects), the board may, at its discretion, require a VWP individual permit.

~~7.~~ 6. The stream impact criterion applies to all components of the project, including any structures and stream channel manipulations.

~~8.~~ 7. When functions ~~and values~~ of surface waters are permanently adversely affected, such as for conversion of forested to emergent wetlands in a permanently maintained utility right-of-way, compensation shall be required for impacts outside of a 20-foot wide permanently maintained corridor. Compensation shall not be required for impacts within the 20-foot wide portion of permanently maintained corridor. For example, with a 50-foot wide, permanently maintained corridor, compensation on each side of the 20-foot portion would be required for impacts that occur between the 20-foot and the 50-foot marks.

~~9.~~ 8. When required, compensation for unavoidable impacts is provided in accordance with 9VAC25-670-70 and 9VAC25-210-116.

B. Activities that may be ~~authorized~~ granted coverage under this VWP general permit include the following:

1. The construction, maintenance, or repair of utility lines, including outfall structures and the excavation, backfill, or bedding for utility lines provided there is no change in preconstruction contours.

2. The construction, maintenance, or expansion of a substation facility or pumping station associated with a power line or utility line.

3. The construction or maintenance of foundations for overhead utility line towers, poles, or anchors, provided the foundations are the minimum size necessary and separate footings for each tower leg (rather than a single pad) are used where feasible.

4. The construction of access roads for the construction or maintenance of utility lines including overhead power lines and utility line substations, provided the activity in combination with any substation does not exceed the threshold limit of this VWP general permit.

C. The board waives the requirement for coverage under a VWP general permit for activities that occur in an isolated wetland of minimal ecological value, as defined in ~~9VAC25-670-10~~ 9VAC25-210-10. ~~Any~~ Upon request by the board, any person claiming this waiver ~~bears the burden to~~ shall demonstrate to the satisfaction of the board that he qualifies for the waiver.

D. ~~Receipt of~~ Coverage under this VWP general permit does not relieve the permittee of the responsibility to comply with any other applicable federal, state, or local statute, ordinance, or regulation.

~~E. In issuing this VWP general permit, the board has not taken into consideration the structural stability of the proposed structure or structures.~~

~~F.~~ E. Coverage under a nationwide or regional permit promulgated by the U.S. Army Corps of Engineers (USACE), and for which the board has issued § 401 certification ~~existing~~ in accordance with 9VAC25-210-130 H as of ~~August 1, 2006~~ August 2, 2016, shall constitute coverage under this VWP general permit unless a state program general permit (SPGP) is ~~approved~~ required and granted for the ~~covered~~ activity or impact. ~~Notwithstanding any other provision, activities authorized under a nationwide or regional permit promulgated by the USACE and certified by the board in accordance with 9VAC25-210-130 do not need to obtain coverage under this~~

~~VWP general permit unless a state programmatic general permit is approved for the covered activity or impact.~~

~~C.~~ F. When the board determines on a case-by-case basis that concerns for water quality and the aquatic environment so indicate, the board may require ~~individual applications and~~ a VWP individual ~~permits~~ permit in accordance with 9VAC25-210-130 B rather than ~~approving~~ granting coverage under this VWP general permit.

**9VAC25-670-35. Administrative continuance.**

Beginning on August 2, 2016, in any case where an existing permittee has submitted a timely and complete notification or application for coverage under the next consecutive VWP general permit in accordance with 9VAC25-670-50 and 9VAC25-670-60 and the board, through no fault of the permittee, does not issue the next consecutive VWP general permit with an effective date on or before the expiration date of the expiring VWP general permit, the conditions of that expiring VWP general permit and any requirements of coverage granted under it shall continue in force until the effective date of the next consecutive VWP general permit.

**9VAC25-670-40. Exceptions to coverage.**

A. ~~Authorization for coverage~~ Coverage under this VWP general permit ~~will not apply in the following areas:~~ is not required if the activity is excluded from permitting in accordance with 9VAC25-210-60.

~~1. Wetlands composed of 10% or more of the following species (singly or in combination) in a vegetative stratum: Atlantic white cedar (Chamaecyparis thyoides), bald cypress (Taxodium distichum), water tupelo (Nyssa aquatica), or overcup oak (Quercus lyrata). Percentages shall be based upon either basal area or percent areal cover in the area of impact.~~

~~2. Surface waters where the proposed activity will impact federal or state listed or proposed threatened or endangered species or proposed or designated critical habitat.~~

B. ~~Authorization for coverage~~ Coverage under this VWP general permit cannot be used in combination with ~~authorizations for~~ coverage under other VWP general permits in order to impact greater than one acre of nontidal wetlands or open water or greater than 1,500 linear feet of nontidal stream bed. ~~More than one authorization for~~ Granting coverage under this VWP general permit more than once for a single and complete project is prohibited, except when the cumulative impact to surface waters does not exceed the limits specified here.

C. The activity to impact surface waters shall not have been prohibited by state law or regulations, nor shall it contravene applicable Water Quality Standards (9VAC25-260).

D. The board shall deny application for coverage under this VWP general permit to any applicant ~~for~~ conducting activities that cause, may reasonably be expected to cause, or may be contributing to a violation of water quality standards, including discharges or discharge-related activities that are likely to significantly affect aquatic life, or for activities that together with other existing or proposed impacts to wetlands will cause or contribute to a significant impairment of state waters or fish and wildlife resources.

E. This VWP general permit does not authorize activities that cause more than minimal changes to the peak hydraulic flow characteristics, that significantly increase flooding, or that cause more than minimal degradation of the water quality of a stream.

F. ~~This~~ Coverage under this VWP general permit ~~may~~ shall not be ~~used~~ granted for:

1. Construction of a stormwater management facility in perennial streams or in waters designated as oxygen-impaired or temperature-impaired (does not include wetlands).

2. Any water withdrawal activities.

3. The pouring of wet or uncured concrete ~~or the use of tremie concrete or grout bags~~ in state waters, unless the area is contained within a cofferdam or the work is performed in the dry or unless approved by the Department of Environmental Quality.

4. Dredging or maintenance dredging.

5. ~~The~~ Any activity in surface waters that will impact federal or state listed or proposed threatened or endangered species or proposed or designated critical habitat, or be the taking of threatened or endangered species in accordance with the following:

a. As pursuant to § 29.1-564 of the Code of Virginia, the taking, transportation, processing, sale, or offer for sale within the Commonwealth of any fish or wildlife appearing on any list of threatened or endangered species published by the United States Secretary of the Interior pursuant to the provisions of the federal Endangered Species Act of 1973 (~~P.L.~~ Public Law 93-205), or any modifications or amendments thereto, is prohibited except as provided in § 29.1-568 of the Code of Virginia.

b. As pursuant to § 29.1-566 of the Code of Virginia and 4VAC15-20-130 B and C, the taking, transportation, processing, sale, or offer for sale within the Commonwealth of any state-listed endangered or threatened species is prohibited except as provided in § 29.1-568 of the Code of Virginia.

6. Any activity in wetlands composed of 10% or more, singularly or in combination, based upon either basal area or percent areal cover in the area of impact, in a vegetative stratum: Atlantic white cedar (Chamaecyparis thyoides), bald cypress (Taxodium distichum), water tupelo (Nyssa aquatica), or overcup oak (Quercus lyrata).

7. Any activity in tidal waters.

**9VAC25-670-50. Notification.**

~~A. Notification to the board is not required for utility line activities that have only temporary impacts provided the~~

~~impacts do not involve mechanized land clearing of forested wetlands.~~

~~B.~~ A. Notification to the board will be required prior to commencing construction, as follows:

1. An application for ~~authorization of~~ coverage for proposed, permanent nontidal wetland or open water impacts greater than one-tenth ~~of an~~ acre~~,~~ or for proposed permanent nontidal stream bed impacts greater than 300 linear feet~~,~~ shall include all information pursuant to 9VAC25-670-60 B. Compensatory mitigation may be required for all permanent impacts ~~in accordance with Parts I, II, and III of this VWP general permit regulation. All temporary impacts shall be restored to preexisting conditions, as per Parts I, II, and III of this VWP general permit regulation~~.

2. An application for the ~~authorization of~~ coverage for proposed, permanent nontidal wetland or open water impacts up to one-tenth ~~of an~~ acre~~,~~ or ~~of~~ for proposed, permanent nontidal stream bed impacts up to 300 linear feet~~,~~ shall be submitted ~~as follows~~ in accordance with either subdivision 2 a or 2 b of this subsection:

a. For any proposed project in wetlands, open water, streams, or compensatory mitigation sites that are under a deed restriction, conservation easement, declaration of restrictive covenant, or other land use protective instrument (hereafter "protected areas"), when such restriction, easement, covenant, or instrument is the result of a federal or state permit action and is specific to activities in wetlands and compensatory mitigation sites, the application shall include all of the information required by 9VAC25-670-60 B. Compensatory mitigation may be required for all permanent impacts.

~~a.~~ b. For all other projects that are not subject to subdivision 2 b of this subsection, the application shall include the information required by subdivisions ~~1 through 9, 13, 15, 20, and 21~~ 1 through 7, 10, 11, 14, and 15 of 9VAC25-670-60 B~~,~~ and documentation that verifies the quantity and type of impacts. Compensatory mitigation may be required for all permanent impacts once the notification limits of one-tenth acre wetlands or open water, or 300 linear feet of stream bed, are exceeded, and if required, the application shall include the information in 9VAC25-670-60 B 12. ~~All temporary impacts, regardless of amount, shall be restored to preexisting conditions, as per Parts I and III of this VWP general permit regulation.~~

~~b. For any proposed project in wetlands, open water, streams, or compensatory mitigation sites that are under a deed restriction, conservation easement, restrictive covenant, or other land use protective instrument (hereafter protected areas), when such restriction, easement, covenant, or instrument is the result of a federal or state permit action and is specific to activities in wetlands and compensatory mitigation sites, the application shall include all of the information required by 9VAC25-670-60 B, and documentation that verifies the quantity and type of impacts. Compensatory mitigation may be required for all permanent impacts, regardless of amount. All temporary impacts, regardless of amount, shall be restored to preexisting conditions, as per Parts I and III of this VWP general permit regulation.~~

~~C. A Joint Permit Application (JPA) or Virginia Department of Transportation Interagency Coordination Meeting Joint Permit Application (VDOT IACM JPA)~~

B. The Department of Environmental Quality-approved application forms shall serve as an application ~~under this regulation~~ for a VWP permit or VWP general permit coverage.

~~D.~~ C. The board will determine whether the proposed activity requires coordination with the United States Fish and Wildlife Service, the Virginia Department of Conservation and Recreation, the Virginia Department of Agriculture and Consumer Services and the Virginia Department of Game and Inland Fisheries regarding the presence of federal or state proposed or listed threatened and endangered species or proposed or designated critical habitat. Based upon consultation with these agencies, the board may deny application for coverage under this general permit. The applicant may also consult with these agencies prior to submitting an application. Species or habitat information that the applicant provides will assist ~~DEQ~~ the Department of Environmental Quality in reviewing and processing the application.

**9VAC25-670-60. Application.**

A. ~~Applications shall be filed with the board, as follows: 1.~~ The applicant shall file a complete application in accordance with 9VAC25-670-50 and this section for ~~a~~ coverage under this VWP ~~General Permit WP2~~ general permit for impacts to surface waters ~~resulting~~ from utility activities ~~of utilities, which will serve as a notice of intent for coverage under this VWP general permit~~.

~~2. The VDOT may use its monthly IACM process for submitting applications.~~

B. ~~The required~~ A complete application ~~shall contain~~ for VWP general permit coverage, at a minimum, consists of the following information~~,~~ if applicable to the project:

1. The applicant's legal name, mailing address, ~~and~~ telephone number~~,~~ and~~,~~ if applicable, electronic mail address and fax number.

2. If different from the applicant, legal name, mailing address, telephone number, and if applicable, electronic mail address and fax number of property owner.

~~2. The~~ 3. If applicable, the authorized agent's ~~(if applicable)~~ name, mailing address, telephone number~~,~~ and~~,~~ if applicable, fax number and electronic mail address.

~~3.~~ 4. The existing VWP general permit tracking number ~~(if applicable),~~ if applicable.

4. The name of the project, narrative description of project purpose, and a description of the proposed activity in surface waters.

5. The name of the water body or water bodies or receiving stream, as applicable.

6. The hydrologic unit code (HUC) for the project area.

7. The name of the city or county where the project is located.

8. Latitude and longitude (to the nearest second) from a central location within the project limits.

9. A detailed location map (e.g., a United States Geologic Survey topographic quadrangle map) of the project area, including the project boundary. The map shall be of sufficient detail such that the site may be easily located for site inspection.

10. (Reserved.)

11. Project plan view. Plan view sketches shall include, at a minimum, north arrow, scale, existing structures, existing and proposed contours (if available), limit of surface water areas, direction of flow, ordinary high water, impact limits, and location and dimension of all proposed structures in impact areas. In addition, cross sectional or profile sketches with the above information may be required to detail impact areas.

12. (Reserved.)

13. Surface water impact information (wetlands, streams, or open water) for both permanent and temporary impacts, including a description of the impact, the areal extent of the impact (area of wetland in square feet and acres; area of stream, length of stream, and average width), the location (latitude and longitude at the center of the impact, or at the center of each impact for linear projects) and the type of surface water impact (open water; wetlands according to the Cowardin classification or similar terminology; or perennial and nonperennial for streams). The board encourages applicants to coordinate the determination of perennial or nonperennial streams with the appropriate local government agency in Tidewater Virginia.

14. Functional values assessment for impacts to wetlands greater than one acre, which shall consist of a summary of field observations of the existing wetland functions and values and an assessment of the impact that the project will have on these functions and values. The following parameters and functions shall be directly addressed: surrounding land uses and cover types; nutrient, sediment, and pollutant trapping; flood control and flood storage capacity; erosion control and shoreline stabilization; groundwater recharge and discharge; aquatic and wildlife habitat; and unique or critical habitats.

15. A description of the specific on-site measures considered and taken during project design and development both to avoid and minimize impacts to surface waters to the maximum extent practicable.

16. A conceptual plan for the intended compensation for unavoidable impacts, including:

a. For wetlands, the conceptual compensation plan shall include: the goals and objectives in terms of replacement of wetland acreage and function; a detailed location map (e.g., a United States Geologic Survey topographic quadrangle map), including latitude and longitude (to the nearest second) at the center of the site; a description of the surrounding land use; a hydrologic analysis, including a draft water budget based on expected monthly inputs and outputs which will project water level elevations for a typical year, a dry year, and a wet year; groundwater elevation data, if available, or the proposed location of groundwater monitoring wells to collect these data; a map for existing surface water areas on the proposed site or sites, including a wetland delineation confirmation for any existing wetlands; a conceptual grading plan; a conceptual planting scheme, including suggested plant species and zonation of each vegetation type proposed; and a description of existing soils, including general information on topsoil and subsoil conditions, permeability, and the need for soil amendments.

b. For streams, the conceptual compensation plan shall include: the goals and objectives in terms of water quality benefits and replacement of stream functions; a detailed location map (e.g., a United States Geologic Survey topographic quadrangle map), including the latitude and longitude to the nearest second; the proposed stream segment restoration locations, including plan view and cross section sketches; the stream deficiencies that need to be addressed; the proposed restoration measures to be employed, including channel measurements, proposed design flows and types of instream structures; and reference stream data, if available.

c. Applicants proposing to compensate off site, including purchase or use of mitigation bank credits, or contribution to an in lieu fee fund, shall submit an evaluation of the feasibility of on site compensation. If on-site compensation is practicable, applicants shall provide documentation as to why the proposed off site compensation is ecologically preferable. The evaluation shall include, but not be limited to, the following assessment criteria: water quality benefits, hydrologic source, hydrologic regime, watershed, surface water functions and values, vegetation type, soils, impact acreage, distance from impacts, timing of compensation versus impacts, acquisition, constructability, and cost.

d. Applicants proposing compensation involving contributions to an in lieu fee fund shall state such as the conceptual compensation plan. Written documentation of the willingness of the entity to accept the donation and

~~documentation of how the amount of the contribution was calculated shall be submitted prior to issuance of this general permit authorization.~~

~~e. Applicants proposing compensation involving the purchase or use of mitigation banking credits shall include as their conceptual compensation plan:~~

~~(1) The name of the proposed mitigation bank and the HUC in which it is located;~~

~~(2) The number of credits proposed to be purchased or used; and~~

~~(3) Certification from the bank owner of the availability of credits.~~

~~17. A delineation map must be provided of the geographic area of a delineated wetland for all wetlands on the site, in accordance with 9VAC25-210-45, including the wetlands data sheets. The delineation map shall also include the location of streams, open water, and the approximate limits of Chesapeake Bay Resource Protection Areas (RPAs), as other state or local requirements may apply if the project is located within an RPA. Wetland types shall be noted according to their Cowardin classification or similar terminology. A copy of the USACE delineation confirmation, or other correspondence from the USACE indicating their approval of the wetland boundary, shall be provided at the time of application, or if not available at that time, as soon as it becomes available during the VWP permit review.~~

~~18. A copy of the FEMA flood insurance rate map or FEMA approved local floodplain map for the project site.~~

~~19. The appropriate application processing fee for a VWP general permit in accordance with 9VAC25-20. The permit application fee for VWP permit authorizations is based on acres only. Therefore, impacts that include linear feet of stream bed must be converted to an acreage in order to calculate the permit application fee.~~

~~20. A written disclosure identifying all wetlands, open water, streams, and associated upland buffers within the proposed project or compensation areas that are under a deed restriction, conservation easement, restrictive covenant, or other land use protective instrument (protected areas). Such disclosure shall include the nature of the prohibited activities within the protected areas.~~

~~21. The following certification:~~

~~"I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system or those persons directly responsible for gathering the information, the information submitted is to the best of my knowledge and belief true, accurate, and complete. I am aware that there are significant penalties for submitting false information including the possibility of fine and imprisonment for knowing violations."~~

~~C. The application shall be signed in accordance with 9VAC25-210-100. If an agent is acting on behalf of an applicant, the applicant shall submit an authorization of the agent that includes the signatures of both the applicant and the agent.~~

5. Project name and proposed project schedule.

6. The following information for the project site location and any related permittee-responsible compensatory mitigation site, if applicable:

a. The physical street address, nearest street, or nearest route number; city or county; zip code; and if applicable, parcel number of the site or sites.

b. Name of the impacted water body or water bodies, or receiving waters, as applicable, at the site or sites.

c. The latitude and longitude to the nearest second at the center of the site or sites.

d. The fourth order subbasin, as defined by the hydrologic unit boundaries of the National Watershed Boundary Dataset, for the site or sites.

e. A detailed map depicting the location of the site or sites, including the project boundary. The map (e.g., a United States Geologic Survey topographic quadrangle map) should be of sufficient detail to easily locate the site or sites for inspection.

f. GIS-compatible shapefile or shapefiles of the project boundary and all existing preservation areas on the site or sites, unless otherwise approved by or coordinated with DEQ. The requirement for a GIS-compatible shapefile or shapefiles may be waived by DEQ on a case-by-case basis.

7. A narrative description of the project, including project purpose and need.

8. Plan-view drawing or drawings of the project site sufficient to assess the project, including at a minimum the following:

a. North arrow, graphic scale, and existing and proposed topographic or bathymetric contours.

b. Limits of proposed impacts to surface waters.

c. Location of all existing and proposed structures.

d. All delineated wetlands and all jurisdictional surface waters on the site, including the Cowardin classification (i.e., emergent, scrub-shrub, or forested) for those surface waters and waterway name, if designated; ebb and flood or direction of flow; and ordinary high water mark in nontidal areas.

e. The limits of Chesapeake Bay Resource Protection Areas (RPAs) as field-verified by the applicant and if available, the limits as approved by the locality in which the project site is located unless the proposed use is

exempt from the Chesapeake Bay reservation Area Designation and Management Regulations (9VAC25-830).

f. The limits of any areas that are under a deed restriction, conservation easement, restrictive covenant, or other land use protective instrument (i.e., protected areas).

9. Cross-sectional and profile drawing or drawings. Cross-sectional drawing or drawings of each proposed impact area shall include at a minimum a graphic scale, existing structures, existing and proposed elevations, limits of surface water areas, ebb and flood or direction of flow (if applicable), ordinary high water mark in nontidal areas, impact limits, and location of all existing and proposed structures. Profile drawing or drawings with this information may be required on a case-by-case basis to demonstrate minimization of impacts. Any application that proposes piping or culverting stream flows shall provide a longitudinal profile of the pipe or culvert position and stream bed thalweg, or shall provide spot elevations of the stream thalweg at the beginning and end of the pipe or culvert, extending to a minimum of 10 feet beyond the limits of proposed impact.

10. A narrative description of all impacts proposed to surface waters, including the type of activity to be conducted in surface waters and any physical alteration to surface waters. Surface water impacts shall be identified as follows:

a. Wetland impacts identified according to their Cowardin classification (i.e., emergent, scrub-shrub, or forested), and for each classification, the individual impacts quantified in square feet to the nearest whole number, cumulatively summed in square feet, and then the sum converted to acres and rounded to two decimal places using commonly accepted arithmetic principles of rounding.

b. Individual stream impacts quantified in linear feet to the nearest whole number and then cumulatively summed, and when compensatory mitigation is required, the impacts identified according to the assessed type using the Unified Stream Methodology.

c. Open water impacts identified according to their Cowardin classification, and for each type, the individual impacts quantified in square feet to the nearest whole number, cumulatively summed in square feet, and then the sum converted to acres and rounded to two decimal places using commonly accepted arithmetic principles of rounding.

d. A copy of the approved jurisdictional determination, if available, or the preliminary jurisdictional determination from the U.S. Army Corps of Engineers (USACE), U.S. Department of Agriculture Natural Resources Conservation Service (NRCS), or DEQ, or other correspondence from the USACE, NRCS, or DEQ indicating approval of the boundary of applicable jurisdictional surface waters, including wetlands data sheets if applicable.

e. A delineation map and GIS-compatible shapefile or shapefiles of the delineation map that depicts the geographic area or areas of all surface water boundaries delineated in accordance with 9VAC25-210-45 and confirmed in accordance with the jurisdictional determination process; identifies such areas in accordance with subdivisions 10 a, 10 b, and 10 c of this subsection; and quantifies and identifies any other surface waters according to their Cowardin classification (i.e., emergent, scrub-shrub, or forested) or similar terminology, if applicable. The requirements for a delineation map or GIS-compatible shapefile or shapefiles may be waived by DEQ on a case-by-case basis.

11. An alternatives analysis for the proposed project detailing the specific on-site measures taken during project design and development to first avoid and then minimize impacts to surface waters to the maximum extent practicable in accordance with the Guidelines for Specification of Disposal Sites for Dredged or Fill Material, 40 CFR Part 230. Avoidance and minimization includes, but is not limited to, the specific on-site measures taken to reduce the size, scope, configuration, or density of the proposed project, including review of alternative sites where required for the project, which would avoid or result in less adverse impact to surface waters, and documentation demonstrating the reason the applicant determined less damaging alternatives are not practicable. The analysis shall demonstrate to the satisfaction of the board that avoidance and minimization opportunities have been identified and measures have been applied to the proposed activity such that the proposed activity in terms of impacts to state waters and fish and wildlife resources is the least environmentally damaging practicable alternative.

12. A compensatory mitigation plan to achieve no net loss of wetland acreage or functions or stream functions and water quality benefits.

a. If permittee-responsible compensation is proposed for wetland impacts, a conceptual wetland compensatory mitigation plan must be submitted in order for an application to be deemed complete and shall include at a minimum (i) the goals and objectives in terms of replacement of wetland acreage or functions; (ii) a detailed location map including latitude and longitude to the nearest second and the fourth order subbasin, as defined by the hydrologic unit boundaries of the National Watershed Boundary Dataset, at the center of the site; (iii) a description of the surrounding land use; (iv) a hydrologic analysis including a draft water budget for nontidal areas based on expected monthly inputs and outputs that will project water level elevations for a

typical year, a dry year, and a wet year; (v) groundwater elevation data, if available, or the proposed location of groundwater monitoring wells to collect these data; (vi) wetland delineation confirmation, data sheets, and maps for existing surface water areas on the proposed site or sites; (vii) a conceptual grading plan; (viii) a conceptual planting scheme including suggested plant species and zonation of each vegetation type proposed; (ix) a description of existing soils including general information on both topsoil and subsoil conditions, permeability, and the need for soil amendments; (x) a draft design of any water control structures; (xi) inclusion of buffer areas; (xii) a description of any structures and features necessary for the success of the site; (xiii) the schedule for compensatory mitigation site construction; and (xiv) measures for the control of undesirable species.

b. If permittee-responsible compensation is proposed for stream impacts, a conceptual stream compensatory mitigation plan must be submitted in order for an application to be deemed complete and shall include at a minimum (i) the goals and objectives in terms of water quality benefits and replacement of stream functions; (ii) a detailed location map including the latitude and longitude to the nearest second and the fourth order subbasin, as defined by the hydrologic unit boundaries of the National Watershed Boundary Dataset, at the center of the site; (iii) a description of the surrounding land use; (iv) the proposed stream segment restoration locations including plan view and cross-sectional drawings; (v) the stream deficiencies that need to be addressed; (vi) data obtained from a DEQ-approved, stream impact assessment methodology such as the Unified Stream Methodology; (vii) the proposed restoration measures to be employed including channel measurements, proposed design flows, types of instream structures, and conceptual planting scheme; (viii) reference stream data, if available; (ix) inclusion of buffer areas; (x) schedule for restoration activities; and (xi) measures for the control of undesirable species.

c. For any permittee-responsible compensatory mitigation, the conceptual compensatory mitigation plan shall also include a draft of the intended protective mechanism or mechanisms, in accordance with 9VAC25-210-116 B 2, such as, but not limited to, a conservation easement held by a third party in accordance with the Virginia Conservation Easement Act (§ 10.1-1009 et seq. of the Code of Virginia) or the Virginia Open-Space Land Act (§ 10.1-1700 et seq. of the Code of Virginia), a duly recorded declaration of restrictive covenants, or other protective instrument. The draft intended protective mechanism shall contain the information in subdivisions c (1), c (2), and c (3) of this subdivision 12 or in lieu thereof shall describe the intended protective mechanism or mechanisms that contains the information required below:

(1) A provision for access to the site;

(2) The following minimum restrictions: no ditching, land clearing, or discharge of dredge or fill material, and no activity in the area designated as compensatory mitigation area with the exception of maintenance; corrective action measures; or DEQ-approved activities described in the approved final compensatory mitigation plan or long-term management plan; and

(3) A long-term management plan that identifies a long-term steward and adequate financial assurances for long-term management in accordance with the current standard for mitigation banks and in-lieu fee program sites, except that financial assurances will not be necessary for permittee-responsible compensation provided by government agencies on government property. If approved by DEQ, permittee-responsible compensation on government property and long-term protection may be provided through federal facility management plans, integrated natural resources management plans, or other alternate management plans submitted by a government agency or public authority.

d. Any compensatory mitigation plan proposing the purchase of mitigation bank or in-lieu fee program credits shall include the number and type of credits proposed to be purchased and documentation from the approved mitigation bank or in-lieu fee program sponsor of the availability of credits at the time of application.

13. Permit application fee. The applicant will be notified by the board as to the appropriate fee for the project.

14. A written description and a graphical depiction identifying all upland areas including buffers, wetlands, open water, other surface waters, and compensatory mitigation areas located within the proposed project boundary or permittee-responsible compensatory mitigation areas that are under a deed restriction, conservation easement, restrictive covenant, or other land use protective instrument (i.e., protected areas). Such description and a graphical depiction shall include the nature of the prohibited activities within the protected areas and the limits of Chesapeake Bay Resource Protection Areas (RPAs) as field-verified by the applicant and if available, the limits as approved by the locality in which the project site is located, unless the proposed use is exempt from the Chesapeake Bay Preservation Area Designation and Management Regulations (9VAC25-830), as additional state or local requirements may apply if the project is located within an RPA.

15. Signature page that has been signed, dated, and certified by the applicant in accordance with 9VAC25-210-100. If the applicant is a business or other organization, the signature must be made by an individual with the authority to bind the business or organization, and the title of the signatory must be provided. The application signature page, either on the copy submitted to the Virginia Marine

Resources Commission or to DEQ, must have an original signature. Electronic submittals containing the original signature page, such as that contained in a scanned document file, are acceptable.

C. An analysis of the functions of wetlands proposed to be impacted may be required by DEQ. When required, the method selected for the analysis shall assess water quality or habitat metrics and shall be coordinated with DEQ in advance of conducting the analysis.

1. No analysis shall be required when:

a. Wetland impacts per each single and complete project total 1.00 acre or less; or

b. The proposed compensatory mitigation consists of purchasing mitigation bank or in-lieu fee program credits at standard mitigation ratios of 2:1 for forest, 1.5:1 for scrub-shrub, and 1:1 for emergent, or higher.

2. Analysis shall be required when wetland impacts per each single and complete project total 1.01 acres or more and when any of the following applies:

a. The proposed compensatory mitigation consists of permittee-responsible compensation, including water quality enhancements as replacement for wetlands; or

b. The proposed compensatory mitigation consists of purchasing mitigation bank or in-lieu fee program credits at less than the standard mitigation ratios of 2:1 for forest, 1.5:1 for scrub-shrub, and 1:1 for emergent.

D. Upon receipt of an application by the appropriate DEQ office, the board has 15 days to review the application and either determine the information requested in subsection B of this section is complete or inform the applicant that additional information is required to make the application complete. Coverage under the VWP general permit shall be approved~~,~~ or approved with conditions, or the application shall be denied within 45 days of receipt of a complete application. If the board fails to act within 45 days on a complete application, coverage under the VWP general permit shall be deemed ~~approved~~ granted.

1. In evaluating the application, the board shall make an assessment of the impacts associated with the project in combination with other existing or proposed impacts. ~~Coverage~~ Application for coverage under the VWP general permit shall be denied if the cumulative impacts will cause or contribute to a significant impairment of surface waters or fish and wildlife resources.

2. The board may place additional ~~conditions~~ requirements on a project in order to ~~approve authorization~~ grant coverage under this VWP general permit. However, ~~these conditions~~ the requirements must be consistent with the VWP general permit regulation.

E. Incomplete application. Where an application is ~~incomplete~~ not accepted as complete by the board within 15 days of receipt, the board shall require the submission of additional information from the applicant and may suspend processing ~~the~~ of any application until such time as the applicant has supplied the requested information and the application is complete. Where the applicant becomes aware that he omitted one or more relevant facts from an application, or submitted incorrect information in an application or ~~in reports~~ any report to the board, ~~he~~ the applicant shall immediately submit such facts or the correct information. A revised application with new information shall be deemed a new application~~,~~ for the purposes of review but shall not require an additional permit application fee. An incomplete permit application may be administratively withdrawn from processing by the board for failure to provide the required information after ~~180~~ 60 days from the date ~~that~~ of the ~~original permit application was received~~ latest written information request made by the board. An applicant may request a suspension of application review by the board, but requesting a suspension shall not preclude the board from administratively withdrawing an incomplete application. Resubmittal of a permit application for the same or similar project, after such time that the original permit application was administratively withdrawn, shall require submittal of an additional permit application fee.

**9VAC25-670-70. Compensation.**

A. ~~In accordance with 9VAC25-670-50 B, compensatory~~ Compensatory mitigation may be required for ~~all~~ permanent, nontidal surface water impacts as specified in 9VAC25-670-50 A. All temporary, nontidal surface water impacts shall be restored to preexisting conditions in accordance with 9VAC25-670-100.

~~B. Generally, the sequence of preferred compensation options shall be restoration, then creation, then mitigation banking, and then in-lieu fee fund. Also, 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 to practicable on-site or in-kind compensation may be considered. When the applicant can demonstrate satisfactorily that an off-site or out-of-kind compensatory mitigation proposal is ecologically preferable, then such proposal may be deemed appropriate for compensation of project impacts.~~

~~C. For the purposes of this VWP general permit, compensatory mitigation for unavoidable wetland impacts may be met through the following:~~

~~1. Wetland creation.~~

~~2. Wetland restoration.~~

~~3. The purchase or use of credits from a mitigation bank, pursuant to § 62.1-44.15:23 of the Code of Virginia.~~

~~4. A contribution to an approved in-lieu fee fund.~~

~~5. Preservation of upland buffers adjacent to state waters, when utilized in conjunction with subdivision 1, 2, or 3 of~~

this subsection and when consistent with 9VAC25-210-116 A.

6. Restoration of upland buffers adjacent to state waters, when utilized in conjunction with subdivision 1, 2, or 3 of this subsection and when consistent with 9VAC25-210-116 A.

7. Preservation of wetlands, when utilized in conjunction with subdivision 1, 2, or 3 of this subsection.

D. For the purposes of this VWP general permit, compensatory mitigation for unavoidable stream impacts may be met through the following:

1. Stream channel restoration or enhancement.

2. Riparian buffer restoration or enhancement.

3. Riparian buffer preservation, when consistent with 9VAC25-210-116 A.

4. A contribution to an approved in-lieu fee fund.

5. The purchase or use of credits from a mitigation bank, pursuant to § 62.1-44.15:23 of the Code of Virginia.

E. In order for contribution to an in-lieu fee fund to be an acceptable form of compensation, the fund must be approved for use by the board according to the provisions of 9VAC25-210-116 D. The applicant shall provide proof of contribution to DEQ prior to commencing activities in impact areas.

F. In order for purchase or use of bank credits to be an acceptable form of compensation, the bank shall be operating in accordance with the provisions of § 62.1-44.15:23 of the Code of Virginia and 9VAC25-210-116 E. The applicant shall provide proof of purchase, use, or debit to DEQ prior to commencing activities in impact areas.

G. B. Compensatory mitigation and any compensatory mitigation proposals shall be in accordance with this section and 9VAC25-210-116.

Compensation C. When required, compensatory mitigation for unavoidable permanent wetland impacts shall be provided at the following minimum compensation to impact mitigation ratios:

1. Impacts to forested wetlands shall be mitigated at 2:1, as calculated on an area basis.

2. Impacts to scrub-shrub wetlands shall be mitigated at 1.5:1, as calculated on an area basis.

3. Impacts to emergent wetlands shall be mitigated at 1:1, as calculated on an area basis.

H. Compensation D. When required, compensatory mitigation for stream bed impacts shall be appropriate to replace lost functions and water quality benefits. One factor in determining the required stream compensation shall be an analysis of stream impacts utilizing a stream impact assessment methodology acceptable to DEQ the Department of Environmental Quality.

I. E. Compensation for permanent open water impacts, other than to streams, may be required at a an in-kind or out-of-kind mitigation ratio of 1:1 replacement to impact ratio or less, as calculated on an area basis, to offset impacts to state waters and fish and wildlife resources from significant impairment. Compensation shall not be required for permanent or temporary impacts to open waters identified as palustrine by the Cowardin classification method, except when such open waters are located in areas of karst topography in Virginia and are formed by the natural solution of limestone.

J. Compensation F. When conversion results in a permanent alteration of the functions of a wetland, compensatory mitigation for conversion impacts to wetlands shall be required at a 1:1 replacement to impact mitigation ratio, as calculated on an area basis, when such conversion results in a permanent alteration of the functions and values of the wetland. For example, the permanent conversion of a forested wetland to an emergent wetland is considered to be a permanent impact for the purposes of this regulation. Compensation for conversion of other types of surface waters may be required, as appropriate, to offset impacts to state waters and fish and wildlife resources from significant impairment.

**9VAC25-670-80. Notice of planned changes; modifications to coverage.**

A. The permittee shall notify the board in advance of the a planned change, and the planned change an application or request will for modification of an authorization for coverage shall be reviewed according to all provisions of this regulation chapter. Coverage shall not be modified if (i) the cumulative total of permanent and temporary impacts exceeds one acre of nontidal wetlands or open water or exceeds 1,500 linear feet of nontidal stream bed or (ii) the criteria in subsection B of this section are not met. The applicant may submit a new permit application for consideration under a VWP individual permit.

B. Authorization under this VWP general permit coverage may be modified subsequent to issuance if the permittee determines that additional permanent wetland, open water, or stream under the following circumstances:

1. Additional impacts to surface waters are necessary, provided that the additional impacts are associated with the previously authorized activities in authorized locations within the same phase of development or within logical termini, the cumulative increase in acreage of wetland or open water impacts is not greater than 1/4 acre, the cumulative increase in stream bed impacts is not greater than 100 linear feet, and the additional impacts are fully mitigated. Prior to a planned change approval, DEQ may require submission of a compensatory mitigation plan for the additional impacts. In cases where the original impacts totaled less than 1/10 acre of wetlands or open water, or less than 300 linear feet of stream bed, and the additional impacts result in these limits being exceeded, the notice of planned change will not be approved. However, the

~~applicant may submit a new permit application and permit application fee for the total impacts to be considered under this VWP general permit, another VWP general permit, or a VWP individual permit.~~:

a. The additional impacts are proposed prior to impacting those additional areas.

b. The proposed additional impacts are located within the project boundary as depicted in the application for coverage or are located in areas of directly-related off-site work unless otherwise prohibited by this VWP general permit regulation.

c. The permittee has provided sufficient documentation that the board may reasonably determine that the additional impacts will not impact federal or state listed or proposed threatened or endangered species or proposed or designated critical habitat, or be the taking of threatened or endangered species.

d. The cumulative, additional permanent wetland or open water impacts for one or more notices of planned change do not exceed 0.25 acre.

e. The cumulative, additional permanent stream impacts for one or more notices of planned change do not exceed 100 linear feet.

f. Documentation is provided demonstrating that the proposed surface water impacts have been avoided to the maximum extent practicable in accordance with the informational requirements of 9VAC25-670-60 B 11.

g. Compensatory mitigation for the proposed impacts, if required, meets the requirements of 9VAC25-670-70 and 9VAC25-210-116. Prior to a planned change approval, the Department of Environmental Quality may require submission of a compensatory mitigation plan for the additional impacts.

h. Where such additional impacts are temporary, and prior to initiating the impacts, the permittee provides a written statement to the board that the area to be temporarily impacted will be restored to its preconstruction elevations and contours, with topsoil from the impact area where practicable, such that the previous acreage and functions are restored, in accordance with Part I A 3 and B 11 of 9VAC25-670-100. The additional temporary impacts shall not cause the cumulative total impacts to exceed the general permit threshold for use. The proposed temporary impacts shall be deemed approved if DEQ does not respond within 10 days of receipt of the request for authorization to temporarily impact additional surface waters.

i. The additional impacts do not change the category of the project, based on the original impact amounts as specified in 9VAC25-670-50 A 2. However, the applicant may submit a new permit application for the total impacts to be considered under this VAP general permit, another VWP general permit, or a VWP individual permit.

~~C. Authorization under this VWP general permit may be modified after issuance if the project results in less~~ 2. A reduction in wetland or stream impacts. ~~Compensation~~ Compensatory mitigation requirements may be modified in relation to the adjusted impacts ~~at the request of the permittee~~, provided that the adjusted ~~compensation~~ compensatory mitigation meets the initial ~~authorization compensation~~ compensatory mitigation goals. DEQ shall not be responsible for ensuring refunds for mitigation bank credit purchases~~, mitigation bank usage,~~ or in-lieu fee ~~fund contributions~~ program credit purchases.

~~D. Authorization under this VWP general permit may be modified after issuance for a~~ 3. A change in project plans or use that does not result in a change ~~in~~ to authorized project impacts other than those allowed in subdivisions 1 and 2 of this subsection.

~~E. Authorization under the VWP general permit may be modified for a change to the mitigation bank at which credits are purchased or used, provided that the same amount of credits are purchased or used and all criteria for use in 9VAC25-210-116 E are met.~~

~~F. Authorization under the VWP general permit may be modified after issuance for typographical errors.~~

~~G. A notice of planned change is not required after authorization issuance for additional temporary impacts to surface waters, provided that DEQ is notified in writing regarding additional temporary impacts, and the area is restored to preexisting conditions in accordance with Part I C 11 of this general permit. In no case can the additional temporary impacts exceed the general permit threshold for use.~~

~~H. In no case can this authorization be modified to exceed the general permit threshold for use.~~

~~I. A notice of planned change shall be denied if fish and wildlife resources are significantly impacted or if the criteria in subsection B of this section are not met. However, the original VWP general permit authorization shall remain in effect. The applicant may submit a new permit application and permit application fee for consideration under a VWP individual permit.~~

4. Substitute a specific, DEQ-approved mitigation bank or in-lieu fee program with another DEQ-approved mitigation bank or in-lieu fee program or substitute all or a portion of the prior authorized permittee-responsible compensation with a purchase of mitigation credits in accordance with 9VAC25-210-116 C from a DEQ-approved mitigation bank or in-lieu fee program. The amount of credits proposed to be purchased shall be sufficient to meet the compensatory mitigation requirement for which the compensatory mitigation is proposed to replace.

5. Correct typographical errors.

**9VAC25-670-90. Termination of ~~authorization by consent~~ coverage.**

~~When all permitted activities requiring notification under 9VAC25-670-50 B and all compensatory mitigation requirements have been completed, or if the authorized impacts will not occur, the~~ A. The permittee shall submit a request for termination by consent within 30 days of ~~project completion or project cancellation~~ completing or canceling all authorized activities requiring notification under 9VAC25-670-50 A and all compensatory mitigation requirements. When submitted for project completion, the request for termination by consent shall constitute a notice of project completion in accordance with 9VAC25-210-130 F. The director may accept this termination of ~~authorization~~ coverage on behalf of the board. The permittee shall submit the following information:

1. Name, mailing address, and telephone number of the permittee;

2. Name and location of the activity;

3. The VWP general permit ~~authorization~~ tracking number; and

4. One of the following certifications:

a. For project completion:

"I certify under penalty of law that all activities and any required compensatory mitigation authorized by ~~a~~ the VWP general permit and general permit coverage have been completed. I understand that by submitting this notice of termination I am no longer authorized to perform activities in surface waters in accordance with the VWP general permit and general permit coverage, and that performing activities in surface waters is unlawful where the activity is not authorized by ~~a~~ the VWP permit or coverage, unless otherwise excluded from obtaining coverage. I also understand that the submittal of this notice does not release me from liability for any violations of ~~this~~ the VWP general permit ~~authorization~~ or coverage."

b. For project cancellation:

"I certify under penalty of law that the activities and any required compensatory mitigation authorized by ~~this~~ the VWP general permit and general permit coverage will not occur. I understand that by submitting this notice of termination I am no longer authorized to perform activities in surface waters in accordance with the VWP general permit and general permit coverage, and that performing activities in surface waters is unlawful where the activity is not authorized by ~~a~~ the VWP permit or coverage, unless otherwise excluded from obtaining coverage. I also understand that the submittal of this notice does not release me from liability for any violations of ~~this~~ the VWP general permit ~~authorization~~ or coverage, nor does it allow me to resume the ~~permitted~~ authorized activities without reapplication and ~~reauthorization~~ coverage."

c. For events beyond permittee control, the permittee shall provide a detailed explanation of the events, to be approved by ~~DEQ~~ the Department of Environmental Quality, and the following certification statement:

"I certify under penalty of law that the activities or the required compensatory mitigation authorized by ~~a~~ the VWP general permit and general permit coverage have changed as the result of events beyond my control (see attached). I understand that by submitting this notice of termination I am no longer authorized to perform activities in surface waters in accordance with the VWP general permit and general permit coverage, and that performing activities in surface waters is unlawful where the activity is not authorized by ~~a~~ the VWP permit or coverage, unless otherwise excluded from obtaining coverage. I also understand that the submittal of this notice does not release me from liability for any violations of ~~this~~ the VWP general permit ~~authorization~~ or coverage, nor does it allow me to resume the ~~permitted~~ authorized activities without reapplication and ~~reauthorization~~ coverage."

B. VWP general permit coverage may be terminated for cause in accordance with 9VAC25-210-180 F and 9VAC25-230, or without cause in accordance with 9VAC25-210-180 G and 9VAC25-230.

**9VAC25-670-95. ~~Transition.~~ (Repealed.)**

~~A. All applications received on or after August 1, 2006, will be processed in accordance with these new procedures.~~

~~B. VWP general permit authorizations issued prior to August 1, 2006, will remain in full force and effect until such authorizations expire, are revoked, or are terminated.~~

~~C. Notices of planned change and all other types of notification that are received by the board prior to August 1, 2006, will be processed in accordance with the VWP general permit regulation in effect at that time. Notices of planned change and all other types of notification to the board that are received on or after August 1, 2006, will be processed in accordance with these new procedures.~~

**9VAC25-670-100. VWP general permit.**

~~Any applicant whose application has been accepted by the board shall be subject to the following requirements:~~

~~VWP General Permit No. WP2~~
~~Authorization expiration date:~~
~~Authorization Note(s):~~

~~VWP GENERAL PERMIT FOR FACILITIES AND ACTIVITIES OF UTILITIES AND PUBLIC SERVICE COMPANIES REGULATED BY THE FEDERAL ENERGY REGULATORY COMMISSION OR THE STATE CORPORATION COMMISSION AND OTHER UTILITY LINE ACTIVITIES UNDER THE VIRGINIA~~

~~WATER PROTECTION PERMIT AND THE VIRGINIA STATE WATER CONTROL LAW~~

~~Based upon an examination of the information submitted by the applicant and in~~

VWP GENERAL PERMIT NO. WP2 FOR FACILITIES AND ACTIVITIES OF UTILITIES AND PUBLIC SERVICE COMPANIES REGULATED BY THE FEDERAL ENERGY REGULATORY COMMISSION OR THE STATE CORPORATION COMMISSION AND OTHER UTILITY LINE ACTIVITIES UNDER THE VIRGINIA WATER PROTECTION PERMIT AND THE VIRGINIA STATE WATER CONTROL LAW

Effective date: August 2, 2016
Expiration date: August 1, 2031

In compliance with § 401 of the Clean Water Act, as amended (33 USC § 1341) and the State Water Control Law and regulations adopted pursuant thereto, the board has determined that there is a reasonable assurance that ~~the activity authorized by~~ this VWP general permit, if ~~conducted in accordance with the conditions set forth herein~~ complied with, will protect instream beneficial uses ~~and~~, will not violate applicable water quality standards~~. The board finds that the effect of the impact, together with other existing or proposed impacts to wetlands~~, and will not cause or contribute to a significant impairment of surface waters or fish and wildlife resources. In issuing this VWP general permit, the board has not taken into consideration the structural stability of any proposed activities.

~~Subject~~ The permanent or temporary impact of up to one acre of nontidal wetlands or open water and up to 1,500 linear feet of nontidal stream bed shall be subject to the provisions of the VWP general permit set forth herein; any requirements in coverage granted under this VWP general permit; the Clean Water Act, as amended~~,~~; and ~~pursuant to~~ the State Water Control Law and regulations adopted pursuant to it~~, the permittee is authorized to permanently or temporarily impact up to one acre of nontidal wetlands or open water and up to 1,500 linear feet of nontidal stream bed~~.

~~Permittee:~~

~~Address:~~

~~Activity Location:~~

~~Activity Description:~~

~~The authorized activity shall be in accordance with this cover page, Part I Special Conditions, Part II Compensation, Monitoring, and Reporting, and Part III Conditions Applicable to All VWP Permits, as set forth herein.~~

~~Director, Department of Environmental Quality~~ ~~Date~~

Part I. Special Conditions.

A. Authorized activities.

1. ~~This permit authorizes~~ The activities authorized by this chapter shall not cause more than the permanent or temporary impacts of up to one acre of nontidal wetlands or open water and up to 1,500 linear feet of nontidal stream bed ~~according to the information provided in the approved and complete application~~.

2. Any changes to the authorized permanent impacts to surface waters ~~associated with this project~~ shall require ~~either~~ a notice of planned change in accordance with 9VAC25-670-80. An application or request for modification to coverage or another VWP permit application may be required.

3. Any changes to the authorized temporary impacts to surface waters ~~associated with this project~~ shall require written notification to ~~DEQ~~ and approval from the Department of Environmental Quality in accordance with 9VAC25-670-80 prior to initiating the impacts and restoration to preexisting conditions in accordance with the conditions of this permit ~~authorization~~.

4. Modification to compensation requirements may be approved at the request of the permittee when a decrease in the amount of authorized surface waters impacts occurs, provided that the adjusted compensation meets the initial ~~authorization~~ compensation goals.

~~5. The activities authorized for coverage under this VWP general permit must commence and be completed within seven years of the date of this authorization.~~

~~B. Continuation of coverage. Reapplication for continuation of coverage under this VWP general permit or a new VWP permit may be necessary if any portion of the authorized activities or any VWP permit requirement (including compensation) has not been completed within seven years of the date of authorization. Notwithstanding any other provision, a request for continuation of coverage under a VWP general permit in order to complete monitoring requirements shall not be considered a new application, and no application fee will be charged. The request for continuation of coverage must be made no less than 60 days prior to the expiration date of this VWP general permit authorization, at which time the board will determine if continuation of the VWP general permit authorization is necessary.~~

~~C.~~ B. Overall ~~project~~ conditions.

1. The activities authorized by this VWP general permit shall be executed in a manner so as to minimize adverse impacts on instream beneficial uses as defined in § 62.1-10 (b) of the Code of Virginia.

2. No activity may substantially disrupt the movement of aquatic life indigenous to the water body, including those species which normally migrate through the area, unless the primary purpose of the activity is to impound water. ~~Culverts~~ Pipes and culverts placed in streams must be installed to maintain low flow conditions~~.~~ and shall be

countersunk at both inlet and outlet ends of the pipe or culvert unless otherwise specifically approved by the Department of Environmental Quality on a case-by-case basis, and as follows: The requirement to countersink does not apply to extensions or maintenance of existing pipes and culverts that are not countersunk, floodplain pipes and culverts being placed above ordinary high water, pipes and culverts being placed on bedrock, or pipes and culverts required to be placed on slopes 5.0% or greater. ~~No activity may cause more than minimal adverse effect on navigation. Furthermore the activity must not impede the passage of normal or expected high flows and he structure or discharge must withstand expected high flows.~~ Bedrock encountered during construction must be identified and approved in advance of a design change where the countersunk condition cannot be met. Pipes and culverts 24 inches or less in diameter shall be countersunk three inches below the natural stream bed elevations, and pipes and culverts greater than 24 inches shall be countersunk at least six inches below the natural stream bed elevations. Hydraulic capacity shall be determined based on the reduced capacity due to the countersunk position. In all stream crossings appropriate measures shall be implemented to minimize any disruption of aquatic life movement.

3. Wet or uncured concrete shall be prohibited from entry into flowing surface waters unless the area is contained within a cofferdam and the work is performed in the dry or unless otherwise approved by the Department of Environmental Quality. Excess or waste concrete shall not be disposed of in flowing surface waters or washed into flowing surface waters.

4. All fill material shall be clean and free of contaminants in toxic concentrations or amounts in accordance with all applicable laws and regulations.

5. Erosion and sedimentation controls shall be designed in accordance with the Virginia Erosion and Sediment Control Handbook, Third Edition, 1992. These controls shall be placed prior to clearing and grading and maintained in good working order to minimize impacts to state waters. These controls shall remain in place until the area is stabilized and shall then be removed.

6. Exposed slopes and streambanks shall be stabilized immediately upon completion of work in each permitted area. All denuded areas shall be properly stabilized in accordance with the Virginia Erosion and Sediment Control Handbook, Third Edition, 1992.

7. All construction, construction access (e.g., cofferdams, sheetpiling, and causeways) and demolition activities associated with ~~this~~ the project shall be accomplished in such a manner that minimizes construction or waste materials from entering surface waters to the maximum extent practicable, unless authorized by this VWP general permit.

8. No machinery may enter flowing waters, unless authorized by this VWP general permit or approved prior to entry by the Department of Environmental Quality.

9. Heavy equipment in temporarily impacted wetland areas shall be placed on mats, geotextile fabric, or other suitable material, to minimize soil disturbance to the maximum extent practicable. Equipment and materials shall be removed immediately upon completion of work.

10. All nonimpacted surface waters and compensatory mitigation areas within 50 feet of ~~permitted~~ authorized activities and within the project or right-of-way limits shall be clearly flagged or marked for the life of the construction activity at that location to preclude any unauthorized disturbances to these surface waters and compensatory mitigation areas during construction. The permittee shall notify contractors that no activities are to occur in these marked surface waters.

11. Temporary disturbances to surface waters during construction shall be avoided and minimized to the maximum extent practicable. All temporarily disturbed wetland areas shall be restored to preexisting conditions within 30 days of completing work at each respective temporary impact area, which shall include reestablishing preconstruction elevations and contours~~,~~ with topsoil from the impact area where practicable and planting or seeding with appropriate wetland vegetation according to cover type (i.e., emergent, scrub-shrub, or forested). The permittee shall take all appropriate measures to promote and maintain revegetation of temporarily disturbed wetland areas with wetland vegetation through the second year post-disturbance. All temporarily impacted streams and streambanks shall be restored to their ~~original~~ preconstruction elevations and contours with topsoil from the impact area where practicable within 30 days following the construction at that stream segment~~, and the banks~~. Streambanks shall be seeded or planted with the same vegetation cover type originally present ~~along the streambanks~~, including supplemental erosion control grasses if necessary~~, except for invasive~~. Invasive species identified on ~~DCR's~~ the Department of Conservation and Recreation's Virginia Invasive ~~Alien~~ Plant Species ~~of Virginia list~~ List shall not be used to the maximum extent practicable or without prior approval from the Department of Environmental Quality.

12. Materials (including fill, construction debris, and excavated and woody materials) temporarily stockpiled in wetlands shall be placed on mats or geotextile fabric, immediately stabilized to prevent entry into state waters, managed such that leachate does not enter state waters, and completely removed within 30 days following completion of that construction activity. Disturbed areas shall be returned to ~~original~~ preconstruction elevations and contours~~,~~ with topsoil from the impact areas where practicable; restored within 30 days following removal of

the stockpile~~.~~; and restored with the same vegetation cover type originally present, including supplemental erosion control grasses if necessary~~, except for invasive~~. Invasive species identified on ~~DCR's~~ the Department of Conservation and Recreation's Virginia Invasive ~~Alien~~ Plant Species ~~of Virginia list~~ List shall not be used to the maximum extent practicable or without prior approval from the Department of Environmental Quality

13. Continuous flow of perennial springs shall be maintained by the installation of spring boxes, french drains, or other similar structures.

14. The permittee shall employ measures to prevent spills of fuels or lubricants into state waters.

15. The permittee shall conduct his activities in accordance with the time-of-year restrictions recommended by the Virginia Department of Game and Inland Fisheries, the Virginia Marine Resources Commission, or other interested and affected agencies, as contained, when applicable, in a Department of Environmental Quality VWP general permit coverage, and shall ensure that all contractors are aware of the time-of-year restrictions imposed.

16. Water quality standards shall not be violated as a result of the construction activities ~~unless allowed by this permit authorization~~.

17. If stream channelization or relocation is required, all work in surface waters shall be done in the dry, unless otherwise authorized by ~~this VWP general permit~~ the Department of Environmental Quality, and all flows shall be diverted around the channelization or relocation area until the new channel is stabilized. This work shall be accomplished by leaving a plug at the inlet and outlet ends of the new channel during excavation. Once the new channel has been stabilized, flow shall be routed into the new channel by first removing the downstream plug and then the upstream plug. The rerouted steam flow must be fully established before construction activities in the old stream channel can begin.

~~D.~~ C. Road crossings.

1. Access roads and associated bridges ~~or~~, pipes, and culverts shall be constructed to minimize the adverse effects on surface waters to the maximum extent practicable. Access roads constructed above preconstruction elevations and contours ~~and elevations~~ in surface waters must be bridged, piped, or culverted to maintain surface flows.

2. Installation of road crossings shall occur in the dry via the implementation of cofferdams, sheetpiling, stream diversions, or similar structures.

~~E.~~ D. Utility lines.

1. All utility line work in surface waters shall be performed in a manner that minimizes disturbance, and the area must be returned to its ~~original~~ preconstruction elevations and contours with topsoil from the impact area where practicable and restored within 30 days of completing work in the area, unless otherwise authorized by ~~this VWP general permit~~ the Department of Environmental Quality. Restoration shall be the seeding or planting of the same vegetation cover type originally present, including supplemental erosion control grasses if necessary~~, except for invasive~~. Invasive species identified on ~~DCR's~~ the Department of Conservation and Recreation's Virginia Invasive ~~Alien~~ Plant Species ~~of Virginia list~~ List shall not be used to the maximum extent practicable or without prior approval from the Department of Environmental Quality.

2. Material resulting from trench excavation may be temporarily sidecast into wetlands, not to exceed 90 days, provided the material is not placed in a manner such that it is dispersed by currents or other forces.

3. The trench for a utility line cannot be constructed in a manner that drains wetlands (e.g., backfilling with extensive gravel layers creating a trench drain effect.). For example, utility lines may be backfilled with clay blocks to ensure that the trench does not drain surface waters through which the utility line is installed.

~~F.~~ E. Stream modification and stream bank protection.

1. Riprap bank stabilization shall be of an appropriate size and design in accordance with the Virginia Erosion and Sediment Control Handbook, Third Edition, 1992.

2. Riprap apron for all outfalls shall be designed in accordance with the Virginia Erosion and Sediment Control Handbook, Third Edition, 1992.

3. For stream bank protection activities, the structure and backfill shall be placed as close to the stream bank as practicable. No material shall be placed in excess of the minimum necessary for erosion protection.

4. All stream bank protection structures shall be located to eliminate or minimize impacts to vegetated wetlands to the maximum extent practicable.

5. Asphalt and materials containing asphalt or other toxic substances shall not be used in the construction of submerged sills or breakwaters.

6. Redistribution of existing stream substrate for the purpose of erosion control is prohibited.

7. No material removed from the stream bottom shall be disposed of in surface waters, unless otherwise authorized by this VWP general permit.

Part II. Construction and Compensation Requirements, Monitoring, and Reporting.

A. Minimum compensation requirements.

1. The permittee shall provide ~~appropriate and practicable~~ any required compensation for ~~all~~ impacts ~~meeting~~ in accordance with the conditions ~~outlined~~ in this VWP general permit and the chapter promulgating the general permit. For all compensation that requires a protective

mechanism, including preservation of surface waters or buffers, the permittee shall record the approved protective mechanism in the chain of title to the property, or an equivalent instrument for government-owned lands, and proof of recordation shall be submitted to the Department of Environmental Quality prior to commencing impacts in surface waters.

2. Compensation options that may be considered under this VWP general permit shall meet the criteria in 9VAC25-670-70 and 9VAC25-210-116.

3. The permittee-responsible compensation site or sites depicted in the conceptual compensation plan submitted with the application shall constitute the compensation site ~~for the approved project~~. A site change ~~will~~ may require a modification to ~~the authorization~~ coverage.

4. For compensation involving the purchase ~~or use~~ of mitigation bank credits or ~~a contribution to an~~ the purchase of in-lieu fee ~~fund~~ program credits, the permittee shall not initiate work in permitted impact areas until documentation of the mitigation bank credit purchase ~~or usage~~ or of the ~~fund contribution~~ in-lieu fee program credit purchase has been submitted to and received by ~~DEQ~~ the Department of Environmental Quality.

5. ~~All aspects of the compensation~~ The final compensation plan shall be ~~finalized,~~ submitted to and approved by the board prior to a construction activity in permitted impact areas. The board shall review and provide written comments on the final plan within 30 days of receipt or it shall be deemed approved. The final ~~compensation~~ plan as approved by the board shall be an enforceable requirement of any coverage under this VWP general permit ~~authorization~~. Deviations from the approved final plan ~~must~~ shall be submitted and approved in advance by the board.

~~6.~~ a. The final permittee-responsible wetlands compensation plan shall include:

~~a. The goals and objectives of the plan in terms of replacement of wetland acreage and functions, by wetland type;~~

~~b. Location map, including latitude and longitude (to the nearest second) at the center of the site;~~

~~c. Summary of the type and acreage of the existing wetland impacts anticipated during the construction of the compensation site and proposed compensation for these impacts;~~

~~d. Grading plan with existing and proposed elevations at one-foot or less contours;~~

~~e. Schedule for compensation site construction, including sequence of events with estimated dates;~~

~~f. Hydrologic analysis, including a water budget based on expected monthly inputs and outputs that will project water level elevations for a typical year, a dry year, and a wet year;~~

~~g. Groundwater elevation data for the site, or the location of groundwater monitoring wells to collect these data, and groundwater data for reference wetlands, if applicable;~~

~~h. Design of water control structures;~~

~~i. Planting scheme and schedule, indicating plant species, zonation, and acreage of each vegetation type proposed;~~

~~j. An abatement and control plan covering all undesirable plant species, as listed on DCR's Invasive Alien Plant Species of Virginia list, that includes the proposed procedures for notifying DEQ of their presence, methods of removal, and the control of such species;~~

~~k. Erosion and sedimentation control plan;~~

~~l. A soil preparation and amendment plan addressing both topsoil and subsoil conditions;~~

~~m. A discussion of structures and features considered necessary for the success of the site;~~

~~n. A monitoring plan, including success criteria, monitoring goals and methodologies, monitoring and reporting schedule, and the locations of photographic stations and monitoring wells, sampling points, and, if applicable, reference wetlands;~~

~~o. Site access plan;~~

~~p. The location and composition of any buffers; and~~

~~q. The mechanism for protection of the compensation areas.~~

(1) The complete information on all components of the conceptual compensation plan.

(2) A summary of the type and acreage of existing wetland impacts anticipated during the construction of the compensation site and the proposed compensation for these impacts; a site access plan; a monitoring plan, including proposed success criteria, monitoring goals, and the location of photo-monitoring stations, monitoring wells, vegetation sampling points, and reference wetlands or streams (if available); an abatement and control plan for undesirable plant species; an erosion and sedimentation control plan; a construction schedule; and the final protective mechanism for the protection of the compensation site or sites, including all surface waters and buffer areas within its boundaries.

(3) The approved protective mechanism. The protective mechanism shall be recorded in the chain of title to the property, or an equivalent instrument for government-owned lands, and proof of recordation shall be submitted to the Department of Environmental Quality prior to commencing impacts in surface waters.

~~7.~~ b. The final permittee-responsible stream compensation plan shall include:

~~a. The goals and objectives of the compensation plan in terms of replacement of stream functions and water quality benefits;~~

~~b. A location map, including latitude and longitude (to the nearest second) at the center of the site;~~

~~c. An evaluation, discussion, and plan sketches of existing conditions on the proposed compensation stream, including the identification of functional and physical deficiencies for which the measures are proposed, and summary of geomorphologic measurements (e.g., stream width, entrenchment ratio, width-depth ratio, sinuosity, slope, substrate, etc.);~~

~~d. The identification of existing geomorphological stream type being impacted and proposed geomorphological stream type for compensation purposes;~~

~~e. Detailed design information for the proposed restorative measures, including geomorphological measurements and reference reach information as appropriate;~~

~~f. Riparian buffer plantings, including planting scheme, species, buffer width;~~

~~g. Livestock access limiting measures, to the greatest extent possible;~~

~~h. A site access plan;~~

~~i. An erosion and sedimentation control plan, if appropriate;~~

~~j. An abatement and control plan covering all undesirable plant species, as listed on DCR's Invasive Alien Plant Species of Virginia list, that includes the proposed procedures for notifying DEQ of a their presence, methods for removal, and the control of any such species;~~

~~k. A schedule for compensation site construction including projected start date, sequence of events with projected dates, and projected completion date;~~

~~l. A monitoring plan, including a monitoring and reporting schedule; monitoring design and methodologies to evaluate the success of the proposed compensation measures, allowing comparison from year to year; proposed success criteria for appropriate compensation measures; location of all monitoring stations including photo stations, vegetation sampling points, survey points, bank pins, scour chains, and reference streams;~~

~~m. The mechanism for protection of the compensation area; and~~

~~n. Plan view sketch depicting the pattern and all compensation measures being employed, a profile sketch, and cross section sketches of the proposed compensation stream.~~

(1) The complete information on all components of the conceptual compensation plan.

(2) An evaluation, discussion, and plan drawing or drawings of existing conditions on the proposed compensation stream, including the identification of functional and physical deficiencies for which the measures are proposed, and summary of geomorphologic measurements (e.g., stream width, entrenchment ratio, width-depth ratio, sinuosity, slope, substrate, etc.); a site access plan; a monitoring plan, including a monitoring and reporting schedule, monitoring design and methodologies for success, proposed success criteria, location of photo-monitoring stations, vegetation sampling points, survey points, bank pins, scour chains, and reference streams; an abatement and control plan for undesirable plant species; an erosion and sedimentation control plan, if appropriate; a construction schedule; a plan-view drawing depicting the pattern and all compensation measures being employed; a profile drawing; cross-sectional drawing or drawings of the proposed compensation stream; and the final protective mechanism for the protection of the compensation site or sites, including all surface waters and buffer areas within its boundaries.

(3) The approved protective mechanism. The protective mechanism shall be recorded in the chain of title to the property, or an equivalent instrument for government-owned lands, and proof of recordation shall be submitted to the Department of Environmental Quality prior to commencing impacts in surface waters.

~~8. For final~~ 6. The following criteria shall apply to permittee-responsible wetland or stream compensation ~~plans, the~~:

a. The vegetation used shall be native species common to the area, shall be suitable for growth in local wetland or riparian conditions, and shall be from areas within the same or adjacent ~~USDA~~ U.S. Department of Agriculture Plant Hardiness Zone or ~~NRCS~~ Natural Resources Conservation Service Land Resource Region as that of the project site. Planting of woody plants shall occur when vegetation is normally dormant, unless otherwise approved in the final wetlands or stream compensation plan or plans.

~~9. The final wetland or stream compensation plan(s) shall include a mechanism for protection in perpetuity of the compensation site(s) to include all state waters within the compensation site boundary or boundaries. Such protections shall be in place within 120 days of final compensation plan approval. The restrictions, protections, or preservations, or similar instrument shall state that no activity will be performed on the property in any area designated as a compensation area with the exception of maintenance or corrective action measures authorized by the board. Unless specifically authorized by the board through the issuance of a VWP individual or general permit, or waiver thereof, this restriction applies to ditching, land clearing or the discharge of dredge or fill material. Such instrument shall contain the specific phrase "ditching, land clearing or discharge of dredge or fill material" in the limitations placed on the use of these areas. The protective instrument shall be recorded in the chain of~~

~~title to the property, or any equivalent instrument for government-owned lands. Proof of recordation shall be submitted within 120 days of survey or final compensation plan approval.~~

~~10.~~ b. All work in permitted impact areas shall cease if compensation site construction has not commenced within 180 days of commencement of project construction, unless otherwise authorized by the board.

~~11. DEQ~~ c. The Department of Environmental Quality shall be notified in writing ~~at least 10 days~~ prior to the initiation of construction activities at the compensation ~~site(s)~~ site.

~~12. Planting of woody plants shall occur when vegetation is normally dormant unless otherwise approved in the final wetland or stream compensation plan(s).~~

~~13.~~ d. Point sources of stormwater runoff shall be prohibited from entering a wetland compensation site prior to treatment by appropriate best management practices. Appropriate best management practices may include sediment traps, grassed waterways, vegetated filter strips, debris screens, oil and grease separators, or forebays.

~~14.~~ e. The success of the compensation shall be based on meeting the success criteria established in the approved final compensation plan.

~~15. Wetland hydrology shall be considered established if depths to the seasonal high water table are equal to or less than 12 inches below ground surface for at least 12.5% of the region's killing frost-free growing season, as defined in the soil survey for the locality of the compensation site or the NRCS WETS table, measured in consecutive days under typical precipitation conditions, and as defined in the water budget of the final compensation plan. For the purpose of this regulation, the growing season is defined as the period in which temperatures are expected to be above 28 degrees Fahrenheit in five out of 10 years, or the period during which the soil temperature in a wetland compensation site is greater than biological zero (five degrees Celsius) at a depth of 50 centimeters (19.6 inches), if such data is available.~~

~~16. The wetland plant community shall be considered established according to the performance criteria specified in the final compensation plan and approved by the board. The proposed vegetation success criteria in the final compensation plan shall include the following:~~

~~a. Species composition shall reflect the desired plant community types stated in the final wetlands compensation plan by the end of the first growing season and shall be maintained through the last monitoring year.~~

~~b. Species composition shall consist of greater than 50% facultative (FAC) or wetter (FACW or OBL) vegetation, as expressed by plant stem density or areal cover, by the end of the first growing season and shall be maintained through the last monitoring year.~~

~~17. Undesirable plant species shall be identified and controlled as described in the undesirable plant species control plan, such that they are not dominant species or do not change the desired community structure. The control plan shall include procedures to notify the board of any invasive species occurrences DEQ when undesirable plant species comprise greater than 5.0% of the vegetation by areal coverage on wetland or stream compensation sites. The notification shall include the methods of removal and control, and whether the methods are successful.~~

~~18.~~ f. If the wetland or stream compensation area fails to meet the specified success criteria in a particular monitoring year, other than the final monitoring year, the reasons for this failure shall be determined and a corrective action plan shall be submitted to ~~DEQ~~ the Department of Environmental Quality for approval with or before that year's monitoring report. The corrective action plan shall contain at a minimum the proposed actions, a schedule for those actions, and a monitoring plan, and shall be implemented by the permittee in accordance with the approved schedule. Should significant changes be necessary to ensure success, the required monitoring cycle shall begin again, with monitoring year one being the year that the changes are complete, as confirmed by ~~DEQ~~ the Department of Environmental Quality. If the wetland or stream compensation area fails to meet the specified success criteria by the final monitoring year, or if the wetland or stream compensation area has not met the stated restoration goals, reasons for this failure shall be determined and a corrective action plan, including proposed actions, a schedule, and a monitoring plan, shall be submitted with the final year monitoring report for ~~DEQ~~ Department of Environmental Quality approval. Corrective action shall be implemented by the permittee in accordance with the approved schedule. Annual monitoring shall be required to continue until two sequential, annual reports indicate that all criteria have been successfully satisfied and the site has met the overall restoration goals (e.g., that corrective actions were successful).

~~19.~~ g. The surveyed wetland boundary for the compensation site shall be based on the results of the hydrology, soils, and vegetation monitoring data and shall be shown on the site plan. Calculation of total wetland acreage shall be based on that boundary at the end of the monitoring cycle. Data shall be submitted by December 31 of the final monitoring year.

~~20.~~ h. Herbicides or algicides shall not be used in or immediately adjacent to the compensation site or sites without prior authorization by the board. All vegetation removal shall be done by manual means, unless

authorized by ~~DEQ~~ the Department of Environmental Quality in advance.

B. Impact site construction monitoring.

1. Construction activities authorized by this permit that are within impact areas shall be monitored and documented. The monitoring shall ~~document the preexisting conditions, activities during construction, and post-construction conditions. Monitoring shall~~ consist of ~~one of the following options~~:

~~a. Photographs shall be taken during construction at the end of the first, second, and third months after commencing construction, and then every six months thereafter for the remainder of the construction project. Photos are not required during periods of no activity within impact areas.~~

~~b. An ortho-rectified photograph shall be taken by a firm specializing in ortho-rectified photography prior to construction, and then annually thereafter, until all impacts are taken. Photos shall clearly show the delineated surface waters and authorized impact areas.~~

~~c. In lieu of photographs, and with prior approval from DEQ, the permittee may submit a written narrative that summarizes site construction activities in impact areas. The narrative shall be submitted at the end of the first, second, and third months after commencing construction, and then every six months thereafter, for the remainder of the construction activities. Narratives are not required during periods of no activity within the impact areas.~~

~~2. As part of construction monitoring, photographs taken at the photo stations or the narrative shall document site activities and conditions, which may include installation and maintenance of erosion and sediment controls; surface water discharges from the site; condition of adjacent nonimpact surface waters; flagged nonimpact surface waters; construction access and staging areas; filling, excavation, and dredging activities; culvert installation; dredge disposal; and site stabilization, grading, and associated restoration activities. With the exception of the preconstruction photographs, photographs at an individual impact site shall not be required until construction activities are initiated at that site. With the exception of the post-construction photographs, photographs at an individual impact site shall not be required once the site is stabilized following completion of construction at that site.~~

~~3. Each photograph shall be labeled to include the following information: permit number, impact area and photo station number, date and time of the photograph, name of the person taking the photograph, photograph orientation, and photograph subject description.~~

a. Preconstruction photographs taken at each impact area prior to initiation of activities within impact areas. Photographs shall remain on the project site and depict the impact area and the nonimpacted surface waters immediately adjacent to and downgradient of each impact area. Each photograph shall be labeled to include the following information: permit number, impact area number, date and time of the photograph, name of the person taking the photograph, photograph orientation, and photograph subject description.

b. Site inspections shall be conducted by the permittee or the permittee's qualified designee once every calendar month during activities within impact areas. Monthly inspections shall be conducted in the following areas: all authorized permanent and temporary impact areas; all avoided surface waters, including wetlands, stream channels, and open water; surface water areas within 50 feet of any land disturbing activity and within the project or right-of-way limits; and all on-site permanent preservation areas required under this permit. Observations shall be recorded on the inspection form provided by the Department of Environmental Quality. The form shall be completed in its entirety for each monthly inspection and shall be kept on site and made available for review by the Department of Environmental Quality staff upon request during normal business hours. Inspections are not required during periods of no activity within impact areas.

~~4.~~ 2. Monitoring of water quality parameters shall be conducted during permanent relocation of perennial streams through new channels in the manner noted below. The permittee shall report violations of water quality standards to ~~DEQ~~ the Department of Environmental Quality in accordance with the procedures in ~~Part II E~~ 9VAC25-670-100 Part II E. Corrective measures and additional monitoring may be required if water quality standards are not met. Reporting shall not be required if water quality standards are not violated.

a. A sampling station shall be located upstream and immediately downstream of the relocated channel.

b. Temperature, pH and dissolved oxygen (D.O.) measurements shall be taken every 30 minutes for at least two hours at each station prior to opening the new channels and immediately before opening new channels.

c. Temperature, pH and D.O. readings shall be taken after opening the channels and every 30 minutes for at least three hours at each station.

C. ~~Wetland~~ Permittee-responsible wetland compensation site monitoring.

1. An as-built ground survey, or an aerial survey provided by a firm specializing in aerial surveys, shall be conducted for the entire compensation site or sites including invert elevations for all water elevation control structures and spot elevations throughout the site or sites. Aerial surveys shall include the variation from actual ground conditions, such as +/- 0.2 feet. Either type of survey shall be certified by a licensed surveyor or by a registered professional engineer to conform to the design plans. The survey shall

be submitted within 60 days of completing compensation site construction. Changes or deviations in the as-built survey or aerial survey shall be shown on the survey and explained in writing.

2. Photographs shall be taken at the compensation site or sites from the permanent markers identified in the final compensation plan, and established to ensure that the same locations and view directions at the site or sites are monitored in each monitoring period. These photographs shall be taken after the initial planting and at a time specified in the final compensation plan during every monitoring year.

3. Compensation site monitoring shall begin on the first day of the first complete growing season (monitoring year 1) after wetland compensation site construction activities, including planting, have been completed. Monitoring shall be required for monitoring years 1, 2, 3, and 5, unless otherwise approved by ~~DEQ~~ the Department of Environmental Quality. In all cases, if all success criteria have not been met in the fifth monitoring year, then monitoring shall be required for each consecutive year until two annual sequential reports indicate that all criteria have been successfully satisfied.

4. The establishment of wetland hydrology shall be measured during the growing season, with the location and number of monitoring wells, and frequency of monitoring for each site, set forth in the final monitoring plan. Hydrology monitoring well data shall be accompanied by precipitation data, including rainfall amounts, either from on site, or from the closest weather station. Once the wetland hydrology success criteria have been satisfied for a particular monitoring year, weekly monitoring may be discontinued for the remainder of that monitoring year following ~~DEQ~~ Department of Environmental Quality approval. After a period of three monitoring years, the permittee may request that hydrology monitoring be discontinued, providing that adequate hydrology has been established and maintained. Hydrology monitoring shall not be discontinued without written approval from ~~DEQ~~ the Department of Environmental Quality.

5. The presence of hydric soils or soils under hydric conditions shall be evaluated in accordance with the final compensation plan.

6. The establishment of wetland vegetation shall be in accordance with the final compensation plan. Monitoring shall take place in August, September, or October during the growing season of each monitoring year, unless authorized in the monitoring plan.

7. The presence of undesirable plant species shall be documented.

8. All wetland compensation monitoring reports shall be submitted in accordance with 9VAC25-670-100 Part II E 6.

D. ~~Stream~~ Permittee-responsible stream compensation~~, restoration~~ and monitoring.

1. Riparian buffer restoration activities shall be detailed in the final compensation plan and shall include, as appropriate, the planting of a variety of native species currently growing in the site area, including appropriate seed mixtures and woody species that are bare root, balled, or burlapped. A minimum buffer width of 50 feet, measured from the top of the stream bank at bankfull elevation landward on both sides of the stream, shall be required where practical.

2. The installation of root wads, vanes, and other instream structures, shaping of the stream banks, and channel relocation shall be completed in the dry whenever practicable.

3. Livestock access to the stream and designated riparian buffer shall be limited to the greatest extent practicable.

4. Stream channel restoration activities shall be conducted in the dry or during low flow conditions. When site conditions prohibit access from the streambank~~,~~ or upon prior authorization from the Department of Environmental Quality, heavy equipment ~~shall~~ may be authorized for use within the stream channel.

5. Photographs shall be taken at the compensation site from the vicinity of the permanent photo stations identified in the final compensation plan. The photograph orientation shall remain constant during all monitoring events. At a minimum, photographs shall be taken from the center of the stream, facing downstream, with a sufficient number of photographs to view the entire length of the restoration site. Photographs shall document the completed restoration conditions. Photographs shall be taken prior to site activities, during instream and riparian compensation construction activities, within one week of completion of activities, and during at least one day of each monitoring year to depict restored conditions.

6. An as-built ground survey, or an aerial survey provided by a firm specializing in aerial surveys, shall be conducted for the entire compensation site or sites. Aerial surveys shall include the variation from actual ground conditions, such as +/- 0.2 feet. The survey shall be certified by the licensed surveyor or by a registered, professional engineer to conform to the design plans. The survey shall be submitted within 60 days of completing compensation site construction. Changes or deviations from the final compensation plans in the as-built survey or aerial survey shall be shown on the survey and explained in writing.

7. Compensation site monitoring shall begin on day one of the first complete growing season (monitoring year 1) after stream compensation site construction activities, including planting, have been completed. Monitoring shall be required for monitoring years 1 and 2, unless otherwise ~~determined~~ approved by ~~DEQ~~ the Department of Environmental Quality. In all cases, if all success criteria

have not been met in the final monitoring year, then monitoring shall be required for each consecutive year until two annual sequential reports indicate that all criteria have been successfully satisfied.

8. All stream compensation site monitoring reports shall be submitted in accordance with 9VAC25-670-100 Part II E 6.

E. Reporting.

1. Written communications required by this VWP general permit shall be submitted to the appropriate Department of Environmental Quality ~~(DEQ)~~ office. The VWP general permit ~~authorization~~ tracking number shall be included on all correspondence.

2. ~~DEQ~~ The Department of Environmental Quality shall be notified in writing ~~at least 10 days~~ prior to the start of construction activities at the first ~~permitted site authorized by this VWP general permit authorization so that inspections of the project can be planned, if deemed necessary by DEQ. The notification shall include projected schedule for initiation and completion of work at each~~ permitted impact area.

~~3. Construction monitoring reports shall be submitted to DEQ no later than the 10th day of the month following the month in which the monitoring event specified in Part II B takes place. The reports shall include the following, as appropriate:~~

~~a. For each permitted impact area, a written narrative stating whether work was performed during the monitoring period, and if work was performed, a description of the work performed, when the work was initiated, and the expected date of completion.~~

~~b. Photographs labeled with permit number, the photo station number, the photo orientation, the date and time of the photo, the name of the person taking the photograph, and a brief description of the construction activities. The first construction monitoring report shall include the photographs taken at each impact site prior to initiation of construction in a permitted impact area. Written notification and photographs demonstrating that all temporarily disturbed wetland and stream areas have been restored in compliance with the permit conditions shall be submitted within 30 days of restoration. The post-construction photographs shall be submitted within 30 days of documenting post-construction conditions.~~

~~c. Summary of activities conducted to comply with the permit conditions.~~

~~d. Summary of permit noncompliance events or problems encountered, subsequent notifications, and corrective actions.~~

~~e. Summary of anticipated work to be completed during the next monitoring period and an estimated date of construction completion at all impact areas.~~

~~f. Labeled site map depicting all impact areas and photo stations.~~

3. A construction status update form provided by the Department of Environmental Quality shall be completed and submitted to the Department of Environmental Quality twice per year for the duration of coverage under a VWP general permit. Forms completed in June shall be submitted by or on July 10, and forms completed in December shall be submitted by or on January 10. The form shall include reference to the VWP permit tracking number and one of the following statements for each authorized surface water impact location:

a. Construction activities have not yet started;

b. Construction activities have started;

c. Construction activities have started but are currently inactive; or

d. Construction activities are complete.

4. ~~DEQ~~ The Department of Environmental Quality shall be notified in writing within 30 days following the completion of all activities in all ~~permitted~~ authorized impact areas ~~authorized under this permit~~.

5. ~~DEQ~~ The Department of Environmental Quality shall be notified in writing ~~at least 10 days~~ prior to the initiation of activities at the permittee-responsible compensation site. The notification shall include a projected schedule of activities and construction completion.

6. All permittee-responsible compensation site monitoring reports shall be submitted annually by December 31, with the exception of the last year ~~of authorization~~, in which case the report shall be submitted at least 60 days prior to the expiration of ~~authorization under~~ the general permit, unless otherwise approved by the Department of Environmental Quality.

a. All wetland compensation site monitoring reports shall include, as applicable, the following:

(1) General description of the site including a site location map identifying photo stations, vegetative and soil monitoring stations, monitoring wells, and wetland zones.

(2) Summary of activities completed during the monitoring year, including alterations or maintenance conducted at the site.

(3) Description of monitoring methods.

(4) Analysis of all hydrology information, including monitoring well data, precipitation data, and gauging data from streams or other open water areas, as set forth in the final compensation plan.

(5) Evaluation of hydric soils or soils under hydric conditions, as appropriate.

(6) Analysis of all vegetative community information, including woody and herbaceous species, both planted

and volunteers, as set forth in the final compensation plan.

(7) Photographs labeled with the permit number, the name of the compensation site, the ~~photo~~ photo-monitoring station number, the photograph orientation, the date and time of the photograph, the name of the person taking the photograph, and a brief description of the photograph subject. This information shall be provided as a separate attachment to each photograph, if necessary. Photographs taken after the initial planting shall be included in the first monitoring report after planting is complete.

(8) Discussion of wildlife or signs of wildlife observed at the compensation site.

(9) Comparison of site conditions from the previous monitoring year and reference site.

(10) Discussion of corrective measures or maintenance activities to control undesirable species, to repair damaged water control devices, or to replace damaged planted vegetation.

(11) Corrective action plan, which includes proposed actions, a schedule, and monitoring plan.

b. All stream compensation site monitoring reports shall include, as applicable, the following:

(1) General description of the site including a site location map identifying photo stations and monitoring stations.

(2) Summary of activities completed during the monitoring year, including alterations or maintenance conducted at the site.

(3) Description of monitoring methods.

(4) An evaluation and discussion of the monitoring results in relation to the success criteria and overall goals of compensation.

(5) Photographs shall be labeled with the permit number, the name of the compensation site, the ~~photo~~ photo-monitoring station number, the photograph orientation, the date and time of the photograph, the name of the person taking the photograph, and a brief description of the photograph subject. Photographs taken prior to compensation site construction activities, during instream and riparian restoration activities, and within one week of completion of activities shall be included in the first monitoring report.

(6) A discussion of alterations, maintenance, or major storm events resulting in significant change in stream profile or cross section, and corrective actions conducted at the stream compensation site.

(7) Documentation of undesirable plant species and summary of abatement and control measures.

(8) A summary of wildlife or signs of wildlife observed at the compensation site.

(9) Comparison of site conditions from the previous monitoring year and reference site, and as-built survey, if applicable.

(10) A corrective action plan, which includes proposed actions, a schedule and monitoring plan.

(11) Additional submittals that were approved by ~~DEQ~~ the Department of Environmental Quality in the final compensation plan.

7. The permittee shall notify ~~DEQ~~ the Department of Environmental Quality in writing when unusual or potentially complex conditions are encountered which require debris removal or involve potentially toxic substance. Measures to remove the obstruction, material, or toxic substance or to change the location of a structure are prohibited until approved by ~~DEQ~~ the Department of Environmental Quality.

8. The permittee shall report fish kills or spills of oil or fuel immediately upon discovery. If spills or fish kills occur between the hours of 8:15 a.m. to 5 p.m., Monday through Friday, the appropriate ~~DEQ~~ Department of Environmental Quality regional office shall be notified; otherwise, the Department of Emergency Management shall be notified at 1-800-468-8892.

9. Violations of state water quality standards shall be reported ~~within 24 hours~~ to the appropriate ~~DEQ~~ Department of Environmental Quality office no later than the end of the business day following discovery.

10. The permittee shall notify the Department of Environmental Quality no later than the end of the third business day following the discovery of additional impacts to surface waters including wetlands, stream channels, and open water that are not authorized by the Department of Environmental Quality or to any required preservation areas. The notification shall include photographs, estimated acreage or linear footage of impacts, and a description of the impacts.

~~10.~~ 11. Submittals required by this VWP general permit shall contain the following signed certification statement:

"I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violation."

Part III. Conditions Applicable to All VWP General Permits.

A. Duty to comply. The permittee shall comply with all conditions, limitations, and other requirements of the VWP

general permit; any requirements in coverage granted under this VWP general permit; the Clean Water Act, as amended; and the State Water Control Law and regulations adopted pursuant to it. Any VWP general permit violation or noncompliance is a violation of the Clean Water Act and State Water Control Law and is grounds for (i) enforcement action, (ii) VWP general permit coverage termination for cause, (iii) VWP general permit coverage revocation, (iv) denial of application for coverage, or (v) denial of an application for a modification to VWP general permit coverage. Nothing in this VWP general permit shall be construed to relieve the permittee of the duty to comply with all applicable federal and state statutes, regulations ~~and~~, toxic standards, and prohibitions. ~~VWP general permit noncompliance is a violation of the Clean Water Act and State Water Control Law, and is grounds for enforcement action, VWP general permit authorization termination for cause, VWP general permit authorization revocation, or denial of a continuation of coverage request.~~

B. Duty to mitigate. The permittee shall take all reasonable steps to minimize or prevent impacts in violation of the VWP general permit which may have a reasonable likelihood of adversely affecting human health or the environment.

C. Reopener. This VWP general permit ~~authorization~~ may be reopened to modify its conditions when the circumstances on which the previous VWP general permit ~~authorization~~ was based have materially and substantially changed, or special studies conducted by the board or the permittee show material and substantial change since the time the VWP general permit ~~authorization~~ was issued and~~,~~ thereby~~,~~ constitute cause for revoking and reissuing the VWP general permit ~~authorization revocation and reissuance~~.

D. Compliance with state and federal law. Compliance with this VWP general permit constitutes compliance with the VWP permit requirements of the State Water Control Law. Nothing in this VWP general permit shall be construed to preclude the institution of any legal action under or relieve the permittee from any responsibilities, liabilities, or other penalties established pursuant to any other state law or regulation or under the authority preserved by § 510 of the Clean Water Act.

E. Property rights. The issuance of this VWP general permit does not convey property rights in either real or personal property~~,~~ or any exclusive privileges, nor does it authorize injury to private property ~~or~~, any invasion of personal property rights, ~~nor~~ or any infringement of federal, state, or local laws or regulations.

F. Severability. The provisions of this VWP general permit ~~authorization~~ are severable.

G. ~~Right of~~ Inspection and entry. ~~The~~ Upon presentation of credentials, the permittee shall allow the board or ~~its agents, upon the presentation of credentials~~ any duly authorized agent of the board, at reasonable times and under reasonable circumstances, to enter upon the permittee's property, public or private, and have access to~~,~~ inspect and copy any records that must be kept as part of the VWP general permit conditions; to inspect any facilities, operations, or practices (including monitoring and control equipment) regulated or required under the VWP general permit; and to sample or monitor any substance, parameter, or activity for the purpose of assuring compliance with the conditions of the VWP general permit or as otherwise authorized by law. For the purpose of this section, the time for inspection shall be deemed reasonable during regular business hours. Nothing contained herein shall make an inspection time unreasonable during an emergency.

H. Transferability of VWP general permit ~~authorization~~ coverage. ~~This~~ VWP general permit ~~authorization~~ coverage may be transferred to another ~~person by a~~ permittee when all of the criteria listed ~~below~~ in this subsection are met. On the date of the VWP general permit ~~authorization~~ coverage transfer, the transferred VWP general permit ~~authorization~~ coverage shall be as fully effective as if it had been ~~issued~~ granted directly to the new permittee.

1. The current permittee notifies the board of the proposed transfer of the ~~title to the facility or property. 2. The notice to the board includes~~ general permit coverage and provides a written agreement between the current and new permittees containing a specific date of transfer of VWP general permit ~~authorization~~ responsibility, coverage, and liability to the new permittee, or that the current permittee will retain such responsibility, coverage, or liability, including liability for compliance with the requirements of enforcement activities related to the ~~permitted~~ authorized activity.

~~3.~~ 2. The board does not within the 15 days notify the current and new permittees of its intent to modify or revoke and reissue the VWP general permit ~~authorization within the 15 days~~.

I. Notice of planned change. ~~Authorization under this~~ VWP general permit coverage may be modified subsequent to issuance in ~~one or more of the cases listed below~~ accordance with 9VAC25-670-80. ~~A notice of planned change is not required if the project results in additional temporary impacts to surface waters, provided that DEQ is notified in writing, the additional temporary impacts are restored to preexisting conditions in accordance with Part I C 11 of this general permit, and the additional temporary impacts do not exceed the general permit threshold for use. The permittee shall notify the board in advance of the planned change, and the planned change request will be reviewed according to all provisions of this regulation.~~

~~1. The permittee determines that additional permanent wetland, open water, or stream impacts are necessary, provided that the additional impacts are associated with the previously authorized activities in authorized locations within the same phase of development, the cumulative increase in acreage of wetland or open water impacts is not~~

~~greater than 1/4 acre, the cumulative increase in stream bed impacts is not greater than 100 linear feet, and the additional impacts are fully compensated.~~

~~2. The project results in less wetland or stream impacts, in which case, compensation requirements may be modified in relation to the adjusted impacts at the request of the permittee, provided that the adjusted compensation meets the initial authorization compensation goals.~~

~~3. There is a change in the project plans that does not result in a change in project impacts.~~

~~4. There is a change in the mitigation bank at which credits are purchased or used, provided that the same amount of credits are purchased or used and all criteria for use are met, as detailed in 9VAC25-210-116 E.~~

~~5. Typographical errors need to be corrected.~~

J. VWP general permit ~~authorization~~ coverage termination for cause. ~~This~~ VWP general permit ~~authorization~~ coverage is subject to termination for cause by the board after public notice and opportunity for a hearing pursuant to 9VAC25-230. Reasons for termination for cause are as follows:

1. Noncompliance by the permittee with any provision of the VWP general permit regulation, any condition of the VWP general permit ~~authorization~~, or any requirement in general permit coverage;

2. The permittee's failure in the application or during the ~~VWP general permit authorization issuance~~ process of granting VWP general permit coverage to disclose fully all relevant facts or the permittee's misrepresentation of any relevant facts at any time;

3. The permittee's violation of a special or judicial order; ~~and~~

4. A determination by the board that the ~~permitted~~ authorized activity endangers human health or the environment and can be regulated to acceptable levels by a modification to the VWP general permit ~~authorization planned change~~ coverage or a termination ~~for cause~~.

5. A change in any condition that requires either a temporary or permanent reduction or elimination of any activity controlled by the VWP general permit; or

6. A determination that the authorized activity has ceased and that the compensation for unavoidable adverse impacts has been successfully completed.

K. The board may terminate VWP general permit coverage without cause when the permittee is no longer a legal entity due to death or dissolution or when a company is no longer authorized to conduct business in the Commonwealth. The termination shall be effective 30 days after notice of the proposed termination is sent to the last known address of the permittee or registered agent, unless the permittee objects within that time. If the permittee does object during that period, the board shall follow the applicable procedures for termination under § 62.1-44.15:25 of the Code of Virginia and 9VAC25-230.

~~K.~~ L. VWP general permit ~~authorization~~ coverage termination by consent. ~~This VWP general permit authorization may be terminated by consent when all permitted activities requiring notification under 9VAC25-670-50 B and all compensatory mitigation have been completed or when the authorized impacts do not occur.~~ The permittee shall submit a request for termination by consent within 30 days of ~~project completion or project cancellation~~ completing or canceling all authorized activities requiring notification under 9VAC25-670-50 A and all compensatory mitigation requirements. When submitted for project completion, the request for termination by consent shall constitute a notice of project completion in accordance with 9VAC25-210-130 F. The director may accept this termination of ~~authorization~~ coverage on behalf of the board. The ~~request for termination by consent~~ permittee shall ~~contain~~ submit the following information:

1. Name, mailing address, and telephone number ~~of the permittee~~;

2. Name and location of the activity;

3. The VWP general permit ~~authorization~~ tracking number; and

4. One of the following certifications:

a. For project completion:

"I certify under penalty of law that all activities and any required compensatory mitigation authorized by ~~a~~ the VWP general permit and general permit coverage have been completed. I understand that by submitting this notice of termination I am no longer authorized to perform activities in surface waters in accordance with the VWP general permit and general permit coverage, and that performing activities in surface waters is unlawful where the activity is not authorized by ~~a~~ the VWP permit or coverage, unless otherwise excluded from obtaining coverage. I also understand that the submittal of this notice does not release me from liability for any violations of ~~this~~ the VWP general permit ~~authorization~~ or coverage."

b. For project cancellation:

"I certify under penalty of law that the activities and any required compensatory mitigation authorized by ~~this~~ the VWP general permit and general permit coverage will not occur. I understand that by submitting this notice of termination I am no longer authorized to perform activities in surface waters in accordance with the VWP general permit and general permit coverage, and that performing activities in surface waters is unlawful where the activity is not authorized by ~~a~~ the VWP permit or coverage, unless otherwise excluded from obtaining coverage. I also understand that the submittal of this notice does not release me from liability for any

violations of ~~this~~ the VWP general permit ~~authorization~~ or coverage, nor does it allow me to resume the ~~permitted~~ authorized activities without reapplication and ~~reauthorization~~ coverage."

c. For events beyond permittee control, the permittee shall provide a detailed explanation of the events, to be approved by ~~DEQ~~ the Department of Environmental Quality, and the following certification statement:

"I certify under penalty of law that the activities or the required compensatory mitigation authorized by ~~a~~ the VWP general permit and general permit coverage have changed as the result of events beyond my control (see attached). I understand that by submitting this notice of termination I am no longer authorized to perform activities in surface waters in accordance with the VWP general permit and general permit coverage, and that performing activities in surface waters is unlawful where the activity is not authorized by ~~a~~ the VWP permit or coverage, unless otherwise excluded from obtaining coverage. I also understand that the submittal of this notice does not release me from liability for any violations of ~~this~~ the VWP general permit ~~authorization~~ or coverage, nor does it allow me to resume the ~~permitted~~ authorized activities without reapplication and ~~reauthorization~~ coverage."

~~L.~~ M. Civil and criminal liability. Nothing in this VWP general permit shall be construed to relieve the permittee from civil and criminal penalties for noncompliance.

~~M.~~ N. Oil and hazardous substance liability. Nothing in this VWP general permit shall be construed to preclude the institution of legal action or relieve the permittee from any responsibilities, liabilities, or penalties to which the permittee is or may be subject under § 311 of the Clean Water Act or §§ 62.1-44.34:14 through 62.1-44.34:23 of the State Water Control Law.

~~N.~~ O. Duty to cease or confine activity. It shall not be a defense for a permittee in an enforcement action that it would have been necessary to halt or reduce the activity for which ~~a~~ VWP general permit coverage has been granted in order to maintain compliance with the conditions of the VWP general permit or coverage.

~~O.~~ P. Duty to provide information.

1. The permittee shall furnish to the board any information ~~which~~ that the board may request to determine whether cause exists for modifying, revoking ~~and reissuing and~~, or terminating ~~the~~ VWP permit ~~authorization,~~ coverage or to determine compliance with the VWP general permit ~~authorization~~ or general permit coverage. The permittee shall also furnish to the board, upon request, copies of records required to be kept by the permittee.

2. Plans, maps, conceptual reports, and other relevant information shall be submitted as required by the board prior to commencing construction.

~~P.~~ Q. Monitoring and records requirements.

1. Monitoring of parameters, other than pollutants, shall be conducted according to approved analytical methods as specified in the VWP general permit. Analysis of pollutants will be conducted according to 40 CFR Part 136 (2000), Guidelines Establishing Test Procedures for the Analysis of Pollutants.

2. Samples and measurements taken for the purpose of monitoring shall be representative of the monitored activity.

3. The permittee shall retain records of all monitoring information, including all calibration and maintenance records and all original strip chart or electronic recordings for continuous monitoring instrumentation, copies of all reports required by the VWP general permit, and records of all data used to complete the application for coverage under the VWP general permit, for a period of at least three years from the date of ~~the~~ general permit expiration ~~of a granted VWP permit~~. This period may be extended by request of the board at any time.

4. Records of monitoring information shall include, as appropriate:

a. The date, exact place, and time of sampling or measurements;

b. The name of the individuals who performed the sampling or measurements;

c. The date and time the analyses were performed;

d. The name of the individuals who performed the analyses;

e. The analytical techniques or methods supporting the information such as observations, readings, calculations, and bench data used;

f. The results of such analyses; and

g. Chain of custody documentation.

~~Q.~~ R. Unauthorized discharge of pollutants. Except in compliance with this VWP general permit, it shall be unlawful for the permittee to:

1. Discharge into state waters sewage, industrial wastes, other wastes, or any noxious or deleterious substances;

2. Excavate in a wetland;

3. Otherwise alter the physical, chemical, or biological properties of state waters and make them detrimental to the public health, to animal or aquatic life, or to the uses of such waters for domestic or industrial consumption, for recreation, or for other uses; or

4. On and after October 1, 2001, conduct the following activities in a wetland:

a. New activities to cause draining that significantly alters or degrades existing wetland acreage or functions;

b. Filling or dumping;

c. Permanent flooding or impounding; or

d. New activities that cause significant alteration or degradation of existing wetland acreage or functions.

S. Duty to reapply. Any permittee desiring to continue a previously authorized activity after the expiration date of the VWP general permit shall comply with the provisions in 9VAC25-670-27.

NOTICE: The following forms used in administering the regulation were filed by the agency. The forms are not being published; however, online users of this issue of the Virginia Register of Regulations may click on the name of a form with a hyperlink to access it. The forms are also available from the agency contact or may be viewed at the Office of the Registrar of Regulations, General Assembly Building, 2nd Floor, Richmond, Virginia 23219.

FORMS (9VAC25-670)

Department of Environmental Quality Water Division Permit Application Fee Form (rev. 10/14)

~~Joint Permit Application for Activities in Waters and Wetlands of the Commonwealth of Virginia (rev. 10/04)~~

Joint Permit Application for Projects in Tidewater, Virginia ~~(eff. 10/04)~~ (eff. 03/14)

Monthly Reporting of Impacts Less than or Equal to One-Tenth Acre Statewide (eff. 08/07)

Standard Joint Permit Application for Activities in Waters and Wetlands of the Commonwealth of Virginia (eff. 03/14)

Virginia Department of Transportation Inter-Agency Coordination Meeting Joint Permit Application ~~(eff. 10/02)~~ (eff. 06/08)

DOCUMENTS INCORPORATED BY REFERENCE (9VAC25-670)

Classification of Wetlands and Deepwater Habitats of the United States, Cowardin, Lewis M. II, et al., United States Fish and Wildlife Service, December 1979, Reprinted 1992.

Guidelines for Specification of Disposal Sites for Dredged of Fill Material, 40 CFR Part 230 (Federal Register December 24, 1980).

Virginia Erosion and Sediment Control Handbook, Third Edition, 1992, Department of Conservation and Recreation.

Virginia Invasive Plant Species List, Natural Heritage Technical Document 14-11, Department of Conservation and Recreation, Division of Natural Heritage (2014).

VA.R. Doc. No. R14-4058; Filed October 23, 2015, 9:58 a.m.

## Proposed Regulation

REGISTRAR'S NOTICE: The State Water Control Board is claiming an exemption from Article 2 of the Administrative Process Act in accordance with § 2.2-4006 A 8 of the Code of Virginia, which exempts general permits issued by the State Water Control Board pursuant to the State Water Control Law (§ 62.1-44.2 et seq. of the Code of Virginia) if the board (i) provides a Notice of Intended Regulatory Action in conformance with the provisions of § 2.2-4007.01; (ii) following the passage of 30 days from the publication of the Notice of Intended Regulatory Action forms a technical advisory committee composed of relevant stakeholders, including potentially affected citizens groups, to assist in the development of the general permit; (iii) provides notice and receives oral and written comment as provided in § 2.2-4007.03; and (iv) conducts at least one public hearing on the proposed general permit.

Title of Regulation: **9VAC25-680. Virginia Water Protection General Permit for Linear Transportation Projects (amending 9VAC25-680-10 through 9VAC25-680-100; adding 9VAC25-680-15, 9VAC25-680-25, 9VAC25-680-27, 9VAC25-680-35; repealing 9VAC25-680-95).**

Statutory Authority: § 62.1-44.15 of the Code of Virginia; § 401 of the Clean Water Act (33 USC § 1251 et seq.).

Public Hearing Information:

January 11, 2016 - 1:30 p.m. - James City County Board of Supervisors, Board Room, Building F, 101 Mounts Bay Road, Williamsburg, VA 23185

January 12, 2016 - 1:30 p.m. - Department of Environmental Quality, Northern Regional Office, 13901 Crown Court, Woodbridge, VA 22193

January 13, 2016 - 1:30 p.m. - Department of Environmental Quality, Blue Ridge-Roanoke Regional Office, 3019 Peters Creek Road, Roanoke, VA 24019

Public Comment Deadline: January 29, 2016.

Agency Contact: Brenda Winn, Department of Environmental Quality, 629 East Main Street, P.O. Box 1105, Richmond, VA 233218, telephone (804) 698-4516, FAX (804) 698-4032, or email brenda.winn@deq.virginia.gov.

Summary:

*The regulatory action reissues the existing general permit that expires on August 1, 2016. The proposed amendments (i) revise or clarify which activities in specific water sources require application for a permit authorization and which activities are excluded; (ii) revise and clarify the application process, including the administrative and technical information required to achieve a complete permit application; (iii) revise and clarify the compensatory mitigation requirements, including the sequencing of acceptable compensatory mitigation actions and compensatory mitigation provisions, the requirements for compensating impacts to open waters, or the compensation necessary for temporary impacts; (iv) modify provisions related to application processing, informational requirements, or actions occurring post-permit authorization for coverage; (v) modify permit authorization transitions between general permit cycles; (vi) delete the authorization term of seven years and provisions for continuation of permit authorization coverage; (vii) incorporate certain federal regulatory provisions; (viii) clarify and update definitions; (ix)*

*reorganize the regulation; and (x) clarify and correct grammar, spelling, and references.*

**9VAC25-680-10. Definitions.**

The words and terms used in this chapter shall have the meanings defined in the State Water Control Law (§ 62.1-44.2 et seq. of the Code of Virginia) and the Virginia Water Protection ~~(VWP)~~ Permit Program Regulation (9VAC25-210) unless a different meaning is required by the context ~~clearly indicates otherwise or unless otherwise~~ or is indicated below.

"Bank protection" means measures employed to stabilize channel banks and combat existing erosion problems. Such measures may include the construction of riprap revetments, sills, rock vanes, beach nourishment, breakwaters, bulkheads, groins, spurs, levees, marsh toe stabilization, anti-scouring devices, and submerged sills.

"Bioengineering method" means a biological measure incorporated into a facility design to benefit water quality and minimize adverse effects to aquatic resources, to the maximum extent practicable, for long-term aquatic resource protection and improvement.

~~"Channelization" means the alteration of a stream channel by widening, deepening, straightening, cleaning or paving certain areas.~~

"Coverage" means authorization to conduct a project in accordance with a VWP general permit.

~~"Cross-sectional drawing" means a graph or plot of ground elevation across a waterbody or a portion of it, usually along a line perpendicular to the waterbody or direction of flow.~~

~~"Emergent wetland" means a class of wetlands characterized by erect, rooted, herbaceous plants growing in water or on a substrate that is at least periodically deficient in oxygen as a result of excessive water content, excluding mosses and lichens. This vegetation is present for most of the growing season in most years and is usually dominated by perennial plants.~~

~~"FEMA" means Federal Emergency Management Agency.~~

~~"Forebay" means a deeper area at the upstream end of a stormwater management facility that would be maintained through excavation.~~

~~"Forested wetland" means a class of wetlands characterized by woody vegetation that is six meters (20 feet) tall or taller. These areas normally possess an overstory of trees, an understory of trees or shrubs, and an herbaceous layer.~~

~~"Greater than one-acre" means more than 1.00 acre (43,560 square feet).~~

~~"Impacts" means results caused by human-induced activities conducted in surface waters, as specified in § 62.1-44.15:20 A of the Code of Virginia.~~

"DEQ" means the Department of Environmental Quality.

"Independent utility" means a test to determine what constitutes a single and complete project. A project is considered to have independent utility if it would be constructed absent the construction of other projects in the project area. Portions of a multi-phase project that depend upon other phases of the project do not have independent utility. Phases of a project that would be constructed even if the other phases are not built can be considered as separate single and complete projects with independent public and economic utility.

~~"Isolated Wetland of Minimal Ecological Value (IWOMEV)" means a wetland that (i) does not have a surface water connection to other state waters; (ii) is less than one-tenth of an acre in size; (iii) is not located in a Federal Emergency Management Agency designated 100-year floodplain; (iv) is not identified by the Virginia Natural Heritage Program as a rare or state significant natural community; (v) is not forested; and (vi) does not contain listed federal or state threatened or endangered species.~~

~~"Less than one-half of an acre" means 0.00 to 0.49 acre (0 to 21,779 square feet).~~

"Linear transportation project" means a project for the construction, expansion, modification or improvement of features such as, but not limited to, roadways, railways, trails, bicycle and pedestrians paths, and airport runways and taxiways, including all attendant features both temporary and permanent. Nonlinear features commonly associated with transportation projects, such as, but not limited to, vehicle maintenance or storage buildings, parking lots, train stations, or aircraft hangars are not included in this definition.

"Notice of project completion" means a statement signed by the permittee or authorized agent that the authorized activities and any required compensatory mitigation have been completed.

~~"Open water" means an area that, during a year with normal patterns of precipitation, has standing water for sufficient duration to establish an ordinary high water mark. The term "open water" includes lakes and ponds but does not include ephemeral waters, stream beds, or wetlands.~~

~~"Ordinary high water" or "ordinary high water mark" means the line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank; shelving; changes in the character of soil; destruction of terrestrial vegetation; the presence of litter and debris; or other appropriate means that consider the characteristics of the surrounding areas.~~

~~"Perennial stream" means a well-defined channel that contains water year-round during a year of normal rainfall. Generally, the water table is located above the streambed for most of the year and groundwater is the primary source for stream flow. A perennial stream exhibits the typical biological, hydrological, and physical characteristics commonly associated with the continuous conveyance of water.~~

~~"Permanent impacts" means those impacts to surface waters, including wetlands, that cause a permanent alteration of the~~

~~physical, chemical, or biological properties of the surface waters, or of the functions and values of a wetland.~~

~~"Person" means an individual, corporation, partnership, association, governmental body, municipal corporation, or any other legal entity.~~

~~"Riprap" means a layer of nonerodible material such as stone or chunks of concrete.~~

~~"Scrub-shrub wetland" means a class of wetlands dominated by woody vegetation less than six meters (20 feet) tall. The species include tree shrubs, young trees, and trees or shrubs that are small or stunted because of environmental conditions.~~

"Single and complete project" means the total project proposed or accomplished by a person, which also has independent utility, as defined in this section. For linear projects, the "single and complete project" (e.g., a single and complete crossing) will apply to each crossing of a separate surface water (e.g., a single ~~waterbody)~~ water body) and to multiple crossings of the same ~~waterbody~~ water body at separate and distinct locations. Phases of a project that have independent public and economic utility may each be considered single and complete.

"State program general permit (SPGP)" means a general permit issued by the Department of the Army in accordance with ~~33 USC 1344(e), 33 CFR 325.2(e)(2),~~ 33 USC § 1344 and ~~33 CFR 325.3(b)~~ 33 CFR 325.5(c)(3) and that is founded on a state program. The SPGP is designed to avoid duplication between the federal and state programs.

~~"Stream bed" means the substrate of a stream, as measured between the ordinary high water marks along a length of stream. The substrate may consist of organic matter, bedrock or inorganic particles that range in size from clay to boulders, or a combination of both. Areas contiguous to the stream bed, but outside of the ordinary high water marks, are not considered part of the stream bed.~~

~~"Surface waters" means all state waters that are not ground water as defined in § 62.1-255 of the Code of Virginia.~~

~~"Temporary impacts" are those impacts to surface waters, including wetlands, that do not cause a permanent alteration of the physical, chemical, or biological properties of the surface water, or of the functions and values of a wetland. Temporary impacts include activities in which the ground is restored to its preconstruction conditions, contours, or elevations, such that previous functions and values are restored.~~

"Up to 300 linear feet" means ~~>0.00 to~~ 300.00 linear feet or less, as measured along the center of the main channel of the stream segment.

"Up to ~~1500~~ 1,500 linear feet" means ~~>0.00 to 1500.00~~ 1,500.00 linear feet or less, as measured along the center of the main channel of the stream segment.

"Up to one-tenth ~~of an~~ acre" means 0.10 acre (4,356 square feet) or less.

"Up to two acres" means 2.00 acres (87,120 square feet) or less.

"Utility line" means a pipe or pipeline for the transportation of any gaseous, liquid, liquefiable or slurry substance, for any purpose, and a cable, line, or wire for the transmission for any purpose of electrical energy, telephone, and telegraph messages and radio and television communication. The term utility line does not include activities which drain a surface water to convert it to an upland, such as drainage tiles or french drains; however, it does apply to pipes conveying drainage from another area.

**9VAC25-680-15. Statewide information requirements.**

The board may request (i) such plans, specifications, and other pertinent information as may be necessary to determine the effect of an applicant's discharge on the quality of state waters or (ii) such other information as may be necessary to accomplish the purposes of this chapter. Any owner, permittee, or person applying for a VWP permit or general permit coverage shall provide the information requested by the board.

**9VAC25-680-20. Purpose; delegation of authority~~; effective date of VWP general permit~~.**

A. The purpose of this regulation is to establish VWP General Permit Number WP3 under the VWP permit program regulation to govern permanent and temporary impacts related to the construction and maintenance of Virginia Department of Transportation (VDOT) or other linear transportation projects. Applications for coverage under this VWP general permit shall be processed for approval, approval with conditions, or denial by the board. ~~Authorization, authorization~~ Coverage, coverage with conditions, or application denial by the board shall constitute the VWP general permit action~~. Each VWP general permit action~~ and shall follow all provisions in the State Water Control Law (§ 62.1-44.2 et seq. of the Code of Virginia), except for the public comment and participation provisions, from which each VWP general permit action is exempt.

B. The director or his designee may perform any act of the board provided under this chapter, except as limited by § 62.1-44.14 of the Code of Virginia.

~~C. This VWP general permit regulation will become effective on August 1, 2006, and will expire on August 1, 2016.~~

~~D. Authorization to impact surface waters under this VWP general permit is effective upon compliance with all the provisions of 9VAC25-680-30. Notwithstanding the expiration date of this general permit regulation, authorization to impact surface waters under this VWP general permit will continue for seven years.~~

**9VAC25-680-25. Authorization for coverage under VWP general permit effective August 1, 2006.**

A. All complete applications or notifications received by the board through 11:59 p.m. on August 1, 2016, shall be

processed in accordance with the VWP general permit regulation in effect August 1, 2006, through August 1, 2016. If the application or notification is incomplete or if there is not adequate time as allowed by § 62.1-44.15:21 of the Code of Virginia to make a completeness determination, the applicant shall reapply for coverage under the VWP general permit effective August 2, 2016, or apply for a VWP individual permit, including payment of any required permit application fee. No refund of permit application fees shall be made.

B. VWP general permit authorizations granted through 11:59 p.m. on August 1, 2016, shall remain in full force and effect until 11:59 p.m. on the expiration date stated on the VWP authorization cover page, unless otherwise revoked or terminated or unless a notice of project completion is received by the board on or before that date. Any permittee that desires to continue an authorized activity beyond the stated expiration date must reapply for coverage under the VWP general permit effective August 2, 2016, pursuant to its terms, standards, and conditions, or apply for a VWP individual permit, including payment of any required permit application fee. This section shall only apply to permittees holding valid authorizations for coverage granted under the VWP general permit effective August 1, 2006, through August 1, 2016.

**9VAC25-680-27. VWP general permit coverage; transition; continuation.**

A. All applications or notifications received on or after August 2, 2016, will be processed in accordance with the VWP general permit regulation effective August 2, 2016.

B. The general permit in 9VAC25-680-100 is effective August 2, 2016, and expires August 1, 2031. Any coverage that is granted pursuant to 9VAC25-680-30 shall remain in full force and effect until 11:59 p.m. on August 1, 2031, unless the general permit coverage is terminated or revoked or unless a notice of project completion is received by the board on or before this date. Where a permittee that has received general permit coverage desires to continue or complete the authorized activities beyond August 1, 2031, the permittee shall reapply for new general permit coverage or for a VWP individual permit, including payment of any required permit application fee. Activities in surface waters requiring a permit shall not commence or continue until VWP general permit coverage is granted or a VWP individual permit is issued by the board.

C. Application may be made at any time for a VWP individual permit in accordance with 9VAC25-210. Activities in surface waters requiring a permit shall not commence or continue until VWP general permit coverage is granted or a VWP individual permit is issued by the board.

**9VAC25-680-30. Authorization to impact surface waters.**

A. Any person ~~governed by this~~ granted coverage under the VWP general permit ~~is authorized to~~ effective August 2, 2016, may permanently or temporarily impact up to two acres of nontidal wetlands or open water and up to 1,500 linear feet of nontidal stream bed for linear transportation projects, provided that:

1. The applicant submits notification as required in 9VAC25-680-50 and 9VAC25-680-60.

2. The applicant remits ~~the~~ any required permit application ~~processing~~ fee ~~in accordance with 9VAC25-20~~.

3. The applicant receives general permit coverage from the Department of Environmental Quality and complies with the limitations and other requirements of ~~9VAC25-680-100~~ the VWP general permit; the general permit coverage; the Clean Water Act, as amended; and the State Water Control Law and attendant regulations.

~~4. The applicant receives approval from the Virginia Department of Environmental Quality.~~

~~5.~~ 4. The applicant has not been required to obtain a VWP individual permit under the VWP permit regulation (9VAC25-210) for the proposed project impacts. The applicant, at his discretion, may seek a VWP individual permit~~,~~ or coverage under another applicable VWP general permit~~,~~ in lieu of coverage under this VWP general permit.

~~6.~~ 5. Impacts, both temporary and permanent, result from a single and complete project, including all attendant features.

a. Where a road segment (e.g., the shortest segment of a road with independent utility that is part of a larger project) has multiple crossings of state waters (several single and complete projects), the board may at its discretion require a VWP individual permit.

b. For the purposes of this chapter, when an interchange has multiple crossings of state waters, the entire interchange shall be considered the single and complete project.

~~7.~~ 6. The stream impact criterion applies to all components of the project, including structures and stream channel manipulations.

~~8.~~ 7. Dredging does not exceed 5,000 cubic yards.

~~9.~~ 8. When required, compensation for unavoidable impacts is provided in accordance with 9VAC25-680-70 and 9VAC25-210-116.

B. Activities that may be ~~authorized~~ granted coverage under this VWP general permit include the construction, expansion, modification, or improvement of linear transportation crossings (e.g., highways, railways, trails, bicycle and pedestrian paths, and airport runways and taxiways, including all attendant features both temporary and permanent).

C. The board waives the requirement for coverage under a VWP general permit for activities that occur in an isolated wetland of minimal ecological value, as defined in ~~9VAC25-680-10~~ 9VAC25-210-10. ~~Any~~ Upon request by the board, any person claiming this waiver ~~bears the burden to~~ shall demonstrate to the satisfaction of the board that he qualifies for the waiver.

D. ~~Receipt of~~ Coverage under this VWP general permit does not relieve the permittee of the responsibility to comply with any other applicable federal, state, or local statute, ordinance, or regulation.

~~E. In issuing this VWP general permit, the board has not taken into consideration the structural stability of the proposed structure or structures.~~

~~F.~~ E. Coverage under a nationwide or regional permit promulgated by the U.S. Army Corps of Engineers (USACE), and for which the board has issued § 401 certification ~~existing~~ in accordance with 9VAC25-210-130 H as of ~~the effective date of this regulation~~ August 2, 2016, shall constitute coverage under this VWP general permit unless a state program general permit (SPGP) is ~~approved~~ required and granted for the ~~covered~~ activity or impact. ~~Notwithstanding any other provision, activities authorized under a nationwide or regional permit promulgated by the USACE and certified by the board in accordance with 9VAC25-210-130 do not need to obtain coverage under this VWP general permit unless a state programmatic general permit is approved for the covered activity or impact.~~

~~G.~~ F. When the board determines on a case-by-case basis that concerns for water quality and the aquatic environment so indicate, the board may require ~~individual applications and~~ a VWP individual ~~permits~~ permit in accordance with 9VAC25-210-130 B rather than ~~approving~~ granting coverage under this VWP general permit.

**9VAC25-680-35. Administrative continuance.**

Beginning on August 2, 2016, in any case where an existing permittee has submitted a timely and complete notification or application for coverage under the next consecutive VWP general permit in accordance with 9VAC25-680-50 and 9VAC25-680-60 and the board, through no fault of the permittee, does not issue the next consecutive VWP general permit with an effective date on or before the expiration date of the expiring VWP general permit, the conditions of that expiring VWP general permit and any requirements of coverage granted under it shall continue in force until the effective date of the next consecutive VWP general permit.

**9VAC25-680-40. Exceptions to coverage.**

A. ~~Authorization for coverage~~ Coverage under this VWP general permit ~~will not apply in the following areas:~~ is not required if the activity is excluded from permitting in accordance with 9VAC25-210-60.

~~1. Wetlands composed of 10% or more of the following species (singly or in combination) in a vegetative stratum: Atlantic white cedar (Chamaecyparis thyoides), bald cypress (Taxodium distichum), water tupelo (Nyssa aquatica), or overcup oak (Quercus lyrata). Percentages shall be based upon either basal area or percent areal cover in the area of impact.~~

~~2. Surface waters where the proposed activity will impact federal or state listed or proposed threatened or endangered species or proposed or designated critical habitat.~~

B. ~~Authorization for coverage~~ Coverage under this VWP general permit cannot be used in combination with ~~authorizations for~~ coverage under other VWP general permits in order to impact greater than two acres of nontidal wetlands or open water or greater than 1,500 linear feet of nontidal stream bed. ~~More than one authorization for~~ Granting coverage under this VWP general permit more than once for a single and complete project is prohibited, except when the cumulative impact to surface waters does not exceed the limits specified here.

C. This VWP general permit ~~may not~~ cannot be used ~~to authorize~~ for nonlinear features commonly associated with transportation projects, such as, but not limited to, vehicle maintenance or storage buildings, parking lots, train stations, or aircraft hangars.

D. The activity to impact surface waters shall not have been prohibited by state law or regulations, nor shall it contravene applicable Water Quality Standards (9VAC25-260).

E. The board shall deny application for coverage under this VWP general permit to any applicant conducting activities that cause, may reasonably be expected to cause, or may be contributing to a violation of water quality standards, including discharges or discharge-related activities that are likely to significantly affect aquatic life, or for activities that together with other existing or proposed impacts to wetlands will cause or contribute to a significant impairment of state waters or fish and wildlife resources.

F. This VWP general permit does not authorize activities that cause more than minimal changes to the peak hydraulic flow characteristics, that significantly increase flooding, or that cause more than minimal degradation of the water quality of a stream.

G. ~~This~~ Coverage under this VWP general permit ~~may~~ shall not be ~~used~~ granted for:

1. Construction of a stormwater management facility in perennial streams or in ~~oxygen or~~ waters designated as oxygen-impaired or temperature-impaired ~~waters~~ (does not include wetlands).

2. The construction of an irrigation impoundment on a perennial stream.

3. Any water withdrawal activities.

4. The location of animal feeding operations or waste storage facilities in state waters.

5. The pouring of wet or uncured concrete ~~or the use of tremie concrete or grout bags~~ in state waters, unless the area is contained within a cofferdam or the work is performed in the dry~~,~~ or unless approved by ~~DEQ~~ the Department of Environmental Quality.

6. Return flow discharges from dredge disposal sites.

7. Overboard disposal of dredge materials.

8. Dredging in marinas.

9. Dredging of shellfish areas, submerged aquatic vegetation beds ~~and~~ or other highly productive areas.

10. Federal navigation projects.

11. ~~The~~ Any activity in surface waters that will impact federal or state listed or proposed threatened or endangered species or proposed or designated critical habitat, or be the taking of threatened or endangered species in accordance with the following:

a. As pursuant to § 29.1-564 of the Code of Virginia, the taking, transportation, processing, sale, or offer for sale within the Commonwealth of any fish or wildlife appearing on any list of threatened or endangered species published by the United States Secretary of the Interior pursuant to the provisions of the federal Endangered Species Act of 1973 (~~P.L.~~ Public Law 93-205), or any modifications or amendments thereto, is prohibited except as provided in § 29.1-568 of the Code of Virginia.

b. As pursuant to § 29.1-566 of the Code of Virginia and 4VAC15-20-130 B and C, the taking, transportation, processing, sale, or offer for sale within the Commonwealth of any state-listed endangered or threatened species is prohibited except as provided in § 29.1-568 of the Code of Virginia.

12. Any activity in wetlands composed of 10% or more, singularly or in combination, based upon either basal area or percent areal cover in the area of impact, in a vegetative stratum: Atlantic white cedar (Chamaecyparis thyoides), bald cypress (Taxodium distichum), water tupelo (Nyssa aquatica), or overcup oak (Quercus lyrata).

13. Any activity in tidal waters.

**9VAC25-680-50. Notification.**

A. Notification to the board will be required prior to commencing construction, as follows:

1. When the Virginia Department of Transportation is the applicant for coverage under this VWP general permit, the notification requirements shall be in accordance with this section and 9VAC25-680-60, unless otherwise authorized by the Department of Environmental Quality.

~~1.~~ 2. An application for ~~authorization of~~ coverage for proposed, permanent nontidal wetland or open water impacts greater than one-tenth ~~of an~~ acre~~,~~ or of proposed permanent nontidal stream bed impacts greater than 300 linear feet~~,~~ shall include all information pursuant to 9VAC25-680-60 B~~, except for 9VAC25-680-60 B 20 when the application is for a Virginia Department of Transportation (VDOT) administered project. VDOT shall provide the information in 9VAC25-680-60 B 20 through the VDOT State Environmental Review Process, the National Environmental Policy Act (42 USC § 4321 et seq.) (for federal actions), or the VDOT Geographic Information System~~. Compensatory mitigation may be required for all permanent impacts~~ in accordance with Parts I, II, and III of this VWP general permit regulation. All temporary impacts shall be restored to preexisting conditions, as per Parts I, II, and III of this VWP general permit regulation.~~

~~2.~~ 3. An application for ~~the authorization of~~ coverage for proposed, permanent nontidal wetland or open water impacts up to one-tenth ~~of an~~ acre~~,~~ or of proposed, permanent nontidal stream bed impacts up to 300 linear feet~~,~~ shall be submitted ~~as follows~~ in accordance with either subdivision 3 a or 3 b of this subsection:

a. ~~For a proposed VDOT administered project that is not subject to subdivision 2 c of this subsection, the application shall include the information required by subdivisions 1 through 8, 13, 15, and 21 of 9VAC25-680-60 B. The VDOT Quarterly Reporting of Impacts Less Than One Tenth Acre application may be used, provided that it contains the required information. Compensatory mitigation may be required for all permanent impacts once the notification limits of one-tenth acre wetlands or open water, or 300 linear feet of stream bed, are exceeded. All temporary impacts, regardless of amount, shall be restored to preexisting conditions, as per Parts I and III of this VWP general permit regulation.~~ For any proposed project in wetlands, open water, streams, or compensatory mitigation sites that are under a deed restriction, conservation easement, declaration of restrictive covenant, or other land use protective instrument (hereafter "protected areas"), when such restriction, easement, covenant, or instrument is the result of a federal or state permit action and is specific to activities in wetlands and compensatory mitigation sites, the application shall include all of the information required by 9VAC25-680-60 B. Compensatory mitigation may be required for all permanent impacts.

b. For all other projects ~~that are not subject to subdivision 2 c of this subsection~~, the application shall include the information required by subdivisions ~~1 through 9, 13, 15, 20, and 21~~ 1 through 7, 11, 12, 15, and 16 of 9VAC25-680-60 B~~,~~ and documentation that verifies the quantity and type of impacts. Compensatory mitigation may be required for all permanent impacts once the notification limits of one-tenth acre wetlands or open water, or 300 linear feet of stream bed, are exceeded, and if required, the application shall include the information in 9VAC25-680-60 B 13. ~~All temporary impacts, regardless of amount, shall be restored to preexisting conditions, as per Parts I and III of this VWP general permit regulation.~~

~~c. For any proposed project in wetlands, open water, streams, or compensatory mitigation sites that are under a deed restriction, conservation easement, restrictive covenant, or other land use protective instrument (hereafter protected areas), when such restriction,~~

~~easement, covenant, or instrument is the result of a federal or state permit action and is specific to activities in wetlands and compensatory mitigation sites, the application shall include all of the information required by 9VAC25-680-60 B, and documentation that verifies the quantity and type of impacts. Application for a VDOT administered project shall provide the required information in 9VAC25-680-60 B 20 through the VDOT State Environmental Review Process, the National Environmental Policy Act (for federal actions), or the VDOT Geographic Information System. Compensatory mitigation may be required for all permanent impacts, regardless of amount. All temporary impacts, regardless of amount, shall be restored to preexisting conditions, as per Parts I and III of this VWP general permit regulation.~~

B. ~~A Joint Permit Application (JPA), a Virginia Department of Transportation Interagency Coordination Meeting Joint Permit Application (VDOT IACM JPA), or a VDOT Quarterly Reporting of Impacts Less Than One-Tenth Acre~~ The Department of Environmental Quality-approved application forms shall serve as an application ~~under this regulation~~ for a VWP permit or VWP general permit coverage.

C. The board will determine whether the proposed activity requires coordination with the United States Fish and Wildlife Service, the Virginia Department of Conservation and Recreation, the Virginia Department of Agriculture and Consumer Services and the Virginia Department of Game and Inland Fisheries regarding the presence of federal or state proposed or listed threatened and endangered species or proposed or designated critical habitat. Based upon consultation with these agencies, the board may deny application for coverage under this general permit. The applicant may also consult with these agencies prior to submitting an application. Species or habitat information that the applicant provides will assist ~~DEQ~~ the Department of Environmental Quality in reviewing and processing the application.

**9VAC25-680-60. Application.**

A. Applications shall be filed with the board as follows:

1. The applicant shall file a complete application in accordance with 9VAC25-680-50~~,~~ and this section for ~~a~~ coverage under this VWP ~~General Permit Number WP3~~ general permit for impacts to surface waters from linear transportation ~~projects, which will serve as a notice of intent for coverage under this VWP general permit~~ activities.

2. The VDOT may use its monthly IACM process for submitting applications.

B. ~~The required~~ A complete application ~~shall contain~~ for VWP general permit coverage, at a minimum, consists of the following information~~,~~ if applicable to the project:

1. The applicant's legal name, mailing address, ~~and~~ telephone number, and~~,~~ if applicable, electronic mail address and fax number.

2. If different from the applicant, legal name, mailing address, telephone number, and if applicable, electronic mail address and fax number of property owner.

~~2. The~~ 3. If applicable, authorized agent's ~~(if applicable)~~ name, mailing address, telephone number, and~~,~~ if applicable, fax number and electronic mail address.

~~3.~~ 4. The existing VWP general permit tracking number ~~(if applicable)~~, if applicable.

~~4. The name of the project, narrative description of project purpose, and a description of the proposed activity in surface waters.~~

~~5. The name of the water body or water bodies or receiving stream, as applicable.~~

~~6. The hydrologic unit code (HUC) for the project area.~~

~~7. The name of the city or county where the project is located.~~

~~8. Latitude and longitude (to the nearest second) from a central location within the project limits.~~

~~9. A detailed location map (e.g., a United States Geologic Survey topographic quadrangle map) of the project area, including the project boundary. The map shall be of sufficient detail such that the site may be easily located for site inspection.~~

~~10. (Reserved.)~~

~~11. Project plan view. Plan view sketches shall include, at a minimum, north arrow, scale, existing structures, existing and proposed contours (if available), limit of surface water areas, direction of flow, ordinary high water mark, impact limits, location and dimension of all proposed structures in impact areas. In addition, cross-sectional or profile sketches with the above information may be required to detail impact areas.~~

~~12. Dredge material management plan (for dredging projects only) including plan and cross-section view drawings of the disposal or dewatering area, the dimensions and design of the proposed berm and spillway, and the capacity of the proposed disposal or dewatering site.~~

~~13. Surface water impact information (wetlands, streams, or open water) for both permanent and temporary impacts, including a description of the impact, the areal extent of the impact (area of wetland in square feet and acres; area of stream, length of stream, and average width); the location (latitude and longitude at the center of the impact, or at the center of each impact for linear projects)) and the type of surface water impact (open water; wetlands according to the Cowardin classification or similar terminology; or perennial and nonperennial for streams). The board encourages applicants to coordinate the~~

determination of perennial or nonperennial streams with the appropriate local government agency in Tidewater Virginia.

14. Functional values assessment for impacts to wetlands greater than one acre, which shall consist of a summary of field observations of the existing wetland functions and values and an assessment of the impact that the project will have on these functions and values. The following parameters and functions shall be directly addressed: surrounding land uses and cover types; nutrient, sediment, and pollutant trapping; flood control and flood storage capacity; erosion control and shoreline stabilization; groundwater recharge and discharge; aquatic and wildlife habitat; and unique or critical habitats.

15. A description of the specific on-site measures considered and taken during project design and development both to avoid and minimize impacts to surface waters to the maximum extent practicable.

16. A conceptual plan for the intended compensation for unavoidable impacts, including:

a. For wetlands, the conceptual compensation plan shall include: the goals and objectives in terms of replacement of wetland acreage and function; a detailed location map (e.g., a United States Geologic Survey topographic quadrangle map), including latitude and longitude (to the nearest second) at the center of the site; a description of the surrounding land use; a hydrologic analysis, including a draft water budget based on expected monthly inputs and outputs which will project water level elevations for a typical year, a dry year, and a wet year; groundwater elevation data, if available, or the proposed location of groundwater monitoring wells to collect these data; a map for existing surface water areas on the proposed site or sites, including a wetland delineation confirmation for any existing wetlands; a conceptual grading plan; a conceptual planting scheme, including suggested plant species and zonation of each vegetation type proposed; and a description of existing soils, including general information on topsoil and subsoil conditions, permeability, and the need for soil amendments.

b. For streams, the conceptual compensation plan shall include: the goals and objectives in terms of water quality benefits and replacement of stream functions; a detailed location map (e.g., a United States Geologic Survey topographic quadrangle map), including the latitude and longitude to the nearest second; the proposed stream segment restoration locations, including plan view and cross-section sketches; the stream deficiencies that need to be addressed; the proposed restoration measures to be employed, including channel measurements, proposed design flows and types of instream structures; and reference stream data, if available.

c. Applicants proposing to compensate off site, including purchase or use of mitigation bank credits, or contribution to an in lieu fee fund, shall submit an evaluation of the feasibility of on-site compensation. If on-site compensation is practicable, applicants shall provide documentation as to why the proposed off-site compensation is ecologically preferable. The evaluation shall include, but not be limited to, the following assessment criteria: water quality benefits, hydrologic source, hydrologic regime, watershed, surface water functions and values, vegetation type, soils, impact acreage, distance from impacts, timing of compensation versus impacts, acquisition, constructability, and cost.

d. Applicants proposing compensation involving contributions to an in lieu fee fund shall state such as the conceptual compensation plan. Written documentation of the willingness of the entity to accept the donation and documentation of how the amount of the contribution was calculated shall be submitted prior to issuance of this general permit authorization.

e. Applicants proposing compensation involving the purchase or use of mitigation banking credits shall include as their conceptual compensation plan:

(1) The name of the proposed mitigation bank and the HUC in which it is located;

(2) The number of credits proposed to be purchased or used; and

(3) Certification from the bank owner of the availability of credits.

17. A delineation map must be provided of the geographic area of a delineated wetland for all wetlands on the site, in accordance with 9VAC25-210-45, including the wetlands data sheets. The delineation map shall also include the location of streams, open water, and the approximate limits of Chesapeake Bay Resource Protection Areas (RPAs), as other state or local requirements may apply if the project is located within an RPA. Wetland types shall be noted according to their Cowardin classification or similar terminology. A copy of the USACE delineation confirmation, or other correspondence from the USACE indicating their approval of the wetland boundary, shall be provided at the time of application, or if not available at that time, as soon as it becomes available during the VWP permit review.

18. A copy of the FEMA flood insurance rate map or FEMA-approved local floodplain map for the project site.

19. The appropriate application processing fee for a VWP permit in accordance with 9VAC25-20-10 et seq. The permit application fee for VWP permit authorizations is based on acres only. Therefore, impacts that include linear feet of stream bed must be converted to an acreage in order to calculate the permit application fee.

~~20. A written disclosure identifying all wetlands, open water, streams, and associated upland buffers within the proposed project or compensation areas that are under a deed restriction, conservation easement, restrictive covenant, or other land use protective instrument (protected areas). Such disclosure shall include the nature of the prohibited activities within the protected areas.~~

~~21. The following certification:~~

~~"I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system or those persons directly responsible for gathering the information, the information submitted is to the best of my knowledge and belief true, accurate, and complete. I am aware that there are significant penalties for submitting false information including the possibility of fine and imprisonment for knowing violations."~~

~~C. The application shall be signed in accordance with 9VAC25-210-100. If an agent is acting on behalf of an applicant, the applicant shall submit an authorization of the agent that includes the signatures of both the applicant and the agent.~~

5. Project name and proposed project schedule.

6. The following information for the project site location, and any related permittee-responsible compensatory mitigation site, if applicable:

a. The physical street address, nearest street, or nearest route number; city or county; zip code; and, if applicable, parcel number of the site or sites.

b. Name of the impacted water body or water bodies, or receiving waters, as applicable, at the site or sites.

c. The latitude and longitude to the nearest second at the center of the site or sites.

d. The fourth order subbasin, as defined by the hydrologic unit boundaries of the National Watershed Boundary Dataset, for the site or sites.

e. A detailed map depicting the location of the site or sites, including the project boundary. The map (e.g., a United States Geologic Survey topographic quadrangle map) should be of sufficient detail to easily locate the site or sites for inspection.

f. GIS-compatible shapefile or shapefiles of the project boundary and all existing preservation areas on the site or sites, unless otherwise approved by or coordinated with DEQ. The requirement for a GIS-compatible shapefile or shapefiles may be waived by DEQ on a case-by-case basis.

7. A narrative description of the project, including project purpose and need.

8. Plan-view drawing or drawings of the project site sufficient to assess the project, including at a minimum the following:

a. North arrow, graphic scale, and existing and proposed topographic or bathymetric contours.

b. Limits of proposed impacts to surface waters.

c. Location of all existing and proposed structures.

d. All delineated wetlands and all jurisdictional surface waters on the site, including the Cowardin classification (i.e., emergent, scrub-shrub, or forested) for those surface waters and waterway name, if designated; ebb and flood or direction of flow; and ordinary high water mark in nontidal areas.

e. The limits of Chesapeake Bay Resource Protection Areas (RPAs) as field-verified by the applicant and if available, the limits as approved by the locality in which the project site is located unless the proposed use is exempt from the Chesapeake Bay Preservation Area Designation and Management Regulations (9VAC25-830).

f. The limits of any areas that are under a deed restriction, conservation easement, restrictive covenant, or other land use protective instrument (i.e., protected areas).

9. Cross-sectional and profile drawing or drawings. Cross-sectional drawing or drawings of each proposed impact area shall include at a minimum a graphic scale, existing structures, existing and proposed elevations, limits of surface water areas, ebb and flood or direction of flow (if applicable), ordinary high water mark in nontidal areas, impact limits, and location of all existing and proposed structures. Profile drawing or drawings with this information may be required on a case-by-case basis to demonstrate minimization of impacts. Any application that proposes piping or culverting stream flows shall provide a longitudinal profile of the pipe or culvert position and stream bed thalweg, or shall provide spot elevations of the stream thalweg at the beginning and end of the pipe or culvert, extending to a minimum of 10 feet beyond the limits of proposed impact.

10. Materials assessment. Upon request by the board, the applicant shall provide evidence or certification that the material is free from toxic contaminants prior to disposal or that the dredging activity will not cause or contribute to a violation of water quality standards during dredging. The applicant may be required to conduct grain size and composition analyses, tests for specific parameters or chemical constituents, or elutriate tests on the dredge material.

11. A narrative description of all impacts proposed to surface waters, including the type of activity to be conducted in surface waters and any physical alteration to

surface waters. Surface water impacts shall be identified as follows:

a. Wetland impacts identified according to their Cowardin classification (i.e., emergent, scrub-shrub, or forested), and for each classification, the individual impacts quantified in square feet to the nearest whole number, cumulatively summed in square feet, and then the sum converted to acres and rounded to two decimal places using commonly accepted arithmetic principles of rounding.

b. Individual stream impacts quantified in linear feet to the nearest whole number and then cumulatively summed, and when compensatory mitigation is required, the impacts identified according to the assessed type using the Unified Stream Methodology.

c. Open water impacts identified according to their Cowardin classification; and for each type, the individual impacts quantified in square feet to the nearest whole number, cumulatively summed in square feet, and then the sum converted to acres and rounded to two decimal places using commonly accepted arithmetic principles of rounding.

d. A copy of the approved jurisdictional determination, if available, or the preliminary jurisdictional determination from the U.S. Army Corps of Engineers (USACE), U.S. Department of Agriculture Natural Resources Conservation Service (NRCS), or DEQ, or other correspondence from the USACE, NRCS, or DEQ indicating approval of the boundary of applicable jurisdictional surface waters, including wetlands data sheets if applicable.

e. A delineation map and GIS-compatible shapefile or shapefiles of the delineation map that depicts the geographic area or areas of all surface water boundaries delineated in accordance with 9VAC25-210-45 and confirmed in accordance with the jurisdictional determination process; identifies such areas in accordance with subdivisions 11 a through 11 c of this subsection; and quantifies and identifies any other surface waters according to their Cowardin classification (i.e., emergent, scrub-shrub, or forested) or similar terminology, if applicable. The requirements for a delineation map or GIS-compatible shapefile or shapefiles may be waived by DEQ on a case-by-case basis.

12. An alternatives analysis for the proposed project detailing the specific on-site measures taken during project design and development to first avoid and then minimize impacts to surface waters to the maximum extent practicable in accordance with the Guidelines for Specification of Disposal Sites for Dredged or Fill Material, 40 CFR Part 230. Avoidance and minimization includes, but is not limited to, the specific on-site measures taken to reduce the size, scope, configuration, or density of the proposed project, including review of alternative sites where required for the project, which would avoid or result in less adverse impact to surface waters, and documentation demonstrating the reason the applicant determined less damaging alternatives are not practicable. The analysis shall demonstrate to the satisfaction of the board that avoidance and minimization opportunities have been identified and measures have been applied to the proposed activity such that the proposed activity in terms of impacts to state waters and fish and wildlife resources is the least environmentally damaging practicable alternative.

13. A compensatory mitigation plan to achieve no net loss of wetland acreage or functions or stream functions and water quality benefits.

a. If permittee-responsible compensation is proposed for wetland impacts, a conceptual wetland compensatory mitigation plan must be submitted in order for an application to be deemed complete and shall include at a minimum (i) the goals and objectives in terms of replacement of wetland acreage or functions; (ii) a detailed location map including latitude and longitude (to the nearest second) and the fourth order subbasin, as defined by the hydrologic unit boundaries of the National Watershed Boundary Dataset, at the center of the site; (iii) a description of the surrounding land use; (iv) a hydrologic analysis including a draft water budget for nontidal areas based on expected monthly inputs and outputs that will project water level elevations for a typical year, a dry year, and a wet year; (v) groundwater elevation data, if available, or the proposed location of groundwater monitoring wells to collect these data; (vi) wetland delineation confirmation, data sheets, and maps for existing surface water areas on the proposed site or sites; (vii) a conceptual grading plan; (viii) a conceptual planting scheme including suggested plant species and zonation of each vegetation type proposed; (ix) a description of existing soils including general information on both topsoil and subsoil conditions, permeability, and the need for soil amendments; (x) a draft design of any water control structures; (xi) inclusion of buffer areas; (xii) a description of any structures and features necessary for the success of the site; (xiii) the schedule for compensatory mitigation site construction; and (xiv) measures for the control of undesirable species.

b. If permittee-responsible compensation is proposed for stream impacts, a conceptual stream compensatory mitigation plan must be submitted in order for an application to be deemed complete and shall include at a minimum (i) the goals and objectives in terms of water quality benefits and replacement of stream functions; (ii) a detailed location map including the latitude and longitude to the nearest second and the fourth order subbasin, as defined by the hydrologic unit boundaries of the National Watershed Boundary Dataset, at the center of the site; (iii) a description of the surrounding land use;

(iv) the proposed stream segment restoration locations including plan view and cross-sectional drawings; (v) the stream deficiencies that need to be addressed; (vi) data obtained from a DEQ-approved, stream impact assessment methodology such as the Unified Stream Methodology; (vii) the proposed restoration measures to be employed including channel measurements, proposed design flows, types of instream structures, and conceptual planting scheme; (viii) reference stream data, if available; (ix) inclusion of buffer areas; (x) schedule for restoration activities; and (xi) measures for the control of undesirable species.

c. For any permittee-responsible compensatory mitigation, the conceptual compensatory mitigation plan shall also include a draft of the intended protective mechanism or mechanisms, in accordance with 9VAC25-210-116 B 2, such as, but not limited to, a conservation easement held by a third party in accordance with the Virginia Conservation Easement Act (§ 10.1-1009 et seq. of the Code of Virginia) or the Virginia Open-Space Land Act (§ 10.1-1700 et seq. of the Code of Virginia), a duly recorded declaration of restrictive covenants, or other protective instrument. The draft intended protective mechanism shall contain the information in subdivisions c (1), c (2), and c (3) of this subdivision 13 or in lieu thereof shall describe the intended protective mechanism or mechanisms that contains the information required below:

(1) A provision for access to the site;

(2) The following minimum restrictions: no ditching, land clearing, or discharge of dredge or fill material, and no activity in the area designated as compensatory mitigation area with the exception of maintenance; corrective action measures; or DEQ-approved activities described in the approved final compensatory mitigation plan or long-term management plan; and

(3) A long-term management plan that identifies a long-term steward and adequate financial assurances for long-term management in accordance with the current standard for mitigation banks and in-lieu fee program sites, except that financial assurances will not be necessary for permittee-responsible compensation provided by government agencies on government property. If approved by DEQ, permittee-responsible compensation on government property and long-term protection may be provided through federal facility management plans, integrated natural resources management plans, or other alternate management plans submitted by a government agency or public authority.

d. Any compensatory mitigation plan proposing the purchase of mitigation bank or in-lieu fee program credits shall include the number and type of credits proposed to be purchased and documentation from the approved mitigation bank or in-lieu fee program sponsor of the availability of credits at the time of application.

14. Permit application fee. The applicant will be notified by the board as to the appropriate fee for the project.

15. A written description and a graphical depiction identifying all upland areas including buffers, wetlands, open water, other surface waters, and compensatory mitigation areas located within the proposed project boundary or permittee-responsible compensatory mitigation areas that are under a deed restriction, conservation easement, restrictive covenant, or other land use protective instrument (i.e., protected areas). Such description and a graphical depiction shall include the nature of the prohibited activities within the protected areas and the limits of Chesapeake Bay Resource Protection Areas (RPAs) as field-verified by the applicant and if available, the limits as approved by the locality in which the project site is located, unless the proposed use is exempt from the Chesapeake Bay Preservation Area Designation and Management Regulations (9VAC25-830), as additional state or local requirements may apply if the project is located within an RPA.

16. Signature page that has been signed, dated, and certified by the applicant in accordance with 9VAC25-210-100. If the applicant is a business or other organization, the signature must be made by an individual with the authority to bind the business or organization, and the title of the signatory must be provided. The application signature page, either on the copy submitted to the Virginia Marine Resources Commission or to DEQ, must have an original signature. Electronic submittals containing the original signature page, such as that contained in a scanned document file, are acceptable.

C. An analysis of the functions of wetlands proposed to be impacted may be required by DEQ. When required, the method selected for the analysis shall assess water quality or habitat metrics and shall be coordinated with DEQ in advance of conducting the analysis.

1. No analysis shall be required when:

a. Wetland impacts per each single and complete project total 1.00 acre or less; or

b. The proposed compensatory mitigation consists of purchasing mitigation bank or in-lieu fee program credits at standard mitigation ratios of 2:1 for forest, 1.5:1 for scrub-shrub, and 1:1 for emergent, or higher.

2. Analysis shall be required when wetland impacts per each single and complete project total 1.01 acres or more and when any of the following applies:

a. The proposed compensatory mitigation consists of permittee-responsible compensation, including water quality enhancements as replacement for wetlands; or

b. The proposed compensatory mitigation consists of purchasing mitigation bank or in-lieu fee program credits

at less than the standard mitigation ratios of 2:1 for forest, 1.5:1 for scrub-shrub, and 1:1 for emergent.

D. Upon receipt of an application from the Department of Transportation for a road or highway construction project by the appropriate DEQ office, the board has 10 business days, pursuant to § 33.2-258 of the Code of Virginia, to review the application and either determine the information requested in subsection B of this section is complete or inform the Department of Transportation that additional information is required to make the application complete ~~(pursuant to § 33.1-19.1 of the Code of Virginia)~~. Upon receipt of an application from other applicants for any type of project, the board has 15 days to review the application and either determine the information requested in subsection B of this section is complete or inform the applicant that additional information is required to make the application complete. ~~For Department of Transportation road or highway construction projects,~~ Pursuant to § 33.2-258 of the Code of Virginia, application for coverage under this VWP general permit for Department of Transportation road or highway construction projects shall be approved~~,~~ or approved with conditions, or the application shall be denied within 30 business days of receipt of a complete application ~~(pursuant to § 33.1-19.1 of the Code of Virginia)~~. For all other projects, application for coverage under this VWP general permit shall be approved~~,~~ or approved with conditions, or the application shall be denied within 45 days of receipt of a complete application. If the board fails to act within the applicable 30 or 45 days on a complete application, coverage under this VWP general permit shall be deemed ~~approved~~ granted.

1. In evaluating the application, the board shall make an assessment of the impacts associated with the project in combination with other existing or proposed impacts. ~~Coverage~~ Application for coverage under this VWP general permit shall be denied if the cumulative impacts will cause or contribute to a significant impairment of state waters or fish and wildlife resources.

2. The board may place additional ~~conditions~~ requirements on a project in order to ~~approve authorization~~ grant coverage under this VWP general permit. However, ~~these conditions~~ the requirements must be consistent with the VWP general permit regulation.

E. Incomplete application. Where an application is ~~incomplete~~ not accepted as complete by the board within the applicable 10 or 15 days of receipt, the board shall require the submission of additional information from the applicant and may suspend processing ~~the~~ of any application until such time as the applicant has supplied the requested information and the application is complete. Where the applicant becomes aware that he omitted one or more relevant facts from an application, or submitted incorrect information in an application or in ~~reports~~ any report to the board, ~~he~~ the applicant shall immediately submit such facts or the correct information. A revised application with new information shall be deemed a new application~~,~~ for the purposes of review but shall not require an additional permit application fee. An incomplete permit application may be administratively withdrawn from processing by the board for failure to provide the required information after ~~180~~ 60 days from the date ~~that~~ of the ~~original permit application was received~~ latest written information request made by the board. An applicant may request a suspension of application review by the board, but requesting a suspension shall not preclude the board from administratively withdrawing an incomplete application. Resubmittal of a permit application for the same or similar project, after such time that the original permit application was administratively withdrawn, shall require submittal of an additional permit application fee.

**9VAC25-680-70. Compensation.**

A. ~~In accordance with 9VAC25-680-50 A, compensatory~~ Compensatory mitigation may be required for ~~all~~ permanent, nontidal surface water impacts as specified in 9VAC25-680-50 A. All temporary, nontidal surface water impacts shall be restored to preexisting conditions in accordance with 9VAC25-680-100.

B. ~~Generally, the sequence of preferred compensation options shall be restoration, then creation, then mitigation banking, and then in-lieu fee fund. Also, 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 to practicable on-site or in-kind compensation may be considered. When the applicant can demonstrate satisfactorily that an off-site or out-of-kind compensatory mitigation proposal is ecologically preferable, then such proposal may be deemed appropriate for compensation of project impacts.~~ Compensatory mitigation and any compensatory mitigation proposals shall be in accordance with this section and 9VAC25-210-116.

~~C. For the purposes of this VWP general permit, compensatory mitigation for unavoidable wetland impacts may be met through the following:~~

~~1. Wetland creation.~~

~~2. Wetland restoration.~~

~~3. The purchase or use of credits from a mitigation bank, pursuant to § 62.1-44.15:23 of the Code of Virginia.~~

~~4. A contribution to an approved in-lieu fee fund.~~

~~5. Preservation of upland buffers adjacent to state waters, when utilized in conjunction with subdivision 1, 2, or 3 of this subsection and when consistent with 9VAC25-210-116 A.~~

~~6. Restoration of upland buffers adjacent to state waters, when utilized in conjunction with subdivision 1, 2, or 3 of this subsection and when consistent with 9VAC25-210-116 A.~~

~~7. Preservation of wetlands, when utilized in conjunction with subdivision 1, 2, or 3 of this subsection.~~

~~D. For the purposes of this VWP general permit, compensatory mitigation for unavoidable stream impacts may be met through the following:~~

~~1. Stream channel restoration or enhancement.~~

~~2. Riparian buffer restoration or enhancement.~~

~~3. Riparian buffer preservation, when consistent with 9VAC25-210-116 A.~~

~~4. A contribution to an approved in-lieu fee fund.~~

~~5. The purchase or use of credits from a mitigation bank, pursuant to § 62.1-44.15:23 of the Code of Virginia.~~

~~E. In order for contribution to an in-lieu fee fund to be an acceptable form of compensation, the fund must be approved for use by the board according to the provisions of 9VAC25-210-116 D. The applicant shall provide proof of contribution to DEQ prior to commencing activities in impact areas.~~

~~F. In order for purchase or use of bank credits to be an acceptable form of compensation, the bank shall be operating in accordance with the provisions of § 62.1-44.15:23 of the Code of Virginia and 9VAC25-210-116 E. The applicant shall provide proof of purchase, use, or debit to DEQ prior to commencing activities in impact areas.~~

~~G. Compensation~~ C. When required, compensatory mitigation for unavoidable, permanent wetland impacts shall be provided at the following minimum ~~compensation to impact~~ mitigation ratios:

1. Impacts to forested wetlands shall be mitigated at 2:1, as calculated on an area basis.

2. Impacts to scrub shrub wetlands shall be mitigated at 1.5:1, as calculated on an area basis.

3. Impacts to emergent wetlands shall be mitigated at 1:1, as calculated on an area basis.

~~H. Compensation~~ D. When required, compensatory mitigation for stream bed impacts shall be appropriate to replace lost functions and water quality benefits. One factor in determining the required stream compensation shall be an analysis of stream impacts utilizing a stream impact assessment methodology acceptable to ~~DEQ~~ the Department of Environmental Quality.

~~I.~~ E. Compensation for permanent open water impacts, other than to streams, may be required at ~~a~~ an in-kind or out-of-kind mitigation ratio of 1:1 ~~replacement to impact ratio~~ or less, as calculated on an area basis, to offset impacts to state waters and fish and wildlife resources ~~from significant impairment~~. Compensation shall not be required for permanent or temporary impacts to open waters identified as palustrine by the Cowardin classification method, except when such open waters are located in areas of karst topography in Virginia and are formed by the natural solution of limestone.

~~J. Compensation~~ F. When conversion results in a permanent alteration of the functions of a wetland, compensatory mitigation for conversion impacts to wetlands shall be required at a 1:1 ~~replacement to impact~~ mitigation ratio, as calculated on an area basis~~, when such conversion results in a permanent alteration of the functions and values of the wetlands~~. For example, the permanent conversion of a forested wetland to an emergent wetland is considered to be a permanent impact for the purposes of this regulation. Compensation for conversion of other types of surface waters may be required, as appropriate, to offset impacts to state waters and fish and wildlife resources ~~from significant impairment~~.

**9VAC25-680-80. Notice of planned changes; modifications to coverage.**

A. The permittee shall notify the board in advance of ~~the~~ a planned change, and ~~the planned change~~ an application or request ~~will~~ for modification to coverage shall be reviewed according to all provisions of this ~~regulation~~ chapter. Coverage shall not be modified if (i) the cumulative total of permanent and temporary impacts exceeds two acres of nontidal wetlands or open water or exceeds 1,500 linear feet of nontidal stream bed or (ii) the criteria in subsection B of this section are not met. The applicant may submit a new permit application for consideration under a VWP individual permit.

B. ~~Authorization under this~~ VWP general permit coverage may be modified ~~subsequent to issuance if the permittee determines that additional permanent wetland, open water, or stream~~ under the following circumstances:

1. Additional impacts to surface waters are necessary, provided that ~~the additional impacts are associated with the previously authorized activities in authorized locations within the same phase of development or within logical termini, the cumulative increase in acreage of wetland or open water impacts is not greater than 1/4 acre, the cumulative increase in stream bed impacts is not greater than 100 linear feet, and the additional impacts are fully mitigated. Prior to a planned change approval, DEQ may require submission of a compensatory mitigation plan for the additional impacts. In cases where the original impacts totaled less than 1/10 acre of wetlands or open water, or less than 300 linear feet of stream bed, and the additional impacts result in these limits being exceeded, the notice of planned change will not be approved. However, the applicant may submit a new permit application and permit application fee for the total impacts to be considered under this VWP general permit, another VWP general permit, or a VWP individual permit.~~:

a. The additional impacts are proposed prior to impacting the additional areas.

b. The proposed additional impacts are located within the project boundary as depicted in the application for coverage or are located in areas of directly-related off-

site work unless otherwise prohibited in this VWP general permit regulation.

c. The permittee has provided sufficient documentation that the board may reasonably determine that the additional impacts will not impact federal or state listed or proposed threatened or endangered species or proposed or designated critical habitat or be the taking of threatened or endangered species.

d. The cumulative, additional permanent wetland or open water impacts for one or more notices of planned change do not exceed 0.25 acre.

e. The cumulative, additional permanent stream impacts for one or more notices of planned change do not exceed 100 linear feet.

f. Documentation is provided demonstrating that the proposed surface water impacts have been avoided to the maximum extent practicable in accordance with the informational requirements of 9VAC25-680-60 B 12.

g. Compensatory mitigation for the proposed impacts, if required, meets the requirements of 9VAC25-680-70 and 9VAC25-210-116. Prior to a planned change approval, the Department of Environmental Quality may require submission of a compensatory mitigation plan for the additional impacts.

h. Where such additional impacts are temporary, and prior to initiating the impacts, the permittee provides a written statement to the board that the area to be temporarily impacted will be restored to its preconstruction elevations and contours, with topsoil from the impact area where practicable, such that the previous acreage and functions are restored, in accordance with Parts I A 3 and B 11 of 9VAC25-680-100. The additional temporary impacts shall not cause the cumulative total impacts to exceed the general permit threshold for use. The proposed temporary impacts shall be deemed approved if DEQ does not respond within 10 days of receipt of the request for authorization to temporarily impact additional surface waters.

i. The additional proposed impacts do not change the category of the project, based on the original impact amounts as specified in 9VAC25-680-50 A 2. However, the applicant may submit a new permit application for the total impacts to be considered under this VWP general permit, another VWP general permit, or a VWP individual permit.

~~C. Authorization under this VWP general permit may be modified after issuance if the project results in less~~ 2. A reduction in wetland or stream impacts. ~~Compensation~~ Compensatory mitigation requirements may be modified in relation to the adjusted impacts ~~at the request of the permittee~~, provided that the adjusted ~~compensation~~ compensatory mitigation meets the initial ~~authorization compensation~~ compensatory mitigation goals. DEQ shall not be responsible for ensuring refunds for mitigation bank credit purchases~~, mitigation bank usage,~~ or in-lieu fee ~~fund contributions~~ program credit purchases.

~~D. Authorization under this VWP general permit may be modified after issuance for a~~ 3. A change in project plans or use that does not result in a change ~~in~~ to authorized project impacts other than those allowed in subdivisions 1 and 2 of this subsection.

~~E. Authorization under the VWP general permit may be modified for a change to the mitigation bank at which credits are purchased or used, provided that the same amount of credits are purchased or used and all criteria for use in 9VAC25-210-116 E are met.~~

~~F. Authorization under the VWP general permit may be modified after issuance for typographical errors.~~

~~G. A Notice of Planned Change is not required after authorization issuance for additional temporary impacts to surface waters, provided that DEQ is notified in writing regarding additional temporary impacts, and the area is restored to preexisting conditions in accordance with Part I C 11 of this general permit. In no case can the additional temporary impacts exceed the general permit threshold for use.~~

~~H. In no case can this authorization be modified to exceed the general permit threshold for use.~~

~~I. A notice of planned change shall be denied if fish and wildlife resources are significantly impacted or if the criteria in subsection B of this section are not met. However, the original VWP general permit authorization shall remain in effect. The applicant may submit a new permit application and permit application fee for consideration under a VWP individual permit.~~

4. Substitute a specific, DEQ-approved mitigation bank or in-lieu fee program with another DEQ-approved mitigation bank or in-lieu fee program or substitute all or a portion of the prior authorized permittee-responsible compensation with a purchase of mitigation credits in accordance with 9VAC25-210-116 C from a DEQ-approved mitigation bank or in-lieu fee program. The amount of credits proposed to be purchased shall be sufficient to meet the compensatory mitigation requirement for which the compensatory mitigation is proposed to replace.

5. Correct typographical errors.

**9VAC25-680-90. Termination of ~~authorization by consent~~ coverage.**

~~When all permitted activities requiring notification under 9VAC25-680-50 A and all compensatory mitigation requirements have been completed, or if the authorized impacts will not occur, the~~ A. The permittee shall submit a request for termination by consent within 30 days of ~~project completion or project cancellation~~ completing or canceling all authorized activities requiring notification under 9VAC25-680-50 A and all compensatory mitigation requirements.

When submitted for project completion, the request for termination by consent shall constitute a notice of project completion in accordance with 9VAC25-210-130 F. The director may accept this termination of ~~authorization~~ coverage on behalf of the board. The permittee shall submit the following information:

1. Name, mailing address, and telephone number of the permittee;

2. Name and location of the activity;

3. The VWP general permit ~~authorization~~ tracking number; and

4. One of the following certifications:

a. For project completion:

"I certify under penalty of law that all activities and any required compensatory mitigation authorized by ~~a~~ the VWP general permit and general permit coverage have been completed. I understand that by submitting this notice of termination I am no longer authorized to perform activities in surface waters in accordance with the VWP general permit and general permit coverage, and that performing activities in surface waters is unlawful where the activity is not authorized by ~~a~~ the VWP permit or coverage, unless otherwise excluded from obtaining coverage. I also understand that the submittal of this notice does not release me from liability for any violations of ~~this~~ the VWP general permit ~~authorization~~ or coverage."

b. For project cancellation:

"I certify under penalty of law that the activities and any required compensatory mitigation authorized by ~~this~~ the VWP general permit and general permit coverage will not occur. I understand that by submitting this notice of termination I am no longer authorized to perform activities in surface waters in accordance with the VWP general permit and general permit coverage, and that performing activities in surface waters is unlawful where the activity is not authorized by ~~a~~ the VWP permit or for coverage, unless otherwise excluded from obtaining coverage. I also understand that the submittal of this notice does not release me from liability for any violations of ~~this~~ the VWP general permit ~~authorization~~ or coverage, nor does it allow me to resume the ~~permitted~~ authorized activities without reapplication and ~~reauthorization~~ coverage."

c. For events beyond permittee control, the permittee shall provide a detailed explanation of the events, to be approved by ~~DEQ~~ the Department of Environmental Quality, and the following certification statement:

"I certify under penalty of law that the activities or the required compensatory mitigation authorized by ~~a~~ the VWP general permit and general permit coverage have changed as the result of events beyond my control (see attached). I understand that by submitting this notice of termination I am no longer authorized to perform activities in surface waters in accordance with the VWP general permit and general permit coverage, and that performing activities in surface waters is unlawful where the activity is not authorized by ~~a~~ the VWP permit or coverage, unless otherwise excluded from obtaining coverage. I also understand that the submittal of this notice does not release me from liability for any violations of ~~this~~ the VWP general permit ~~authorization~~ or coverage, nor does it allow me to resume the ~~permitted~~ authorized activities without reapplication and ~~reauthorization~~ coverage."

B. VWP general permit coverage may be terminated for cause in accordance with 9VAC25-210-180 F and 9VAC25-230, or without cause in accordance with 9VAC25-210-180 G and 9VAC25-230.

**9VAC25-680-95. ~~Transition.~~ (Repealed.)**

~~A. All applications received on or after August 1, 2006, will be processed in accordance with these new procedures.~~

~~B. VWP general permit authorizations issued prior to August 1, 2006, will remain in full force and effect until such authorizations expire, are revoked, or are terminated.~~

~~C. Notices of planned change and all other types of notification that are received by the board prior to August 1, 2006, will be processed in accordance with the VWP general permit regulation in effect at that time. Notices of planned change and all other types of notification to the board that are received on or after August 1, 2006, will be processed in accordance with these new procedures.~~

**9VAC25-680-100. VWP general permit.**

~~Any applicant whose application has been accepted by the board shall be subject to the following requirements:~~

~~VWP General Permit No. WP3~~
~~Authorization Expiration date:~~
~~Authorization Notes(s):~~

~~VWP GENERAL PERMIT FOR LINEAR TRANSPORTATION PROJECTS UNDER THE VIRGINIA WATER PROTECTION PERMIT AND THE VIRGINIA STATE WATER CONTROL LAW~~

~~Based upon an examination of the information submitted by the applicant and in~~

VWP GENERAL PERMIT NO. WP3 FOR LINEAR TRANSPORTATION PROJECTS UNDER THE VIRGINIA WATER PROTECTION PERMIT AND THE VIRGINIA STATE WATER CONTROL LAW

Effective date: August 2, 2016
Expiration date: August 1, 2031

In compliance with § 401 of the Clean Water Act, as amended (33 USC § 1341) and the State Water Control Law and regulations adopted pursuant thereto, the board has determined that there is a reasonable assurance that ~~the activity authorized by~~ this VWP general permit, if ~~conducted~~

~~in accordance with the conditions set forth herein~~ complied with, will protect instream beneficial uses ~~and~~, will not violate applicable water quality standards~~. The board finds that the effect of the impact, together with other existing or proposed impacts to wetlands~~, and will not cause or contribute to a significant impairment of state waters or fish and wildlife resources. In issuing this VWP general permit, the board has not taken into consideration the structural stability of any proposed activities.

~~Subject~~ The permanent or temporary impact of up to two acres of nontidal wetlands or open water and up to 1,500 linear feet of nontidal stream bed shall be subject to the provisions of the VWP general permit set forth herein; any requirements in coverage granted under this VWP general permit; the Clean Water Act, as amended~~,~~; and ~~pursuant to~~ the State Water Control Law and regulations adopted pursuant to it~~, the permittee is authorized to permanently or temporarily impact up to two acres of nontidal wetlands or open water and up to 1,500 linear feet of nontidal stream bed~~.

~~Permittee:~~

~~Address:~~

~~Activity Location:~~

~~Activity Description:~~

~~The authorized activity shall be in accordance with this cover page, Part I Special Conditions, Part II Compensation, Monitoring, and Reporting, and Part III Conditions Applicable to All VWP Permits, as set forth herein.~~

~~Director, Department of Environmental Quality~~ ~~Date~~

Part I. Special Conditions.

A. Authorized activities.

1. ~~This permit authorizes~~ The activities authorized by this chapter shall not cause more than the permanent or temporary impacts of up to two acres of nontidal wetlands or open water and up to 1,500 linear feet of nontidal stream bed ~~according to the information provided in the approved and complete application~~.

2. Any changes to the authorized permanent impacts to surface waters ~~associated with this project~~ shall require ~~either~~ a notice of planned change in accordance with 9VAC25-680-80. An application or request for modification to coverage or another VWP permit application may be required.

3. Any changes to the authorized temporary impacts to surface waters ~~associated with this project~~ shall require written notification to ~~DEQ~~ and approval from the Department of Environmental Quality in accordance with 9VAC25-680-80 prior to initiating the impacts and restoration to preexisting conditions in accordance with the conditions of this permit ~~authorization~~.

4. Modification to compensation requirements may be approved at the request of the permittee when a decrease in the amount of authorized surface waters impacts occurs, provided that the adjusted compensation meets the initial ~~authorization~~ compensation goals.

~~5. The activities authorized for coverage under this VWP general permit must commence and be completed within seven years of the date of this authorization.~~

~~B. Continuation of Coverage. Reapplication for continuation of coverage under this VWP general permit or a new VWP permit may be necessary if any portion of the authorized activities or any VWP permit requirement (including compensation) has not been completed within seven years of the date of authorization. Notwithstanding any other provision, a request for continuation of coverage under a VWP general permit in order to complete monitoring requirements shall not be considered a new application and no application fee will be charged. The request for continuation of coverage must be made no less than 60 days prior to the expiration date of this VWP general permit authorization, at which time the board will determine if continuation of the VWP general permit authorization is necessary.~~

~~C.~~ B. Overall ~~project~~ conditions.

1. The activities authorized by this VWP general permit shall be executed in a manner so as to minimize adverse impacts on instream beneficial uses as defined in § 62.1-10 (b) of the Code of Virginia.

2. No activity may substantially disrupt the movement of aquatic life indigenous to the water body, including those species which normally migrate through the area, unless the primary purpose of the activity is to impound water. ~~Culverts~~ Pipes and culverts placed in streams must be installed to maintain low flow conditions~~.~~ and shall be countersunk at both inlet and outlet ends of the pipe or culvert unless specifically approved by the Department of Environmental Quality on a case-by-case basis and as follows: The requirement to countersink does not apply to extensions or maintenance of existing culverts that are not countersunk, ~~floodplan~~ floodplain pipe and culverts being placed above ordinary high water, pipes and culverts being placed on bedrock, or pipes or culverts required to be placed on slopes 5.0% or greater. ~~No activity may cause more than minimal adverse effect on navigation. Furthermore the activity must not impede the passage of normal or expected high flows and the structure or discharge must withstand expected high flows.~~ Bedrock encountered during construction must be identified and approved in advance of a design change where the countersunk condition cannot be met. Pipes and culverts 24 inches or less in diameter shall be countersunk three inches below the natural stream bed elevations, and pipes and culverts greater than 24 inches shall be countersunk at least six inches below the natural stream bed elevations. Hydraulic capacity shall be determined based on the

reduced capacity due to the countersunk position. In all stream crossings appropriate measures shall be implemented to minimize any disruption of aquatic life movement.

3. Wet or uncured concrete shall be prohibited from entry into flowing surface waters, unless the area is contained within a cofferdam and the work is performed in the dry or unless otherwise approved by ~~DEQ~~ the Department of Environmental Quality. Excess or waste concrete shall not be disposed of in flowing surface waters or washed into flowing surface waters.

4. All fill material shall be clean and free of contaminants in toxic concentrations or amounts in accordance with all applicable laws and regulations.

5. Erosion and sedimentation controls shall be designed in accordance with the Virginia Erosion and Sediment Control Handbook, Third Edition, 1992. These controls shall be placed prior to clearing and grading and maintained in good working order to minimize impacts to state waters. These controls shall remain in place until the area is stabilized and shall then be removed.

6. Exposed slopes and streambanks shall be stabilized immediately upon completion of work in each permitted impact area. All denuded areas shall be properly stabilized in accordance with the Virginia Erosion and Sediment Control Handbook, Third Edition, 1992.

7. All construction, construction access (e.g., cofferdams, sheetpiling, and causeways) and demolition activities associated with ~~this~~ the project shall be accomplished in a manner that minimizes construction or waste materials from entering surface waters to the maximum extent practicable, unless authorized by this VWP general permit.

8. No machinery may enter flowing waters, unless authorized by this VWP general permit or approved prior to entry by the Department of Environmental Quality.

9. Heavy equipment in temporarily impacted wetland areas shall be placed on mats, geotextile fabric, or other suitable material, to minimize soil disturbance to the maximum extent practicable. Equipment and materials shall be removed immediately upon completion of work.

10. All nonimpacted surface waters and compensatory mitigation areas within 50 feet of ~~permitted~~ authorized activities and within the project or right-of-way limits shall be clearly flagged or marked for the life of the construction activity at that location to preclude unauthorized disturbances to these surface waters and compensatory mitigation areas during construction. The permittee shall notify contractors that no activities are to occur in these marked surface waters.

11. Temporary disturbances to surface waters during construction shall be avoided and minimized to the maximum extent practicable. All temporarily disturbed wetland areas shall be restored to preexisting conditions within 30 days of completing work at each respective temporary impact area, which shall include reestablishing preconstruction elevations and contours~~,~~ with topsoil from the impact area where practicable and planting or seeding with appropriate wetland vegetation according to cover type (i.e., emergent, ~~scrub/shrub,~~ scrub-shrub, or forested). The permittee shall take all appropriate measures to promote and maintain revegetation of temporarily disturbed wetland areas with wetland vegetation through the second year post-disturbance. All temporarily impacted streams and streambanks shall be restored to their ~~original~~ preconstruction elevations and contours with topsoil from the impact area where practicable within 30 days following the construction at that stream segment~~, and the banks.~~ Streambanks shall be seeded or planted with the same vegetation cover type originally present ~~along the streambanks~~, including supplemental erosion control grasses if necessary~~, except for invasive~~. Invasive species identified on ~~DCR's~~ the Department of Conservation and Recreation's Virginia Invasive ~~Alien~~ Plant Species ~~of Virginia list~~ List shall not be used to the maximum extent practicable or without prior approval from the Department of Environmental Quality.

12. Materials (including fill, construction debris, and excavated and woody materials) temporarily stockpiled in wetlands shall be placed on mats or geotextile fabric, immediately stabilized to prevent entry into state waters, managed such that leachate does not enter state waters, and completely removed within 30 days following completion of that construction activity. Disturbed areas shall be returned to ~~original~~ preconstruction elevations and contours~~,~~ with topsoil from the impact area where practicable; restored within 30 days following removal of the stockpile~~,~~; and restored with the same vegetation cover type originally present, including supplemental erosion control grasses if necessary~~, except for invasive~~. Invasive species identified on ~~DCR's~~ the Department of Conservation and Recreation's Virginia Invasive ~~Alien~~ Plant Species ~~of Virginia list~~ List shall not be used to the maximum extent practicable or without prior approval from the Department of Environmental Quality.

13. Continuous flow of perennial springs shall be maintained by the installation of spring boxes, french drains, or other similar structures.

14. The permittee shall employ measures to prevent spills of fuels or lubricants into state waters.

15. The permittee shall conduct his activities in accordance with the time-of-year restrictions recommended by the Virginia Department of Game and Inland Fisheries, the Virginia Marine Resources Commission, or other interested and affected agencies, as contained, when applicable, in Department of Environmental Quality VWP general permit coverage, and shall ensure that all

contractors are aware of the time-of-year restrictions imposed.

16. Water quality standards shall not be violated as a result of the construction activities~~, unless allowed by this permit authorization~~.

17. If stream channelization or relocation is required, all work in surface waters shall be done in the dry, unless otherwise authorized by ~~this VWP general permit~~ the Department of Environmental Quality, and all flows shall be diverted around the channelization or relocation area until the new channel is stabilized. This work shall be accomplished by leaving a plug at the inlet and outlet ends of the new channel during excavation. Once the new channel has been stabilized, flow shall be routed into the new channel by first removing the downstream plug and then the upstream plug. The rerouted stream flow must be fully established before construction activities in the old stream channel can begin.

~~D.~~ C. Road crossings.

1. Access roads and associated bridges ~~or~~, pipes, and culverts shall be constructed to minimize the adverse effects on surface waters to the maximum extent practicable. Access roads constructed above preconstruction elevations and contours ~~and elevations~~ in surface waters must be bridged, piped, or culverted to maintain surface flows.

2. Installation of road crossings shall occur in the dry via the implementation of cofferdams, sheetpiling, stream diversions, or similar structures.

~~E.~~ D. Utility lines.

1. All utility line work in surface waters shall be performed in a manner that minimizes disturbance, and the area must be returned to its ~~original~~ preconstruction elevations and contours with topsoil from the impact area where practicable and restored within 30 days of completing work in the area, unless otherwise authorized by ~~this VWP general permit~~ the Department of Environmental Quality. Restoration shall be the seeding or planting of the same vegetation cover type originally present, including supplemental erosion control grasses if necessary~~, except for invasive~~. Invasive species identified on ~~DCR's~~ the Department of Conservation and Recreation's Virginia Invasive ~~Alien~~ Plant Species ~~of Virginia list~~ List shall not be used to the maximum extent practicable or without prior approval from the Department of Environmental Quality.

2. Material resulting from trench excavation may be temporarily sidecast into wetlands not to exceed a total of 90 days, provided the material is not placed in a manner such that it is dispersed by currents or other forces.

3. The trench for a utility line cannot be constructed in a manner that drains wetlands (e.g., backfilling with extensive gravel layers creating a french drain effect). For example, utility lines may be backfilled with clay blocks to ensure that the trench does not drain surface waters through which the utility line is installed.

~~F.~~ E. Stream modification and stream bank protection.

1. Riprap bank stabilization shall be of an appropriate size and design in accordance with the Virginia Erosion and Sediment Control Handbook, Third Edition, 1992.

2. Riprap aprons for all outfalls shall be designed in accordance with the Virginia Erosion and Sediment Control Handbook, Third Edition, 1992.

3. For bank protection activities, the structure and backfill shall be placed as close to the stream bank as practicable. No material shall be placed in excess of the minimum necessary for erosion protection.

4. All stream bank protection structures shall be located to eliminate or minimize impacts to vegetated wetlands to the maximum extent practicable.

5. Asphalt and materials containing asphalt or other toxic substances shall not be used in the construction of submerged sills or breakwaters.

6. Redistribution of existing stream substrate for the purpose of erosion control is prohibited.

7. No material removed from the stream bottom shall be disposed of in surface waters, unless otherwise authorized by this VWP general permit.

~~G.~~ F. Dredging.

1. Dredging depths shall be determined and authorized according to the proposed use and controlling depths outside the area to be dredged.

2. Dredging shall be accomplished in a manner that minimizes disturbance of the bottom and minimizes turbidity levels in the water column.

3. If evidence of impaired water quality, such as a fish kill, is observed during the dredging, dredging operations shall cease, and the Department of Environmental Quality ~~(DEQ)~~ shall be notified immediately.

4. Barges used for the transportation of dredge material shall be filled in such a manner to prevent the overflow of dredged materials.

5. Double handling of dredged material in state waters shall not be permitted.

6. For navigation channels the following shall apply:

a. A buffer of four times the depth of the dredge cut shall be maintained between the bottom edge of the design channel and the channelward limit of wetlands, or a buffer of 15 feet shall be maintained from the dredged cut and the channelward edge of wetlands, whichever is greater. This landward limit of buffer shall be flagged and inspected prior to construction.

b. Side slope cuts of the dredging area shall not exceed a two-horizontal-to-one-vertical slope to prevent slumping of material into the dredged area.

7. A dredged material management plan for the designated upland disposal site shall be submitted and approved 30 days prior to initial dredging activity.

8. Pipeline outfalls and spillways shall be located at opposite ends of the dewatering area to allow for maximum retention and settling time. Filter fabric shall be used to line the dewatering area and to cover the outfall pipe to further reduce sedimentation to state waters.

9. The dredge material dewatering area shall be of adequate size to contain the dredge material and to allow for adequate dewatering and settling out of sediment prior to discharge back into state waters.

10. The dredge material dewatering area shall utilize an earthen berm or straw bales covered with filter fabric along the edge of the area to contain the dredged material, ~~and~~ filter bags, or other similar filtering practices, any of which shall be properly stabilized prior to placing the dredged material within the containment area.

11. Overtopping of the dredge material containment berms with dredge materials shall be strictly prohibited.

~~H.~~ G. Stormwater management facilities.

1. Stormwater management facilities shall be installed in accordance with best management practices and watershed protection techniques (e.g., vegetated buffers, siting considerations to minimize adverse effects to aquatic resources, bioengineering methods incorporated into the facility design to benefit water quality and minimize adverse effects to aquatic resources) that provide for long-term aquatic resources protection and enhancement, to the maximum extent practicable.

2. Compensation for unavoidable impacts shall not be allowed within maintenance areas of stormwater management facilities.

3. Maintenance activities within stormwater management facilities shall not require additional permit ~~authorization~~ coverage or compensation, provided that the maintenance activities do not exceed the original contours of the facility, as approved and constructed, and is accomplished in designated maintenance areas as indicated in the facility maintenance or design plan or when unavailable, an alternative plan approved by the Department of Environmental Quality.

Part II. Construction and Compensation Requirements, Monitoring and Reporting.

A. Minimum compensation requirements:

1. The permittee shall provide ~~appropriate and practicable~~ any required compensation for ~~all~~ impacts ~~meeting~~ in accordance with the conditions ~~outlined~~ in this VWP general permit and the chapter promulgating the general permit. For all compensation that requires a protective mechanism, including preservation of surface waters or buffers, the permittee shall record the approved protective mechanism in the chain of title to the property, or an equivalent instrument for government-owned lands, and proof of recordation shall be submitted to the Department of Environmental Quality prior to commencing impacts in surface waters.

2. Compensation options that may be considered under this VWP general permit shall meet the criteria in 9VAC25-680-70 and 9VAC25-210-116.

3. The permittee-responsible compensation site or sites depicted in the conceptual compensation plan submitted with the application shall constitute the compensation site ~~for the approved project~~. A site change ~~will~~ may require a modification to ~~the authorization~~ coverage.

4. For compensation involving the purchase ~~or use~~ of mitigation bank credits or ~~a contribution to an~~ the purchase of in-lieu fee ~~fund~~ program credits, the permittee shall not initiate work in permitted impact areas until documentation of the mitigation bank credit purchase ~~or usage~~ or of the ~~fund contribution~~ in-lieu fee program credit purchase has been submitted to and received by ~~DEQ~~ the Department of Environmental Quality.

5. ~~All aspects of the compensation~~ The final compensatory mitigation plan shall be ~~finalized,~~ submitted to and approved by the board prior to a construction activity in permitted impact areas. The board shall review and provide written comments on the final plan within 30 days of receipt or it shall be deemed approved. The final ~~compensation~~ plan as approved by the board shall be an enforceable requirement of any coverage under this VWP general permit ~~authorization~~. Deviations from the approved final plan ~~must~~ shall be submitted and approved in advance by the board.

~~6.~~ a. The final permittee-responsible wetlands compensation plan shall include:

~~a. The goals and objectives of the plan in terms of replacement of wetland acreage and functions, by wetland type;~~

~~b. Location map, including latitude and longitude (to the nearest second) at the center of the site;~~

~~c. Summary of the type and acreage of existing wetland impacts anticipated during the construction of the compensation site and proposed compensation for these impacts;~~

~~d. Grading plan with existing and proposed elevations at one foot or less contours;~~

~~e. Schedule for compensation site construction, including sequence of events with estimated dates;~~

~~f. Hydrologic analysis, including a water budget based on expected monthly inputs and outputs that will project water level elevations for a typical year, a dry year, and a wet year;~~

~~g. Groundwater elevation data for the site, or the location of groundwater monitoring wells to collect these data,~~

~~and groundwater data for reference wetlands, if applicable;~~

~~h. Design of water control structures;~~

~~i. Planting scheme and schedule, indicating plant species zonation, and acreage of each vegetation type proposed;~~

~~j. An abatement and control plan covering all undesirable plant species, as listed on DCR's Invasive Alien Plant Species of Virginia list, that includes the proposed procedures for notifying DEQ of their presence, methods of removal, and the control of such species;~~

~~k. Erosion and sedimentation control plan;~~

~~l. A soil preparation and amendment plan addressing both topsoil and subsoil conditions;~~

~~m. A discussion of structures and features considered necessary for the success of the plan;~~

~~n. A monitoring plan, including success criteria, monitoring goals and methodologies, monitoring and reporting schedule, and the locations of photographic stations and monitoring wells, sampling points and, if applicable, reference wetlands;~~

~~o. Site access plan;~~

~~p. The location and composition of any buffers; and~~

~~q. The mechanism for protection of the compensation areas.~~

(1) The complete information on all components of the conceptual compensation plan.

(2) A summary of the type and acreage of existing wetland impacts anticipated during the construction of the compensation site and the proposed compensation for these impacts; a site access plan; a monitoring plan, including proposed success criteria, monitoring goals, and the location of photo-monitoring stations, monitoring wells, vegetation sampling points, and reference wetlands or streams (if available); an abatement and control plan for undesirable plant species; an erosion and sedimentation control plan; a construction schedule; and the final protective mechanism for the protection of the compensation site or sites, including all surface waters and buffer areas within its boundaries.

(3) The approved protective mechanism. The protective mechanism shall be recorded in the chain of title to the property, or an equivalent instrument for government-owned lands, and proof of recordation shall be submitted to the Department of Environmental Quality prior to commencing impacts in surface waters.

~~7.~~ b. The final permittee-responsible stream compensation plan shall include:

~~a. The goals and objectives of the compensation plan in terms of replacement of stream functions and water quality benefits;~~

~~b. A location map, including latitude and longitude (to the nearest second) at the center of the site;~~

~~c. An evaluation, discussion, and plan sketches of existing conditions on the proposed compensation stream, including the identification of functional and physical deficiencies for which the measures are proposed, and summary of geomorphologic measurements (e.g., stream width, entrenchment ratio, width depth ratio, sinuosity, slope, substrate, etc.);~~

~~d. The identification of existing geomorphological stream type being impacted and proposed geomorphological stream type for compensation purposes;~~

~~e. Detailed design information for the proposed restorative measures, including geomorphological measurements and reference reach information as appropriate;~~

~~f. Riparian buffer plantings, including planting scheme, species, buffer width;~~

~~g. Livestock access limiting measures, to the greatest extent possible;~~

~~h. A site access plan;~~

~~i. An erosion and sedimentation control plan, if appropriate;~~

~~j. Abatement and control plan covering all undesirable plant species, as listed on DCR's Invasive Alien Plant Species of Virginia list that includes the proposed procedures for notifying DEQ of their presence, methods for removal, and the control of such species;~~

~~k. A schedule for compensation site construction including projected start date, sequence of events with projected dates, and projected completion date;~~

~~l. A monitoring plan, including a monitoring and reporting schedule; monitoring design and methodologies to evaluate the success of the proposed compensation measures, allowing comparison from year to year; proposed success criteria for appropriate compensation measures; location of all monitoring stations including photo stations, vegetation sampling points, survey points, bank pins, scour chains, and reference streams;~~

~~m. The mechanism for protection of the compensation area; and~~

~~n. Plan view sketch depicting the pattern and all compensation measures being employed, a profile sketch, and cross section sketches of the proposed compensation stream.~~

(1) The complete information on all components of the conceptual compensation plan.

(2) An evaluation, discussion, and plan drawing or drawings of existing conditions on the proposed compensation stream, including the identification of functional and physical deficiencies for which the measures are proposed, and summary of geomorphologic

measurements (e.g., stream width, entrenchment ratio, width-depth ratio, sinuosity, slope, substrate, etc.); a site access plan; a monitoring plan, including a monitoring and reporting schedule, monitoring design and methodologies for success, proposed success criteria, location of photo-monitoring stations, vegetation sampling points, survey points, bank pins, scour chains, and reference streams; an abatement and control plan for undesirable plant species; an erosion and sedimentation control plan, if appropriate; a construction schedule; a plan-view drawing depicting the pattern and all compensation measures being employed; a profile drawing; cross-sectional drawing or drawings of the proposed compensation stream; and the final protective mechanism for the protection of the compensation site or sites, including all surface waters and buffer areas within its boundaries.

(3) The approved protective mechanism. The protective mechanism shall be recorded in the chain of title to the property, or an equivalent instrument for government-owned lands, and proof of recordation shall be submitted to the Department of Environmental Quality prior to commencing impacts in surface waters.

~~8. For final~~ 6. The following criteria shall apply to permittee-responsible wetland or stream compensation ~~plans, the~~:

a. The vegetation used shall be native species common to the area, shall be suitable for growth in local wetland or riparian conditions, and shall be from areas within the same or adjacent ~~USDA~~ U.S. Department of Agriculture Plant Hardiness Zone or ~~NRCS~~ Natural Resources Conservation Service Land Resource Region as that of the project site. Planting of woody plants shall occur when vegetation is normally dormant, unless otherwise approved in the final wetlands or stream compensation plan or plans.

~~9. The final wetland or stream compensation plan or plans shall include a mechanism for protection in perpetuity of the compensation sites to include all state waters within the compensation site boundary or boundaries. Such protections shall be in place within 120 days of final compensation plan approval. The restrictions, protections, or preservations, or similar instrument, shall state that no activity will be performed on the property in any area designated as a compensation area with the exception of maintenance or corrective action measures authorized by the board. Unless specifically authorized by the board through the issuance of a VWP individual or general permit, or waiver thereof, this restriction applies to ditching, land clearing or the discharge of dredge or fill material. Such instrument shall contain the specific phrase "ditching, land clearing or discharge of dredge or fill material" in the limitations placed on the use of these areas. The protective instrument shall be recorded in the chain of title to the property, or an equivalent instrument for government-owned lands. Proof of recordation shall be submitted within 120 days of final compensation plan approval.~~

~~10.~~ b. All work in permitted impact areas shall cease if compensation site construction has not commenced within 180 days of commencement of project construction, unless otherwise authorized by the board.

~~11. DEQ~~ c. The Department of Environmental Quality shall be notified in writing ~~at least 10 days~~ prior to the initiation of construction activities at the compensation ~~sites~~ site.

~~12. Planting of woody plants shall occur when vegetation is normally dormant unless otherwise approved in the final wetlands or stream compensation plan(s).~~

~~13.~~ d. Point sources of stormwater runoff shall be prohibited from entering a wetland compensation site prior to treatment by appropriate best management practices. Appropriate best management practices may include sediment traps, grassed waterways, vegetated filter strips, debris screens, oil and grease separators, or forebays.

~~14.~~ e. The success of the compensation shall be based on meeting the success criteria established in the approved final compensation plan.

~~15. Wetland hydrology shall be considered established if depths to the seasonal high water table are equal to or less than 12 inches below ground surface for at least 12.5% of the region's killing frost-free growing season, as defined in the soil survey for the locality of the compensation site or the NRCS WETS table, measured in consecutive days under typical precipitation conditions, and as defined in the water budget of the final compensation plan. For the purpose of this regulation, the growing season is defined as the period in which temperatures are expected to be above 28 degrees Fahrenheit in five out of 10 years, or the period during which the soil temperature in a wetland compensation site is greater than biological zero (five degrees Celsius) at a depth of 50 centimeters (19.6 inches), if such data is available.~~

~~16. The wetland plant community shall be considered established according to the performance criteria specified in the final compensation plan and approved by the board. The proposed vegetation success criteria in the final compensation plan shall include the following:~~

~~a. Species composition shall reflect the desired plant community types stated in the final wetland compensation plan by the end of the first growing season and shall be maintained through the last monitoring year.~~

~~b. Species composition shall consist of greater than 50% facultative (FAC) or wetter (FACW or OBL) vegetation, as expressed by plant stem density or areal cover, by the~~

~~end of the first growing season and shall be maintained through the last monitoring year.~~

~~17. Undesirable plant species shall be identified and controlled as described in the undesirable plant species control plan, such that they are not dominant species or do not change the desired community structure. The control plan shall include procedures to notify DEQ when undesirable plant species comprise greater than 5.0% of the vegetation by areal coverage on wetland or stream compensation sites. The notification shall include the methods of removal and control, and whether the methods are successful.~~

~~18.~~ f. If the wetland or stream compensation area fails to meet the specified success criteria in a particular monitoring year, other than the final monitoring year, the reasons for this failure shall be determined and a corrective action plan shall be submitted to ~~DEQ~~ the Department of Environmental Quality for approval with or before that year's monitoring report. The corrective action plan shall contain at minimum the proposed actions, a schedule for those actions, and a monitoring plan, and shall be implemented by the permittee in accordance with the approved schedule. Should significant changes be necessary to ensure success, the required monitoring cycle shall begin again, with monitoring year one being the year that the changes are complete as confirmed by ~~DEQ~~ the Department of Environmental Quality. If the wetland or stream compensation area fails to meet the specified success criteria by the final monitoring year, or if the wetland or stream compensation area has not met the stated restoration goals, reasons for this failure shall be determined and a corrective action plan, including proposed actions, a schedule, and a monitoring plan, shall be submitted with the final year monitoring report for ~~DEQ~~ the Department of Environmental Quality approval. Corrective action shall be implemented by the permittee in accordance with the approved schedule. Annual monitoring shall be required to continue until two sequential, annual reports indicate that all criteria have been successfully satisfied and the site has met the overall restoration goals (e.g., that corrective actions were successful).

~~19.~~ g. The surveyed wetland boundary for the compensation site shall be based on the results of the hydrology, soils, and vegetation monitoring data and shall be shown on the site plan. Calculation of total wetland acreage shall be based on that boundary at the end of the monitoring cycle. Data shall be submitted by December 31 of the final monitoring year.

~~20.~~ h. Herbicides or algicides ~~shall~~ not be used in or immediately adjacent to the compensation site or sites without prior authorization by the board. All vegetation removal shall be done by manual means only, unless authorized by ~~DEQ~~ the Department of Environmental Quality in advance.

B. Impact site construction monitoring.

1. Construction activities authorized by this permit that are within impact areas shall be monitored and documented. The monitoring shall ~~document the preexisting conditions, activities during construction, and post-construction conditions. Monitoring shall~~ consist of ~~one of the following options~~:

~~a. Photographs shall be taken during construction at the end of the first, second and third months of commencing construction, and then every six months thereafter for the remainder of the construction project. Photos are not required during periods of no activity within impact areas.~~

~~b. An ortho-rectified photograph shall be taken by a firm specializing in ortho-rectified photography prior to construction, and annually thereafter, until all impacts are taken. Photos shall clearly show the delineated surface waters and authorized impact areas.~~

~~c. In lieu of photographs, and with prior approval from DEQ, the permittee may submit a written narrative that summarizes site construction activities in impact areas. The narrative shall be submitted at the end of the first, second, and third months after commencing construction, and then every six months thereafter, for the remainder of the construction activities. Narratives are not required during periods of no activity with the impact areas.~~

~~2. As part of construction monitoring, photographs taken at the photo stations or the narrative shall document site activities and conditions, which may include installation and maintenance of erosion and sediment controls; surface water discharges from the site; condition of adjacent nonimpact surface waters; flagged nonimpact surface waters; construction access and staging areas; filling, excavation, and dredging activities; culvert installation; dredge disposal; and site stabilization, grading, and associated restoration activities. With the exception of the preconstruction photographs, photographs at an individual impact site shall not be required until construction activities are initiated at that site. With the exception of the post-construction photographs, photographs at an individual impact site shall not be required once the site is stabilized following completion of construction at that site.~~

~~3. Each photograph shall be labeled to include the following information: permit number, impact area and photo station number, date and time of the photograph, name of the person taking the photograph, photograph orientation, and photograph subject description.~~

a. Preconstruction photographs taken at each impact area prior to initiation of activities within impact areas. Photographs shall remain on the project site and depict the impact area and the nonimpacted surface waters

immediately adjacent to and downgradient of each impact area. Each photograph shall be labeled to include the following information: permit number, impact area number, date and time of the photograph, name of the person taking the photograph, photograph orientation, and photograph subject description.

b. Site inspections shall be conducted by the permittee or the permittee's qualified designee once every calendar month during activities within impact areas. Monthly inspections shall be conducted in the following areas: all authorized permanent and temporary impact areas; all avoided surface waters, including wetlands, stream channels, and open water; surface water areas within 50 feet of any land disturbing activity and within the project or right-of-way limits; and all on site permanent preservation areas required under this permit. Observations shall be recorded on the inspection form provided by the Department of Environmental Quality. The form shall be completed in its entirety for each monthly inspection and shall be kept on site and made available for review by the Department of Environmental Quality staff upon request during normal business hours. Inspections are not required during periods of no activity within impact areas.

~~4.~~ 2. Monitoring of water quality parameters shall be conducted during permanent relocation of perennial streams through new channels in the manner noted below. The permittee shall report violations of water quality standards to ~~DEQ~~ the Department of Environmental Quality in accordance with the procedures in ~~Part II E~~ 9VAC25-680-100 Part II E. Corrective measures and additional monitoring may be required if water quality standards are not met. Reporting shall not be required if water quality standards are not violated.

a. A sampling station shall be located upstream and immediately downstream of the relocated channel.

b. Temperature, pH and dissolved oxygen (D.O.) measurements shall be taken every 30 minutes for at least two hours at each station prior to opening the new channels and immediately before opening new channels.

c. Temperature, pH and D.O. readings shall be taken after opening the channels and every 30 minutes for at least three hours at each station.

C. ~~Wetland~~ Permittee-responsible wetland compensation site monitoring.

1. An as-built ground survey, or an aerial survey provided by a firm specializing in aerial surveys, shall be conducted for the entire compensation site or sites, including invert elevations for all water elevation control structures and spot elevations throughout the site or sites. Aerial surveys shall include the variation from actual ground conditions, such as +/- 0.2 feet. Either type of survey shall be certified by a licensed surveyor or by a registered professional engineer to conform to the design plans. The survey shall be submitted within 60 days of completing compensation site construction. Changes or deviations in the as-built survey or aerial survey shall be shown on the survey and explained in writing.

2. Photographs shall be taken at the compensation site or sites from the permanent markers identified in the final compensation plan, and established to ensure that the same locations and view directions at the site or sites are monitored in each monitoring period. These photographs shall be taken after the initial planting and at a time specified in the final compensation plan during every monitoring year.

3. Compensation site monitoring shall begin on the first day of the first complete growing season (monitoring year 1) after wetland compensation site construction activities, including planting, have been completed. Monitoring shall be required for monitoring years 1, 2, 3, and 5, unless otherwise approved by ~~DEQ~~ the Department of Environmental Quality. In all cases, if all success criteria have not been met in the final monitoring year, then monitoring shall be required for each consecutive year until two annual sequential reports indicate that all criteria have been successfully satisfied.

4. The establishment of wetland hydrology shall be measured weekly during the growing season, with the location and number of monitoring wells, and frequency of monitoring for each site, set forth in the final monitoring plan. Hydrology monitoring well data shall be accompanied by precipitation data, including rainfall amounts, either from on site or from the closest weather station. Once the wetland hydrology success criteria have been satisfied for a particular monitoring year, monitoring may be discontinued for the remainder of that monitoring year following ~~DEQ~~ Department of Environmental Quality approval. After a period of three monitoring years, the permittee may request that hydrology monitoring be discontinued, providing that adequate hydrology has been established and maintained. Hydrology monitoring shall not be discontinued without written approval from ~~DEQ~~ the Department of Environmental Quality.

5. The presence of hydric soils or soils under hydric conditions shall be evaluated in accordance with the final compensation plan.

6. The establishment of wetland vegetation shall be in accordance with the final compensation plan. Monitoring shall take place in August, September, or October during the growing season of each monitoring year, unless otherwise authorized in the monitoring plan.

7. The presence of undesirable plant species shall be documented.

8. All wetland compensation monitoring reports shall be submitted in accordance with 9VAC25-680-100 Part II E 6.

D. ~~Stream~~ Permittee-responsible stream compensation~~, restoration,~~ and monitoring.

1. Riparian buffer restoration activities shall be detailed in the final compensation plan and shall include, as appropriate, the planting of a variety of native species currently growing in the site area, including appropriate seed mixtures and woody species that are bare root, balled, or burlapped. A minimum buffer width of 50 feet, measured from the top of the stream bank at bankfull elevation landward on both sides of the stream, shall be required where practical.

2. The installation of root wads, vanes, and other instream structures, shaping of the stream banks and channel relocation shall be completed in the dry whenever practicable.

3. Livestock access to the stream and designated riparian buffer shall be limited to the greatest extent practicable.

4. Stream channel restoration activities shall be conducted in the dry or during low flow conditions. When site conditions prohibit access from the streambank~~,~~ or upon prior authorization from the Department of Environmental Quality, heavy equipment ~~shall~~ may be authorized for use within the stream channel.

5. Photographs shall be taken at the compensation site from the vicinity of the permanent photo stations identified in the final compensation plan. The photograph orientation shall remain constant during all monitoring events. At a minimum, photographs shall be taken from the center of the stream, facing downstream, with a sufficient number of photographs to view the entire length of the restoration site. Photographs shall document the completed restoration conditions. Photographs shall be taken prior to site activities, during instream and riparian compensation construction activities, within one week of completion of activities, and during at least one day of each monitoring year to depict restored conditions.

6. An as-built ground survey, or an aerial survey provided by a firm specializing in aerial surveys, shall be conducted for the entire compensation site or sites. Aerial surveys shall include the variation from actual ground conditions, such as +/- 0.2 feet. The survey shall be certified by the licensed surveyor or by a registered, professional engineer to conform to the design plans. The survey shall be submitted within 60 days of completing compensation site construction. Changes or deviations from the final compensation plans in the as-built survey or aerial survey shall be shown on the survey and explained in writing.

7. Compensation site monitoring shall begin on day one of the first complete growing season (monitoring year 1) after stream compensation site constructions activities, including planting, have been completed. Monitoring shall be required for monitoring years 1 and 2, unless otherwise ~~determined~~ approved by ~~DEQ~~ the Department of Environmental Quality. In all cases, if all success criteria have not been met in the final monitoring year, then monitoring shall be required for each consecutive year until two annual sequential reports indicate that all criteria have been successfully satisfied.

8. All stream compensation site monitoring reports shall be submitted in accordance with 9VAC25-680-100 Part II E 6.

E. Reporting.

1. Written communications required by this VWP general permit shall be submitted to the appropriate ~~DEQ~~ Department of Environmental Quality office. The VWP general permit ~~authorization~~ tracking number shall be included on all correspondence.

2. ~~DEQ~~ The Department of Environmental Quality shall be notified in writing ~~at least 10 days~~ prior to the start of construction activities at the first ~~permitted site authorized by this VWP general permit authorization so that inspections of the project can be planned, if deemed necessary by DEQ. The notification shall include a projected schedule for initiation and completion of work at each~~ permitted impact area.

~~3. Construction monitoring reports shall be submitted to DEQ no later than the 10th day of the month following the month in which the monitoring event specified in Part II B takes place, unless otherwise specified below. The reports shall include the following, as appropriate:~~

~~a. For each permitted impact area, a written narrative stating whether work was performed during the monitoring period, and if work was performed, a description of the work performed, when the work was initiated, and the expected date of completion.~~

~~b. Photographs labeled with the permit number, the photo station number, the photo orientation, the date and time of the photo, the name of the person taking the photograph, and a brief description of the construction activities. The first construction monitoring report shall include the photographs taken at each impact site prior to initiation of construction in a permitted impact area. Written notification and photographs demonstrating that all temporarily disturbed wetland and stream areas have been restored in compliance with the permit conditions shall be submitted within 30 days of restoration. The post-construction photographs shall be submitted within 30 days of documenting post-construction conditions.~~

~~c. Summary of activities conducted to comply with the permit conditions.~~

~~d. Summary of permit noncompliance events or problems encountered, subsequent notifications, and corrective actions.~~

~~e. Summary of anticipated work to be completed during the next monitoring period and an estimated date of construction completion at all impact areas.~~

~~f. Labeled site map depicting all impact areas and photo stations.~~

3. A construction status update form provided by the Department of Environmental Quality shall be completed and submitted to the Department of Environmental Quality twice per year for the duration of coverage under a VWP general permit. Forms completed in June shall be submitted by or on July 10, and forms completed in December shall be submitted by or on January 10. The form shall include reference to the VWP permit tracking number and one of the following statements for each authorized surface water impact location:

a. Construction activities have not yet started;

b. Construction activities have started;

c. Construction activities have started but are currently inactive; or

d. Construction activities are complete.

4. ~~DEQ~~ The Department of Environmental Quality shall be notified in writing within 30 days following the completion of all activities in all ~~permitted~~ authorized impact areas ~~authorized under this permit~~.

5. ~~DEQ~~ The Department of Environmental Quality shall be notified in writing ~~at least 10 days~~ prior to the initiation of activities at the permittee-responsible compensation site. The notification shall include a projected schedule of activities and construction completion.

6. All permittee-responsible compensation site monitoring reports shall be submitted annually by December 31, with the exception of the last year ~~of authorization~~, in which case the report shall be submitted at least 60 days prior to the expiration of ~~authorization under~~ the general permit, unless otherwise approved by the Department of Environmental Quality.

a. All wetland compensation site monitoring reports shall include, as applicable, the following:

(1) General description of the site including a site location map identifying photo stations, vegetative and soil monitoring stations, monitoring wells, and wetland zones.

(2) Summary of activities completed during the monitoring year, including alterations or maintenance conducted at the site.

(3) Description of monitoring methods.

(4) Analysis of all hydrology information, including monitoring well data, precipitation data, and gauging data from streams or other open water areas, as set forth in the final compensation plan.

(5) Evaluation of hydric soils or soils under hydric conditions, as appropriate.

(6) Analysis of all vegetative community information, including woody and herbaceous species, both planted and volunteers, as set forth in the final compensation plan.

(7) Photographs labeled with the permit number, the name of the compensation site, the ~~photo~~ photo-monitoring station number, the photograph orientation, the date and time of the photograph, the name of the person taking the photograph, and a brief description of the photograph subject. This information shall be provided as a separate attachment to each photograph, if necessary. Photographs taken after the initial planting shall be included in the first monitoring report after planting is complete.

(8) Discussion of wildlife or signs of wildlife observed at the compensation site.

(9) Comparison of site conditions from the previous monitoring year and reference site.

(10) Discussion of corrective measures or maintenance activities to control undesirable species, to repair damaged water control devices, or to replace damaged planted vegetation.

(11) Corrective action plan, which includes proposed actions, a schedule, and monitoring plan.

b. All stream compensation site monitoring reports shall include, as applicable, the following:

(1) General description of the site including a site location map identifying photo stations and monitoring stations.

(2) Summary of activities completed during the monitoring year, including alterations or maintenance conducted at the site.

(3) Description of monitoring methods.

(4) An evaluation and discussion of the monitoring results in relation to the success criteria and overall goals of compensation.

(5) Photographs shall be labeled with the permit number, the name of the compensation site, the ~~photo~~ photo-monitoring station number, the photograph orientation, the date and time of the photograph, the name of the person taking the photograph, and a brief description of the photograph subject. Photographs taken prior to compensation site construction activities, during instream and riparian restoration activities, and within one week of completion of activities shall be included in the first monitoring report.

(6) A discussion of alterations, maintenance, or major storm events resulting in significant change in stream profile or cross section, and corrective actions conducted at the stream compensation site.

(7) Documentation of undesirable plant species and summary of abatement and control measures.

(8) A summary of wildlife or signs of wildlife observed at the compensation site.

(9) Comparison of site conditions from the previous monitoring year and reference site, and as-built survey, if applicable.

(10) A corrective action plan, which includes proposed actions, a schedule and monitoring plan.

(11) Additional submittals that were approved by ~~DEQ~~ the Department of Environmental Quality in the final compensation plan.

7. The permittee shall notify ~~DEQ~~ the Department of Environmental Quality in writing when unusual or potentially complex conditions are encountered which require debris removal or involve potentially toxic substance. Measures to remove the obstruction, material, or toxic substance or to change the location of a structure are prohibited until approved by ~~DEQ~~ the Department of Environmental Quality.

8. The permittee shall report fish kills or spills of oil or fuel immediately upon discovery. If spills or fish kills occur between the hours of 8:15 a.m. to 5 p.m., Monday through Friday, the appropriate ~~DEQ~~ Department of Environmental Quality regional office shall be notified; otherwise, the Department of Emergency Management shall be notified at 1-800-468-8892.

9. Violations of state water quality standards shall be reported ~~within 24 hours~~ to the appropriate ~~DEQ~~ Department of Environmental Quality office no later than the end of the business day following discovery.

10. The permittee shall notify the Department of Environmental Quality no later than the end of the third business day following the discovery of additional impacts to surface waters including wetlands, stream channels, and open water that are not authorized by the Department of Environmental Quality or to any required preservation areas. The notification shall include photographs, estimated acreage or linear footage of impacts, and a description of the impacts.

~~10.~~ 11. Submittals required by this VWP general permit shall contain the following signed certification statement:

"I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violation."

Part III. Conditions Applicable to All VWP General Permits.

A. Duty to comply. The permittee shall comply with all conditions, limitations, and other requirements of the VWP general permit; any requirements in coverage granted under this VWP general permit; the Clean Water Act, as amended; and the State Water Control Law and regulations adopted pursuant to it. Any VWP general permit violation or noncompliance is a violation of the Clean Water Act and State Water Control Law and is grounds for (i) enforcement action, (ii) VWP general permit coverage termination for cause, (iii) VWP general permit coverage revocation, (iv) denial of application for coverage, or (v) denial of an application for a modification to VWP general permit coverage. Nothing in this VWP general permit shall be construed to relieve the permittee of the duty to comply with all applicable federal and state statutes, regulations, and toxic standards and prohibitions. ~~VWP general permit noncompliance is a violation of the Clean Water Act and State Water Control Law, and is grounds for enforcement action, VWP general permit authorization, termination for cause, VWP general permit authorization, revocation, or denial of a continuation of coverage request.~~

B. Duty to mitigate. The permittee shall take all reasonable steps to minimize or prevent impacts in violation of the VWP general permit that may have a reasonable likelihood of adversely affecting human health or the environment.

C. Reopener. This VWP general permit ~~authorization~~ may be reopened to modify its conditions when the circumstances on which the previous VWP general permit ~~authorization~~ was based have materially and substantially changed, or special studies conducted by the board or the permittee show material and substantial change since the time the VWP general permit ~~authorization~~ was issued and thereby constitute cause for revoking and reissuing the VWP general permit ~~authorization revocation and reissuance~~.

D. Compliance with state and federal law. Compliance with this VWP general permit constitutes compliance with the VWP permit requirements of the State Water Control Law. Nothing in this VWP general permit shall be construed to preclude the institution of any legal action under or relieve the permittee from any responsibilities, liabilities, or other penalties established pursuant to any other state law or regulation or under the authority preserved by § 510 of the Clean Water Act.

E. Property rights. The issuance of this VWP general permit does not convey property rights in either real or personal property~~,~~ or exclusive privileges, nor does it authorize injury to private property ~~or~~, any invasion of personal property rights, ~~nor~~ or any infringement of federal, state, or local laws or regulations.

F. Severability. The provisions of this VWP general permit ~~authorization~~ are severable.

G. ~~Right of~~ Inspection and entry. ~~The~~ Upon presentation of credentials, the permittee shall allow the board or ~~its agents, upon the presentation of credentials~~ any duly authorized agent of the board, at reasonable times and under reasonable circumstances, to enter upon the permittee's property, public or private, and have access to inspect and copy any records

that must be kept as part of the VWP general permit conditions; to inspect any facilities, operations, or practices (including monitoring and control equipment) regulated or required under the VWP general permit; and to sample or monitor any substance, parameter, or activity for the purpose of assuring compliance with the conditions of the VWP general permit or as otherwise authorized by law. For the purpose of this section, the time for inspection shall be deemed reasonable during regular business hours. Nothing contained herein shall make an inspection time unreasonable during an emergency.

H. Transferability of VWP general permit ~~authorization~~ coverage. ~~This~~ VWP general permit ~~authorization~~ coverage may be transferred to another ~~person by a~~ permittee when all of the criteria listed ~~below~~ in this subsection are met. On the date of the VWP general permit ~~authorization~~ coverage transfer, the transferred VWP general permit ~~authorization~~ coverage shall be as fully effective as if it had been ~~issued~~ granted directly to the new permittee.

1. The current permittee notifies the board of the proposed transfer of the ~~title to the facility or property. 2. The notice to the board includes~~ general permit coverage and provides a written agreement between the current and new permittees containing a specific date of transfer of VWP general permit ~~authorization~~ responsibility, coverage, and liability to the new permittee, or that the current permittee will retain such responsibility, coverage, or liability, including liability for compliance with the requirements of enforcement activities related to the ~~permitted~~ authorized activity.

~~3.~~ 2. The board does not within 15 days notify the current and new permittees of its intent to modify or revoke and reissue the VWP general permit ~~authorization within 15 days~~.

I. Notice of planned change. ~~Authorization under this~~ VWP general permit coverage may be modified subsequent to issuance in ~~one or more of the cases listed below~~ accordance with 9VAC25-680-80. ~~A notice of planned change is not required if the project results in additional temporary impacts to surface waters, provided that DEQ is notified in writing, the additional temporary impacts are restored to preexisting conditions in accordance with Part I C 11 of this general permit, and the additional temporary impacts do not exceed the general permit threshold for use. The permittee shall notify the board in advance of the planned change, and the planned change request will be reviewed according to all provisions of this regulation.~~

~~1. The permittee determines that additional permanent wetland, open water, or stream impacts are necessary, provided that the additional impacts are associated with the previously authorized activities in authorized locations within the same phase of development, the cumulative increase in acreage of wetland or open water impacts is not greater than 1/4 acre, the cumulative increase in stream bed impacts is not greater than 100 linear feet, and the additional impacts are fully compensated.~~

~~2. The project results in less wetland or stream impacts, in which case compensation requirements may be modified in relation to the adjusted impacts at the request of the permittee, provided that the adjusted compensation meets the initial authorization compensation goals.~~

~~3. There is a change in the project plans that does not result in a change in project impacts.~~

~~4. There is a change in the mitigation bank at which credits are purchased or used, provided that the same amount of credits are purchased or used and all criteria for use are met, as detailed in 9VAC25-210-116 E.~~

~~5. Typographical errors need to be corrected.~~

J. VWP general permit ~~authorization~~ coverage termination for cause. ~~This~~ VWP general permit ~~authorization~~ coverage is subject to termination for cause by the board after public notice and opportunity for a hearing pursuant to 9VAC25-230. Reasons for termination for cause are as follows:

1. Noncompliance by the permittee with any provision of the VWP general permit regulation, any condition of the VWP general permit ~~authorization~~, or any requirement in general permit coverage;

2. The permittee's failure in the application or during the ~~VWP general permit authorization issuance~~ process of granting VWP general permit coverage to disclose fully all relevant facts or the permittee's misrepresentation of any relevant facts at any time;

3. The permittee's violation of a special or judicial order; ~~and~~

4. A determination by the board that the ~~permitted~~ authorized activity endangers human health or the environment and can be regulated to acceptable levels by a modification to VWP general permit ~~authorization planned change~~ coverage or a termination ~~for cause.~~;

5. A change in any condition that requires either a temporary or permanent reduction or elimination of any activity controlled by the VWP general permit; or

6. A determination that the authorized activity has ceased and that the compensation for unavoidable adverse impacts has been successfully completed.

K. The board may terminate VWP general permit coverage without cause when the permittee is no longer a legal entity due to death or dissolution or when a company is no longer authorized to conduct business in the Commonwealth. The termination shall be effective 30 days after notice of the proposed termination is sent to the last known address of the permittee or registered agent, unless the permittee objects within that time. If the permittee does object during that period, the board shall follow the applicable procedures for termination under § 62.1-44.15:25 of the Code of Virginia and 9VAC25-230.

~~K.~~ L. VWP general permit ~~authorization~~ coverage termination by consent. ~~This VWP general permit authorization may be terminated by consent when all permitted activities requiring notification under 9VAC25-680-50 A and all compensatory mitigation have been completed or when the authorized impacts will not occur.~~ The permittee shall submit a request for termination by consent within 30 days of ~~project completion or project cancellation~~ completing or cancelling all authorized activities requiring notification under 9VAC25-680-50 A and all compensatory mitigation requirements. When submitted for project completion, the request for termination by consent shall constitute a notice of project completion in accordance with 9VAC25-210-130 F. The director may accept this termination of ~~authorization~~ coverage on behalf of the board. The ~~request for termination by consent~~ permittee shall ~~contain~~ submit the following information:

1. Name, mailing address, and telephone number ~~of the permittee~~;

2. Name and location of the activity;

3. The VWP general permit ~~authorization~~ tracking number; and

4. One of the following certifications:

a. For project completion:

"I certify under penalty of law that all activities and any required compensatory mitigation authorized by ~~a~~ the VWP general permit and general permit coverage have been completed. I understand that by submitting this notice of termination I am no longer authorized to perform activities in surface waters in accordance with the VWP general permit and general permit coverage, and that performing activities in surface waters is unlawful where the activity is not authorized by ~~a~~ the VWP permit or coverage, unless otherwise excluded from obtaining coverage. I also understand that the submittal of this notice does not release me from liability for any violations of ~~this~~ the VWP general permit ~~authorization~~ coverage."

b. For project cancellation:

"I certify under penalty of law that the activities and any required compensatory mitigation authorized by ~~this~~ the VWP general permit and general permit coverage will not occur. I understand that by submitting this notice of termination I am no longer authorized to perform activities in surface waters in accordance with the VWP general permit and general permit coverage, and that performing activities in surface waters is unlawful where the activity is not authorized by ~~a~~ the VWP permit or coverage, unless otherwise excluded from obtaining coverage. I also understand that the submittal of this notice does not release me from liability for any violations of ~~this~~ the VWP general permit ~~authorization~~ or coverage, nor does it allow me to resume the ~~permitted~~ authorized activities without reapplication and ~~reauthorization~~ coverage."

c. For events beyond permittee control, the permittee shall provide a detailed explanation of the events, to be approved by ~~DEQ~~ the Department of Environmental Quality, and the following certification statement:

"I certify under penalty of law that the activities or the required compensatory mitigation authorized by ~~a~~ the VWP general permit and general permit coverage have been completed (see attached). I understand that by submitting this notice of termination I am no longer authorized to perform activities in surface waters in accordance with the VWP general permit and general permit coverage, and that performing activities in surface waters is unlawful where the activity is not authorized by ~~a~~ the VWP permit or coverage, unless otherwise excluded from obtaining coverage. I also understand that the submittal of this notice does not release me from liability for any violations of ~~this~~ the VWP general permit authorization or coverage, nor does it allow me to resume the ~~permitted~~ authorized activities without reapplication and ~~reauthorization~~ coverage."

~~L.~~ M. Civil and criminal liability. Nothing in this VWP general permit shall be construed to relieve the permittee from civil and criminal penalties for noncompliance.

~~M.~~ N. Oil and hazardous substance liability. Nothing in this VWP general permit shall be construed to preclude the institution of legal action or relieve the permittee from any responsibilities, liabilities, or penalties to which the permittee is or may be subject under § 311 of the Clean Water Act or §§ 62.1-44.34:14 through 62.1-44.34:23 of the State Water Control Law.

~~N.~~ O. Duty to cease or confine activity. It shall not be a defense for a permittee in an enforcement action that it would have been necessary to halt or reduce the activity for which ~~a~~ VWP general permit coverage has been granted in order to maintain compliance with the conditions of the VWP general permit or coverage.

~~O.~~ P. Duty to provide information.

1. The permittee shall furnish to the board any information ~~which~~ that the board may request to determine whether cause exists for modifying, revoking ~~and reissuing and~~, or terminating ~~the~~ VWP permit ~~authorization,~~ coverage or to determine compliance with the VWP general permit ~~authorization~~ or general permit coverage. The permittee shall also furnish to the board, upon request, copies of records required to be kept by the permittee.

2. Plans, maps, conceptual reports, and other relevant information shall be submitted as required by the board prior to commencing construction.

~~P.~~ Q. Monitoring and records requirements.

1. Monitoring of parameters, other than pollutants, shall be conducted according to approved analytical methods as

specified in the VWP general permit. Analysis of pollutants will be conducted according to 40 CFR Part 136 (2000), Guidelines Establishing Test Procedures for the Analysis of Pollutants.

2. Samples and measurements taken for the purpose of monitoring shall be representative of the monitored activity.

3. The permittee shall retain records of all monitoring information, including all calibration and maintenance records and all original strip chart or electronic recordings for continuous monitoring instrumentation, copies of all reports required by the VWP general permit, and records of all data used to complete the application for coverage under the VWP general permit, for a period of at least three years from the date of ~~the~~ general permit expiration ~~of a granted VWP permit~~. This period may be extended by request of the board at any time.

4. Records of monitoring information shall include, as appropriate:

a. The date, exact place, and time of sampling or measurements;

b. The name of the individuals who performed the sampling or measurements;

c. The date and time the analyses were performed;

d. The name of the individuals who performed the analyses;

e. The analytical techniques or methods supporting the information such as observations, readings, calculations, and bench data used;

f. The results of such analyses; and

g. Chain of custody documentation.

~~Q.~~ R. Unauthorized discharge of pollutants. Except in compliance with this VWP general permit, it shall be unlawful for the permittee to:

1. Discharge into state waters sewage, industrial wastes, other wastes, or any noxious or deleterious substances;

2. Excavate in a wetland;

3. Otherwise alter the physical, chemical, or biological properties of state waters and make them detrimental to the public health, to animal or aquatic life, or to the uses of such waters for domestic or industrial consumption, for recreation, or for other uses; or

4. On and after August 1, 2001, for linear transportation projects of the Virginia Department of Transportation, or on and after October 1, 2001 for all other projects, conduct the following activities in a wetland:

a. New activities to cause draining that significantly alters or degrades existing wetland acreage or functions;

b. Filling or dumping;

c. Permanent flooding or impounding; or

d. New activities that cause significant alteration or degradation of existing wetland acreage or functions.

S. Duty to reapply. Any permittee desiring to continue a previously authorized activity after the expiration date of the VWP general permit shall comply with the provisions in 9VAC25-680-27.

NOTICE: The following forms used in administering the regulation were filed by the agency. The forms are not being published; however, online users of this issue of the Virginia Register of Regulations may click on the name of a form with a hyperlink to access it. The forms are also available from the agency contact or may be viewed at the Office of the Registrar of Regulations, General Assembly Building, 2nd Floor, Richmond, Virginia 23219.

FORMS (9VAC25-680)

Department of Environmental Quality Water Division Permit Application Fee Form (rev. 10/14)

~~Joint Permit Application for Activities in Waters and Wetlands of the Commonwealth of Virginia (eff. 10/04)~~

Joint Permit Application for Projects in Tidewater, Virginia ~~(eff. 10/04)~~ (eff. 03/14)

Monthly Reporting of Impacts Less than or Equal to One-Tenth Acre Statewide (eff. 08/2007)

Standard Joint Permit Application for Activities in Waters and Wetlands of the Commonwealth of Virginia (eff. 03/2014)

Virginia Department of Transportation Inter-Agency Coordination Meeting Joint Permit Application ~~(eff. 10/02)~~ (eff. 06/2008)

DOCUMENTS INCORPORATED BY REFERENCE (9VAC25-680)

Classification of Wetlands and Deepwater Habitats of the United States, Cowardin, Lewis M. II, et al., United States Fish and Wildlife Service, December 1979, Reprinted 1992.

Guidelines for Specification of Disposal Sites for Dredged of Fill Material, 40 CFR Part 230 (Federal Register December 24, 1980)

Virginia Erosion and Sediment Control Handbook, Third Edition, 1992, Department of Conservation and Recreation~~.~~

Virginia Invasive Plant Species List, Natural Heritage Technical Document 14-11, Department of Conservation and Recreation, Division of Natural Heritage (2014)

VA.R. Doc. No. R14-4059; Filed October 23, 2015, 10:00 a.m.

## Proposed Regulation

REGISTRAR'S NOTICE: The State Water Control Board is claiming an exemption from Article 2 of the Administrative Process Act in accordance with § 2.2-4006 A 8 of the Code of Virginia, which exempts general permits issued by the State Water Control Board pursuant to the State Water Control Law (§ 62.1-44.2 et seq. of the Code of Virginia) if the board (i) provides a Notice of Intended Regulatory Action in

conformance with the provisions of § 2.2-4007.01; (ii) following the passage of 30 days from the publication of the Notice of Intended Regulatory Action forms a technical advisory committee composed of relevant stakeholders, including potentially affected citizens groups, to assist in the development of the general permit; (iii) provides notice and receives oral and written comment as provided in § 2.2-4007.03; and (iv) conducts at least one public hearing on the proposed general permit.

Title of Regulation: **9VAC25-690. Virginia Water Protection General Permit for Impacts from Development and Certain Mining Activities (amending 9VAC25-690-10 through 9VAC25-690-100; adding 9VAC25-690-15, 9VAC25-690-25, 9VAC25-690-27, 9VAC25-690-35; repealing 9VAC25-690-95).**

Statutory Authority: § 62.1-44.15 of the Code of Virginia; § 401 of the Clean Water Act (33 USC § 1251 et seq.).

Public Hearing Information:

January 11, 2016 - 1:30 p.m. - James City County Board of Supervisors, Board Room, Building F, 101 Mounts Bay Road, Williamsburg, VA 23185

January 12, 2016 - 1:30 p.m. - Department of Environmental Quality, Northern Regional Office, 13901 Crown Court, Woodbridge, VA 22193

January 13, 2016 - 1:30 p.m. - Department of Environmental Quality, Blue Ridge-Roanoke Regional Office, 3019 Peters Creek Road, Roanoke, VA 24019

Public Comment Deadline: January 29, 2016.

Agency Contact: Brenda Winn, Department of Environmental Quality, 629 East Main Street, P.O. Box 1105, Richmond, VA 233218, telephone (804) 698-4516, FAX (804) 698-4032, or email brenda.winn@deq.virginia.gov.

Summary:

*The regulatory action reissues the existing general permit that expires on August 1, 2016. The proposed amendments (i) revise or clarify which activities in specific water sources require application for a permit authorization and which activities are excluded; (ii) revise and clarify the application process, including the administrative and technical information required to achieve a complete permit application; (iii) revise and clarify the compensatory mitigation requirements, including the sequencing of acceptable compensatory mitigation actions and compensatory mitigation provisions, the requirements for compensating impacts to open waters, or the compensation necessary for temporary impacts; (iv) modify provisions related to application processing, informational requirements, or actions occurring post-permit authorization for coverage; (v) modify permit authorization transitions between general permit cycles; (vi) delete the authorization term of seven years and provisions for continuation of permit authorization coverage; (vii) incorporate certain federal regulatory provisions; (viii) clarify and update definitions; (ix) reorganize the regulation; and (x) clarify and correct grammar, spelling, and references.*

**9VAC25-690-10. Definitions.**

The words and terms used in this ~~regulation~~ chapter shall have the meanings defined in the State Water Control Law (§ 62.1-44.2 et seq. of the Code of Virginia) and the Virginia Water Protection ~~(VWP)~~ Permit Program Regulation (9VAC25-210) unless a different meaning is required by the context ~~clearly indicates otherwise~~ or ~~unless otherwise~~ is indicated below.

"Bank protection" means measures employed to stabilize channel banks and combat existing erosion problems. Such measures may include the construction of riprap revetments, sills, rock vanes, beach nourishment, breakwaters, bulkheads, groins, spurs, levees, marsh toe stabilization, anti-scouring devices, and submerged sills.

"Bioengineering method" means a biological measure incorporated into a facility design to benefit water quality and minimize adverse effects to aquatic resources, to the maximum extent practicable, for long-term aquatic resource protection and improvement.

~~"Channelization" means the alteration of a stream channel by widening, deepening, straightening, cleaning or paving certain areas.~~

"Coverage" means authorization to conduct a project in accordance with a VWP general permit.

~~"Cross sectional drawing" means a graph or plot of ground elevation across a waterbody or a portion of it, usually along a line perpendicular to the waterbody or direction of flow.~~

~~"Emergent wetland" means a class of wetlands characterized by erect, rooted, herbaceous plants growing in water or on a substrate that is at least periodically deficient in oxygen as a result of excessive water content, excluding mosses and lichens. This vegetation is present for most of the growing season in most years and is usually dominated by perennial plants.~~

~~"FEMA" means Federal Emergency Management Agency.~~

~~"Forebay" means a deeper area at the upstream end of a stormwater management facility that would be maintained through excavation.~~

~~"Forested wetland" means a class of wetlands characterized by woody vegetation that is six meters (20 feet) tall or taller. These areas typically possess an overstory of trees, an understory of trees or shrubs, and an herbaceous layer.~~

~~"Greater than one acre" means more than 1.00 acre (43,560 square feet).~~

"DEQ" means the Department of Environmental Quality.

"Histosols" means organic soils that are often called mucks, peats, or mucky peats. The list of histosols in the Commonwealth includes, but is not limited to, the following soil series: Back Bay, Belhaven, Dorovan, Lanexa,

Mattamuskeet, Mattan, Palms, Pamlico, Pungo, Pocaty, and Rappahannock. Histosols are identified in the Hydric ~~soils list~~ Soils of the United States lists generated by ~~United States~~ U.S. Department of Agriculture Natural Resources Conservation Service.

~~"Impacts" means results caused by human induced activities conducted in surface waters, as specified in § 62.1-44.15:20 A of the Code of Virginia.~~

"Independent utility" means a test to determine what constitutes a single and complete project. A project is considered to have independent utility if it would be constructed absent the construction of other projects in the project area. Portions of a phased development project that depend upon other phases of the project do not have independent utility. Portions of a phased development project that would be constructed even if the other phases are not built can be considered as separate single complete projects with independent public and economic utility.

"In-stream mining" means activities or operations that remove accumulated sand, gravel, and mineral deposits directly from stream channels using equipment such as, but not limited to, hydraulic dredges, clamshell dredges, or draglines for the sole purpose of processing and selling the material. In-stream mining does not include dredging activities, whose main purpose is to maintain channels and harbors for navigation, nor does it include the recovery of spilled material, such as sand, gravel, and aggregate, that was inadvertently spilled into a waterway during loading activities.

~~"Isolated Wetland of Minimal Ecological Value (IWOMEV)" means a wetland that (i) does not have a surface water connection to other state waters; (ii) is less than one-tenth of an acre in size; (iii) is not located in a Federal Emergency Management Agency designated 100-year floodplain; (iv) is not identified by the Virginia Natural Heritage Program as a rare or state significant natural community; (v) is not forested; and (vi) does not contain listed federal or state threatened or endangered species.~~

~~"Less than one-half of an acre" means 0.49 acre (21,779 square feet) or less.~~

"Notice of project completion" means a statement submitted by the permittee or authorized agent that the authorized activities and any required compensatory mitigation have been completed.

~~"Open water" means an area that, during a year with normal patterns of precipitation, has standing water for sufficient duration to establish an ordinary high water mark. The term "open water" includes lakes and ponds but does not include ephemeral waters, stream beds, or wetlands.~~

~~"Ordinary high water" or "ordinary high water mark" means the line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank; shelving; changes in the character of soil; destruction of terrestrial vegetation; the presence of litter and debris; or other appropriate means that consider the characteristics of the surrounding areas.~~

~~"Perennial stream" means a well-defined channel that contains water year-round during a year of normal rainfall. Generally, the water table is located above the streambed for most of the year and groundwater is the primary source for stream flow. A perennial stream exhibits the typical biological, hydrological, and physical characteristics commonly associated with the continuous conveyance of water.~~

~~"Permanent impacts" means those impacts to surface waters, including wetlands, that cause a permanent alteration of the physical, chemical, or biological properties of the surface waters, or of the functions and values of a wetland.~~

~~"Person" means an individual, corporation, partnership, association, governmental body, municipal corporation, or any other legal entity.~~

"Phased development" means more than one project proposed for a single piece of property or an assemblage of contiguous properties under consideration for development by the same person, or by related persons, that will begin and be completed at different times. Depending on the relationship between the projects, a phased development may be considered a single and complete project or each project may be considered a single and complete project, if each project has independent utility, as defined in this subsection.

"Recreational facility" means a facility that is integrated into the natural landscape and does not substantially change preconstruction grades or deviate from natural landscape contours.

~~"Riprap" means a layer of nonerodible material such as stone or chunks of concrete.~~

~~"Scrub-shrub wetland" means a class of wetlands dominated by woody vegetation less than six meters (20 feet) tall. The species include true shrubs, young trees, and trees or shrubs that are small or stunted because of environmental conditions.~~

"Single and complete project" means the total project proposed or accomplished by a person, which also has independent utility, as defined in this section. For linear projects, the "single and complete project" (e.g., a single and complete crossing) will apply to each crossing of a separate surface water (e.g., a single ~~waterbody)~~ water body) and to multiple crossings of the same ~~waterbody~~ water body at separate and distinct locations. Phases of a project that have independent public and economic utility may each be considered single and complete.

"State program general permit (SPGP)" means a general permit issued by the Department of the Army in accordance with ~~33 USC 1344(e), 33 CFR 325.2(e)(2),~~ 33 USC § 1344 and ~~33 CFR 325.3(b)~~ 33 CFR 325.5(c)(3) and that is founded on a state program. The SPGP is designed to avoid duplication between the federal and state programs.

~~"Stream bed" means the substrate of a stream, as measured between the ordinary high water marks along a length of stream. The substrate may consist of organic matter, bedrock or inorganic particles that range in size from clay to boulders, or a combination of both. Areas contiguous to the stream bed, but outside of the ordinary high water marks, are not considered part of the stream bed.~~

~~"Surface waters" means all state waters that are not ground water as defined in § 62.1-255 of the Code of Virginia.~~

~~"Temporary impacts" are those impacts to surface waters, including wetlands, that do not cause a permanent alteration of the physical, chemical, or biological properties of the surface waters, or of the functions and values of a wetland. Temporary impacts include activities in which the ground is restored to its preconstruction conditions, contours, or elevations, such that previous functions and values are restored.~~

"Up to 300 linear feet" means ~~>0.00 to~~ 300.00 linear feet or less as measured along the center of the main channel of the stream segment.

"Up to ~~1500~~ 1,500 linear feet" means ~~>0.00 to 1500.00~~ 1,500.00 linear feet or less, as measured along the center of the main channel of the stream segment.

"Up to one-tenth ~~of an~~ acre" means 0.10 acre (4,356 square feet) or less.

"Up to two acres" means 2.00 acres (87,120 square feet) or less.

"Utility line" means a pipe or pipeline for the transportation of a gaseous, liquid, liquefiable or slurry substance, for any purpose, and a cable, line, or wire for the transmission for any purpose of electrical energy, telephone, and telegraph messages and radio and television communication. The term utility line does not include activities which drain a surface water to convert it to an upland, such as drainage tiles or french drains; however, it does apply to pipes conveying drainage from another area.

**9VAC25-690-15. Statewide information requirements.**

The board may request (i) such plans, specifications, and other pertinent information as may be necessary to determine the effect of an applicant's discharge on the quality of state waters or (ii) such other information as may be necessary to accomplish the purposes of this chapter. Any owner, permittee, or person applying for a VWP permit or general permit coverage shall provide the information requested by the board.

**9VAC25-690-20. Purpose; delegation of authority~~; effective date of VWP general permit~~.**

A. The purpose of this regulation is to establish VWP General Permit Number WP4 under the VWP permit program regulation to govern permanent and temporary impacts related to the construction and maintenance of development activities~~,~~ and to activities directly associated with aggregate mining (e.g., sand, gravel, and crushed or broken stone); hard rock/mineral mining (e.g., metalliferous ores); and surface coal, natural gas, and coalbed methane gas mining, as authorized by the Virginia Department of Mines, Minerals and Energy. Applications for coverage under this VWP general permit shall be processed for approval, approval with conditions, or denial by the board. ~~Authorization, authorization~~ Coverage, coverage with conditions, or application denial by the board shall constitute the VWP general permit action and shall follow all provisions in the State Water Control Law (§ 62.1-44.2 et seq. of the Code of Virginia), except for the public comment and participation provisions, from which each VWP general permit ~~authorization, authorization with conditions, or denial~~ action is exempt.

B. The director or his designee may perform any act of the board provided under this chapter, except as limited by § 62.1-44.14 of the Code of Virginia.

~~C. This VWP general permit regulation will become effective on August 1, 2006, and will expire on August 1, 2016.~~

~~D. Authorization to impact surface waters under this VWP general permit is effective upon compliance with all the provisions of 9VAC25-690-30. Notwithstanding the expiration date of this general permit regulation, authorization to impact surface waters under this VWP general permit will continue for seven years.~~

**9VAC25-690-25. Authorization for coverage under VWP general permit effective August 1, 2006.**

A. All complete applications or notifications received by the board through 11:59 p.m. on August 1, 2016, shall be processed in accordance with the VWP general permit regulation in effect August 1, 2006, through August 1, 2016. If the application or notification is incomplete or if there is not adequate time as allowed by § 62.1-44.15:21 of the Code of Virginia to make a completeness determination, the applicant shall reapply for coverage under the VWP general permit effective August 2, 2016, or apply for a VWP individual permit, including payment of any required permit application fee. No refund of permit application fees shall be made.

B. VWP general permit authorizations granted through 11:59 p.m. on August 1, 2016, shall remain in full force and effect until 11:59 p.m. on the expiration date stated on the VWP authorization cover page, unless otherwise revoked or terminated or unless a notice of project completion is received by the board on or before that date. Any permittee that desires to continue an authorized activity beyond the stated expiration date must reapply for coverage under the VWP general permit effective August 2, 2016, pursuant to its terms, standards, and conditions, or apply for a VWP individual permit, including payment of any required permit application fee. This section shall only apply to permittees holding valid authorizations for coverage granted under the VWP general permit effective August 1, 2006, through August 1, 2016.

**9VAC25-690-27. VWP general permit coverage; transition; continuation.**

A. All applications or notifications received on or after August 2, 2016, will be processed in accordance with the VWP general permit regulation effective August 2, 2016.

B. The general permit in 9VAC25-690-100 is effective August 2, 2016, and expires August 1, 2031. Any coverage that is granted pursuant to 9VAC25-690-30 shall remain in full force and effect until 11:59 p.m. on August 1, 2031, unless the general permit coverage is terminated or revoked or unless a notice of project completion is received by the board on or before this date. Where a permittee that has received general permit coverage desires to continue or complete the authorized activities beyond August 1, 2031, the permittee shall reapply for new general permit coverage or for a VWP individual permit, including payment of any required permit application fee. Activities in surface waters requiring a permit shall not commence or continue until VWP general permit coverage is granted or a VWP individual permit is issued by the board.

C. Application may be made at any time for a VWP individual permit in accordance with 9VAC25-210. Activities in surface waters requiring a permit shall not commence or continue until VWP general permit coverage is granted or a VWP individual permit is issued by the board.

**9VAC25-690-30. Authorization to impact surface waters.**

A. Any person ~~governed by this~~ granted coverage under the VWP general permit ~~is authorized to~~ effective August 2, 2016, may permanently or temporarily impact up to two acres of nontidal wetlands or open water and up to 1,500 linear feet of nontidal stream bed for general development and certain mining activities, provided that:

1. The applicant submits notification as required in 9VAC25-690-50 and 9VAC25-690-60.

2. The applicant remits ~~the~~ any required permit application ~~processing~~ fee ~~in accordance with 9VAC25-20~~.

3. The applicant receives general permit coverage from the Department of Environmental Quality and complies with the limitations and other requirements of ~~9VAC25-690-100~~ the VWP general permit; the general permit coverage; the Clean Water Act, as amended; and the State Water Control Law and attendant regulations.

~~4. The applicant receives approval from the Virginia Department of Environmental Quality.~~

~~5.~~ 4. The applicant has not been required to obtain a VWP individual permit under the VWP permit program regulation (9VAC25-210) for the proposed project impacts. The applicant, at his discretion, may seek a VWP individual permit~~,~~ or coverage under another applicable VWP general permit~~,~~ in lieu of coverage under this VWP general permit.

~~6.~~ 5. Impacts, both temporary and permanent, result from a single and complete project including all attendant features.

a. Where a road segment (e.g., the shortest segment of a road with independent utility that is part of a larger project) has multiple crossings of surface waters (several single and complete projects), the board may, at its discretion, require a VWP individual permit.

b. For the purposes of this chapter, when an interchange has multiple crossings of surface waters, the entire interchange shall be considered the single and complete project.

~~7.~~ 6. The stream impact criterion applies to all components of the project, including structures and stream channel manipulations.

~~8.~~ 7. Dredging does not exceed 5,000 cubic yards.

~~9.~~ 8. When required, compensation for unavoidable impacts is provided in accordance with 9VAC25-690-70 and 9VAC25-210-116.

B. Activities that may be ~~authorized~~ granted coverage under this VWP general permit include the following:

1. Residential, commercial, institutional. The construction or expansion of building foundations, building pads, and attendant features for residential, commercial, and institutional development activities.

a. Residential developments include both single and multiple units.

b. Commercial developments include, but are not limited to, retail stores, industrial facilities, restaurants, business parks, office buildings, and shopping centers.

c. Institutional developments include, but are not limited to, schools, fire stations, government office buildings, judicial buildings, public works buildings, libraries, hospitals, and places of worship.

d. Attendant features include, but are not limited to, roads, parking lots, garages, yards, utility lines, stormwater management facilities, and recreation facilities (such as playgrounds, playing fields and golf courses). Attendant features must be necessary for the use and maintenance of the structures.

2. Recreational facilities. The construction or expansion of recreational facilities and small support facilities.

a. Recreational facilities include, but are not limited to, hiking trails, bike paths, horse paths, nature centers, and campgrounds (but not trailer parks). Boat ramps (concrete or open-pile timber), boathouses, covered boat lifts, mooring piles and dolphins, fender piles, camels (wooden floats serving as fenders alongside piers), and open-pile piers (including floating piers, travel-lift piers, etc.) associated with recreational facilities are also included.

b. Recreational facilities do not include as a primary function the use of motor vehicles, buildings or impervious surfaces.

c. Golf courses and ski area expansions may qualify as recreational facilities provided the construction of the proposed facility does not result in a substantial deviation from the natural contours and the facility is designed to minimize adverse effects on state waters and riparian areas. Measures that may be used to minimize adverse effects on waters and riparian areas include the implementation of integrated pest management plans, adequate stormwater management, vegetated buffers, and fertilizer management plans.

d. Small support facilities are authorized provided they are directly related to the recreational activity. Small support facilities include, but are not limited to, maintenance storage buildings and stables.

e. The following do not qualify as recreational facilities: hotels, restaurants, playing fields (e.g., baseball, soccer or football fields), basketball and tennis courts, racetracks, stadiums, arenas or new ski areas.

f. The recreational facility must have an adequate water quality management plan, such as a stormwater management plan, to ensure that the recreational facility results in no substantial adverse effects to water quality.

3. Stormwater management facilities. The construction, maintenance, and excavation of stormwater management facilities; the installation and maintenance of water control structures, outfall structures, and emergency spillways; and the maintenance dredging of existing stormwater management facilities.

a. Stormwater management facilities include stormwater ponds and facilities, detention basins, retention basins, traps, and other facilities designed to reduce pollutants in stormwater runoff.

b. The stormwater management facility must:

(1) To the maximum extent practicable, be designed to maintain preconstruction downstream flow conditions (e.g., location, capacity and flow rates).

(2) Not permanently restrict or impede the passage of normal or expected high flows, unless the primary purpose of the facility is to impound waters.

(3) Withstand expected high flows.

(4) To the maximum extent practicable, provide for retaining excess flows from the site, provide for maintaining surface flow rates from the site similar to preconstruction conditions, and not increase water flows from the project site, relocate water, or redirect flow beyond preconstruction conditions.

(5) To the maximum extent practicable, reduce adverse effects such as flooding or erosion downstream and upstream of the project site, unless the facility is part of a larger system designed to manage water flows.

(6) Be designed using best management practices (BMPs) and watershed protection techniques. Examples of such BMPs are described in the Virginia Stormwater Management Handbook and include, but are not limited to, forebays, vegetated buffers, bioengineering methods, and siting considerations to minimize adverse effects to aquatic resources.

c. Maintenance excavation shall be in accordance with the original facility maintenance plan, or when unavailable, an alternative plan approved by the Department of Environmental Quality, and shall not exceed to the maximum extent practicable, the character, scope, or size detailed in the original ~~contours~~ design of the facility ~~as approved and constructed~~.

4. Mining facilities. The construction or expansion of mining facilities and attendant features for a single and complete project. This general permit may not be used to authorize impacts from in-stream mining activities or operations as defined in 9VAC25-690-10.

a. Mining facilities include activities directly associated with aggregate mining (e.g., sand, gravel, and crushed or broken stone); hard rock/mineral mining (e.g., metalliferous ores); and surface coal, natural gas, and coalbed methane gas mining, as authorized by the Virginia Department of Mines, Minerals, and Energy.

b. Attendant features are authorized provided they are directly related to the mining facility, and include, but are not limited to, access road construction, parking lots, offices, maintenance shops, garages, and stormwater management facilities.

c. Both direct impacts (e.g., footprints of all fill areas, road crossings, sediment ponds, and stormwater management facilities; mining through state waters; stockpile of overburden, and excavation) and indirect impacts (e.g., diversion of surface water and reach of state waters affected by sediment pond pool and sediment transport) shall be considered when ~~issuing an authorization~~ granting coverage under this general permit.

C. The board waives the requirement for coverage under a VWP general permit for activities that occur in an isolated wetland of minimal ecological value, as defined in ~~9VAC25-690-10~~ 9VAC25-210-10. ~~Any~~ Upon request by the board, any person claiming this waiver ~~bears the burden to~~ shall demonstrate to the satisfaction of the board that he qualifies for the waiver.

D. ~~Receipt of this~~ Coverage under VWP general permit does not relieve the permittee of the responsibility to comply with any other applicable federal, state, or local statute, ordinance, or regulation.

~~E. In issuing this VWP general permit, the board has not taken into consideration the structural stability of the proposed structure of structures.~~

~~F.~~ E. Coverage under a nationwide or regional permit promulgated by the U.S. Army Corps of Engineers (USACE), and for which the board has issued § 401 certification ~~existing~~ in accordance with 9VAC25-210-130 H as of ~~August 1, 2006~~ August 2, 2016, shall constitute coverage under this VWP general permit unless a state program general permit (SPGP) is ~~approved~~ required and granted for the ~~covered~~ activity or impact. ~~Notwithstanding any other provision, activities authorized under a nationwide or regional permit promulgated by the USACE and certified by the board in accordance with 9VAC25-210-130 do not need to obtain coverage under this VWP general permit unless a state programmatic general permit is approved for the covered activity or impact.~~

~~G.~~ F. Coverage under a permit issued by the Department of Mines, Minerals and Energy under the Virginia Coal Surface Mining Control and Reclamation Act, Chapter 19 (§ 45.1-226 et seq.) of Title 45.1 of the Code of Virginia, where such permit authorizes activities that may be permitted by this ~~regulation~~ chapter and contains a mitigation plan for the impacts from the mining activities, shall also constitute coverage under this VWP general permit.

~~H.~~ G. When the board determines on a case-by-case basis that concerns for water quality and the aquatic environment so indicate, the board may require ~~individual applications and~~ a VWP individual ~~permits~~ permit in accordance with 9VAC25-210-130 B rather than ~~approving~~ granting coverage under this VWP general permit.

**9VAC25-690-35. Administrative continuance.**

Beginning on August 2, 2016, in any case where an existing permittee has submitted a timely and complete notification or application for coverage under the next consecutive VWP general permit in accordance with 9VAC25-690-50 and 9VAC25-690-60 and the board, through no fault of the permittee, does not issue the next consecutive VWP general permit with an effective date on or before the expiration date of the expiring VWP general permit, the conditions of that expiring VWP general permit and any requirements of coverage granted under it shall continue in force until the effective date of the next consecutive VWP general permit.

**9VAC25-690-40. Exceptions to coverage.**

A. ~~Authorization for coverage~~ Coverage under this VWP general permit ~~will not apply in the following areas:~~ is not required if the activity is excluded from permitting in accordance with 9VAC25-210-60.

~~1. Wetlands composed of 10% or more of the following species (singly or in combination) in a vegetative stratum: Atlantic white cedar (Chamaecyparis thyoides), bald cypress (Taxodium distichum), water tupelo (Nyssa aquatica), or overcup oak (Quercus lyrata). Percentages shall be based upon either basal area or percent areal cover in the area of impact.~~

~~2. Wetlands underlain by histosols.~~

~~3. Surface waters where the proposed activity will impact federal or state listed or proposed threatened or endangered species or proposed or designated critical habitat.~~

B. ~~Authorization for coverage~~ Coverage under this VWP general permit cannot be used in combination with ~~authorization for~~ coverage under other VWP general permits in order to impact greater than two acres of nontidal wetlands or open water or greater than 1,500 linear feet of nontidal stream bed. ~~More than one authorization for~~ Granting coverage under this VWP general permit more than once for a single and complete project is prohibited, except when the cumulative impact to surface waters does not exceed the limits specified here.

C. This VWP general permit cannot be used for an activity in a phased development ~~which~~ that would cause the aggregate total loss of nontidal wetlands or open water in the subdivision to exceed two acres~~,~~ or to exceed 1,500 linear feet of nontidal stream bed.

D. The activity to impact surface waters shall not have been prohibited by state law or regulations, nor shall it contravene applicable Water Quality Standards (9VAC25-260).

E. The board shall deny application for coverage under this VWP general permit to any applicant ~~for~~ conducting activities that cause, may reasonably be expected to cause, or may be contributing to a violation of water quality standards, including discharges or discharge-related activities that are likely to significantly affect aquatic life, or for activities that together with other existing or proposed impacts to wetlands will cause or contribute to a significant impairment of state waters or fish and wildlife resources.

F. This VWP general permit does not authorize activities that cause more than minimal changes to the peak hydraulic flow characteristics, that significantly increase flooding, or that cause more than minimal degradation of the water quality of a stream.

G. ~~This~~ Coverage under this VWP general permit ~~may~~ shall not be ~~used~~ granted for:

1. Construction of a stormwater management facility in perennial streams or in waters designated as ~~oxygen~~ oxygen-impaired or temperature-impaired (does not include wetlands).

2. The construction of an irrigation impoundment on a perennial stream.

3. Any water withdrawal activities.

4. The location of animal feeding operations or waste storage facilities in state waters.

5. The pouring of wet or uncured concrete ~~or the use of tremie concrete or grout bags~~ in state waters, unless the area is contained within a cofferdam and the work is

performed in the dry or unless approved by the Department of Environmental Quality.

6. Return flow discharges from dredge disposal sites.

7. Overboard disposal of dredge materials.

8. Dredging in marinas.

9. Dredging of shellfish areas, submerged aquatic vegetation beds, or other highly productive areas.

10. Federal navigation projects.

11. The construction of new ski areas.

12. ~~The~~ Any activity in surface water that will impact federal or state listed or proposed threatened or endangered species or proposed or designated critical habitat, or be the taking of threatened or endangered species in accordance with the following:

a. As pursuant to § 29.1-564 of the Code of Virginia, the taking, transportation, processing, sale, or offer for sale within the Commonwealth of any fish or wildlife appearing on any list of threatened or endangered species published by the United States Secretary of the Interior pursuant to the provisions of the federal Endangered Species Act of 1973 ~~(P.L.~~ (Public Law 93-205), or any modifications or amendments thereto, is prohibited except as provided in § 29.1-568 of the Code of Virginia.

b. As pursuant to § 29.1-566 of the Code of Virginia and 4VAC15-20-130 B and C, the taking, transportation, processing, sale, or offer for sale within the Commonwealth of any state-listed endangered or threatened species is prohibited except as provided in § 29.1-568 of the Code of Virginia.

13. Any activity in wetlands composed of 10% or more, singularly or in combination, based upon either basal area or percent areal cover in the area of impact, in a vegetative stratum: Atlantic white cedar (Chamaecyparis thyoides), bald cypress (Taxodium distichum), water tupelo (Nyssa aquatica), or overcup oak (Quercus lyrata).

14. Any activity in wetlands underlain by histosols.

15. Any activity in tidal waters.

**9VAC25-690-50. Notification.**

A. Notification to the board will be required prior to commencing construction as follows:

1. An application for ~~authorization of~~ coverage for proposed, permanent nontidal wetland or open water impacts greater than one-tenth ~~of an~~ acre~~,~~ or ~~of~~ for proposed permanent nontidal stream bed impacts greater than 300 linear feet~~,~~ shall include all information pursuant to 9VAC25-690-60 B. Compensatory mitigation may be required for all permanent impacts ~~in accordance with Parts I, II, and III of this VWP general permit regulation. All temporary impacts shall be restored to preexisting conditions, as per Parts I, II, and III of this VWP general permit regulation~~.

2. An application for ~~the authorization of~~ coverage for proposed, permanent nontidal wetland or open water impacts up to one-tenth ~~of an~~ acre~~,~~ or ~~of~~ for proposed, permanent nontidal stream bed impacts up to 300 linear feet~~,~~ shall be submitted ~~as follows~~ in accordance with either subdivision 2 a or 2 b of this subsection:

a. For any proposed project in wetlands, open water, streams, or compensatory mitigation sites that are under a deed restriction, conservation easement, declaration of restrictive covenant, or other land use protective instrument (hereafter "protected areas"), when such restriction, easement, covenant, or instrument is the result of a federal or state permit action and is specific to activities in wetlands and compensatory mitigation sites, the application shall include all of the information required by 9VAC25-690-60 B. Compensatory mitigation may be required for all permanent impacts.

~~a.~~ b. For all other projects ~~that are not subject to subdivision 2 b of this subsection~~, the application shall include the information required by subdivisions ~~1 through 9, 13, 15, 20, and 21~~ 1 through 7, 11, 12, 15, and 16 of 9VAC25-690-60 B, and documentation that verifies the quantity and type of impacts. Compensatory mitigation may be required for all permanent impacts once the notification limits of one-tenth acre wetlands or open water, or 300 linear feet of stream bed, are exceeded, and if required, the application shall include the information in 9VAC25-690-60 B 13. ~~All temporary impacts, regardless of amount, shall be restored to preexisting conditions, as per Parts I and III of this VWP general permit regulation.~~

~~b. For any proposed project in wetlands, open water, streams, or compensatory mitigation sites that are under a deed restriction, conservation easement, restrictive covenant, or other land use protective instrument (hereafter protected areas), when such restriction, easement, covenant, or instrument is the result of a federal or state permit action and is specific to activities in wetlands and compensatory mitigation sites, the application shall include all of the information required by 9VAC25-690-60 B, and documentation that verifies the quantity and type of impacts. Compensatory mitigation may be required for all permanent impacts, regardless of amount. All temporary impacts, regardless of amount, shall be restored to preexisting conditions, as per Parts I and III of this VWP general permit regulation.~~

B. ~~A Joint Permit Application (JPA) or Virginia Department of Transportation Interagency Coordination Meeting Joint Permit Application (VDOT IACM JPA)~~ The Department of Environmental Quality-approved application forms shall serve as an application ~~under this regulation~~ for a VWP permit or VWP general permit coverage.

C. The board will determine whether the proposed activity requires coordination with the United States Fish and Wildlife

Service, the Virginia Department of Conservation and Recreation, the Virginia Department of Agriculture and Consumer Services and the Virginia Department of Game and Inland Fisheries regarding the presence of federal or state proposed or listed threatened and endangered species or proposed or designated critical habitat. Based upon consultation with these agencies, the board may deny application for coverage under this general permit. The applicant may also consult with these agencies prior to submitting an application. Species or habitat information that the applicant provides will assist ~~DEQ~~ the Department of Environmental Quality in reviewing and processing the application.

**9VAC25-690-60. Application.**

A. ~~Applications shall be filed with the board as follows: 1.~~ The applicant shall file a complete application in accordance with 9VAC25-690-50 and this section for ~~a~~ coverage under this VWP general permit ~~number WP4~~ for impacts to surface waters from development and certain mining activities~~, which will serve as a notice of intent for coverage under this VWP general permit~~.

~~2. The VDOT may use its monthly IACM process for submitting applications~~.

B. ~~The required~~ A complete application ~~shall contain~~ for VWP general permit coverage, at a minimum, consists of the following information~~,~~ if applicable to the project:

1. The applicant's legal name, mailing address, telephone number, and~~,~~ if applicable, electronic mail address and fax number.

2. If different from the applicant, legal name, mailing address, telephone number, and if applicable, electronic mail address and fax number of property owner.

~~2. The~~ 3. If applicable, the authorized agent's ~~(if applicable)~~ name, mailing address, telephone number, and~~,~~ if applicable, fax number and electronic mail address.

~~3.~~ 4. The existing VWP general permit tracking number ~~(if applicable)~~, if applicable.

~~4. The name of the project, narrative description of project purpose, and a description of the proposed activity in surface waters.~~

~~5. The name of the water body or water bodies or receiving stream, as applicable.~~

~~6. The hydrologic unit code (HUC) for the project area.~~

~~7. The name of the city or county where the project is located.~~

~~8. Latitude and longitude (to the nearest second) from a central location within the project limits.~~

~~9. A detailed location map (e.g., a United States Geologic Survey topographic quadrangle map) of the project area, including the project boundary. The map shall be of sufficient detail such that the site may be easily located for site inspection.~~

~~10. (Reserved.)~~

~~11. Project plan view. plan view sketches shall include, at a minimum, north arrow, scale, existing structures, existing contours, proposed contours (if available), limit of surface water areas, direction of flow, ordinary high water, impact limits, and location and dimension of all proposed structures in impact areas. In addition, cross-sectional or profile sketches with the above information may be required to detail impact areas.~~

~~12. Dredge material management plan (for dredging projects only) including plan and cross-section view drawings of the disposal or dewatering area, the dimensions and design of the proposed berm and spillway, and the capacity of the proposed disposal or dewatering site.~~

~~13. Surface water impact information (wetlands, streams, or open water) for both permanent and temporary impacts, including a description of the impact, the areal extent of the impact (area of wetland in square feet and acres; area of stream, length of stream, and average width); the location (latitude and longitude at the center of the impact, or at the center of each impact for linear projects); and the type of surface water impact (open water; wetlands according to the Cowardin classification or similar terminology; or perennial and nonperennial for streams). The board encourages applicants to coordinate the determination of perennial or nonperennial streams with the appropriate local government agency in Tidewater Virginia.~~

~~14. Functional values assessment for impacts to wetlands greater than one acre, which shall consist of a summary of field observations of the existing wetland functions and values and an assessment of the impact that the project will have on these functions and values. The following parameters and functions shall be directly addressed: surrounding land uses and cover types; nutrient, sediment, and pollutant trapping; flood control and flood storage capacity; erosion control and shoreline stabilization; groundwater recharge and discharge; aquatic and wildlife habitat; and unique or critical habitats.~~

~~15. A description of the specific on-site measures considered and taken during project design and development both to avoid and minimize impacts to surface waters to the maximum extent practicable.~~

~~16. A conceptual plan for the intended compensation for unavoidable impacts, including:~~

~~a. For wetlands, the conceptual compensation plan shall include: the goals and objectives in terms of replacement of wetland acreage and function; a detailed location map (e.g., a United States Geologic Survey topographic quadrangle map), including latitude and longitude (to the nearest second) at the center of the site; a description of the surrounding land use; a hydrologic analysis, including a draft water budget based on expected~~

~~monthly inputs and outputs which will project water level elevations for a typical year, a dry year, and a wet year; groundwater elevation data, if available, or the proposed location of groundwater monitoring wells to collect these data; a map for existing surface water areas on the proposed site or sites, including a wetland delineation confirmation for any existing wetlands; a conceptual grading plan; a conceptual planting scheme, including suggested plant species and zonation of each vegetation type proposed; and a description of existing soils including general information on topsoil and subsoil conditions, permeability, and the need for soil amendments.~~

~~b. For streams, the conceptual compensation plan shall include: the goals and objectives in terms of water quality benefits and replacement of stream functions; a detailed location map (e.g., a United States Geologic Survey topographic quadrangle map), including the latitude and longitude to the nearest second; the proposed stream segment restoration locations, including plan view and cross section sketches; the stream deficiencies that need to be addressed; the proposed restoration measures to be employed, including channel measurements, proposed design flows and types of instream structures; and reference stream data, if available.~~

~~c. Applicants proposing to compensate off site, including purchase or use of mitigation bank credits, or contribution to an in lieu fee fund, shall submit an evaluation of the feasibility of on site compensation. If on site compensation is practicable, applicants shall provide documentation as to why the proposed off site compensation is ecologically preferable. The evaluation shall include, but not be limited to, the following assessment criteria: water quality benefits, hydrologic source, hydrologic regime, watershed, surface water functions and values, vegetation type, soils, impact acreage, distance from impacts, timing of compensation versus impacts, acquisition, constructability, and cost.~~

~~d. Applicants proposing compensation involving contributions to in lieu fee programs shall state such as the conceptual compensation plan. Written documentation of the willingness of the entity to accept the donation and documentation of how the amount of the contribution was calculated shall be submitted prior to issuance of this general permit authorization.~~

~~e. Applicants proposing compensation involving the purchase or use of mitigation banking credits shall include as their conceptual compensation plan:~~

~~(1) The name of the proposed mitigation bank and the HUC in which it is located;~~

~~(2) The number of credits proposed to be purchased or used; and~~

~~(3) Certification from the bank owner of the availability of credits.~~

~~17. A delineation map must be provided of the geographic area of a delineated wetland for all wetlands on the site, in accordance with 9VAC25-210-45, including the wetlands data sheets. The delineation map shall also include the location of streams, open water, and the approximate limits of Chesapeake Bay Resource Protection Areas (RPAs), as other state or local requirements may apply if the project is located within an RPA. Wetland types shall be noted according to their Cowardin classification or similar terminology. A copy of the USACE delineation confirmation, or other correspondence from the USACE indicating their approval of the wetland boundary, shall be provided at the time of application, or if not available at that time, as soon as it becomes available during the VWP permit review.~~

~~18. A copy of the FEMA flood insurance rate map or FEMA-approved local floodplain map for the project site.~~

~~19. The appropriate application processing fee for a VWP general permit in accordance with 9VAC25-20. The permit application fee for VWP permit authorizations is based on acres only. Therefore, impacts calculated using linear feet of stream bed must be converted to an acreage in order to calculate the total permit application fee.~~

~~20. A written disclosure identifying all wetlands, open water, streams, and associated upland buffers within the proposed project or compensation areas that are under a deed restriction, conservation easement, restrictive covenant, or other land use protective instrument (protected areas). Such disclosure shall include the nature of the prohibited activities within the protected areas.~~

~~21. The following certification:~~

~~"I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system or those persons directly responsible for gathering the information, the information submitted is to the best of my knowledge and belief true, accurate, and complete. I am aware that there are significant penalties for submitting false information including the possibility of fine and imprisonment for knowing violations."~~

~~C. The application shall be signed in accordance with 9VAC25-210-100. If an agent is acting on behalf of an applicant, the applicant shall submit an authorization of the agent that includes the signatures of both the applicant and the agent.~~

5. Project name and proposed project schedule.

6. The following information for the project site location, and any related permittee-responsible compensatory mitigation site, if applicable:

a. The physical street address, nearest street, or nearest route number; city or county; zip code; and, if applicable, parcel number of the site or sites.

b. Name of the impacted water body or water bodies, or receiving waters, as applicable, at the site or sites.

c. The latitude and longitude to the nearest second at the center of the site or sites.

d. The fourth order subbasin, as defined by the hydrologic unit boundaries of the National Watershed Boundary Dataset, for the site or sites.

e. A detailed map depicting the location of the site or sites, including the project boundary. The map (e.g., a United States Geologic Survey topographic quadrangle map) should be of sufficient detail to easily locate the site or sites for inspection.

f. GIS-compatible shapefile or shapefiles of the project boundary and all existing preservation areas on the site or sites, unless otherwise approved by or coordinated with DEQ. The requirement for a GIS-compatible shapefile or shapefiles may be waived by DEQ on a case-by-case basis.

7. A narrative description of the project, including project purpose and need.

8. Plan-view drawing or drawings of the project site sufficient to assess the project, including at a minimum the following:

a. North arrow, graphic scale, and existing and proposed topographic or bathymetric contours.

b. Limits of proposed impacts to surface waters.

c. Location of all existing and proposed structures.

d. All delineated wetlands and all jurisdictional surface waters on the site, including the Cowardin classification (i.e., emergent, scrub-shrub, or forested) for those surface waters and waterway name, if designated; ebb and flood or direction of flow; and ordinary high water mark in nontidal areas.

e. The limits of Chesapeake Bay Resource Protection Areas (RPAs) as field-verified by the applicant and if available the limits as approved by the locality in which the project site is located unless the proposed use is exempt from the Chesapeake Bay Preservation Area Designation and Management Regulations (9VAC25-830).

f. The limits of any areas that are under a deed restriction, conservation easement, restrictive covenant, or other land use protective instrument (i.e., protected areas).

9. Cross-sectional and profile drawing or drawings. Cross-sectional drawing or drawings of each proposed impact area shall include at a minimum a graphic scale, existing structures, existing and proposed elevations, limits of surface water areas, ebb and flood or direction of flow (if applicable), ordinary high water mark in nontidal areas, impact limits, and location of all existing and proposed structures. Profile drawing or drawings with this information may be required on a case-by-case basis to demonstrate minimization of impacts. Any application that proposes piping or culverting stream flows shall provide a longitudinal profile of the pipe or culvert position and stream bed thalweg, or shall provide spot elevations of the stream thalweg at the beginning and end of the pipe or culvert, extending to a minimum of 10 feet beyond the limits of proposed impact.

10. Materials assessment. Upon request by the board, the applicant shall provide evidence or certification that the material is free from toxic contaminants prior to disposal or that the dredging activity will not cause or contribute to a violation of water quality standards during dredging. The applicant may be required to conduct grain size and composition analyses, tests for specific parameters or chemical constituents, or elutriate tests on the dredge material.

11. A narrative description of all impacts proposed to surface waters, including the type of activity to be conducted in surface waters and any physical alteration to surface waters. Surface water impacts shall be identified as follows:

a. Wetland impacts identified according to their Cowardin classification (i.e., emergent, scrub-shrub, or forested), and for each classification, the individual impacts quantified in square feet to the nearest whole number, cumulatively summed in square feet, and then the sum converted to acres and rounded to two decimal places using commonly accepted arithmetic principles of rounding.

b. Individual stream impacts quantified in linear feet to the nearest whole number and then cumulatively summed, and when compensatory mitigation is required, the impacts identified according to the assessed type using the Unified Stream Methodology.

c. Open water impacts identified according to their Cowardin classification, and for each type, the individual impacts quantified in square feet to the nearest whole number, cumulatively summed in square feet, and then the sum converted to acres and rounded to two decimal places using commonly accepted arithmetic principles of rounding.

d. A copy of the approved jurisdictional determination, if available, or the preliminary jurisdictional determination from the U.S. Army Corps of Engineers (USACE), U.S. Department of Agriculture Natural Resources Conservation Service (NRCS), or DEQ, or other correspondence from the USACE, NRCS, or DEQ indicating approval of the boundary of applicable jurisdictional surface waters, including wetlands data sheets if applicable.

e. A delineation map and GIS-compatible shapefile or shapefiles of the delineation map that depicts the geographic area or areas of all surface water boundaries delineated in accordance with 9VAC25-210-45 and confirmed in accordance with the jurisdictional determination process; identifies such areas in accordance with subdivisions 11 a, 11 b, and 11 c of this subsection; and quantifies and identifies any other surface waters according to their Cowardin classification (i.e., emergent, scrub-shrub, or forested) or similar terminology, if applicable. The requirements for a delineation map or GIS-compatible shapefile or shapefiles may be waived by DEQ on a case-by-case basis.

12. An alternatives analysis for the proposed project detailing the specific on-site measures taken during project design and development to first avoid and then minimize impacts to surface waters to the maximum extent practicable in accordance with the Guidelines for Specification of Disposal Sites for Dredged or Fill Material, 40 CFR Part 230. Avoidance and minimization includes, but is not limited to, the specific on-site measures taken to reduce the size, scope, configuration, or density of the proposed project, including review of alternative sites where required for the project, which would avoid or result in less adverse impact to surface waters, and documentation demonstrating the reason the applicant determined less damaging alternatives are not practicable. The analysis shall demonstrate to the satisfaction of the board that avoidance and minimization opportunities have been identified and measures have been applied to the proposed activity such that the proposed activity in terms of impacts to state waters and fish and wildlife resources is the least environmentally damaging practicable alternative.

13. A compensatory mitigation plan to achieve no net loss of wetland acreage or functions or stream functions and water quality benefits.

a. If permittee-responsible compensation is proposed for wetland impacts, a conceptual wetland compensatory mitigation plan must be submitted in order for an application to be deemed complete and shall include at a minimum (i) the goals and objectives in terms of replacement of wetland acreage or functions; (ii) a detailed location map including latitude and longitude to the nearest second and the fourth order subbasin, as defined by the hydrologic unit boundaries of the National Watershed Boundary Dataset, at the center of the site; (iii) a description of the surrounding land use; (iv) a hydrologic analysis including a draft water budget for nontidal areas based on expected monthly inputs and outputs that will project water level elevations for a typical year, a dry year, and a wet year; (v) groundwater elevation data, if available, or the proposed location of groundwater monitoring wells to collect these data; (vi) wetland delineation confirmation, data sheets, and maps for existing surface water areas on the proposed site or sites; (vii) a conceptual grading plan; (viii) a conceptual planting scheme including suggested plant species and zonation of each vegetation type proposed; (ix) a description of existing soils including general information on both topsoil and subsoil conditions, permeability, and the need for soil amendments; (x) a draft design of any water control structures; (xi) inclusion of buffer areas; (xii) a description of any structures and features necessary for the success of the site; (xiii) the schedule for compensatory mitigation site construction; and (xiv) measures for the control of undesirable species.

b. If permittee-responsible compensation is proposed for stream impacts, a conceptual stream compensatory mitigation plan must be submitted in order for an application to be deemed complete and shall include at a minimum (i) the goals and objectives in terms of water quality benefits and replacement of stream functions; (ii) a detailed location map including the latitude and longitude (to the nearest second) and the fourth order subbasin, as defined by the hydrologic unit boundaries of the National Watershed Boundary Dataset, at the center of the site; (iii) a description of the surrounding land use; (iv) the proposed stream segment restoration locations including plan view and cross-sectional drawings; (v) the stream deficiencies that need to be addressed; (vi) data obtained from a DEQ-approved, stream impact assessment methodology such as the Unified Stream Methodology; (vii) the proposed restoration measures to be employed including channel measurements, proposed design flows, types of instream structures, and conceptual planting scheme; (viii) reference stream data, if available; (ix) inclusion of buffer areas; (x) schedule for restoration activities; and (xi) measures for the control of undesirable species.

c. For any permittee-responsible compensatory mitigation, the conceptual compensatory mitigation plan shall also include a draft of the intended protective mechanism or mechanisms, in accordance with 9VAC25-210-116 B 2, such as, but not limited to, a conservation easement held by a third party in accordance with the Virginia Conservation Easement Act (§ 10.1-1009 et seq. of the Code of Virginia) or the Virginia Open-Space Land Act (§ 10.1-1700 et seq. of the Code of Virginia), a duly recorded declaration of restrictive covenants, or other protective instrument. The draft intended protective mechanism shall contain the information in subdivisions c (1), c (2), and c (3) of this subdivision 13 or in lieu thereof shall describe the intended protective mechanism or mechanisms that contains the information required below:

(1) A provision for access to the site;

(2) The following minimum restrictions: no ditching, land clearing, or discharge of dredge or fill material, and

no activity in the area designated as compensatory mitigation area with the exception of maintenance; corrective action measures; or DEQ-approved activities described in the approved final compensatory mitigation plan or long-term management plan; and

(3) A long-term management plan that identifies a long-term steward and adequate financial assurances for long-term management in accordance with the current standard for mitigation banks and in-lieu fee program sites, except that financial assurances will not be necessary for permittee-responsible compensation provided by government agencies on government property. If approved by DEQ, permittee-responsible compensation on government property and long-term protection may be provided through federal facility management plans, integrated natural resources management plans, or other alternate management plans submitted by a government agency or public authority.

d. Any compensatory mitigation plan proposing the purchase of mitigation bank or in-lieu fee program credits shall include the number and type of credits proposed to be purchased and documentation from the approved bank or in-lieu fee program sponsor of the availability of credits at the time of application.

14. Permit application fee. The applicant will be notified by the board as to the appropriate fee for the project.

15. A written description and a graphical depiction identifying all upland areas including buffers, wetlands, open water, other surface waters, and compensatory mitigation areas located within the proposed project boundary or permittee-responsible compensatory mitigation areas that are under a deed restriction, conservation easement, restrictive covenant, or other land use protective instrument (i.e., protected areas). Such description and a graphical depiction shall include the nature of the prohibited activities within the protected areas and the limits of Chesapeake Bay Resource Protection Areas (RPAs) as field-verified by the applicant and if available, the limits as approved by the locality in which the project site is located, unless the proposed use is exempt from the Chesapeake Bay Preservation Area Designation and Management Regulations (9VAC25-830), as additional state or local requirements may apply if the project is located within an RPA.

16. Signature page that has been signed, dated, and certified by the applicant in accordance with 9VAC25-210-100. If the applicant is a business or other organization, the signature must be made by an individual with the authority to bind the business or organization, and the title of the signatory must be provided. The application signature page, either on the copy submitted to the Virginia Marine Resources Commission or to DEQ, must have an original signature. Electronic submittals containing the original signature page, such as that contained in a scanned document file, are acceptable.

C. An analysis of the functions of wetlands proposed to be impacted may be required by DEQ. When required, the method selected for the analysis shall assess water quality or habitat metrics and shall be coordinated with DEQ in advance of conducting the analysis.

1. No analysis shall be required when:

a. Wetland impacts per each single and complete project total 1.00 acre or less; or

b. The proposed compensatory mitigation consists of purchasing mitigation bank or in-lieu fee program credits at standard mitigation ratios of 2:1 for forest, 1.5:1 for scrub-shrub, and 1:1 for emergent, or higher.

2. Analysis shall be required when wetland impacts per each single and complete project total 1.01 acres or more and when any of the following applies:

a. The proposed compensatory mitigation consists of permittee-responsible compensation, including water quality enhancements as replacement for wetlands; or

b. The proposed compensatory mitigation consists of purchasing mitigation bank or in-lieu fee program credits at less than the standard mitigation ratios of 2:1 for forest, 1.5:1 for scrub-shrub, and 1:1 for emergent.

D. Upon receipt of an application by the appropriate DEQ office, the board has 15 days to review the application and either determine the information requested in subsection B of this section is complete or inform the applicant that additional information is required to make the application complete. Coverage under this VWP general permit shall be approved~~,~~ or approved with conditions, or the application shall be denied within 45 days of receipt of a complete application. If the board fails to act within 45 days on a complete application, coverage under this VWP permit general permit shall be deemed ~~approved~~ granted.

1. In evaluating the application, the board shall make an assessment of the impacts associated with the project in combination with other existing or proposed impacts. ~~Coverage~~ Application for coverage under this VWP general permit shall be denied if the cumulative impacts will cause or contribute to a significant impairment of state waters or fish and wildlife resources.

2. The board may place additional ~~conditions~~ requirements on a project in order to ~~approve authorization~~ grant coverage under this VWP general permit. However, ~~these conditions~~ the requirements must be consistent with the VWP general permit regulation.

E. Incomplete application. Where an application is ~~incomplete~~ not accepted as complete by the board within 15 days of receipt, the board shall require the submission of additional information from the applicant and may suspend processing ~~the~~ of any application until such time as the applicant has supplied the requested information and the

application is complete. Where the applicant becomes aware that he omitted one or more relevant facts from an application, or submitted incorrect information in an application or in ~~reports~~ any report to the board, the applicant shall immediately submit such facts or the correct information. A revised application with new information shall be deemed a new application~~,~~ for purposes of review but shall not require an additional permit application fee. An incomplete permit application may be administratively withdrawn from processing by the board for failure to provide the required information after ~~180~~ 60 days from the date ~~that~~ of the ~~original permit application was received~~ latest written information request made by the board. An applicant may request a suspension of application review by the board, but requesting a suspension shall not preclude the board from administratively withdrawing an incomplete application. Resubmittal of a permit application for the same or similar project, after such time that the original permit application was administratively withdrawn, shall require submittal of an additional permit application fee.

**9VAC25-690-70. Compensation.**

A. ~~In accordance with 9VAC25-690-50 A, compensatory~~ Compensatory mitigation may be required for ~~all~~ permanent, nontidal surface water impacts as specified in 9VAC25-690-50 A. All temporary, nontidal surface water impacts shall be restored to preexisting conditions in accordance with 9VAC25-690-100.

B. ~~Generally, the sequence of preferred compensation options shall be restoration, then creation, then mitigation banking, and then in-lieu fee fund. Also, 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 to practicable on-site or in-kind compensation may be considered. When the applicant can demonstrate satisfactorily that an off-site or out-of-kind compensatory mitigation proposal is ecologically preferable, then such proposal may be deemed appropriate for compensation of project impacts.~~ Compensatory mitigation and any compensatory mitigation proposals shall be in accordance with this section and 9VAC25-210-116.

~~C. For the purposes of this VWP general permit, compensatory mitigation for unavoidable wetland impacts may be met through the following:~~

~~1. Wetland creation.~~

~~2. Wetland restoration.~~

~~3. The purchase or use of credits from a mitigation bank, pursuant to § 62.1-44.15:23 of the Code of Virginia.~~

~~4. A contribution to an approved in-lieu fee fund.~~

~~5. Preservation of upland buffers adjacent to state waters, when utilized in conjunction with subdivision 1, 2, or 3 of this subsection and when consistent with 9VAC25-210-116 A.~~

~~6. Restoration of upland buffers adjacent to state waters, when utilized in conjunction with subdivision 1, 2, or 3 of this subsection and when consistent with 9VAC25-210-116 A.~~

~~7. Preservation of wetlands, when utilized in conjunction with subdivision 1, 2, or 3 of this subsection.~~

~~D. For the purposes of this VWP general permit, compensatory mitigation for unavoidable stream impacts may be met through the following:~~

~~1. Stream channel restoration or enhancement.~~

~~2. Riparian buffer restoration or enhancement.~~

~~3. Riparian buffer preservation, when consistent with 9VAC25-210-116 A.~~

~~4. A contribution to an approved in-lieu fee fund.~~

~~5. The purchase or use of credits from a mitigation bank, pursuant to § 62.1-44.15:23 of the Code of Virginia.~~

~~E. In order for contribution to an in-lieu fee fund to be an acceptable form of compensation, the fund must be approved for use by the board according to the provisions of 9VAC25-210-116 D. The applicant shall provide proof of contribution to DEQ prior to commencing activities in impact areas.~~

~~F. In order for purchase or use of bank credits to be an acceptable form of compensation, the bank shall be operating in accordance with the provisions of § 62.1-44.15:23 of the Code of Virginia and 9VAC25-210-116 E. The applicant shall provide proof of purchase, use, or debit to DEQ prior to commencing activities in impact areas.~~

~~G. Compensation~~ C. When required, compensatory mitigation for unavoidable, permanent wetland impacts shall be provided at the following minimum ~~compensation to impact~~ mitigation ratios:

1. Impacts to forested wetlands shall be mitigated at 2:1, as calculated on an area basis.

2. Impacts to scrub shrub wetlands shall be mitigated at 1.5:1, as calculated on an area basis.

3. Impacts to emergent wetlands shall be mitigated at 1:1, as calculated on an area basis.

~~H. Compensation~~ D. When required, compensatory mitigation for stream bed impacts shall be appropriate to replace lost functions and water quality benefits. One factor in determining the required compensation shall be an analysis of stream impacts utilizing a stream impact assessment methodology acceptable to ~~DEQ~~ the Department of Environmental Quality.

~~I.~~ E. Compensation for permanent open water impacts, other than to streams, may be required at ~~a~~ an in-kind or out-of-kind mitigation ratio of 1:1 ~~replacement to impact ratio~~ or less, as calculated on an area basis, to offset impacts to state waters and fish and wildlife resources ~~from significant~~

~~impairment~~. Compensation shall not be required for permanent or temporary impacts to open waters identified as palustrine by the Cowardin classification method, except when such open waters are located in areas of karst topography in Virginia and are formed by the natural solution of limestone.

~~J. Compensation~~ F. When conversion results in a permanent alteration of the functions of a wetland, compensatory mitigation for conversion impacts to wetlands shall be required at a 1:1 ~~replacement to impact~~ mitigation ratio, as calculated on an area basis~~, when such conversion results in a permanent alteration of the functions and values of the wetland~~. For example, the permanent conversion of a forested wetland to an emergent wetland is considered to be a permanent impact for the purposes of this regulation. Compensation for conversion of other types of surface waters may be required, as appropriate, to offset impacts to state waters and fish and wildlife resources ~~from significant impairment~~.

**9VAC25-690-80. Notice of planned changes; modifications to coverage.**

A. The permittee shall notify the board in advance of ~~the~~ a planned change, and ~~the planned changes~~ an application or request ~~will~~ for modification to coverage shall be reviewed according to all provisions of this ~~regulation~~ chapter. Coverage shall not be modified if (i) the cumulative total of permanent and temporary impacts exceeds two acres of nontidal wetlands or open water exceeds 1,500 linear feet of nontidal stream bed or (ii) the criteria in subsection B of this section are not met. The applicant may submit a new permit application for consideration under a VWP individual permit.

B. ~~Authorization under this~~ VWP general permit coverage may be modified ~~subsequent to issuance if the permittee determines that additional permanent wetland, open water, or stream~~ under the following circumstances:

1. Additional impacts to surface waters are necessary, provided that ~~the additional impacts are associated with the previously authorized activities in authorized locations within the same phase of development, the cumulative increase in acreage of wetland or open water impacts is not greater than 1/4 acre, the cumulative increase in stream bed impacts is not greater than 100 linear feet, and the additional impacts are fully mitigated. Prior to a planned change approval, DEQ may require submission of a compensatory mitigation plan for the additional impacts. In cases where the original impacts totaled less than 1/10 acre of wetlands or open water, or less than 300 linear feet of stream bed, and the additional impacts result in these limits being exceeded, the notice of planned change will not be approved.~~:

a. The additional impacts are proposed prior to impacting the additional areas.

b. The proposed additional impacts are located within the project boundary as depicted in the application for coverage or are located in areas of directly-related off-site work unless otherwise prohibited in this VWP general permit regulation.

c. The permittee has provided sufficient documentation that the board may reasonably determine that the additional impacts will not impact federal or state listed or proposed threatened or endangered species or proposed or designated critical habitat or be the taking of threatened or endangered species.

d. The cumulative, additional permanent wetland or open water impacts for one or more notices of planned change do not exceed 0.25 acre.

e. The cumulative, additional permanent stream impacts for one or more notices of planned change do not exceed 100 linear feet.

f. Documentation is provided demonstrating that the proposed surface water impacts have been avoided to the maximum extent practicable in accordance with the informational requirements of 9VAC25-690-60 B 12.

g. Compensatory mitigation for the proposed impacts, if required, meets the requirements of 9VAC25-690-70 and 9VAC25-210-116. Prior to a planned change approval, the Department of Environmental Quality may require submission of a compensatory mitigation plan for the additional impacts.

h. Where such additional impacts are temporary, and prior to initiating the impacts, the permittee provides a written statement to the board that the area to be temporarily impacted will be restored to its preconstruction elevations and contours, with topsoil from the impact area where practicable, such that the previous acreage and functions are restored, in accordance with Parts I A 3 and B 11 of 9VAC25-690-100. The additional temporary impacts shall not cause the cumulative total impacts to exceed the general permit threshold for use. The proposed temporary impacts shall be deemed approved if DEQ does not respond within 10 days of receipt of the request for authorization to temporarily impact additional surface waters.

i. The additional proposed impacts do not change the category of the project, based on the original impacts amounts as specified in 9VAC25-690-50 A 2. However, the applicant may submit a new permit application ~~and permit application fee~~ for the total impacts to be considered under this VWP general permit, another VWP general permit, or a VWP individual permit.

~~C. Authorization under this VWP general permit may be modified after issuance if the project results in less~~ 2. A reduction in wetland or stream impacts. ~~Compensation~~ Compensatory mitigation requirements may be modified in relation to the adjusted impacts ~~at the request of the permittee~~, provided that the adjusted ~~compensation~~ compensatory mitigation meets the initial ~~authorization~~

~~compensation~~ compensatory mitigation goals. DEQ shall not be responsible for ensuring refunds for mitigation bank credit purchases~~, mitigation bank usage,~~ or in-lieu fee ~~fund contributions~~ program credit purchases.

~~D. Authorization under this VWP general permit may be modified after issuance for a~~ 3. A change in project plans or use that does not result in a change ~~in~~ to authorized project impacts other than those allowed by subdivisions 1 and 2 of this subsection.

~~E. Authorization under the VWP general permit may be modified for a change to the mitigation bank at which credits are purchased or used, provided that the same amount of credits are purchased or used and all criteria for use in 9VAC25-210-116 E are met~~ 4. Substitute a specific, DEQ-approved mitigation bank or in-lieu fee program with another DEQ-approved mitigation bank or in-lieu fee program or substitute all or a portion of the prior authorized permittee-responsible compensation with a purchase of mitigation credits in accordance with 9VAC25-210-116 C from a DEQ-approved mitigation bank or in-lieu fee program. The amount of credits proposed to be purchased shall be sufficient to meet the compensatory mitigation requirement for which the compensatory mitigation is proposed to replace.

5. Correct typographical errors.

~~F. Authorization under the VWP general permit may be modified after issuance for typographical errors.~~

~~G. A Notice of Planned Change is not required after authorization issuance for additional temporary impacts to surface waters, provided that DEQ is notified in writing regarding additional temporary impacts, and the area is restored to preexisting conditions in accordance with Part I C 11 of this general permit. In no case can the additional temporary impacts exceed the general permit threshold for use.~~

~~H. In no case can this authorization be modified to exceed the general permit threshold for use.~~

~~I. A notice of planned change shall be denied if fish and wildlife resources are significantly impacted or if the criteria in subsection B of this section are not met. However, the original VWP general permit authorization shall remain in effect. The applicant may submit a new permit application and permit application fee for consideration under a VWP individual permit.~~

**9VAC25-690-90. Termination of ~~authorization by consent~~ coverage.**

~~When all permitted activities requiring notification under 9VAC25-690-50 A and all compensatory mitigation requirements have been completed, or if the authorized impacts will not occur, the~~ A. The permittee shall submit a request for termination by consent within 30 days of ~~project completion or project cancellation~~ completing or cancelling all authorized activities requiring notification under 9VAC25-690-50 A and all compensatory mitigation requirements. When submitted for project completion, the request for termination by consent shall constitute a notice of project completion in accordance with 9VAC25-210-130 F. The director may accept this termination of ~~authorization~~ coverage on behalf of the board. The permittee shall submit the following information:

1. Name, mailing address, and telephone number of the permittee;

2. Name and location of the activity;

3. The VWP general permit ~~authorization~~ tracking number; and

4. One of the following certifications:

a. For project completion:

"I certify under penalty of law that all activities and any required compensatory mitigation authorized by ~~a~~ the VWP general permit and general permit coverage have been completed. I understand that by submitting this notice of termination I am no longer authorized to perform activities in surface waters in accordance with the VWP general permit and general permit coverage, and that performing activities in surface waters is unlawful where the activity is not authorized by ~~a~~ the VWP permit or coverage, unless otherwise excluded from obtaining coverage. I also understand that the submittal of this notice does not release me from liability for any violations of ~~this~~ the VWP general permit ~~authorization~~ or coverage."

b. For project cancellation:

"I certify under penalty of law that the activities and any required compensatory mitigation authorized by ~~this~~ the VWP general permit and general permit coverage will not occur. I understand that by submitting this notice of termination I am no longer authorized to perform activities in surface waters in accordance with the VWP general permit and general permit coverage, and that performing activities in surface waters is unlawful where the activity is not authorized by ~~a~~ the VWP permit or coverage, unless otherwise excluded from obtaining coverage. I also understand that the submittal of this notice does not release me from liability for any violations of ~~this~~ the VWP general permit ~~authorization~~ or coverage, nor does it allow me to resume the ~~permitted~~ authorized activities without reapplication and ~~reauthorization~~ coverage."

c. For events beyond permittee control, the permittee shall provide a detailed explanation of the events, to be approved by ~~DEQ~~ the Department of Environmental Quality, and the following certification statement:

"I certify under penalty of law that the activities or the required compensatory mitigation authorized by ~~a~~ the VWP general permit and general permit coverage have changed as the result of events beyond my control (see attached). I understand that by submitting this notice of

termination I am no longer authorized to perform activities in surface waters in accordance with the VWP general permit and general permit coverage, and that performing activities in surface waters is unlawful where the activity is not authorized by ~~a~~ the VWP permit or coverage, unless otherwise excluded from obtaining coverage. I also understand that the submittal of this notice does not release me from liability for any violations of ~~this~~ the VWP general permit ~~authorization~~ or coverage, nor does it allow me to resume the ~~permitted~~ authorized activities without reapplication and ~~reauthorization~~ coverage."

B. VWP general permit coverage may be terminated for cause in accordance with 9VAC25-210-180 F and 9VAC25-230, or without cause in accordance with 9VAC25-210-180 G and 9VAC25-230.

**9VAC25-690-95. ~~Transition.~~ (Repealed.)**

~~A. All applications received on or after August 1, 2006, will be processed in accordance with these new procedures.~~

~~B. VWP general permit authorizations issued prior to August 1, 2006, will remain in full force and effect until such authorizations expire, are revoked, or are terminated.~~

~~C. Notices of planned change and all other types of notification that are received by the board prior to August 1, 2006, will be processed in accordance with the VWP general permit regulation in effect at that time. Notices of planned change and all other types of notification to the board that are received on or after August 1, 2006, will be processed in accordance with these new procedures.~~

**9VAC25-690-100. VWP general permit.**

~~Any applicant whose application has been accepted by the board shall be subject to the following requirements:~~

~~VWP General Permit No. WP4~~
~~Authorization effective date:~~
~~Authorization expiration date:~~
~~Authorization Notes(s):~~

~~VWP GENERAL PERMIT FOR IMPACTS FROM DEVELOPMENT AND CERTAIN MINING ACTIVITIES UNDER THE VIRGINIA WATER PROTECTION PERMIT AND THE VIRGINIA STATE WATER CONTROL LAW~~

~~Based upon an examination of the information submitted by the applicant and in~~

VWP GENERAL PERMIT NO. WP4 FOR IMPACTS FROM DEVELOPMENT AND CERTAIN MINING ACTIVITIES UNDER THE VIRGINIA WATER PROTECTION PERMIT AND THE VIRGINIA STATE WATER CONTROL LAW

Effective date: August 2, 2016
Expiration date: August 1, 2031

In compliance with § 401 of the Clean Water Act, as amended (33 USC § 1341) and the State Water Control Law and regulations adopted pursuant thereto, the board has determined that there is a reasonable assurance that ~~the activity authorized by~~ this VWP general permit, if ~~conducted in accordance with the conditions set forth herein~~ complied with, will protect instream beneficial uses ~~and~~, will not violate applicable water quality standards~~. The board finds that the effect of the impact, together with other existing or proposed impacts to wetlands~~, and will not cause or contribute to a significant impairment of state waters or fish and wildlife resources. In issuing this VWP general permit, the board has not taken into consideration the structural stability of any proposed activities.

~~Subject~~ The permanent or temporary impact of up to two acres of nontidal wetlands or open water and up to 1,500 linear feet of nontidal stream bed shall be subject to the provisions of the VWP general permit set forth herein; any requirements in coverage granted under this general permit; the Clean Water Act, as amended~~,~~; and ~~pursuant to~~ the State Water Control Law and regulations adopted pursuant to it~~, the permittee is authorized to permanently or temporarily impact up to two acres of nontidal wetlands or open water and up to 1,500 linear feet of nontidal stream bed~~.

~~Permittee:~~

~~Address:~~

~~Activity Location:~~

~~Activity Description:~~

~~The authorized activity shall be in accordance with this cover page, Part I Special Conditions, Part II Compensation, Monitoring, and Reporting, and Part III Conditions Applicable to All VWP Permits, as set forth herein.~~

~~Director, Department of Environmental Quality~~ ~~Date~~

Part I. Special Conditions.

A. Authorized activities.

1. ~~This permit authorizes~~ The activities authorized by this chapter shall not cause more than the permanent or temporary impacts of up to two acres of nontidal wetlands or open water and up to 1,500 linear feet of nontidal stream bed ~~according to the information provided in the approved and complete application~~.

2. Any changes to the authorized permanent impacts to surface waters ~~associated with this project~~ shall require ~~either~~ a notice of planned change in accordance with 9VAC25-690-80~~,~~. An application or request for modification to coverage or another VWP permit application may be required.

3. Any changes to the authorized temporary impacts to surface waters ~~associated with this project~~ shall require written notification to ~~DEQ~~ and approval from the Department of Environmental Quality in accordance with 9VAC25-690-80 prior to initiating the impacts and

restoration to preexisting conditions in accordance with the conditions of this permit ~~authorization~~.

4. Modification to compensation requirements may be approved at the request of the permittee when a decrease in the amount of authorized surface waters impacts occurs, provided that the adjusted compensation meets the initial ~~authorization~~ compensation goals.

~~5. The activities authorized for coverage under this VWP general permit must commence and be completed within seven years of the date of this authorization.~~

~~B. Continuation of coverage. Reapplication for continuation of coverage under this VWP general permit or a new VWP permit may be necessary if any portion of the authorized activities or any VWP general permit requirement (including compensation) has not been completed within seven years of the date of authorization. Notwithstanding any other provision, a request for continuation of coverage under a VWP general permit in order to complete monitoring requirements shall not be considered a new application, and no application fee will be charged. The request for continuation of coverage must be made no less than 60 days prior to the expiration date of this VWP general permit authorization, at which time the board will determine if continuation of the VWP general permit authorization is necessary.~~

~~C.~~ B. Overall ~~project~~ conditions.

1. The activities authorized by this VWP general permit shall be executed in a manner so as to minimize adverse impacts on instream beneficial uses as defined in § 62.1-10 (b) of the Code of Virginia.

2. No activity may substantially disrupt the movement of aquatic life indigenous to the water body, including those species which normally migrate through the area, unless the primary purpose of the activity is to impound water. ~~Culverts~~ Pipes and culverts placed in streams must be installed to maintain low flow conditions~~.~~ and shall be countersunk at both inlet and outlet ends of the pipe or culvert unless otherwise specifically approved by the Department of Environmental Quality on a case-by-case basis, and as follows: The requirement to countersink does ~~no~~ not apply to extensions or maintenance of existing pipes and culverts that are not countersunk, floodplain pipes and culverts being placed above ordinary high water, pipes and culverts being placed on bedrock, or pipes and culverts required to be placed on slopes 5.0% or greater. ~~No activity may cause more than minimal adverse effect on navigation. Furthermore the activity must not impede the passage of normal or expected high flows and the structure or discharge must withstand expected high flows.~~ Bedrock encountered during construction must be identified and approved in advance of a design change where the countersunk condition cannot be met. Pipes and culverts 24 inches or less in diameter shall be countersunk three inches below the natural stream bed elevations, and pipes and culverts greater than 24 inches shall be countersunk at least six inches below the natural stream bed elevations. Hydraulic capacity shall be determined based on the reduced capacity due to the countersunk position. In all stream crossings appropriate measures shall be implemented to minimize any disruption of aquatic life movement.

3. Wet or uncured concrete shall be prohibited from entry into flowing surface waters unless the area is contained within a cofferdam and the work is performed in the dry or unless otherwise approved by the Department of Environmental Quality. Excess or waste concrete shall not be disposed of in flowing surface waters or washed into flowing surface waters.

4. All fill material shall be clean and free of contaminants in toxic concentrations or amounts in accordance with all applicable laws and regulations.

5. Erosion and sedimentation controls shall be designed in accordance with the Virginia Erosion and Sediment Control Handbook, Third Edition, 1992, or for mining activities covered by this general permit, the standards issued by the Virginia Department of Mines, Minerals and Energy that are effective as those in the Virginia Erosion and Sediment Control Handbook, Third Edition, 1992. These controls shall be placed prior to clearing and grading and maintained in good working order to minimize impacts to state waters. These controls shall remain in place until the area is stabilized and shall then be removed.

6. Exposed slopes and streambanks shall be stabilized immediately upon completion of work in each permitted impact area. All denuded areas shall be properly stabilized in accordance with the Virginia Erosion and Sediment Control Handbook, Third Edition, 1992.

7. All construction, construction access (e.g., cofferdams, sheetpiling, and causeways) and demolition activities associated with ~~this~~ the project shall be accomplished in a manner that minimizes construction or waste materials from entering surface waters to the maximum extent practicable, unless authorized by this VWP general permit.

8. No machinery may enter flowing waters, unless authorized by this VWP general permit or approved prior to entry by the Department of Environmental Quality.

9. Heavy equipment in temporarily-impacted wetland areas shall be placed on mats, geotextile fabric, or other suitable material to minimize soil disturbance to the maximum extent practicable. Equipment and materials shall be removed immediately upon completion of work.

10. All nonimpacted surface waters and compensatory mitigation areas within 50 feet of ~~permitted~~ authorized activities and within the project or right-of-way limits shall be clearly flagged or marked for the life of the construction activity at that location to preclude unauthorized disturbances to these surface waters and compensatory

mitigation areas during construction. The permittee shall notify contractors that no activities are to occur in these marked surface waters.

11. Temporary disturbances to surface waters during construction shall be avoided and minimized to the maximum extent practicable. All temporarily disturbed wetland areas shall be restored to preexisting conditions within 30 days of completing work at each respective temporary impact area, which shall include reestablishing preconstruction elevations and contours with topsoil from the impact area where practicable and planting or seeding with appropriate wetland vegetation according to cover type (i.e., emergent, ~~scrub/shrub,~~ scrub-shrub, or forested). The permittee shall take all appropriate measures to promote and maintain revegetation of temporarily disturbed wetland areas with wetland vegetation through the second year post-disturbance. All temporarily impacted streams and streambanks shall be restored to their ~~original~~ preconstruction elevations and contours with topsoil from the impact area where practicable within 30 days following the construction at that stream segment~~, and the banks~~. Streambanks shall be seeded or planted with the same vegetation cover type originally present ~~along the streamsbanks~~, including supplemental erosion control grasses if necessary~~, except for invasive~~. Invasive species identified on ~~DCR's~~ the Department of Conservation and Recreation's Virginia Invasive ~~Alien~~ Plant Species ~~of Virginia list~~ List shall not be used to the maximum extent practicable or without prior approval from the Department of Environmental Quality.

12. Materials (including fill, construction debris, and excavated and woody materials) temporarily stockpiled in wetlands shall be placed on mats or geotextile fabric, immediately stabilized to prevent entry into state waters, managed such that leachate does not enter state waters, and completely removed within 30 days following completion of that construction activity. Disturbed areas shall be returned to ~~original~~ preconstruction elevations and contours~~,~~ with topsoil from the impact area where practicable; restored within 30 days following removal of the stockpile~~,~~; and restored with the same vegetation cover type originally present, including supplemental erosion control grasses if necessary~~, except for invasive~~. Invasive species identified on ~~DCR's~~ the Department of Conservation and Recreation's Virginia Invasive ~~Alien~~ Plant Species ~~of Virginia list~~ List shall not be used to the maximum extent practicable or without prior approval from the Department of Environmental Quality.

13. Continuous flow of perennial springs shall be maintained by the installation of spring boxes, french drains, or other similar structures.

14. The permittee shall employ measures to prevent spills of fuels or lubricants into state waters.

15. The permittee shall conduct activities in accordance with the time-of-year restrictions recommended by the Virginia Department of Game and Inland Fisheries, the Virginia Marine Resources Commission, or other interested and affected agencies, as contained, when applicable, in Department of Environmental Quality VWP general permit coverage, and shall ensure that all contractors are aware of the time-of-year restrictions imposed.

16. Water quality standards shall not be violated as a result of the construction activities~~, unless allowed by this permit authorization~~.

17. If stream channelization or relocation is required, all work in surface waters shall be done in the dry, unless otherwise authorized by ~~this VWP general permit~~ the Department of Environmental Quality, and all flows shall be diverted around the channelization or relocation area until the new channel is stabilized. This work shall be accomplished by leaving a plug at the inlet and outlet ends of the new channel during excavation. Once the new channel has been stabilized, flow shall be routed into the new channel by first removing the downstream plug and then the upstream plug. The rerouted stream flow must be fully established before construction activities in the old stream channel can begin.

~~D.~~ C. Road crossings.

1. Access roads and associated bridges ~~or~~, pipes, and culverts shall be constructed to minimize the adverse effects on surface waters to the maximum extent practicable. Access roads constructed above preconstruction elevations and contours ~~and elevations~~ in surface waters must be bridged, piped, or culverted to maintain surface flows.

2. Installation of road crossings shall occur in the dry via the implementation of cofferdams, sheetpiling, stream diversions, or similar structures.

~~E.~~ D. Utility lines.

1. All utility line work in surface waters shall be performed in a manner that minimizes disturbance, and the area must be returned to its ~~original~~ preconstruction elevations and contours with topsoil from the impact area where practicable and restored within 30 days of completing work in the area, unless otherwise authorized ~~by this VWP general permit~~ the Department of Environmental Quality. Restoration shall be the seeding of planting of the same vegetation cover type originally present, including supplemental erosion control grasses if necessary~~, except for invasive~~. Invasive specifies identified on ~~DCR's~~ the Department of Conservation and Recreation's Virginia Invasive ~~Alien~~ Plant Species ~~of Virginia list~~ List shall not be used to the maximum extent practicable or without prior approval from the Department of Environmental Quality.

2. Material resulting from trench excavation may be temporarily sidecast into wetlands not to exceed a total of 90 days, provided the material is not placed in a manner such that it is dispersed by currents or other forces.

3. The trench for a utility line cannot be constructed in a manner that drains wetlands (e.g., backfilling with extensive gravel layers creating a french drain effect.). For example, utility lines may be backfilled with clay blocks to ensure that the trench does not drain surface waters through which the utility line is installed.

~~F.~~ E. Stream modification and stream bank protection.

1. Riprap bank stabilization shall be of an appropriate size and design in accordance with the Virginia Erosion and Sediment Control Handbook, Third Edition, 1992.

2. Riprap apron for all outfalls shall be designed in accordance with the Virginia Erosion and Sediment Control Handbook, Third Edition, 1992.

3. For stream bank protection activities, the structure and backfill shall be placed as close to the stream bank as practicable. No material shall be placed in excess of the minimum necessary for erosion protection.

4. All stream bank protection structures shall be located to eliminate or minimize impacts to vegetated wetlands to the maximum extent practicable.

5. Asphalt and materials containing asphalt or other toxic substances shall not be used in the construction of submerged sills or breakwaters.

6. Redistribution of existing stream substrate for the purpose of erosion control is prohibited.

7. No material removed from the stream bottom shall be disposed of in surface waters, unless otherwise authorized by this VWP general permit.

~~G.~~ F. Dredging.

1. Dredging depths shall be determined and authorized according to the proposed use and controlling depths outside the area to be dredged.

2. Dredging shall be accomplished in a manner that minimizes disturbance of the bottom and minimizes turbidity levels in the water column.

3. If evidence of impaired water quality, such as a fish kill, is observed during the dredging, dredging operations shall cease, and the ~~DEQ~~ the Department of Environmental Quality shall be notified immediately.

4. Barges used for the transportation of dredge material shall be filled in such a manner to prevent the overflow of dredged materials.

5. Double handling of dredged material in state waters shall not be permitted.

6. For navigation channels the following shall apply:

a. A buffer of four times the depth of the dredge cut shall be maintained between the bottom edge of the design channel and the channelward limit of wetlands, or a buffer of 15 feet shall be maintained from the dredged cut and the channelward edge of wetlands, whichever is greater. This landward limit of buffer shall be flagged and inspected prior to construction.

b. Side slope cuts of the dredging area shall not exceed a two-horizontal-to-one-vertical slope to prevent slumping of material into the dredged area.

7. A dredged material management plan for the designated upland disposal site shall be submitted and approved 30 days prior to initial dredging activity.

8. Pipeline outfalls and spillways shall be located at opposite ends of the dewatering area to allow for maximum retention and settling time. Filter fabric shall be used to line the dewatering area and to cover the outfall pipe to further reduce sedimentation to state waters.

9. The dredge material dewatering area shall be of adequate size to contain the dredge material and to allow for adequate dewatering and settling out of sediment prior to discharge back into state waters.

10. The dredge material dewatering area shall utilize an earthen berm or straw bales covered with filter fabric along the edge of the area to contain the dredged material, ~~and~~ filter bags, or other similar filtering practices, any of which shall be properly stabilized prior to placing the dredged material within the containment area.

11. Overtopping of the dredge material containment berms with dredge materials shall be strictly prohibited.

~~H.~~ G. Stormwater management facilities.

1. Stormwater management facilities shall be installed in accordance with best management practices and watershed protection techniques (e.g., vegetated buffers, siting considerations to minimize adverse effects to aquatic resources, bioengineering methods incorporated into the facility design to benefit water quality and minimize adverse effects to aquatic resources) that provide for long-term aquatic resources protection and enhancement, to the maximum extent practicable.

2. Compensation for unavoidable impacts shall not be allowed within maintenance areas of stormwater management facilities.

3. Maintenance activities within stormwater management facilities shall not require additional permit ~~authorization~~ coverage or compensation provided that the maintenance activities do not exceed the original contours of the facility, as approved and constructed, and is accomplished in designated maintenance areas as indicated in the facility maintenance or design plan or when unavailable, an alternative plan approved by the Department of Environmental Quality.

Part II. Construction and Compensation Requirements, Monitoring, and Reporting.

A. Minimum compensation requirements.

1. The permittee shall provide ~~appropriate and practicable~~ any required compensation for ~~all~~ impacts ~~meeting~~ in accordance with the conditions ~~outlined~~ in this VWP general permit and the chapter promulgating the general permit. For all compensation that requires a protective mechanism, including preservation of surface waters or buffers, the permittee shall record the approved protective mechanism in the chain of title to the property, or an equivalent instrument for government-owned lands, and proof of recordation shall be submitted to the Department of Environmental Quality prior to commencing impacts in surface waters.

2. Compensation options that may be considered under this VWP general permit shall meet the criteria in 9VAC25-690-70 and 9VAC25-210-116.

3. The permittee-responsible compensation site or sites depicted in the conceptual compensation plan submitted with the application shall constitute the compensation site ~~for the approved project~~. A site change ~~will~~ may require a modification to ~~the authorization~~ coverage.

4. For compensation involving the purchase ~~or use~~ of mitigation bank credits or ~~a contribution to an~~ the purchase of in-lieu fee ~~fund~~ program credits, the permittee shall not initiate work in permitted impact areas until documentation of the mitigation bank credit purchase ~~or usage~~ or of the ~~fund contribution~~ in-lieu fee program credit purchase has been submitted to and received by ~~DEQ~~ the Department of Environmental Quality.

5. ~~All aspects of the~~ The final compensation plan shall be ~~finalized,~~ submitted to and approved by the board prior to a construction activity in permitted impact areas. The board shall review and provide written comments on the final plan within 30 days of receipt or it shall be deemed approved. The final ~~compensation~~ plan as approved by the board shall be an enforceable requirement of any coverage under this VWP general permit ~~authorization~~. Deviations from the approved final plan ~~must~~ shall be submitted and approved in advance by the board.

~~6.~~ a. The final permittee-responsible wetlands compensation plan shall include:

~~a. The goals and objectives of the plan in terms of replacement of wetland acreage and functions, by wetland type;~~

~~b. Location map, including latitude and longitude (to the nearest second) at the center of the site;~~

~~c. Summary of the type and acreage of existing wetland impacts anticipated during the construction of the compensation site and proposed compensation for these impacts;~~

~~d. Grading plan with existing and proposed elevations at one-foot or less contours;~~

~~e. Schedule for compensation site construction, including sequence of events with estimated dates;~~

~~f. Hydrologic analysis, including a water budget based on expected monthly inputs and outputs that will project water level elevations for a typical year, a wet year, and a dry year;~~

~~g. Groundwater elevation data for the site, or the location of groundwater monitoring wells to collect these data, and groundwater data for reference wetlands, if applicable;~~

~~h. Design of water control structures;~~

~~i. Planting scheme and schedule, indicating plant species, zonation, and acreage of each vegetation type proposed;~~

~~j. An abatement and control plan covering all undesirable plant species, as listed on DCR's Invasive Alien Plant Species of Virginia list, that includes the proposed procedures for notifying DEQ of their presence, methods of removal, and the control of such species;~~

~~k. Erosion and sedimentation control plan;~~

~~l. A soil preparation and amendments plan addressing both topsoil and subsoil conditions;~~

~~m. A discussion of structures and features considered necessary for the success of the site;~~

~~n. A monitoring plan, including success criteria, monitoring goals and methodologies, monitoring and reporting schedule, and the locations of photographic stations and monitoring wells, sampling points, and, if applicable, reference wetlands;~~

~~o. Site access plan;~~

~~p. The location and composition of any buffers; and~~

~~q. The mechanism for protection of the compensation area(s).~~

(1) The complete information on all components of the conceptual compensation plan.

(2) A summary of the type and acreage of existing wetland impacts anticipated during the construction of the compensation site and the proposed compensation for these impacts; a site access plan; a monitoring plan, including proposed success criteria, monitoring goals, and the location of photo-monitoring stations, monitoring wells, vegetation sampling points, and reference wetlands or streams (if available); an abatement and control plan for undesirable plant species; an erosion and sedimentation control plan; a construction schedule; and the final protective mechanism for the compensation site or sites, including all surface waters and buffer areas within its boundaries.

(3) The approved protective mechanism. The protective mechanism shall be recorded in the chain of title to the

property, or an equivalent instrument for government-owned lands, and proof of recordation shall be submitted to the Department of Environmental Quality prior to commencing impacts in surface waters.

~~7.~~ b. The final permittee-responsible stream compensation plan shall include:

~~a. The goals and objectives of the compensation plan in terms of replacement of stream functions and water quality benefits;~~

~~b. A location map, including latitude and longitude (to the nearest second) at the center of the site;~~

~~c. An evaluation, discussion, and plan sketches of existing conditions on the proposed compensation stream, including the identification of functional and physical deficiencies for which the measures are proposed, and summary of geomorphologic measurements (e.g., stream width, entrenchment ratio, width-depth ratio, sinuosity, slope, substrate, etc.);~~

~~d. The identification of existing geomorphological stream type being impacted and proposed geomorphological stream type for compensation purposes;~~

~~e. Detailed design information for the proposed restorative measures, including geomorphological measurements and reference reach information as appropriate;~~

~~f. Riparian buffer plantings, including planting scheme, species, buffer width;~~

~~g. Livestock access limiting measures, to the greatest extent possible;~~

~~h. A site access plan;~~

~~i. An erosion and sedimentation control plan, if appropriate;~~

~~j. An abatement and control plan covering all undesirable plant species, listed on DCR's Invasive Alien Plant Species of Virginia list, that includes the proposed procedures for notifying DEQ of their presence, methods for removal, and the control of such species;~~

~~k. A schedule for compensation site construction including projected start date, sequence of events with projected dates, and projected completion date;~~

~~l. A monitoring plan, including a monitoring and reporting schedule; monitoring design and methodologies to evaluate the success of the proposed compensation measures, allowing comparison from year to year; proposed success criteria for appropriate compensation measures; location of all monitoring stations including photo stations, vegetation sampling points, survey points, bank pins, scour chains, and reference streams;~~

~~m. The mechanism for protection of the compensation area; and~~

~~n. Plan view sketch depicting the pattern and all compensation measures being employed, a profile sketch, and cross-section sketches of the proposed compensation stream.~~

(1) The complete information on all components of the conceptual compensation plan.

(2) An evaluation, discussion, and plan drawing or drawings of existing conditions on the proposed compensation stream, including the identification of functional and physical deficiencies for which the measures are proposed, and summary of geomorphologic measurements (e.g., stream width, entrenchment ratio, width-depth ratio, sinuosity, slope, substrate, etc.); a site access plan; a monitoring plan, including a monitoring and reporting schedule, monitoring design and methodologies for success, proposed success criteria, location of photo-monitoring stations, vegetation sampling points, survey points, bank pins, scour chains, and reference streams; an abatement and control plan for undesirable plant species; an erosion and sedimentation control plan, if appropriate; a construction schedule; a plan-view drawing depicting the pattern and all compensation measures being employed; a profile drawing; cross-sectional drawing or drawings of the proposed compensation stream; and the final protective mechanism for the protection of the compensation site or sites, including all surface waters and buffer areas within its boundaries.

(3) The approved protective mechanism. The protective mechanism shall be recorded in the chain of title to the property, or an equivalent instrument for government-owned lands, and proof of recordation shall be submitted to the Department of Environmental Quality prior to commencing impacts in surface waters.

~~8. For final~~ 6. The following criteria shall apply to permittee-responsible wetland or stream compensation ~~plans, the~~:

a. The vegetation used shall be native species common to the area, shall be suitable for growth in local wetland or riparian conditions, and shall be from areas within the same or adjacent ~~USDA~~ U.S. Department of Agriculture Plant Hardiness Zone or ~~NRCS~~ Natural Resources Conservation Service Land Resource Region as that of the project site. Planting of woody plants shall occur when vegetation is normally dormant, unless otherwise approved in the final wetlands or stream compensation plan or plans.

~~9. The final wetland or stream compensation plan(s) shall include a mechanism for protection in perpetuity of the compensation sites(s) to include all state waters within the compensation site boundary or boundaries. Such protections shall be in place within 120 days of final compensation plan approval. The restrictions, protections, or preservations, or similar instrument, shall state that no activity will be performed on the property in any area designated as a compensation area with the exception of~~

~~maintenance or corrective action measures authorized by the board. Unless specifically authorized by the board through the issuance of a VWP individual or general permit, or waiver thereof, this restriction applies to ditching, land clearing or the discharge of dredge or fill material. Such instrument shall contain the specific phrase "ditching, land clearing or discharge of dredge or fill material" in the limitations placed on the use of these areas. The protective instrument shall be recorded in the chain of title to the property, or an equivalent instrument for government owned lands. Proof of recordation shall be submitted within 120 days of final compensation plan approval.~~

~~10.~~ b. All work in permitted impact areas shall cease if compensation site construction has not commenced within 180 days of commencement of project construction, unless otherwise authorized by the board.

~~11. DEQ~~ c. The Department of Environmental Quality shall be notified in writing ~~at least 10 days~~ prior to the initiation of construction activities at the compensation ~~site(s)~~ site.

~~12. Planting of woody plants shall occur when vegetation is normally dormant unless otherwise approved in the final wetlands or stream compensation plan(s).~~

~~13.~~ d. Point sources of stormwater runoff shall be prohibited from entering a wetland compensation site prior to treatment by appropriate best management practices. Appropriate best management practices may include sediment traps, grassed waterways, vegetated filter strips, debris screens, oil and grease separators, or forebays.

~~14.~~ e. The success of the compensation shall be based on meeting the success criteria established in the approved final compensation plan.

~~15. Wetland hydrology shall be considered established if depths to the seasonal high water table are equal to or less than 12 inches below ground surface for at least 12.5% of the region's killing frost free growing season, as defined in the soil survey for the locality of the compensation site or the NRCS WETS table, measured in consecutive days under typical precipitation conditions, and as defined in the water budget of the final compensation plan. For the purpose of this regulation, the growing season is defined as the period in which temperatures are expected to be above 28 degrees Fahrenheit in five out of 10 years, or the period during which the soil temperature in a wetland compensation site is greater than biological zero (five degrees Celsius) at a depth of 50 centimeters (19.6 inches), if such data is available.~~

~~16. The wetland plant community shall be considered established according to the performance criteria specified in the final compensation plan and approved by the board. The proposed vegetation success criteria in the final compensation plan shall include the following:~~

~~a. Species composition shall reflect the desired plant community types stated in the final wetland compensation plan by the end of the first growing season and shall be maintained through the last monitoring year.~~

~~b. Species composition shall consist of greater than 50% facultative (FAC) or wetter (FACW or OBL) vegetation, as expressed by plant stem density or areal cover, by the end of the first growing season and shall be maintained through the last monitoring year.~~

~~17. Undesirable plant species shall be identified and controlled as described in the undesirable plant species control plan, such that they are not dominant species or do not change the desired community structure. The control plan shall include procedures to notify DEQ when undesirable plant species comprise greater than 5.0% of the vegetation by areal coverage on wetland or stream compensation sites. The notification shall include the methods of removal and control, and whether the methods are successful.~~

~~18.~~ f. If the wetland or stream compensation area fails to meet the specified success criteria in a particular monitoring year, other than the final monitoring year, the reasons for this failure shall be determined, and a corrective action plan shall be submitted to ~~DEQ~~ the Department of Environmental Quality for approval with or before that year's monitoring report. The corrective action plan shall contain at minimum the proposed actions, a schedule for those actions, and a monitoring plan, and shall be implemented by the permittee in accordance with the approved schedule. Should significant changes be necessary to ensure success, the required monitoring cycle shall begin again, with monitoring year one being the year that the changes are complete, as confirmed by ~~DEQ~~ the Department of Environmental Quality. If the wetland or stream compensation area fails to meet the specified success criteria by the final monitoring year, or if the wetland or stream compensation area has not met the stated restoration goals, reasons for this failure shall be determined and a corrective action plan, including proposed actions, a schedule, and a monitoring plan, shall be submitted with the final year monitoring report for ~~DEQ~~ Department of Environmental Quality approval. Corrective action shall be implemented by the permittee in accordance with the approved schedule. Annual monitoring shall be required to continue until two sequential, annual reports indicate that all criteria have been successfully satisfied and the site has met the overall restoration goals (e.g., that corrective actions were successful).

~~19.~~ g. The surveyed wetland boundary for the wetlands compensation site shall be based on the results of the hydrology, soils, and vegetation monitoring data and shall be shown on the site plan. Calculation of total

wetland acreage shall be based on that boundary at the end of the monitoring cycle. Data shall be submitted by December 31 of the final monitoring year.

~~20.~~ h. Herbicides or algicides shall not be used in or immediately adjacent to the wetlands or stream compensation site or sites without prior authorization by the board. All vegetation removal shall be done by manual means, unless authorized by ~~DEQ~~ the Department of Environmental Quality in advance.

B. Impact site construction monitoring.

1. Construction activities authorized by this permit that are within impact areas shall be monitored and documented. The monitoring shall ~~document the preexisting conditions, activities during construction, and post-construction conditions. Monitoring shall~~ consist of ~~one of the following options~~:

~~a. Photographs shall be taken during construction at the end of the first, second, and third months after commencing construction, and then every six months thereafter for the remainder of the construction project. Photos are not required during periods of no activity within impact areas.~~

~~b. An ortho-rectified photograph shall be taken by a firm specializing in ortho-rectified photography prior to construction, and then annually thereafter, until all impacts are taken. Photos shall clearly show the delineated surface waters and authorized impact areas.~~

~~c. In lieu of photographs, and with prior approval from DEQ, the permittee may submit a written narrative that summarizes site construction activities in impact areas. The narrative shall be submitted at the end of the first, second, and third months after commencing construction, and then every six months thereafter, for the remainder of the construction activities. Narratives are not required during periods of no activity within the impact areas.~~

~~2. As part of construction monitoring, photographs taken at the photo stations or the narrative shall document site activities and conditions, which may include installation and maintenance of erosion and sediment controls; surface water discharges from the site; condition of adjacent nonimpact surface waters; flagged nonimpact surface waters; construction access and staging areas; filling, excavation, and dredging activities; culvert installation; dredge disposal; and site stabilization, grading, and associated restoration activities. With the exception of the preconstruction photographs, photographs at an individual impact site shall not be required until construction activities are initiated at that site. With the exception of the post-construction photographs, photographs at an individual impact site shall not be required once the site is stabilized following completion of construction at that site.~~

~~3. Each photograph shall be labeled to include the following information: permit number, impact area and photo station number, date and time of the photograph, name of the person taking the photograph, photograph orientation, and photograph subject description.~~

a. Preconstruction photographs taken at each impact area prior to initiation of activities within impact areas. Photographs shall remain on the project site and depict the impact area and the nonimpacted surface waters immediately adjacent to and downgradient of each impact area. Each photograph shall be labeled to include the following information: permit number, impact area number, date and time of the photograph, name of the person taking the photograph, photograph orientation, and photograph subject description.

b. Site inspections shall be conducted by the permittee or the permittee's qualified designee once every calendar month during activities within impact areas. Monthly inspections shall be conducted in the following areas: all authorized permanent and temporary impact areas; all avoided surface waters, including wetlands, stream channels, and open water; surface water areas within 50 feet of any land disturbing activity and within the project or right-of-way limits; and all on-site permanent preservation areas required under this permit. Observations shall be recorded on the inspection form provided by the Department of Environmental Quality. The form shall be completed in its entirety for each monthly inspection and shall be kept on-site and made available for review by the Department of Environmental Quality staff upon request during normal business hours. Inspections are not required during periods of no activity within impact areas.

~~4.~~ 2. Monitoring of water quality parameters shall be conducted during permanent relocation of perennial streams through new channels in the manner noted below. The permittee shall report violations of water quality standards to ~~DEQ~~ the Department of Environmental Quality in accordance with the procedures in ~~Part II E~~ 9VAC25-690-100 Part II E. Corrective measures and additional monitoring may be required if water quality standards are not met. Reporting shall not be required if water quality standards are not violated.

a. A sampling station shall be located upstream and immediately downstream of the relocated channel.

b. Temperature, pH and dissolved oxygen (D.O.) measurements shall be taken every 30 minutes for at least two hours at each station prior to opening the new channels and immediately before opening new channels.

c. Temperature, pH and D.O. readings shall be taken after opening the channels and every 30 minutes for at least three hours at each station.

C. ~~Wetland~~ Permittee-responsible wetland compensation site monitoring.

1. An as-built ground survey, or an aerial survey provided by a firm specializing in aerial surveys, shall be conducted for the entire compensation site or sites including invert elevations for all water elevation control structures and spot elevations throughout the site or sites. Aerial surveys shall include the variation from actual ground conditions, such as +/- 0.2 feet. Either type of survey shall be certified by a licensed surveyor or by a registered professional engineer to conform to the design plans. The survey shall be submitted within 60 days of completing compensation site construction. Changes or deviations in the as-built survey or aerial survey shall be shown on the survey and explained in writing.

2. Photographs shall be taken at the compensation site or sites from the permanent markers identified in the final compensation plan, and established to ensure that the same locations and view directions at the site or sites are monitored in each monitoring period. These photographs shall be taken after the initial planting and at a time specified in the final compensation plan during every monitoring year.

3. Compensation site monitoring shall begin on day one of the first complete growing season (monitoring year 1) after wetland compensation site construction activities, including planting, have been completed. Monitoring shall be required for monitoring years 1, 2, 3, and 5, unless otherwise approved by ~~DEQ~~ the Department of Environmental Quality. In all cases if all success criteria have not been met in the final monitoring year, then monitoring shall be required for each consecutive year until two annual sequential reports indicate that all criteria have been successfully satisfied.

4. The establishment of wetland hydrology shall be measured during the growing season, with the location and number of monitoring wells, and frequency of monitoring for each site, set forth in the final monitoring plan. Hydrology monitoring well data shall be accompanied by precipitation data, including rainfall amounts either from on site or from the closest weather station. Once the wetland hydrology success criteria have been satisfied for a particular monitoring year, monitoring may be discontinued for the remainder of that monitoring year following ~~DEQ~~ Department of Environmental Quality approval. After a period of three monitoring years, the permittee may request that hydrology monitoring be discontinued, providing that adequate hydrology has been established and maintained. Hydrology monitoring shall not be discontinued without written approval from ~~DEQ~~ the Department of Environmental Quality.

5. The presence of hydric soils or soils under hydric conditions shall be evaluated in accordance with the final compensation plan.

6. The establishment of wetland vegetation shall be in accordance with the final compensation plan. Monitoring shall take place in August, September, or October during the growing season of each monitoring year, unless otherwise authorized in the monitoring plan~~:~~.

7. The presence of undesirable plant species shall be documented.

8. All wetland compensation monitoring reports shall be submitted in accordance with 9VAC25-690-100 Part II E 6.

D. ~~Stream~~ Permittee-responsible stream compensation~~, restoration,~~ and monitoring.

1. Riparian buffer restoration activities shall be detailed in the final compensation plan and shall include, as appropriate, the planting of a variety of native species currently growing in the site area, including appropriate seed mixtures and woody species that are bare root, balled, or burlapped. A minimum buffer width of 50 feet, measured from the top of the stream bank at bankfull elevation landward on both sides of the stream, shall be required where practical.

2. The installation of root wads, vanes, and other instream structures, shaping of the stream banks, and channel relocation shall be completed in the dry whenever practicable.

3. Livestock access to the stream and designated riparian buffer shall be limited to the greatest extent practicable.

4. Stream channel restoration activities shall be conducted in the dry or during low flow conditions. When site conditions prohibit access from the streambank~~,~~ or upon prior authorization from the Department of Environmental Quality, heavy equipment ~~shall~~ may be authorized for use within the stream channel.

5. Photographs shall be taken at the compensation site from the vicinity of the permanent photo stations identified in the final compensation plan. The photograph orientation shall remain constant during all monitoring events. At a minimum, photographs shall be taken from the center of the stream, facing downstream, with a sufficient number of photographs to view the entire length of the restoration site. Photographs shall document the completed restoration conditions. Photographs shall be taken prior to site activities, during instream and riparian compensation construction activities, within one week of completion of activities, and during at least one day of each monitoring year to depict restored conditions.

6. An as-built ground survey, or an aerial survey provided by a firm specializing in aerial surveys, shall be conducted for the entire compensation site or sites. Aerial surveys shall include the variation from actual ground conditions, such as +/- 0.2 feet. The survey shall be certified by the licensed surveyor or by a registered, professional engineer to conform to the design plans. The survey shall be

submitted within 60 days of completing compensation site construction. Changes or deviations from the final compensation plans in the as-built survey or aerial survey shall be shown on the survey and explained in writing.

7. Compensation site monitoring shall begin on day one of the first complete growing season (monitoring year 1) after stream compensation site construction activities, including planting, have been completed. Monitoring shall be required for monitoring years 1 and 2, unless otherwise ~~determined~~ approved by ~~DEQ~~ the Department of Environmental Quality. In all cases, if all success criteria have not been met in the final monitoring year, then monitoring shall be required for each consecutive year until two annual sequential reports indicate that all criteria have been successfully satisfied.

8. All stream compensation site monitoring reports shall be submitted by in accordance with 9VAC25-690-100 Part II E 6.

E. Reporting.

1. Written communications required by this VWP general permit shall be submitted to the appropriate ~~DEQ~~ Department of Environmental Quality office. The VWP general permit ~~authorization~~ tracking number shall be included on all correspondence.

2. ~~DEQ~~ The Department of Environmental Quality shall be notified in writing ~~at least 10 days~~ prior to the start of construction activities at the first ~~permitted site authorized by this VWP general permit authorization so that inspections of the project can be planned, if deemed necessary by DEQ. The notification shall include a projected schedule for initiation and completion of work at each~~ permitted impact area.

~~3. Construction monitoring reports shall be submitted to DEQ no later than the 10th day of the month following the month in which the monitoring event specified in Part II B takes place, unless otherwise specified below. The reports shall include the following, as appropriate:~~

~~a. For each permitted impact area, a written narrative stating whether work was performed during the monitoring period, and if work was performed, a description of the work performed, when the work was initiated, and the expected date of completion.~~

~~b. Photographs labeled with the permit number, the photo station number, the photo orientation, the date and time of the photo, the name of the person taking the photograph, and a brief description of the construction activities. The first construction monitoring report shall include the photographs taken at each impact site prior to initiation of construction in a permitted impact area. Written notification and photographs demonstrating that all temporarily disturbed wetland and stream areas have been restored in compliance with the permit conditions shall be submitted within 30 days of restoration. The post-construction photographs shall be submitted within 30 days of documenting post-construction conditions.~~

~~c. Summary of activities conducted to comply with the permit conditions.~~

~~d. Summary of permit noncompliance events or problems encountered, subsequent notifications, and corrective actions.~~

~~e. Summary of anticipated work to be completed during the next monitoring period, and an estimated date of construction completion at all impact areas.~~

~~f. Labeled site map depicting all impact areas and photo stations.~~

3. A construction status update form provided by the Department of Environmental Quality shall be completed and submitted to the Department of Environmental Quality twice per year for the duration of coverage under a VWP general permit. Forms completed in June shall be submitted by or on July 10, and forms completed in December shall be submitted by or on January 10. The form shall include reference to the VWP permit tracking number and one of the following statements for each authorized surface water impact location:

a. Construction activities have not yet started;

b. Construction activities have started;

c. Construction activities have started but are currently inactive; or

d. Construction activities are complete.

4. ~~DEQ~~ The Department of Environmental Quality shall be notified in writing within 30 days following the completion of all activities in all ~~permitted~~ authorized impact areas ~~authorized under this permit~~.

5. ~~DEQ~~ The Department of Environmental Quality shall be notified in writing ~~at least 10 days~~ prior to the initiation of activities at the permittee-responsible compensation site. The notification shall include a projected schedule of activities and construction completion.

6. All permittee-responsible compensation site monitoring reports shall be submitted annually by December 31, with the exception of the last year ~~of authorization~~, in which case the report shall be submitted at least 60 days prior to the expiration of ~~authorization under~~ the general permit, unless otherwise approved by the Department of Environmental Quality.

a. All wetland compensation site monitoring reports shall include, as applicable, the following:

(1) General description of the site including a site location map identifying photo stations, vegetative and soil monitoring stations, monitoring wells, and wetland zones.

(2) Summary of activities completed during the monitoring year, including alterations or maintenance conducted at the site.

(3) Description of monitoring methods.

(4) Analysis of all hydrology information, including monitoring well data, precipitation data, and gauging data from streams or other open water areas, as set forth in the final compensation plan.

(5) Evaluation of hydric soils or soils under hydric conditions, as appropriate.

(6) Analysis of all vegetative community information, including woody and herbaceous species, both planted and volunteers, as set forth in the final compensation plan.

(7) Photographs labeled with the permit number, the name of the compensation site, the ~~photo~~ photo-monitoring station number, the photograph orientation, the date and time of the photograph, the name of the person taking the photograph, and a brief description of the photograph subject. This information shall be provided as a separate attachment to each photograph, if necessary. Photographs taken after the initial planting shall be included in the first monitoring report after planting is complete.

(8) Discussion of wildlife or signs of wildlife observed at the compensation site.

(9) Comparison of site conditions from the previous monitoring year and reference site.

(10) Discussion of corrective measures or maintenance activities to control undesirable species, to repair damaged water control devices, or to replace damaged planted vegetation.

(11) Corrective action plan, which includes proposed actions, a schedule, and monitoring plan.

b. All stream compensation site monitoring reports shall include, as applicable, the following:

(1) General description of the site including a site location map identifying photo stations and monitoring stations.

(2) Summary of activities completed during the monitoring year, including alterations or maintenance conducted at the site.

(3) Description of monitoring methods.

(4) An evaluation and discussion of the monitoring results in relation to the success criteria and overall goals of compensation.

(5) Photographs shall be labeled with the permit number, the name of the compensation site, the ~~photo~~ photo-monitoring station number, the photograph orientation, the date and time of the photograph, the name of the person taking the photograph, and a brief description of the photograph subject. Photographs taken prior to compensation site construction activities, during instream and riparian restoration activities, and within one week of completion of activities shall be included in the first monitoring report.

(6) A discussion of alterations, maintenance, or major storm events resulting in significant change in stream profile or cross section, and corrective actions conducted at the stream compensation site.

(7) Documentation of undesirable plant species and summary of abatement and control measures.

(8) A summary of wildlife or signs of wildlife observed at the compensation site.

(9) Comparison of site conditions from the previous monitoring year and reference site, and as-built survey, if applicable.

(10) A corrective action plan, which includes proposed actions, a schedule and monitoring plan.

(11) Additional submittals that were approved by ~~DEQ~~ the Department of Environmental Quality in the final compensation plan.

7. The permittee shall notify ~~DEQ~~ the Department of Environmental Quality in writing when unusual or potentially complex conditions are encountered which require debris removal or involve potentially toxic substance. Measures to remove the obstruction, material, or toxic substance or to change the location of a structure are prohibited until approved by ~~DEQ~~ the Department of Environmental Quality.

8. The permittee shall report fish kills or spills of oil or fuel immediately upon discovery. If spills or fish kills occur between the hours of 8:15 a.m. to 5 p.m., Monday through Friday, the appropriate ~~DEQ~~ Department of Environmental Quality regional office shall be notified; otherwise, the Department of Emergency Management shall be notified at 1-800-468-8892.

9. Violations of state water quality standards shall be reported ~~within 24 hours~~ to the appropriate ~~DEQ~~ Department of Environmental Quality office no later than the end of the business day following discovery.

10. The permittee shall notify the Department of Environmental Quality no later than the end of the third business day following the discovery of additional impacts to surface waters including wetlands, stream channels, and open water that are not authorized by the Department of Environmental Quality or to any required preservation areas. The notification shall include photographs, estimated acreage or linear footage of impacts, and a description of the impacts.

~~10.~~ 11. Submittals required by this VWP general permit shall contain the following signed certification statement:

"I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the

information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violation."

Part III. Conditions Applicable to All VWP General Permits.

A. Duty to comply. The permittee shall comply with all conditions, limitations, and other requirements of the VWP general permit; any requirements in coverage granted under this VWP general permit, the Clean Water Act, as amended; and the State Water Control Law and regulations adopted pursuant to it. Any VWP general permit violation or noncompliance is a violation of the Clean Water Act and State Water Control Law and is grounds for (i) enforcement action, (ii) VWP general permit coverage termination for cause, (iii) VWP general permit coverage revocation, (iv) denial of application for coverage, or (v) denial of an application for a modification to VWP general permit coverage. Nothing in this VWP general permit shall be construed to relieve the permittee of the duty to comply with all applicable federal and state statutes, regulations, ~~and~~ toxic standards, and prohibitions. ~~VWP general permit noncompliance is a violation of the Clean Water Act and State Water Control Law, and is grounds for enforcement action, VWP general permit authorization termination for cause, VWP general permit authorization revocation, or denial of a continuation of coverage request.~~

B. Duty to mitigate. The permittee shall take all reasonable steps to minimize or prevent impacts in violation of the VWP general permit which may have a reasonable likelihood of adversely affecting human health or the environment.

C. Reopener. This VWP general permit ~~authorization~~ may be reopened to modify its conditions when the circumstances on which the previous VWP general permit ~~authorization~~ was based have materially and substantially changed, or special studies conducted by the board or the permittee show material and substantial change since the time the VWP general permit ~~authorization~~ was issued and thereby constitute cause for revoking and reissuing the VWP general permit ~~authorization revocation and reissuance~~.

D. Compliance with state and federal law. Compliance with this VWP general permit constitutes compliance with the VWP permit requirements of the State Water Control Law. Nothing in this VWP general permit shall be construed to preclude the institution of any legal action under or relieve the permittee from any responsibilities, liabilities, or other penalties established pursuant to any other state law or regulation or under the authority preserved by § 510 of the Clean Water Act.

E. Property rights. The issuance of this VWP general permit does not convey property rights in either real or personal property~~,~~ or any exclusive privileges, nor does it authorize injury to private property ~~or~~, any invasion of personal property rights, ~~nor~~ or any infringement of federal, state or local laws or regulations.

F. Severability. The provisions of this VWP general permit ~~authorization~~ are severable.

G. ~~Right of~~ Inspection and entry. ~~The~~ Upon presentation of credential, the permittee shall allow the board or ~~its agents, upon the presentation of credentials~~ any duly authorized agent of the board, at reasonable times and under reasonable circumstances, to enter upon the permittee's property, public or private, and have access to~~,~~ inspect and copy any records that must be kept as part of the VWP general permit conditions; to inspect any facilities, operations, or practices (including monitoring and control equipment) regulated or required under the VWP general permit; and to sample or monitor any substance, parameter, or activity for the purpose of assuring compliance with the conditions of the VWP general permit or as otherwise authorized by law. For the purpose of this section, the time for inspection shall be deemed reasonable during regular business hours. Nothing contained herein shall make an inspection time unreasonable during an emergency.

H. Transferability of VWP general permit ~~authorization~~ coverage. ~~This~~ VWP general permit ~~authorization~~ coverage may be transferred to another ~~person by a~~ permittee when all of the criteria listed ~~below~~ in this subsection are met. On the date of the VWP general permit ~~authorization~~ coverage transfer, the transferred VWP general permit ~~authorization~~ coverage shall be as fully effective as if it had been ~~issued~~ granted directly to the new permittee.

1. The current permittee notifies the board of the proposed transfer of the ~~title to the facility or property. 2. The notice to the board includes~~ general permit coverage and provides a written agreement between the current and new permittees containing a specific date of transfer of VWP general permit ~~authorization~~ responsibility, coverage, and liability to the new permittee, or that the current permittee will retain such responsibility, coverage, or liability, including liability for compliance with the requirements of enforcement activities related to the ~~permitted~~ authorized activity.

~~3.~~ 2. The board does not within 15 days notify the current and new permittees of its intent to modify or revoke and reissue the VWP general permit ~~authorization within 15 days~~.

I. Notice of planned change. ~~Authorization under the~~ VWP general permit coverage may be modified subsequent to issuance in ~~one or more of the cases listed below~~ accordance with 9VAC25-690-80. ~~A notice of planned change is not required if the project results in additional temporary impacts to surface waters, provided that DEQ is notified in writing, the additional temporary impacts are restored to preexisting conditions in accordance with Part I C 11 of this general~~

~~permit, and the additional temporary impacts do not exceed the general permit threshold for use. The permittee shall notify the board in advance of the planned change, and the planned change request will be reviewed according to all provisions of this regulation.~~

~~1. The permittee determines that additional permanent wetland, open water, or stream impacts are necessary, provided that the additional impacts are associated with the previously authorized activities in authorized locations within the same phase of development, the cumulative increase in acreage of wetland or open water impacts is not greater than 1/4 acre, the cumulative increase in stream bed impacts is not greater than 100 linear feet, and the additional impacts are fully compensated.~~

~~2. The project results in less wetland or stream impacts, in which case, compensation requirements may be modified in relation to the adjusted impacts at the request of the permittee, provided that the adjusted compensation meets the initial authorization compensation goals.~~

~~3. There is a change in the project plans that does not result in a change in project impacts.~~

~~4. There is a change in the mitigation bank at which credits are purchased or used, provided that the same amount of credits are purchased or used and all criteria for use are met, as detailed in 9VAC25-210-116 E.~~

~~5. Typographical errors need to be corrected.~~

J. VWP general permit ~~authorization~~ coverage termination for cause. ~~This~~ VWP general permit ~~authorization~~ coverage is subject to termination for cause by the board after public notice and opportunity for a hearing pursuant to 9VAC25-230. Reasons for termination for cause are as follows:

1. Noncompliance by the permittee with any provision of the VWP general permit regulation, any condition of the VWP general permit ~~authorization~~, or any requirement in general permit coverage;

2. The permittee's failure in the application or during the ~~VWP general permit authorization issuance~~ process of granting VWP general permit coverage to disclose fully all relevant facts or the permittee's misrepresentation of any relevant facts at any time;

3. The permittee's violation of a special or judicial order; ~~and~~

4. A determination by the board that the ~~permitted~~ authorized activity endangers human health or the environment and can be regulated to acceptable levels by a modification to VWP general permit ~~authorization planned change~~ coverage or a termination ~~for cause.~~;

5. A change in any condition that requires either a temporary or permanent reduction or elimination of any activity controlled by the VWP general permit; or

6. A determination that the authorized activity has ceased and that the compensation for unavoidable adverse impacts has been successfully completed.

K. The board may terminate VWP general permit coverage without cause when the permittee is no longer a legal entity due to death or dissolution or when a company is no longer authorized to conduct business in the Commonwealth. The termination shall be effective 30 days after notice of the proposed termination is sent to the last known address of the permittee or registered agent, unless the permittee objects within that time. If the permittee does object during that period, the board shall follow the applicable procedures for termination under § 62.1-44.15:25 of the Code of Virginia and 9VAC25-230.

~~K.~~ L. VWP general permit ~~authorization~~ coverage termination by consent. ~~This VWP general permit authorization may be terminated by consent when all permitted activities requiring notification under 9VAC25-690-50 A and all compensatory mitigation have been completed or when the authorized impacts will not occur.~~ The permittee shall submit a request for termination by consent within 30 days of ~~project completion or project cancellation~~ completing or cancelling all authorized activities requiring notification under 9VAC25-690-50 A and all compensatory mitigation requirements. When submitted for project completion, the request for termination by consent shall constitute a notice of project completion in accordance with 9VAC25-210-130 F. The director may accept this termination of ~~authorization~~ coverage on behalf of the board. The ~~request for termination by consent~~ permittee shall ~~contain~~ submit the following information:

1. Name, mailing address, and telephone number ~~of the permittee~~;

2. Name and location of the activity;

3. The VWP general permit ~~authorization~~ tracking number; and

4. One of the following certifications:

a. For project completion:

"I certify under penalty of law that all activities and any required compensatory mitigation authorized by ~~a~~ the VWP general permit and general permit coverage have been completed. I understand that by submitting this notice of termination I am no longer authorized to perform activities in surface waters in accordance with the VWP general permit and general permit coverage, and that performing activities in surface waters is unlawful where the activity is not authorized by ~~a~~ the VWP permit or coverage, unless otherwise excluded from obtaining coverage. I also understand that the submittal of this notice does not release me from liability for any violations of ~~this~~ the VWP general permit ~~authorization~~ or coverage."

b. For project cancellation:

"I certify under penalty of law that the activities and any required compensatory mitigation authorized by ~~this~~ the VWP general permit and general permit coverage will not occur. I understand that by submitting this notice of termination I am no longer authorized to perform activities in surface waters in accordance with the VWP general permit and general permit coverage, and that performing activities in surface waters is unlawful where the activity is not authorized by ~~a~~ the VWP permit or coverage, unless otherwise excluded from obtaining coverage. I also understand that the submittal of this notice does not release me from liability for any violations of ~~this~~ the VWP general permit ~~authorization~~ or coverage, nor does it allow me to resume the ~~permitted~~ authorized activities without reapplication and ~~reauthorization~~ coverage."

c. For events beyond permittee control, the permittee shall provide a detailed explanation of the events, to be approved by ~~DEQ~~ the Department of Environmental Quality, and the following certification statement:

"I certify under penalty of law that the activities or the required compensatory mitigation authorized by ~~a~~ the VWP general permit and general permit coverage have changed as the result of events beyond my control (see attached). I understand that by submitting this notice of termination I am no longer authorized to perform activities in surface waters in accordance with the VWP general permit and general permit coverage, and that performing activities in surface waters is unlawful where the activity is not authorized by ~~a~~ the VWP permit or coverage, unless otherwise excluded from obtaining coverage. I also understand that the submittal of this notice does not release me from liability for any violations of ~~this~~ the VWP general permit ~~authorization~~ or coverage, nor does it allow me to resume the ~~permitted~~ authorized activities without reapplication and ~~reauthorization~~ coverage."

~~L.~~ M. Civil and criminal liability. Nothing in this VWP general permit shall be construed to relieve the permittee from civil and criminal penalties for noncompliance.

~~M.~~ N. Oil and hazardous substance liability. Nothing in this VWP general permit shall be construed to preclude the institution of legal action or relieve the permittee from any responsibilities, liabilities, or penalties to which the permittee is or may be subject under § 311 of the Clean Water Act or §§ 62.1-44.34:14 through 62.1-44.34:23 of the State Water Control Law.

~~N.~~ O. Duty to cease or confine activity. It shall not be a defense for a permittee in an enforcement action that it would have been necessary to halt or reduce the activity for which ~~a~~ VWP general permit coverage has been granted in order to maintain compliance with the conditions of the VWP general permit or coverage.

~~O.~~ P. Duty to provide information.

1. The permittee shall furnish to the board any information ~~which~~ that the board may request to determine whether cause exists for modifying, revoking ~~and reissuing and~~, or terminating ~~the~~ VWP permit ~~authorization,~~ coverage or to determine compliance with the VWP general permit ~~authorization~~ or general permit coverage. The permittee shall also furnish to the board, upon request, copies of records required to be kept by the permittee.

2. Plans, maps, conceptual reports, and other relevant information shall be submitted as required by the board prior to commencing construction.

~~P.~~ Q. Monitoring and records requirements.

1. Monitoring of parameters, other than pollutants, shall be conducted according to approved analytical methods as specified in the VWP general permit. Analysis of pollutants will be conducted according to 40 CFR Part 136 (2000), Guidelines Establishing Test Procedures for the Analysis of Pollutants.

2. Samples and measurements taken for the purpose of monitoring shall be representative of the monitored activity.

3. The permittee shall retain records of all monitoring information, including all calibration and maintenance records and all original strip chart or electronic recordings for continuous monitoring instrumentation, copies of all reports required by the VWP general permit, and records of all data used to complete the application for coverage under the VWP general permit, for a period of at least three years from the date of ~~the~~ general permit expiration ~~of a granted VWP permit~~. This period may be extended by request of the board at any time.

4. Records of monitoring information shall include, as appropriate:

a. The date, exact place, and time of sampling or measurements;

b. The name of the individuals who performed the sampling or measurements;

c. The date and time the analyses were performed;

d. The name of the individuals who performed the analyses;

e. The analytical techniques or methods supporting the information such as observations, readings, calculations, and bench data used;

f. The results of such analyses; and

g. Chain of custody documentation.

~~Q.~~ R. Unauthorized discharge of pollutants. Except in compliance with this VWP general permit, it shall be unlawful for the permittee to:

1. Discharge into state waters sewage, industrial wastes, other wastes, or any noxious or deleterious substances;

2. Excavate in a wetland;

3. Otherwise alter the physical, chemical, or biological properties of state waters and make them detrimental to the public health, to animal or aquatic life, or to the uses of such waters for domestic or industrial consumption, for recreation, or for other uses; or

4. On and after October 1, 2001, conduct the following activities in a wetland:

a. New activities to cause draining that significantly alters or degrades existing wetland acreage or functions;

b. Filling or dumping;

c. Permanent flooding or impounding; or

d. New activities that cause significant alteration or degradation of existing wetland acreage or functions.

S. Duty to reapply. Any permittee desiring to continue a previously authorized activity after the expiration date of the VWP general permit shall comply with the provisions in 9VAC25-690-27.

NOTICE: The following forms used in administering the regulation were filed by the agency. The forms are not being published; however, online users of this issue of the Virginia Register of Regulations may click on the name of a form with a hyperlink to access it. The forms are also available from the agency contact or may be viewed at the Office of the Registrar of Regulations, General Assembly Building, 2nd Floor, Richmond, Virginia 23219.

FORMS (9VAC25-690)

Department of Environmental Quality Water Division Permit Application Fee Form (rev. 10/14)

~~Joint Permit Application for Activities in Waters and Wetlands of the Commonwealth of Virginia (eff. 10/04)~~

Joint Permit Application for Projects of Tidewater, Virginia ~~(eff. 10/04)~~ (eff. 03/14)

Monthly Reporting of Impacts Less than or Equal to One-Tenth Acre Statewide (eff. 08/07)

Standard Joint Permit Application for Activities in Waters and Wetlands of the Commonwealth of Virginia (eff. 03/14)

Virginia Department of Transportation Inter-Agency Coordination Meeting Joint Permit Application ~~(eff. 10/02)~~ (eff. 06/08)

DOCUMENTS INCORPORATED BY REFERENCE (9VAC25-690)

Classification of Wetlands and Deepwater Habitats of the United States, Cowardin, Lewis M. II, et al., United States Fish and Wildlife Service, December 1979, Reprinted 1992

Guidelines for Specification of Disposal Sites for Dredged of Fill Material, 40 CFR Part 230 (Federal Register December 24, 1980)

Virginia Erosion and Sediment Control Handbook, Third Edition, 1992, Department of Conservation and Recreation

Virginia Invasive Plant Species List, Natural Heritage Technical Document 14-11, Department of Conservation and Recreation, Division of Natural Heritage (2014)

Virginia Stormwater Management Handbook, First Edition, 1999, Department of Conservation and Recreation

VA.R. Doc. No. R14-4060; Filed October 23, 2015, 10:01 a.m.

# TITLE 11. GAMING

## CHARITABLE GAMING BOARD

### Proposed Regulation

Title of Regulation: **11VAC15-40. Charitable Gaming Regulations (amending 11VAC15-40-10, 11VAC15-40-30, 11VAC15-40-50 through 11VAC15-40-80, 11VAC15-40-110, 11VAC15-40-120, 11VAC15-40-130, 11VAC15-40-147, 11VAC15-40-150; adding 11VAC15-40-440 through 11VAC15-40-520, 11VAC15-40-600, 11VAC15-40-610; repealing 11VAC15-40-420, 11VAC15-40-430).**

Statutory Authority: § 18.2-340.15 of the Code of Virginia.

Public Hearing Information:

December 8, 2015 - 10 am - American Legion Post 177, 3939 Oak Street, Fairfax, VA 22030

Public Comment Deadline: January 15, 2016.

Agency Contact: Michael Menefee, Program Manager, Charitable and Regulatory Programs, Department of Agriculture and Consumer Services, 102 Governor Street, Richmond, VA 23219, telephone (804) 786-3983, FAX (804) 371-7479, or email michael.menefee@vdacs.virginia.gov.

Basis: Section 18.2-340.15 of the Code of Virginia authorizes the Charitable Gaming Board to prescribe regulations and conditions under which charitable gaming is to be conducted in Virginia. Chapters 36 and 350 of the 2013 Acts of Assembly amended the charitable gaming statute to require the board to adopt regulations pertaining to a new bingo game called "network bingo."

Purpose: Chapters 36 and 350 of the 2013 Acts of Assembly amended the charitable gaming statute to require the board to adopt regulations pertaining to a new bingo game called "network bingo." This regulatory action is intended to promulgate the required network bingo regulations. This action also seeks to amend provisions of the current regulations that need clarification. Charitable gaming organizations, which are nonprofits, use gaming revenues to support numerous community programs that often benefit and promote the welfare of the citizens of the Commonwealth.

Substance: Chapters 36 and 350 of the 2013 Acts of Assembly amended the charitable gaming statute to require the board to adopt regulations that prescribe the conditions under which organizations may conduct network bingo. These regulations will also establish a percentage of the

proceeds derived from network bingo sales that must be allocated to (i) prize pools, (ii) the organization conducting the network bingo, and (iii) the network bingo provider. The regulations will establish procedures for retaining and the ultimate distribution of any unclaimed prize.

This regulatory action will also include amendments to clarify existing provisions in the regulations in order to address questions that have arisen subsequent to November 2012, when 11VAC15-40 became effective.

Issues: Network bingo is intended to provide charitable gaming organizations with a new option to stimulate greater attendance at their gaming events and increase gaming revenues.

Special interest groups that are concerned with the expansion of gaming in the Commonwealth typically monitor the progress of all regulations pertaining to charitable gaming. The department is not aware of specific concerns with the proposed regulations.

This regulatory action poses no disadvantages to the public or the Commonwealth.

Department of Planning and Budget's Economic Impact Analysis:

Summary of the Proposed Amendments to Regulation. Pursuant to a 2013 legislative mandate,[1] the Charitable Gaming Board (Board) proposes to prescribe the conditions, procedures, and rules under which charitable organizations may run network bingo. Network bingo is a concept in which several locations throughout the Commonwealth are networked together to play a single bingo game for a chance at winning a large prize. A portion of the money generated from the network bingo game is pooled together to create the large prize.

Result of Analysis. Whether the benefits exceed the costs depend on the policy views of the observer.

Estimated Economic Impact. Network bingo allows games in several locations throughout the Commonwealth to be counted as a single bingo game to increase the chances of winning a larger prize. A portion of the money generated from the network bingo game is pooled together to create the large prize. Network bingo would be an entirely new bingo offering in Virginia. Charitable gaming organizations will not be required to offer network bingo to their gaming patrons. Organizations that choose to do so would need to contract with registered suppliers to secure the required equipment. According to the Department of Agriculture and Consumer Services, there is no historical information to estimate how much providers will charge the organizations for the equipment to support network bingo and for the maintenance of such equipment, or how those costs would be passed on to the gaming patrons.

Since offering network bingo would be optional, the proposed introduction of the game will not be costly for charitable organizations. The higher potential payouts may encourage additional players to participate in charitable gaming or may entice existing participants to play more. Thus, there may be additional revenue raised for charitable organizations. Firms that provide network bingo equipment and services would likely benefit by being able to sell more of their products and services.

On the other hand, some citizens consider gambling to be a negative for society. To the extent that the introduction of network bingo may increase the participation in gambling, these citizens would likely consider the proposed addition of network bingo to produce a net cost. Thus, whether or not the proposed amendments to this regulation produce a net benefit depends upon the policy views of the observer.

Businesses and Entities Affected. Currently, there are approximately 330 charitable organizations that are permitted to conduct gaming.[2] There is no historical information to estimate how many network bingo providers will enter the market, but the Department of Agriculture and Consumer Services estimates that the majority of the network bingo providers are small businesses.

Localities Particularly Affected. The proposed amendments do not disproportionately affect particular localities.

Projected Impact on Employment. The proposed amendments may moderately increase employment at firms that provide goods and services for network bingo.

Effects on the Use and Value of Private Property. The proposed amendments will provide the potential for additional business for firms that provide network bingo products and services. The value of some of these firms may increase.

Small Businesses: Costs and Other Effects. The proposed amendments will provide the potential for additional business for small firms that provide network bingo. The proposed amendments do not increase costs.

Small Businesses: Alternative Method that Minimizes Adverse Impact. The proposed amendments are unlikely to adversely affect small businesses.

Real Estate Development Costs. The proposed amendments are unlikely to affect real estate development costs.

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[1] Chapters 36 and 350 of the 2013 Acts of Assembly.

[2] Data Source: Department of Agriculture and Consumer Services

Agency's Response to Economic Impact Analysis: The agency concurs with the analysis of the Department of Planning and Budget.

Summary:

*Pursuant to Chapters 36 and 350 of the 2013 Acts of Assembly, the proposed amendments establish a new bingo game called "network bingo." The regulations (i) prescribe the conditions under which organizations may conduct network bingo; (ii) establish a percentage of the proceeds derived from network bingo sales that must be allocated to*

*prize pools, the organization conducting the network bingo, and the network bingo provider; and (iii) establish procedures for retaining and distribution of any unclaimed prize.*

Part I
Definitions

**11VAC15-40-10. Definitions.**

In addition to the definitions contained in § 18.2-340.16 of the Code of Virginia, the words and terms below when used in this regulation shall have the following meanings unless the context clearly indicates otherwise:

"Agent" means any person authorized by a supplier, network bingo provider, or manufacturer to act for or in place of such supplier, network bingo provider, or manufacturer.

"Board" means the Virginia Charitable Gaming Board.

"Board of directors" means the board of directors, managing committee, or other supervisory body of a qualified organization.

"Calendar day" means the period of 24 consecutive hours commencing at 12:00:01 a.m. and concluding at midnight.

"Calendar week" means the period of seven consecutive calendar days commencing at 12:00:01 a.m. on Sunday and ending at midnight the following Saturday.

"Cash" means United States currency or coinage.

"Commissioner" means the Commissioner of the Virginia Department of Agriculture and Consumer Services.

"Concealed face bingo card" means a nonreusable bingo card constructed to conceal the card face.

"Conduct" means the actions associated with the provision of a gaming operation during and immediately before or after the permitted activity, which may include, but not be limited to (i) selling bingo cards or packs, electronic bingo devices, instant bingo or pull-tab cards, electronic pull-tab devices, electronic pull-tabs, network bingo cards, or raffle tickets; (ii) calling bingo games; (iii) distributing prizes; and (iv) any other services provided by game workers.

"Control program" means software involved in any critical game function.

"Daubing" means covering a square containing a number called with indelible ink or otherwise marking a number called on a card or an electronic facsimile of a card.

"Deal" means each separate package or series of packages consisting of one game of instant bingo, pull-tabs, or seal cards with the same serial number.

"Decision bingo" means a bingo game where the cost to a player to play is dependent on the number of bingo numbers called and the prize payout is in direct relationship to the number of participants and the number of bingo numbers called, but shall not exceed statutory prize limits for a regular bingo game.

"Department" means the Virginia Department of Agriculture and Consumer Services~~, Division of Consumer Protection, Office of Charitable Gaming~~.

"Designator" means an object used in the bingo number selection process, such as a ping-pong ball, upon which bingo letters and numbers are imprinted.

"Discount" means any reduction in cost of admission or game packs or any other purchases through use of coupons, free packs, or other similar methods.

"Disinterested player" means a player who is unbiased.

"Disposable paper card" means a nonreusable, paper bingo card manufactured with preprinted numbers.

"Distributed pull-tab system" means a computer system consisting of a computer or computers and associated equipment for the use of distributing a finite number of electronic pull-tabs, a certain number of which entitle a player to prize awards at various levels.

"Door prize" means any prize awarded by the random drawing or random selection of a name or number based solely on attendance at a charitable gaming activity.

"Electronic bingo device" means an electronic unit that uses proprietary software or hardware or, in conjunction with commonly available software and computers, displays facsimiles of bingo cards and allows a player to daub such cards or allows for the automatic daubing of such cards.

"Electronic games of chance system" means a distributed pull-tab system.

"Electronic pull-tabs" means an electronic version of a single instant bingo card or pull-tab. An electronic pull-tab is a predetermined game outcome in electronic form, distributed on-demand from a finite number of game outcomes by a distributed pull-tab system.

"Electronic pull-tab device" means an electronic unit used to facilitate the play of an electronic pull-tab. An electronic pull-tab device may take the form of an upright cabinet or a handheld device or may be of any other composition as approved by the department.

"Equipment and video systems" means equipment that facilitates the conduct of charitable gaming such as ball blowers, flashboards, electronic verifiers, and replacement parts for such equipment. Equipment and video systems shall not include dispensing devices, electronic bingo devices, and electronic pull-tab devices.

"Event game" means a bingo game that is played using instant bingo cards or pull-tabs in which the winners include both instant winners and winners who are determined by the random draw of a bingo ball, the random call of a bingo number, or the use of a seal card, and that is sold in its entirety and played to completion during a single bingo session.

"Fiscal year" or "annual reporting period" means the 12-month period beginning January 1 and ending December 31 of any given year.

"Flare" means a printed or electronic display that bears information relating to the name of the manufacturer or logo, name of the game, card count, cost per play, serial number, number of prizes to be awarded, and specific prize amounts in a deal of instant bingo, pull-tab, seal cards, or electronic pull-tabs.

"Free space number," "perm number," "center number," "card number," or "face number" means the number generally printed in the center space of a bingo card that identifies the unique pattern of numbers printed on that card.

"Game program" means a written list of all games to be played including, but not limited to, the sales price of all bingo paper, network bingo cards, and electronic bingo devices, pack configuration, prize amounts to be paid during a session for each game, and an indication whether prize amounts are fixed ~~or are~~ based on attendance.

"Game set" means the entire pool of electronic pull-tabs that contains predefined and randomized game results assigned under a unique serial number. This term is equivalent to "deal" or "deck."

"Game subset" means a division of a game set into equal sizes.

"Immediate family" means one's spouse, parent, child, sibling, grandchild, grandparent, mother or father-in-law, or stepchild.

"Interested persons" means the president, an officer, or a ~~bingo~~ game manager of any qualified organization that is exempt or is a permit applicant or holds a permit to conduct charitable gaming; or the owner, director, officer, or partner of an entity engaged in supplying charitable gaming supplies to organizations, engaged in providing network bingo supplies to organizations, or engaged in manufacturing any component of a distributed pull-tab system that is distributed in the Commonwealth.

"IRS" means the ~~United States~~ U.S. Internal Revenue Service.

"Management" means the provision of oversight of a gaming operation, which may include, but is not limited to, the responsibilities of applying for and maintaining a permit or authorization; compiling, submitting, and maintaining required records and financial reports; and ensuring that all aspects of the operation are in compliance with all applicable statutes and regulations.

"Manufacturer" means a person who or entity that assembles from raw materials or subparts a completed piece of bingo equipment or supplies, a distributed pull-tab system, or other charitable gaming equipment or supplies. "Manufacturer" also means a person who or entity that modifies, converts, adds, or removes parts to or from bingo equipment or supplies, a distributed pull-tab system, or other charitable gaming equipment or supplies to further their promotion or sale for the conduct of charitable gaming.

~~"OCG number" means a unique identification number issued by the department.~~

"Operation" means the activities associated with production of a charitable gaming activity, which may include, but is not limited to, (i) the direct on-site supervision of the conduct of charitable gaming; (ii) coordination of game workers; and (iii) all responsibilities of charitable gaming designated by the organization's management.

"Organization number" means a unique identification number issued by the department.

"Owner" means any individual with financial interest of 10% or more in a supplier, network bingo provider, or a manufacturer of a distributed pull-tab system distributed in the Commonwealth.

"Pack" means sheets of bingo paper or electronic facsimiles assembled in the order of games to be played. This shall not include any raffle.

"Prize" means cash, merchandise, certificate, or other item of value awarded to a winning player.

"Progressive bingo" means a bingo game in which the prize is carried forward to the next game if a predetermined pattern is not completed within a specified number of bingo numbers called.

"Progressive seal card" means a seal card game in which a prize is carried forward to the next deal if not won when a deal is completed.

"Remuneration" means payment in cash or the provision of anything of value for goods provided or services rendered.

"Seal card" means a board or placard used in conjunction with a deal of the same serial number that contains one or more concealed areas that, when removed or opened, reveal a predesignated winning number, letter, or symbol located on that board or placard.

"Selection device" means a manually or mechanically operated device used to randomly select bingo numbers.

"Serial number" means a unique number assigned by the manufacturer to each set of bingo cards or network bingo cards; each instant bingo, pull-tab, or seal card in a deal; each electronic bingo device; each door prize ticket; each game set and game subset of electronic pull-tabs; and each electronic pull-tab device.

"Series number" means the number of unique card faces contained in a set of disposable bingo paper cards, network bingo cards, or bingo hard cards. A 9000 series, for example, has 9000 unique faces.

"Session" means a period of time during which one or more bingo games are conducted, and during which instant bingo, pull-tabs, seal cards, or electronic pull-tabs may be sold and redeemed. A session begins with the sale of instant bingo,

pull-tabs, seal cards, electronic pull-tabs, electronic bingo devices, network bingo cards, or bingo cards or packs.

"Treasure chest" means a raffle including a locked treasure chest containing a prize that a participant, selected through some other authorized charitable game, is afforded the chance to select from a series of keys a predetermined key that will open the locked treasure chest to win a prize.

"Use of proceeds" means the use of funds derived by an organization from its charitable gaming activities, which are disbursed for those lawful religious, charitable, community, or educational purposes. This includes expenses relating to the acquisition, construction, maintenance, or repair of any interest in the real property involved in the operation of the organization and used for lawful religious, charitable, community, or educational purposes.

"Voucher" means a printed ticket tendered to the player, upon request, for any unused game plays and/or winnings that remain on the electronic pull-tab device.

"WINGO" means a variation of a traditional bingo game that uses visual devices rather than a verbal caller and is intended for play by hearing impaired persons.

**11VAC15-40-30. Permit application process.**

A. Any organization anticipating gross gaming receipts that exceed the amount set forth in § 18.2-340.23 of the Code of Virginia shall complete a department-prescribed application to request issuance or renewal of an annual permit to conduct charitable gaming. Organizations shall submit a nonrefundable fee payable to the Treasurer of Virginia in the amount of $200 with the application, unless the organization is exempt from such fee pursuant to § 18.2-340.23 of the Code of Virginia.

B. The department may initiate action against any organization exempt from permit requirements when it reasonably believes the organization is not in compliance with the provisions of charitable gaming laws or this chapter.

C. Permit holders requiring a special permit pursuant to § 18.2-340.27 E of the Code of Virginia shall convey their request on a form prescribed by the department. Organizations shall submit a fee payable to the Treasurer of Virginia in the amount of $50 with the request for a special permit, unless the organization is exempt from such fee pursuant to § 18.2-340.23 of the Code of Virginia.

D. Permits shall be valid for a period of one year from the date of issuance or for a period specified on the permit. The department may issue permits for periods of less than one year.

E. Permits shall be granted only after a background investigation of an organization or interested persons, or both, to ensure public safety and welfare as required by § 18.2-340.25 of the Code of Virginia. Investigations shall consider the nature, the age and severity, and the potential harm to public safety and welfare of any criminal offenses. The investigation may include, but shall not be limited to, the following:

1. A search of criminal history records for the chief executive officer and chief financial officer of the organization. Information and authorization to conduct these records checks shall be provided in the permit application. In addition, the department shall require that the organization provides assurances that all other members involved in the management, operation, or conduct of charitable gaming meet the requirements of subdivision 13 of § 18.2-340.33 of the Code of Virginia. Applications may be denied if:

a. Any person participating in the management of any charitable gaming has ever been:

(1) Convicted of a felony; or

(2) Convicted of any misdemeanor involving fraud, theft, or financial crimes within the preceding five years.

b. Any person participating in the conduct of charitable gaming has been:

(1) Convicted of any felony in the preceding 10 years; or

(2) Convicted of any misdemeanor involving fraud, theft, or financial crimes within the preceding five years;

2. An inquiry as to whether the organization has been granted tax-exempt status pursuant to § 501(c) by the Internal Revenue Service and is in compliance with IRS annual filing requirements;

3. An inquiry as to whether the organization has entered into any contract with, or has otherwise employed for compensation, any persons for the purpose of organizing or managing, operating, or conducting any charitable gaming activity;

4. Inquiries into the finances and activities of the organization and the sources and uses of funds; and

5. Inquiries into the level of community or financial support to the organization and the level of community involvement in the membership and management of the organization.

F. The permit application for an organization that has not previously held a permit shall include:

1. A copy of the articles of incorporation, bylaws, charter, constitution, or other appropriate organizing document;

2. A copy of the determination letter issued by the IRS under § 501(c) of the Internal Revenue Code, if appropriate, or a letter from the national office of an organization indicating the applicant organization is in good standing and is currently covered by a group exemption ruling. A letter of good standing is not required if the applicable national or state office has furnished the department with a listing of member organizations in good standing in the Commonwealth as of January 1 of each year and has agreed to promptly provide the department any changes to the listing as they occur;

3. A copy of the written lease or proposed written lease agreement and all other agreements if the organization rents or intends to rent a facility where bingo is or will be conducted. Information on the lease shall include name, address, and phone number of the landlord; maximum occupancy of the building; and the rental amount per session; and

4. An authorization by an officer or other appropriate official of the organization to permit the department to determine whether the organization has been investigated or examined by the IRS in connection with charitable gaming activities during the previous three years.

G. Copies of minutes of meetings of the organization and any contracts with landlords ~~or,~~ suppliers, network bingo providers, or manufacturers to which the organization is or may be a party may be requested by the department prior to rendering a permitting decision.

H. Organizations applying to renew a permit previously issued by the department shall submit articles of incorporation, bylaws, charter, constitution, or other organizing document, and IRS determination letter only if there are any amendments or changes to these documents that are directly related to the management, operation, or conduct of charitable gaming.

I. Organizations may request permits to conduct joint bingo games as provided in § 18.2-340.29 of the Code of Virginia.

1. In the case of a joint game, each organization shall file a permit application.

2. The nonrefundable permit fee for joint games shall be a total of $200. However, no permit application fee is due if each of the organizations is exempt from the application fee pursuant to § 18.2-340.23 of the Code of Virginia.

3. A single permit shall be issued in the names of all the organizations conducting a joint game. All restrictions and prohibitions applying to single organizations shall apply to qualified organizations jointly conducting bingo games pursuant to § 18.2-340.29 of the Code of Virginia.

4. No charitable gaming shall be conducted prior to the issuance of a joint permit.

5. Applications for joint games shall include an explanation of the division of manpower, costs, and proceeds for the joint game.

J. An organization wishing to change dates, times, or locations of its charitable gaming shall request an amendment to its permit. Amendment requests shall be made in writing on a form prescribed by the department in advance of the proposed effective date.

K. An organization may cancel its charitable gaming due to inclement weather, disasters, or other circumstances outside the organization's control without an amendment to its permit.

L. An organization may sell raffle tickets for a drawing to be held outside of the Commonwealth of Virginia in the United States provided:

1. The raffle is conducted by the organization in conjunction with a meeting outside the Commonwealth of Virginia or with another organization that is licensed to conduct raffles outside the Commonwealth of Virginia;

2. The raffle is conducted in accordance with these regulations and the laws and regulations of the state where the drawing is to be held; and

3. The portion of the proceeds derived from the sale of raffle tickets in the Commonwealth is reported to the department.

M. Any permitted organization that ceases to conduct charitable gaming shall immediately notify the department in writing and provide the department a report as to the disposition of all unused gaming supplies on a form prescribed by the department.

Article 2

Conduct of Games, Rules of Play, Electronic Bingo

**11VAC15-40-50. Conduct of bingo, instant bingo, pull-tabs, seal cards, event games, network bingo, and raffles.**

A. Organizations subject to this chapter shall post their permit at all times on the premises where charitable gaming is conducted.

B. No individual shall provide any information or engage in any conduct that alters or is intended to alter the outcome of any charitable game.

C. Individuals under 18 years of age may play bingo provided such persons are accompanied by a parent or legal guardian. It shall be the responsibility of the organization to ensure that such individuals are eligible to play. An organization's house rules may further limit the play of bingo or purchase of raffle tickets by minors.

D. Individuals under the age of 18 may sell raffle tickets for a qualified organization raising funds for activities in which they are active participants.

E. No individual under the age of 18 may participate in the management or operation of bingo games. Individuals 14 through 17 years of age may participate in the conduct of a bingo game provided the organization permitted for charitable gaming obtains and keeps on file written parental consent from the parent or legal guardian and verifies the date of birth of the minor. An organization's house rules may further limit the involvement of minors in the conduct of bingo games.

F. No qualified organization shall sell any network bingo cards, instant bingo, pull-tab, seal card, or electronic pull-tab to any individual under 18 years of age. No individual under 18 years of age shall play or redeem any network bingo cards, instant bingo, pull-tab, seal card, or electronic pull-tab.

G. Unless otherwise prohibited by the Code of Virginia or this chapter, nonmembers who are under the direct

supervision of a bona fide member may participate in the conduct of bingo.

H. All game workers shall have in their possession a picture identification, such as a driver's license or other government-issued identification, and shall make the picture identification available for inspection upon request by a department agent while participating in the management, operation, or conduct of a bingo game.

I. A game manager who is a bona fide member of the organization and is designated by the organization's management as the person responsible for the operation of the bingo game during a particular session shall be present any time a bingo game is conducted.

J. Organizations shall ensure that all charitable gaming equipment is in working order before charitable gaming activities commence.

K. Any organization selling bingo, instant bingo, pull-tabs, seal cards, network bingo supplies, or electronic pull-tabs shall:

1. Maintain a supplier's, network bingo provider's, or manufacturer's invoice or a legible copy thereof at the location where the gaming is taking place and cards are sold. The original invoice or legible copy shall be stored in the same storage space as the gaming supplies. All gaming supplies shall be stored in a secure area that has access limited only to bona fide members of the organization; and

2. Pay for all gaming supplies only by a check drawn on the charitable gaming account of the organization.

A complete inventory of all such gaming supplies shall be maintained by the organization on the premises where the gaming is being conducted.

L. A bingo session game worker may receive complimentary food and nonalcoholic beverages provided on premises, as long as the retail value of such food and beverages does not exceed $15 for each session.

M. Permitted organizations shall not commingle records, supplies, or funds from permitted activities with those from instant bingo, pull-tabs, seal cards, or electronic pull-tabs sold in social quarters in accordance with § 18.2-340.26:1 of the Code of Virginia.

N. Individuals who are not members of an organization or are members who do not participate in any charitable gaming activities may be paid reasonable fees for preparation of quarterly and annual financial reports.

O. Except as allowed pursuant to § 18.2-340.34:1 of the Code of Virginia, no free packs, free electronic bingo devices, free network bingo cards, discounts, or remuneration in any other form shall be provided directly or indirectly to game workers, members of their family, or individuals residing in their household. The reduction of tuition, dues, or any fees or payments due as a result of a member or shareholder, or anyone in their household, working bingo games or raffles is prohibited.

P. Individuals providing security for an organization's charitable gaming activity shall not participate in the charitable gaming activity and shall not be compensated with charitable gaming supplies or network bingo cards or with rentals of electronic bingo devices or electronic pull-tab devices.

Q. No organization shall award any prize money or any merchandise valued in excess of the amounts specified by the Code of Virginia.

R. Multiple bingo sessions shall be permitted in a single premises as long as the sessions are distinct from one another and are not used to advertise or do not result in the awarding of more in prizes than is permitted for a single qualified organization. All leases for organizations to conduct charitable gaming in a single premises shall ensure each session is separated by an interval of at least 30 minutes. Bingo sales for the subsequent session may take place during the 30-minute break once the building is cleared of all patrons and workers from the previous session.

S. All bingo and instant bingo, pull-tabs, seal card, or electronic pull-tab sales, play, and redemption must occur within the time specified on the charitable gaming permit. Network bingo card sales must occur within the time specified on the charitable gaming permit.

T. Instant bingo, pull-tabs, seal cards, or electronic pull-tabs shall only be sold in conjunction with a bingo session, except as authorized by § 18.2-340.26:1 or 18.2-340.26:2 of the Code of Virginia. No instant bingo, pull-tabs, seal card, or electronic pull-tab sales shall take place more than two hours before the selection of the first ball for the first bingo game or more than two hours after the selection of the last ball for the last bingo game. If multiple sessions are held at the same location, no instant bingo, pull-tab, seal card, or electronic pull-tab sales shall be conducted during the required 30-minute break between sessions. The department may take action if it believes that a bingo session is not legitimate or is being conducted in a manner such that instant bingo, pull-tabs, seal cards, or electronic pull-tabs are not being sold in conjunction with a bingo session.

U. Only a game worker for a qualified organization may rent, exchange, or otherwise provide electronic bingo devices or electronic pull-tab devices to players.

V. A qualified organization shall conduct only bingo games, network bingo, and raffles listed on a game program for that session. The program shall list all prize amounts. If the prize amounts are determined by attendance or at the end of a game, the game program shall list the attendance required for the prize amount or disclose that prizes shall be determined at the end of a game and the method for determining the prize amount. In such case, the organization shall announce the prize amount at the end of the game. The percentage of the gross receipts from network bingo cards allocated to the prize pool shall be listed on the game program along with the maximum allowable prize amount for network bingo.

W. A qualified organization selling instant bingo, pull-tabs, seal cards, or electronic pull-tabs shall post a flare provided by the manufacturer at the location where such cards are sold. All such sales and prize payouts shall be in accordance with the flare for that deal.

X. Only qualified organizations, facilities in which qualified organizations play bingo, network bingo providers, and suppliers permitted by the department shall advertise a bingo game. Providing players with information about network bingo or bingo games through printed advertising is permitted, provided the name of the qualified organization shall be in a type size equal to or larger than the name of the premises, the hall, or the word "bingo." Printed advertisements shall identify the use of proceeds percentage reported in the past quarter or fiscal year.

Y. Raffles that award prizes based on a percentage of gross receipts shall use prenumbered tickets.

Z. The following rules shall apply to instant bingo, pull-tab, or seal card dispensing devices:

1. A dispensing device shall only be used at a location and time during which a qualified organization holds a permit to conduct charitable gaming. Only cards purchased by an organization to be used during the organization's charitable gaming activity shall be in the dispensing device.

2. Keys to the dispensing area and coin/cash box shall be in the possession and control of the game manager or designee of the organization's board of directors at all times. Keys shall at all times be available at the location where the dispensing device is being used.

3. The game manager or designee shall provide access to the dispensing device to a department agent for inspection upon request.

4. Only a game worker of an organization may stock the dispensing device, remove cash, or pay winners' prizes.

AA. Organizations shall only rent, lease, or purchase charitable gaming supplies from a supplier, network bingo supplies from a network bingo provider, or electronic pull-tabs from a manufacturer or supplier who has a current permit issued by the department.

BB. An organization shall not tamper with bingo paper received from a supplier.

CC. The total amount of all discounts given by any organization during any fiscal year shall not exceed 1.0% of the organization's gross receipts.

**11VAC15-40-60. Rules of play.**

A. Each organization shall adopt "house rules" regarding conduct of the ~~game~~ session. The "house rules" for the network bingo game shall be adopted by a mutual agreement among all of the organizations participating in a particular network bingo or by the network bingo provider. Such rules shall be consistent with the provisions of the law and this chapter. "House rules" shall be conspicuously posted or printed on the game program.

B. All players shall be physically present at the location where the bingo numbers for a bingo game are drawn to play the game or to claim a prize, except when the player, who has purchased a network bingo card, is participating in network bingo. Seal card prizes that can only be determined after a seal is removed or opened must be claimed within 30 days of the close of a deal. All other prizes must be claimed on the game date.

C. The following rules of play shall govern the sale of instant bingo, pull-tabs, and seal cards:

1. No cards that have been marked, defaced, altered, tampered with, or otherwise constructed in a manner that tends to deceive the public or affect the chances of winning or losing shall be placed into play.

2. Winning cards shall have the winning symbol or number defaced or punched immediately after redemption by the organization's authorized representative.

3. An organization may commingle unsold instant bingo cards and pull-tabs with no more than one additional deal. The practice of commingling deals shall be disclosed to the public via house rules or in a similar manner. Seal card deals shall not be commingled.

4. If a deal is not played to completion and unsold cards remain, the remaining cards shall be sold at the next session the same type of ticket is scheduled to be sold. If no future date is anticipated, the organization shall, after making diligent efforts to sell the entire deal, consider the deal closed or completed. The unsold cards shall be retained for a minimum of three years following the close of the fiscal year and shall not be opened.

5. All seal card games purchased shall contain the sign-up sheet, the seals, and the cards packaged together in each deal.

6. Progressive seal card prizes not claimed within 30 days shall be carried forward to the next progressive seal card game in progress and paid to the next progressive seal card game prize winner.

D. No one involved in the conduct of bingo may play bingo, play network bingo, or purchase network bingo cards at any session they have worked or intend to work. No one involved in the sale or redemption of any instant bingo, pull-tabs, seal cards, or electronic pull-tabs may purchase directly or through others instant bingo, pull-tab, seal card, or electronic pull-tab products from organizations they assist on the day they have worked or from any deal they have helped sell or redeem, whichever occurs later.

E. Electronic bingo.

1. Electronic bingo devices may be used by bingo players in the following manner:

a. Players may input into the device each number called or the device may automatically daub each number as the number is called;

b. Players must notify the game operator or caller of a winning pattern of bingo by a means other than use of the electronic bingo device;

c. Players are limited to playing a maximum of 54 card faces per device per game;

d. Electronic bingo devices shall not be reserved for players. Each player shall have an equal opportunity to use the available electronic bingo devices on a first come, first served basis;

e. Each electronic bingo device shall produce a player receipt with the organization name, date, time, location, sequential transaction or receipt number, number of electronic bingo cards loaded, cost of electronic bingo cards loaded, and date and time of the transaction. Images of cards or faces stored in an electronic bingo device must be exact duplicates of the printed faces if faces are printed;

f. Department agents may examine and inspect any electronic bingo device and related system. Such examination and inspection shall include immediate access to the electronic bingo device and unlimited inspection of all parts and associated systems and may involve the removal of equipment from the game premises for further testing;

g. All electronic bingo devices must be loaded or enabled for play on the premises where the game will be played;

h. All electronic bingo devices shall be rented or otherwise provided to a player only by an organization and no part of the proceeds of the rental of such devices shall be paid to a landlord, or his employee, agent, or member of his immediate family; and

i. If a player's call of a bingo is disputed by another player, or if a department agent makes a request, one or more cards stored on an electronic bingo device shall be printed by the organization.

2. Players may exchange a defective electronic bingo device for another electronic bingo device provided a disinterested player verifies that the device is not functioning. A disinterested player shall also verify that no numbers called for the game in progress have been keyed into the replacement electronic bingo device prior to the exchange.

F. The following rules of play shall govern the conduct of raffles:

1. Before a prize drawing, each stub or other detachable section of each ticket sold shall be placed into a receptacle from which the winning tickets shall be drawn. The receptacle shall be designed so that each ticket placed in it has an equal chance to be drawn.

2. All prizes shall be valued at fair market value.

G. The following rules shall apply to "decision bingo" games:

1. Decision bingo shall be played on bingo cards in the conventional manner.

2. Players shall enter a game by paying a predetermined amount for each card face in play.

3. Players shall pay a predetermined fee for each set of three bingo numbers called for each card in play.

4. The prize amount shall be the total of all fees not to exceed the prize limit set forth for regular bingo in § 18.2-340.33 of the Code of Virginia. Any excess funds shall be retained by the organization.

5. The predetermined amounts in subdivisions 2 and 3 of this subsection shall be printed in the game program. The prize amount for a game shall be announced before the prize is paid to the winner.

H. The following rules shall apply to "treasure chest" games:

1. The organization shall list the treasure chest game on the bingo game program as a "Treasure Chest Raffle."

2. The organization shall have house rules posted that describe how the game is to be played.

3. The treasure chest participant shall only be selected through some other authorized charitable game at the same bingo session.

4. The organization shall account for all funds as treasure chest/raffle sales on the session reconciliation form.

5. If the player does not open the lock on the treasure chest, the game manager or his designee shall proceed to try every key until the correct key opens the treasure chest lock to show all players that one of the keys will open the lock.

I. The following rules shall apply to progressive bingo games:

1. Bingo paper sold for use in progressive bingo games shall conform to the standards set forth in 11VAC15-40-130.

2. Organizations shall not include in admission packs the bingo paper intended for use in progressive bingo games.

3. Any progressive bingo game, its prize, and the number of bingo numbers to be called shall be clearly announced before the progressive bingo game is played and shall be posted on the premises where the progressive bingo game is played during each session that a progressive bingo game is played.

4. Pricing for a progressive bingo game card or sheet shall be listed on the game program.

5. If the predetermined pattern is not covered within the predetermined number of bingo numbers to be called, then the number of bingo numbers called will increase by one

number for each subsequent session the progressive bingo game is played.

6. If the predetermined pattern is not covered within the predetermined number of bingo numbers to be called for that progressive bingo game, then the game will continue as a regular bingo game until the predetermined pattern is covered and a regular bingo prize is awarded.

7. The prize for any progressive bingo game shall be in accordance with the provisions of subdivision 10 of § 18.2-340.33 of the Code of Virginia.

J. The following rules shall apply to "WINGO":

1. "WINGO" shall be played only for the hearing-impaired players.

2. "WINGO" shall utilize a visual device such as an oversized deck of cards in place of balls selected from a blower.

3. A caller must be in an area visible to all players and shall randomly select cards or other visual devices one at a time and display them so that all players can see them.

4. The organization must have house rules for "WINGO" and the rules shall identify how players indicate that they have won.

5. All financial reporting shall be consistent with reporting for a traditional bingo game.

K. The following rules of play shall apply to event games:

1. No instant bingo cards or pull-tabs that have been marked, defaced, altered, tampered with, or otherwise constructed in a manner that tends to deceive the public or affect the chances of winning or losing shall be placed into play.

2. Instant bingo cards and pull-tabs used in an event game shall not be offered for sale or sold at a purchase price other than the purchase price indicated on the flare for that particular deal.

3. The maximum prize amount for event games shall not exceed the amount set forth in subdivision 9 of § 18.2-340.33 of the Code of Virginia for instant bingo, pull-tab, or seal card.

4. A sign-up sheet is not required for event games in which the winner or winners are determined using a seal card.

5. Organizations shall determine the winner or winners of event games during the same bingo session in which the instant bingo cards or pull-tabs are sold.

6. An authorized representative of the organization shall deface or punch the winning instant bingo cards or winning pull-tabs immediately after redemption.

7. If unsold bingo cards or unsold pull-tabs remain, the unsold cards shall be retained for a minimum of three years following the close of the fiscal year and shall not be opened.

Article 3
Bank Accounts, Recordkeeping, Financial Reporting, Audits, Fees

**11VAC15-40-70. Bank accounts.**

A. A qualified organization shall maintain a charitable gaming bank account that is separate from any other bank account and all gaming receipts shall be deposited into the charitable gaming bank account.

B. Disbursements for expenses other than prizes and reimbursement of meal expenses shall be made by check directly from a charitable gaming account. However, expenses related to a network bingo game may be disbursed through an electronic fund transfer to the network bingo provider provided that such an arrangement is agreed upon by both the qualified organization and the network bingo provider. A written agreement specifying the terms of this arrangement shall be required prior to any electronic fund transfer occurring between the two parties.

C. All charitable gaming bank account records, including but not limited to monthly bank statements, canceled checks or facsimiles thereof, and reconciliations, shall be maintained for a minimum of three years following the close of a fiscal year.

D. All receipts from each session of bingo games and instant bingo, network bingo games, pull-tabs, seal cards, or electronic pull-tabs shall be deposited by the second business day following the session at which they were received.

E. Raffle proceeds shall be deposited into the qualified organization's charitable gaming bank account no later than the end of the calendar week following the week during which the organization received the proceeds.

**11VAC15-40-80. Recordkeeping.**

A. In addition to the records required by § 18.2-340.30 D of the Code of Virginia, qualified organizations conducting bingo shall maintain a system of records for a minimum of three years from the close of the fiscal year, unless otherwise specified, for each gaming session on forms prescribed by the department, or reasonable facsimiles of those forms approved by the department, that include:

1. Charitable gaming supplies or network bingo supplies purchased and used;

2. A session reconciliation form, an instant bingo, pull-tab, or seal card reconciliation form, and an electronic pull-tab reconciliation form completed and signed within 48 hours of the end of the session by the ~~bingo~~ game manager;

3. All discounts provided;

4. A reconciliation to account for cash received from floor workers for the sale of extra bingo sheets for any game, or network bingo cards;

5. The summary report that electronic bingo systems are required to maintain pursuant to 11VAC15-40-130 D 11;

6. An admissions control system that provides a cross-check on the number of players in attendance and admission sales. This may include a ticket control system, cash register, or any similar system;

7. All operating expenses including rent, advertising, and security. Copies of invoices for all such expenses shall also be maintained;

8. Expected and actual receipts from games played on hard cards and number of games played on hard cards;

9. A record of the name and address of each winner for all seal cards; in addition, the winning ticket and seal card shall be maintained for a minimum of 90 days after the session;

10. A record of all door prizes awarded; and

11. For any prize or jackpot of a value that meets or exceeds the reporting requirements in the Internal Revenue Service's Publication 3079, the name and address of each individual to whom any such prize or jackpot is awarded and the amount of the award.

B. Qualified organizations conducting raffles shall have a recordkeeping system to account for cash receipts, cash disbursements, raffle tickets purchased or sold, and prizes awarded. All records shall be maintained for a minimum of three years from the close of the fiscal year. The recordkeeping system shall include:

1. Invoices for the purchase of raffle tickets, which shall reflect the following information:

a. Name and address of supplier;

b. Name of purchaser;

c. Date of purchase;

d. Number of tickets printed;

e. Ticket number sequence for tickets printed; and

f. Sales price of individual ticket;

2. A record of cash receipts from raffle ticket sales by tracking the total number of tickets available for sale, the number issued to sellers, the number returned, the number sold, and reconciliation of all raffle sales to receipts;

3. Serial numbers of tickets for raffle sales initiated and concluded at a bingo game or sequentially numbered tickets, which shall state the name, address, and telephone number of the organization, the prize or prizes to be awarded, the date of the prize drawing or selection, the selling price of the raffle ticket, and the charitable gaming permit number;

4. For any raffle prize of a value that meets or exceeds the reporting requirements in the Internal Revenue Service's Publication 3079, receipts on which prize winners must provide printed name, residence address, and the amount and description of the prize received; and

5. Deposit records of the required weekly deposits of raffle receipts.

C. All raffle tickets shall have a detachable section; be consecutively numbered with the detachable section having the same number; provide space for the purchaser's name, complete address, and telephone number; and state (i) the name and address of the organization; (ii) the prize or prizes to be awarded; (iii) the date, time and location of the prize drawing; (iv) the selling price of the ticket; and (v) the charitable gaming permit number. Winning tickets and unsold tickets shall be maintained for a minimum of three years from the close of the fiscal year.

D. All unused charitable gaming supplies or network bingo supplies shall either be returned for refund to the original supplier in unopened original packaging in resalable condition as determined by the supplier or destroyed following notification to the department on a form prescribed by the department. The organization shall maintain a receipt for all such supplies returned to the supplier or destroyed.

Article 4
Rent

**11VAC15-40-110. Requirements regarding renting premises, agreements, and landlord participation.**

A. No organization shall rent or use any leased premises to conduct charitable gaming unless all terms for rental or use are set forth in a written agreement and signed by the parties thereto prior to the issuance of a permit to conduct charitable gaming. A qualified organization that leases a building or other premises that is utilized in whole or in part for the purpose of conducting charitable gaming more frequently than two calendar days in one calendar week shall only lease such premises directly from (i) a qualified organization that is exempt from taxation pursuant to § 501 (c) of the Internal Revenue Code or (ii) any county, city, or town.

B. Organizations shall not make payments to a landlord except by check drawn on the organization's charitable gaming account.

C. No landlord, his agent or employee, member of his immediate family, or person residing in his household shall make directly or indirectly a loan to any officer, director, game manager, or entity involved in the management, operation, or conduct of charitable gaming of an organization in Virginia that leases its charitable gaming facility from the landlord.

D. No landlord, his agent or employee, member of his immediate family, or person residing in his household shall make any direct or indirect payment to any officer, director, game manager, or entity involved in the management, operation, or conduct of charitable gaming conducted at a facility rented from the landlord in Virginia unless the payment is authorized by the lease agreement and is in accordance with the law.

E. No landlord, his agent or employee, member of his immediate family, or person residing in the same household

shall at charitable games conducted on the landlord's premises:

1. Participate in the management, operation, or conduct of any charitable games;

2. Sell, lease, or otherwise provide any ~~bingo~~ charitable gaming supplies including, but not limited to, bingo cards, pull-tab cards, electronic pull-tabs, network bingo cards, or other game pieces; or

3. Require as a condition of the lease or contract that a particular manufacturer, distributor, network bingo provider, or supplier of ~~bingo~~ charitable gaming supplies is used by the organization.

"~~Bingo~~ Charitable gaming supplies" as used in this chapter shall not include glue, markers, or tape sold from concession stands or from a location physically separated from the location where ~~bingo~~ charitable gaming supplies are normally sold.

F. No member of an organization involved in the management, operation, or conduct of charitable gaming shall provide any services to a landlord or be remunerated in any manner by the landlord of the facility where an organization is conducting its charitable gaming.

Part III
Suppliers

**11VAC15-40-120. Suppliers of charitable gaming supplies: application, qualifications, suspension, revocation or refusal to renew permit, maintenance, and production of records.**

A. Prior to providing any charitable gaming supplies, a supplier shall submit an application on a form prescribed by the department and receive a permit. A $1,000 application fee payable to the Treasurer of Virginia is required. In addition, a supplier must be authorized to conduct business in the Commonwealth of Virginia, which may include, but not be limited to, registration with the State Corporation Commission, the Department of Taxation, and the Virginia Employment Commission. The actual cost of background investigations for a permit may be billed by the department to an applicant.

B. The department may refuse to issue a permit or may suspend or revoke a permit if an officer, director, employee, agent, or owner:

1. Is operating without a valid license, permit, or certificate as a supplier, network bingo provider, or manufacturer in any state in the United States;

2. Fails or refuses to recall a product as directed by the department;

3. Conducts business with unauthorized entities or is not authorized to conduct business in the Commonwealth of Virginia;

4. Has been convicted of or pleaded nolo contendere to any crime as specified by § 18.2-340.34 B of the Code of Virginia; has had any license, permit, certificate, or other authority related to activities defined as charitable gaming in the Commonwealth suspended or revoked in the Commonwealth or in any other jurisdiction; has failed to file or has been delinquent in excess of one year in the filing of any tax returns or the payment of any taxes due the Commonwealth; or has failed to establish a registered office or registered agent in the Commonwealth if so required by § 13.1-634 or 13.1-763 of the Code of Virginia. As this provision relates to employees or agents, it shall only apply to individuals involved in sales to or solicitations of customers in the Commonwealth of Virginia;

5. Fails to notify the department within 20 days of the occurrence, knowledge, or receipt of the filing of any administrative or legal action relating to charitable gaming or the distribution of charitable gaming supplies involving or concerning the supplier, any officers or directors, employees, agent, or owner during the term of its permit;

6. Fails to provide to the department upon request a current Letter for Company Registration on file with the U.S. Department of ~~Justice Gambling Devices Registration Unit~~ Justice, if required in accordance with the Gambling Devices Act of 1962 (15 USC 1171-1178) for any device that it sells, distributes, services, or maintains in the Commonwealth of Virginia; or

7. Has been engaged in conduct that would compromise the department's objective of maintaining the highest level of integrity in charitable gaming.

C. A supplier shall not sell, offer to sell, or otherwise provide charitable gaming supplies for use by anyone in the Commonwealth of Virginia other than to an organization with a permit from the department or another permitted supplier. However, a supplier may:

1. Sell charitable gaming supplies to an organization that expects to gross the amount set forth in § 18.2-340.23 of the Code of Virginia or less in any 12-month period, providing that the amount of such purchase would not be reasonably expected to produce more than the amount set forth in § 18.2-340.23 of the Code of Virginia in gross sales. For each such organization, the supplier shall maintain the name, address, and telephone number. The supplier shall also obtain a written and signed statement from an officer or game manager of such organization confirming that gross receipts are expected to be the amount set forth in § 18.2-340.23 of the Code of Virginia or less. Such statement shall be dated and kept on file for a minimum of three years from the close of a fiscal year.

2. Sell bingo cards and paper to persons or entities other than qualified organizations provided such supplies shall not be sold or otherwise provided for use in charitable gaming activities regulated by the department or in unlawful gambling activities. For each such sale, the supplier shall maintain the name, address, and telephone

number of the purchaser. The supplier shall also obtain a written statement from the purchaser verifying that such supplies will not be used in charitable gaming or any unlawful gambling activity. Such statement shall be dated and kept on file for a minimum of three years from the close of a fiscal year. Payment for such sales in excess of $50 shall be accepted in the form of a check.

3. Sell pull-tabs, seal cards, and electronic pull-tabs to organizations for use only upon the premises owned or exclusively leased by the organization and at such times as the portion of the premises in which the pull-tabs, seal cards, or electronic pull-tabs are sold is open only to members and their guests as authorized by § 18.2-340.26:1 of the Code of Virginia. Each such sale shall be accounted for separately and the accompanying invoice shall be clearly marked: "For Use in Social Quarters Only."

All such sales shall be documented pursuant to subsection H of this section and reported to the department pursuant to subsection J of this section. This provision shall not apply to the sale to landlords of equipment and video systems as defined in this chapter.

D. A supplier shall not sell, offer to sell, or otherwise provide charitable gaming supplies to any individual or organization in the Commonwealth of Virginia unless the charitable gaming supplies are purchased or obtained from a manufacturer or another permitted supplier. Suppliers may take back for credit and resell supplies received from an organization with a permit that has ceased charitable gaming or is returning supplies not needed.

E. No supplier, supplier's agent, or employee may be involved in the management, operation, or conduct of charitable gaming in the Commonwealth of Virginia. No member of a supplier's immediate family or person residing in the same household as a supplier may be involved in the management, operation, or conduct of charitable gaming of any customer of the supplier in the Commonwealth of Virginia. No supplier, supplier's agent, or employee may participate in any charitable gaming of any customer of the supplier in the Commonwealth of Virginia. For the purposes of this regulation, servicing of electronic bingo devices or electronic pull-tab devices shall not be considered conduct or participation.

F. The department shall conduct a background investigation prior to the issuance of a permit to any supplier. The investigation may include, but shall not be limited to, the following:

1. A search of criminal history on all officers, directors, and owners; and

2. Verification of current compliance with Commonwealth of Virginia tax laws.

If the officers, directors, or owners are domiciled outside of the Commonwealth of Virginia, or have resided in the Commonwealth of Virginia for fewer than five years, a criminal history search conducted by the appropriate authority in any state in which they have resided during the previous five years shall be provided by the applicant.

G. Appropriate information and authorizations shall be provided to the department to verify information cited in subsection F of this section.

H. Suppliers shall document each sale or rental of charitable gaming supplies to an organization in the Commonwealth of Virginia on an invoice, which reflects the following:

1. Name, address, and ~~OCG~~ organization number of the organization;

2. Date of sale or rental and location where ~~bingo~~ charitable gaming supplies are shipped if different from the billing address;

3. Name, form number, and serial number of each deal of instant bingo, pull-tabs, seal cards, electronic pull-tabs, or bundles and the quantity of cards in each deal;

4. Quantity of deals sold, the cost per deal, the selling price per card, the cash take-in per deal, and the cash payout per deal;

5. Serial number of the top sheet in each pack of disposable bingo paper, the quantity of sheets in each pack or pad, the cut and color, and the quantity of packs or pads sold;

6. Serial number for each series of uncollated bingo paper and the number of sheets sold;

7. Detailed information concerning the type, quantity, and individual price of any other charitable gaming supplies or related items including, but not limited to, concealed face bingo cards, hard cards, markers or daubers and refills, or any other merchandise. For concealed face bingo cards, the quantity of sets, price per set, and the serial number of each set shall be included;

8. Serial number of each electronic pull-tab device, a description of the physical attributes of the electronic pull-tab device, the quantity of electronic pull-tab devices sold or rented, and the physical address to which each electronic pull-tab device is shipped or delivered;

9. Serial number and description of any other equipment sold or rented that is used to facilitate the distribution, play, and redemption of electronic pull-tabs and the physical address to which the equipment is shipped or delivered; and

10. Any type of equipment, device, or product manufactured for or intended to be used in the conduct of charitable games including, but not limited to, designators, designator receptacles, number display boards, selection devices, dispensing machines, and verification devices.

I. Suppliers shall ensure that two copies of the detailed invoice are provided to the customer for each sale of charitable gaming supplies.

J. Each supplier shall provide a report to the department by March 1 of each year on sales of charitable gaming supplies

for the fiscal year ending December 31 of the previous year to each organization in the Commonwealth of Virginia. This report shall be provided to the department via a department-approved electronic medium. The report shall include the name ~~and~~, address, and organization number of each organization and the following information for each sale or transaction:

1. Bingo paper sales including purchase price, description of paper to include quantity of sheets in pack and quantity of faces on sheet, and quantity of single sheets or packs shipped;

2. Deals of instant bingo, pull-tabs, seal cards, electronic pull-tabs, or any other raffle sales including purchase price, deal name, deal form number, quantity of tickets in deal, ticket price, cash take-in per deal, cash payout per deal, and quantity of deals;

3. Electronic bingo device sales including purchase or rental price and quantity of units;

4. Equipment used to facilitate the distribution, play, and redemption of electronic pull-tabs including purchase or rental price, description of equipment, quantity of units of each type of equipment, and the physical address to which the equipment is shipped or delivered; and

5. Sales of miscellaneous items such as daubers, markers, and other merchandise including purchase price, description of product, and quantity of units.

K. The department shall set manufacturing and testing criteria for all electronic bingo devices and other equipment used in the conduct of charitable gaming. An electronic bingo device shall not be sold, leased, or otherwise furnished to any person in the Commonwealth of Virginia for use in the conduct of charitable gaming until an identical sample device containing identical proprietary software has been certified by a testing facility that has been formally recognized by the department as a testing facility that upholds the standards of integrity established by the department. The testing facility must certify that the device conforms, at a minimum, to the restrictions and conditions set forth in these regulations. Once the testing facility reports the test results to the department, the department will either approve or disapprove the submission and inform the manufacturer of the results ~~within 10 business days~~. If any such equipment does not meet the department's criteria, it shall be recalled and shall not be distributed in the Commonwealth of Virginia. The cost of testing shall be borne by the manufacturer of such equipment.

L. Department employees shall have the right to inspect all electronic and mechanical equipment used in the conduct of charitable gaming.

M. Suppliers, their agents and employees, members of the supplier's immediate family, or persons residing in their household shall not make any loan directly or indirectly to any organization or officer, director, game manager, or entity involved in the management, operation, or conduct of charitable gaming of a supplier's customer located in the Commonwealth of Virginia.

N. No supplier, supplier's agent, or employee shall directly or indirectly provide a rebate, discount, or refund to any person other than an organization that purchases supplies or leases or purchases equipment from the supplier. All such transactions shall be recorded on the supplier's account books.

O. A supplier shall not rent, sell, or otherwise provide electronic bingo devices or equipment used to distribute, play, or redeem electronic pull-tabs unless the supplier possesses a valid permit in the Commonwealth of Virginia.

P. A written agreement specifying the terms of lease or rental shall be required for any electronic bingo devices or equipment used to distribute, play, or redeem electronic pull-tabs provided to an organization.

**11VAC15-40-130. Construction and other standards for bingo, instant bingo, pull-tabs, seal cards, raffles, electronic bingo devices, and instant bingo, pull-tab, and seal card dispensers.**

A. No supplier shall knowingly sell or otherwise provide to an organization and no organization shall knowingly use ~~bingo~~ charitable gaming supplies unless they conform to the following construction standards:

1. Disposable paper sold shall be of sufficient weight and quality to allow for clearly readable numbers and to prevent ink from spreading, bleeding, or otherwise obscuring other numbers or cards.

2. Each sheet of disposable bingo paper shall be comprised of cards bearing a serial number. No serial number shall be repeated on or in the same style, series, and color of cards within a three-year period.

3. Disposable bingo paper assembled in books or packs shall not be separated except for single-sheet specials. This provision does not apply to two-part cards on which numbers are filled by players and one part is separated and provided to an organization for verification purposes.

4. Each unit of disposable bingo paper shall have an exterior label listing the following information:

a. Description of product;

b. Number of packs or loose sheets;

c. Series numbers;

d. Serial number of the top sheet;

e. Number of cases;

f. Cut of paper; and

g. Color of paper.

5. "Lucky Seven" bingo cards or electronic facsimiles thereof shall have a single face where seven numbers shall be chosen. "Lucky Seven" sheets or electronic facsimiles thereof shall have multiple faces where seven numbers shall be chosen per face.

B. No supplier shall knowingly sell or otherwise provide to an organization and no organization shall knowingly use instant bingo, pull-tab, or seal cards unless they conform to the following construction standards:

1. Cards shall be constructed so that concealed numbers, symbols, or winner protection features cannot be viewed or determined from the outside of the card by using a high intensity lamp of 500 watts, with or without utilizing a focusing lens.

2. Deals shall be designed, constructed, glued, and assembled in a manner to prevent determination of a winning or losing ticket without removing the tabs or otherwise uncovering the symbols or numbers as intended.

3. Each card in a deal shall bear the same serial number. Only one serial number shall be used in a deal. No serial number used in a deal shall be repeated by the same manufacturer on that same manufacturer's form within a three-year period. The flare of each deal shall accompany the deal and shall have affixed to it the same serial number as the tickets in such deal.

4. Numbers or symbols on cards shall be fully visible in the window and shall be placed so that no part of a number or symbol remains covered when the tab is removed.

5. Cards shall be glued on all edges and around each window. Glue shall be of sufficient strength and type to prevent the undetectable separation or delamination of the card. For banded tickets, the glue must be of sufficient strength and quality to prevent the separation of the band from the ticket.

6. The following minimum information shall be printed on a card:

a. Break open pull-tab and instant bingo cards:

(1) Name of the manufacturer or its distinctive logo;

(2) Name of the game;

(3) Manufacturer's form number;

(4) Price per individual card or bundle;

(5) Unique minimum five-digit game serial number printed on the game information side of the card; and

(6) Number of winners and respective winning number or symbols and specific prize amounts unless accompanied by a manufacturer's preprinted publicly posted flare with that information.

b. Banded pull-tabs:

(1) Manufacturer;

(2) Serial number;

(3) Price per individual card or bundle unless accompanied by a manufacturer's preprinted publicly posted flare with that information; and

(4) Number of winners and respective winning numbers or symbols and prize amounts or a manufacturer's preprinted publicly posted flare giving that information.

7. All seal card games sold to organizations shall contain the sign-up sheet, seals, and cards packaged together in each deal.

C. Raffle tickets used independent of a ~~bingo game~~ session must conform to the following construction standards:

1. Each ticket shall have a detachable section and shall be consecutively numbered.

2. Each section of a ticket shall bear the same number. The section retained by the organization shall provide space for the purchaser's name, complete address, and telephone number.

3. The following information shall be printed on the purchaser's section of each ticket:

a. Dates and times of drawings;

b. Locations of the drawings;

c. Name of the charitable organization conducting the raffle;

d. Price of the ticket;

e. Charitable gaming permit number; and

f. Prizes.

Exceptions to these construction standards are allowed only with prior written approval from the department.

D. Electronic bingo.

1. The department, at its discretion, may require additional testing of electronic bingo devices at any time. Such additional testing shall be at the manufacturer's expense and shall be a condition of the continued use of such device.

2. All electronic bingo devices shall use proprietary software and hardware or commonly available software and hardware and shall be enabled for play on the premises where the game is to be played.

3. Each electronic bingo device shall have a unique identification number securely encoded into the software of the device. The unique identification number shall not be alterable by anyone other than the manufacturer of the electronic bingo device. Manufacturers of electronic bingo devices shall employ sufficient security safeguards in designing and manufacturing the devices such that it may be verified that all proprietary software components are authentic copies of the approved software components and all functioning components of the device are operating with identical copies of approved software programs. The electronic bingo device must also have sufficient security safeguards so that any restrictions or requirements authorized by the department or any approved proprietary software are protected from alteration by unauthorized personnel. The electronic bingo device shall not contain hard-coded or unchangeable passwords. Security measures that may be employed to comply with these provisions include, but are not limited to, the use of dongles, digital signature comparison hardware and software, secure boot

loaders, encryption, and key and callback password systems.

4. A firewall or equivalent hardware device configured to block all inbound and outbound traffic that has not been expressly permitted and is not required for the continued use of the electronic bingo system must exist between the electronic bingo system and any external point of access.

5. Electronic bingo devices shall not allow a player to create a card by the input of specific numbers on each card. Manufacturers shall ensure that an electronic bingo device does not allow for the play of any bingo card faces other than those verifiably purchased by the patron.

6. Electronic bingo devices shall not accept cash, currency, or tokens for play.

7. Electronic bingo devices shall require the manual entry of numbers as they are called, the manual verification of numbers as they have been electronically transmitted to the device, or the full automatic daubing of numbers as each number is called. During the play of a bingo game, the transmission of data to electronic bingo devices shall be limited to one-way communication to the electronic bingo device and shall consist only of publicly available information regarding the current game.

8. A device shall not allow the play of more than 54 cards per device per game.

9. The electronic bingo device system shall record a sequential transaction number or audit tracking number for each transaction. The system shall not allow the manual resetting or changing of this number.

10. The system shall produce a receipt for each electronic bingo device rented or otherwise provided containing the following:

a. Organization name;

b. Location of bingo game;

c. Date and time of the transaction;

d. Sequential transaction or receipt number;

e. Description of each electronic bingo product loaded. The description must include the quantity of bingo card faces that appear on each electronic bingo product (i.e., 9 Jackpot) and the sales price of each electronic bingo product;

f. Quantity of each electronic bingo product loaded; and

g. Total sales price of the transaction.

11. The system shall maintain and make available on demand a summary report for each session that includes the following:

a. Organization name;

b. Location of bingo game;

c. Date and time of each transaction;

d. Sequential transaction or receipt number of each transaction;

e. Description of each electronic bingo product loaded each session. The description must include the quantity of bingo card faces that appear on each electronic bingo product and the sales price of each electronic bingo product;

f. Quantity of each electronic bingo product loaded;

g. Total sales price of each electronic bingo product loaded; and

h. Total sales price for each transaction;

i. A transaction history correlating the sequential transaction number of each electronic bingo device sale to the unique identification number of the electronic bingo device on which the sale was played;

j. Sufficient information to identify voids and returns, including the date and time of each voided transaction and return, the sequential transaction number, and the cost of voided transactions and returns; and

k. Total gross receipts for each session.

12. Each electronic bingo device shall be programmed to automatically erase all stored electronic bingo cards at the end of the last game of a session, within a set time from their rental to a player, or by some other clearance method approved by the department.

13. All electronic bingo devices shall be reloaded with another set of electronic bingo cards at the beginning of each session if the devices are to be reused at the same location.

E. In instances where a defect in packaging or in the construction of deals or electronic bingo devices is discovered by or reported to the department, the department shall notify the manufacturer of the deals or electronic bingo devices containing the alleged defect. Should the department, in consultation with the manufacturer, determine that a defect exists, and should the department determine the defect affects game security or otherwise threatens public confidence in the game, the department may, with respect to deals or electronic bingo devices for use still located within the Commonwealth of Virginia, require the supplier to:

1. Recall the deals or electronic bingo devices affected that have not been sold or otherwise provided; or

2. Issue a total recall of all affected deals or electronic bingo devices.

F. No supplier shall knowingly sell or otherwise provide to an organization and no organization shall knowingly use an instant bingo, pull-tab, or seal card dispenser unless the dispenser conforms to the following standards:

1. Each dispenser shall be manufactured in a manner that ensures a pull-tab ticket is dispensed only after insertion of United States currency or coinage into the dispenser. Such ticket and any change due shall be the only items dispensed from the machine.

2. Each dispenser shall be manufactured in a manner that ensures the dispenser neither displays nor has the capability of displaying or otherwise identifying an instant bingo, pull-tab, or seal card winning or nonwinning ticket.

3. Each dispenser shall be manufactured in such a manner that any visual animation does not simulate or display rolling or spinning reels or produce audible music or enhanced sound effects.

4. Each dispenser shall be equipped with separate locks for the instant bingo, pull-tab, or seal card supply modules and money boxes. Locks shall be configured so that no one key will operate both the supply modules and money boxes.

G. The department may require testing of a dispensing device at any time to ensure that it meets construction standards and allows for fair play. Such tests shall be conducted at the cost of the manufacturer of such dispensing devices.

H. The face value of the instant bingo, pull-tab, or seal cards being dispensed shall match the amount deposited in the currency/coin acceptor less change provided.

I. A dispensing device shall only dispense instant bingo, pull-tab, or seal cards that conform to the construction standards established in subsection B of this section and the randomization standards established in 11VAC15-40-140.

J. Suppliers and manufacturers of instant bingo, pull-tab, or seal card dispensers shall comply with the requirements of the Gambling Devices Act of 1962 (15 USC §§ 1171-1178).

## Part IV
## Electronic Games of Chance Systems

### Article 1
### Manufacturers

**11VAC15-40-147. Manufacturers of electronic games of chance systems: application, qualifications, suspension, revocation or refusal to renew permit, maintenance, and production of records.**

A. As used in this section, "manufacturer" means a person or entity that assembles from raw materials or subparts an electronic games of chance system.

B. Prior to providing any electronic games of chance system, a manufacturer shall submit an application on a form prescribed by the department and receive a permit. A $1,000 application fee payable to the Treasurer of Virginia is required. In addition, a manufacturer must be authorized to conduct business in the Commonwealth of Virginia, which may include, but not be limited to, registration with the State Corporation Commission, the Department of Taxation, and the Virginia Employment Commission. The actual cost of background investigations for a permit may be billed by the department to an applicant.

C. The department may refuse to issue a permit or may suspend or revoke a permit if an officer, director, employee, agent, or owner:

1. Is operating without a valid license, permit, or certificate as a supplier, network bingo provider, or manufacturer in any state in the United States;

2. Fails or refuses to recall a product as directed by the department;

3. Conducts business with unauthorized entities or is not authorized to conduct business in the Commonwealth of Virginia;

4. Has been convicted of or pleaded nolo contendere to any crime as specified by § 18.2-340.34 B of the Code of Virginia; has had any license, permit, certificate, or other authority related to activities defined as charitable gaming in the Commonwealth suspended or revoked in the Commonwealth or in any other jurisdiction; has failed to file or has been delinquent in excess of one year in the filing of any tax returns or the payment of any taxes due the Commonwealth; or has failed to establish a registered office or registered agent in the Commonwealth if so required by § 13.1-634 or 13.1-763 of the Code of Virginia. As this provision relates to employees or agents, it shall only apply to individuals involved in sales to or solicitations of customers in the Commonwealth of Virginia;

5. Fails to notify the department within 20 days of the occurrence, knowledge, or receipt of the filing of any administrative or legal action relating to charitable gaming or the distribution of electronic games of chance systems involving or concerning the manufacturer, any officers or directors, employees, agent, or owner during the term of its permit;

6. Fails to provide to the department upon request a current Letter for Company Registration on file with the U.S. Department of Justice ~~, Gambling Devices Registration Unit~~, if required in accordance with the Gambling Devices Act of 1962 (15 USC §§ 1171-1178) for any device that it distributes in the Commonwealth of Virginia; or

7. Has been engaged in conduct that would compromise the department's objective of maintaining the highest level of integrity in charitable gaming.

D. A manufacturer shall not distribute electronic games of chance systems for use by anyone in the Commonwealth of Virginia other than to a permitted charitable gaming organization or a permitted supplier. However, a manufacturer may:

1. Distribute an electronic games of chance system to an organization that expects to gross the amount set forth in § 18.2-340.23 of the Code of Virginia or less in any 12-month period, providing that the amount of such purchase would not be reasonably expected to produce more than the amount set forth in § 18.2-340.23 of the Code of Virginia in gross sales. For each such organization, the manufacturer shall maintain the name, address, and telephone number. The manufacturer shall also obtain a

written and signed statement from an officer or game manager of such organization confirming that gross receipts are expected to be the amount set forth in § 18.2-340.23 of the Code of Virginia or less. Such statement shall be dated and kept on file for a minimum of three years from the close of a fiscal year.

2. Distribute electronic games of chance systems to an organization for use only upon the premises owned or exclusively leased by the organization and at such times as the portion of the premises in which electronic pull-tabs are sold is open only to members and their guests as authorized by § 18.2-340.26:1 of the Code of Virginia. Each such distribution shall be accounted for separately and the accompanying invoice shall be clearly marked: "For Use in Social Quarters Only."

All such distributions shall be documented pursuant to subsection H of this section and reported to the department pursuant to subsection J of this section.

E. No manufacturer of electronic games of chance systems, the manufacturer's agent, or the manufacturer's employee may be involved in the management, operation, or conduct of charitable gaming in the Commonwealth of Virginia. No member of a manufacturer's immediate family or person residing in the same household as a manufacturer may be involved in the management, operation, or conduct of charitable gaming of any customer of the manufacturer in the Commonwealth of Virginia. No manufacturer of electronic games of chance systems, the manufacturer's agent, or the manufacturer's employee may participate in any charitable gaming of any customer of the manufacturer in the Commonwealth of Virginia. For the purposes of this regulation, servicing of electronic games of chance systems shall not be considered conduct or participation.

F. The department shall conduct a background investigation prior to the issuance of a permit to any manufacturer. The investigation may include, but shall not be limited to, the following:

1. A search of criminal history records on all officers, directors, and owners; and

2. Verification of current compliance with Commonwealth of Virginia tax laws.

If the officers, directors, or owners are domiciled outside of the Commonwealth of Virginia, or have resided in the Commonwealth of Virginia for fewer than five years, a criminal history search conducted by the appropriate authority in any state in which they have resided during the previous five years shall be provided by the applicant.

G. Appropriate information and authorizations shall be provided to the department to verify information cited in subsection F of this section.

H. Manufacturers shall document each distribution an electronic games of chance system to any person for use in the Commonwealth of Virginia on an invoice, which reflects the following:

1. Name, address, and ~~OCG~~ organization number of the organization or supplier;

2. Date of sale or rental and location where the electronic games of chance system is shipped or delivered, if different from the billing address;

3. Name, form number, and serial number of each deal of electronic pull-tabs;

4. Quantity of deals sold, the cost per deal, the selling price per card, the cash take-in per deal, and the cash payout per deal;

5. Serial number of each electronic pull-tab device, a description of the physical attributes of the electronic pull-tab device, the quantity of electronic pull-tab devices sold or rented, and the physical address to which each electronic pull-tab device is shipped or delivered; and

6. Serial number and description of any other equipment sold or rented that is used to facilitate the distribution, play, and redemption of electronic pull-tabs and the physical address to which the equipment is shipped or delivered.

I. Manufacturers shall ensure that two copies of the detailed invoice are provided to the customer for each distribution of electronic games of chance systems.

J. Each manufacturer shall provide a report to the department by March 1 of each year on distribution of electronic games of chance systems for the fiscal year ending December 31 of the previous year to each organization and permitted supplier in the Commonwealth of Virginia. This report shall be provided to the department via a department-approved electronic medium. The report shall include the name ~~and~~, address, and organization number of each organization and permitted supplier and the following information for each sale or transaction:

1. Deals of electronic pull-tabs including purchase price, deal name, deal form number, quantity of electronic pull-tabs in deal, electronic pull-tab price, cash take-in per deal, cash payout per deal, and quantity of deals; and

2. Equipment used to facilitate the distribution, play, and redemption of electronic pull-tabs including purchase or rental price, description of equipment, quantity of units of each type of equipment, and the physical address to which the equipment is shipped or delivered.

K. A manufacturer, its agents and employees, members of a manufacturer's immediate family, or persons residing in a manufacturer's household shall not make any loan directly or indirectly to any organization or officer, director, game manager, or entity involved in the management, operation, or conduct of charitable gaming of the manufacturer's customer located in the Commonwealth of Virginia.

L. A manufacturer, its agent, or its employee shall not directly or indirectly provide a rebate, discount, or refund to

any person other than an organization that purchases, rents, or leases an electronic games of chance system from the manufacturer. All such transactions shall be recorded on the manufacturer's account books.

M. A written agreement specifying the terms of lease or rental shall be required for any equipment used to distribute, play, or redeem electronic pull-tabs provided to an organization or permitted supplier.

Article 2
General Requirements

**11VAC15-40-150. Approval of distributed pull-tab systems, validation systems, point-of-sale stations, and redemption terminals; approval of game themes and sounds.**

A. The department shall set manufacturing and testing criteria for all distributed pull-tab systems, validation systems, point-of-sale stations, redemption terminals, and other equipment used in the conduct of charitable gaming. A distributed pull-tab system, validation system, point-of-sale station, redemption terminal, or other equipment shall not be sold, leased, or otherwise furnished to any person in the Commonwealth of Virginia for use in the conduct of charitable gaming until an identical sample system or equipment containing identical software has been certified by a testing facility that has been formally recognized by the department as a testing facility that upholds the standards of integrity established by the department. The testing facility must certify that the distributed pull-tab system and associated hardware and software conform, at a minimum, to the requirements set forth in this chapter. Once the testing facility reports the test results to the department, the department will either approve or disapprove the distributed pull-tab system or system components and inform the manufacturer of the results ~~within 10 business days~~. If any such system or equipment does not meet the department's criteria, it shall be recalled and shall not be distributed in the Commonwealth of Virginia. The cost of testing shall be borne by the manufacturer of such equipment.

B. No supplier or manufacturer shall knowingly sell or otherwise provide to an organization and no organization shall knowingly use a distributed pull-tab system, validation system, point-of-sale station, redemption terminal, or other equipment used to conduct charitable gaming unless it conforms to the requirements set forth in this regulation.

C. If a defect in a distributed pull-tab system, validation system, point-of-sale station, redemption terminal, or other equipment used to conduct charitable gaming is discovered by or reported to the department, the department shall notify the manufacturer of the system or equipment containing the alleged defect. Should the department, in consultation with the manufacturer, determine that a defect exists and should the department determine the defect affects game security or otherwise threatens public confidence in the game, the department may, with respect to any distributed pull-tab system, validation system, point of sale station, redemption terminal, or other equipment used to conduct charitable gaming still located within the Commonwealth of Virginia, require the supplier or manufacturer to issue a recall of all affected distributed pull-tab systems, validation systems, point-of-sale stations, redemption terminals, or other equipment.

D. All game themes, sounds, and music shall be approved by the department prior to being available for play on an electronic pull-tab device in the Commonwealth of Virginia.

~~Part V~~
~~Administrative Process~~

**11VAC15-40-420. ~~Procedural rules for the conduct of fact-finding conferences and hearings.~~ (Repealed.)**

~~A. As used in this section, "manufacturer" means a person or entity that assembles from raw materials or subparts an electronic games of chance system.~~

~~B. Fact finding conference; notification, appearance, and conduct.~~

~~1. Unless automatic revocation or immediate suspension is required by law, no permit to conduct charitable gaming, to sell charitable gaming supplies, or to distribute electronic games of chance shall be denied, suspended, or revoked except after review and approval of such proposed denial, suspension, or revocation action by the board, and upon notice stating the basis for such proposed action and the time and place for a fact finding conference as set forth in § 2.2-4019 of the Administrative Process Act.~~

~~2. If a basis exists for a refusal to renew, suspend, or a revoke a permit, the department shall notify by certified mail or by hand delivery the interested persons at the address of record maintained by the department.~~

~~3. Notification shall include the basis for the proposed action and afford interested persons the opportunity to present written and oral information to the department that may have a bearing on the proposed action at a fact-finding conference. If there is no withdrawal, a fact finding conference shall be scheduled at the earliest mutually agreeable date, but no later than 60 days from the date of the notification. Organizations, suppliers, or manufacturers who wish to waive their right to a conference shall notify the department at least 14 days before the scheduled conference.~~

~~4. If, after consideration of evidence presented during an informal fact finding conference, a basis for action still exists, the interested persons shall be notified in writing within 60 days of the fact finding conference via certified or hand-delivered mail of the decision and the right to a formal hearing. Parties to the conference may agree to extend the report deadline if more time is needed to consider relevant evidence.~~

~~C. Hearing; notification, appearance, and conduct.~~

~~1. If, after a fact-finding conference, a sufficient basis still exists to deny, suspend, or revoke a permit, interested persons shall be notified by certified or hand-delivered mail of the proposed action and of the opportunity for a hearing on the proposed action. If an organization , supplier, or manufacturer desires to request a hearing, it shall notify the department within 14 days of receipt of a report on the conference. Parties may enter into a consent agreement to settle the issues at any time prior to, or subsequent to, an informal fact-finding conference.~~

~~2. If an interested party or representative fails to appear at a hearing, the hearing officer may proceed in his absence and make a recommendation.~~

~~3. Oral and written arguments may be submitted to and limited by the hearing officer. Oral arguments shall be recorded in an appropriate manner.~~

~~D. Hearing location. Hearings before a hearing officer shall be held, insofar as practicable, in the county or city in which the organization, supplier , or manufacturer is located. If the parties agree, hearing officers may conduct hearings at locations convenient to the greatest number of persons or by telephone conference, video conference, or similar technology, in order to expedite the hearing process.~~

~~E. Hearing decisions.~~

~~1. Recommendations of the hearing officer shall be a part of the record and shall include a written statement of the hearing officer's findings of fact and recommendations as well as the reasons or basis for the recommendations. Recommendations shall be based upon all the material issues of fact, law, or discretion presented on the record.~~

~~2. The department shall review the recommendation of the hearing officer and render a decision on the recommendation within 30 days of receipt. The decision shall cite the appropriate rule, relief, or denial thereof as to each issue.~~

~~F. Agency representation. The commissioner's designee may represent the department in an informal conference or at a hearing.~~

**11VAC15-40-430. ~~Reporting violations.~~ (Repealed.)**

~~A. As used in this section, "manufacturer" means a person or entity that assembles from raw materials or subparts an electronic games of chance system.~~

~~B. Unless otherwise required by law, the identity of any individual who provides information to the department or its agents regarding alleged violations shall be held in strict confidence.~~

~~C. Any officer, director, or game manager of a qualified organization or any officer or director of a supplier or manufacturer shall immediately report to the department any information pertaining to the suspected misappropriation or theft of funds or any other violations of charitable gaming statutes or these regulations.~~

~~D. Failure to report the information required by subsection C of this section may result in the denial, suspension, or revocation of a permit.~~

~~E. Any officer, director, or game manager of a qualified organization involved in the management, operation, or conduct of charitable gaming shall immediately notify the department upon being convicted of a felony or a crime involving fraud, theft, or financial crimes.~~

~~F. Any officer, director, partner, or owner of a supplier or manufacturer shall immediately notify the department upon being convicted or pleading nolo contendere to a felony or a crime involving gambling or an action against any license or certificate held by the supplier in any state in the United States.~~

~~G. Failure to report information required by subsection E or F of this section by any officer, director, or game manager of a qualified organization or by any supplier or manufacturer may result in the denial, suspension, or revocation of a permit.~~

~~H. Any officer, director, or game manager of a qualified organization involved in charitable gaming shall immediately report to the department any change the Internal Revenue Service makes in the tax status of the organization, or if the organization is a chapter of a national organization covered by a group tax exempt determination, the tax status of the national organization.~~

~~I. All organizations regulated by the department shall display prominently a poster advising the public of a phone number where complaints relating to charitable gaming may be made. Such posters shall be in a format prescribed by the department.~~

Part V
Network Bingo

Article 1
Network Bingo Providers

**11VAC15-40-440. Network bingo providers: application, qualifications, suspension, revocation or refusal to renew permit, maintenance, and production of records.**

A. Prior to providing network bingo, a network bingo provider shall submit an application on a form prescribed by the department and receive a permit. A $500 application fee payable to the Treasurer of Virginia is required. In addition, a network bingo provider must be authorized to conduct business in the Commonwealth of Virginia, which may include, but not be limited to, registration with the State Corporation Commission, the Department of Taxation, and the Virginia Employment Commission. The actual cost of background investigations for a permit may be billed by the department to an applicant.

B. The department may refuse to issue a permit or may suspend or revoke a permit if an officer, director, partner, employee, agent, or owner:

1. Is operating without a valid license, permit, or certificate as a supplier, manufacturer, or network bingo provider in any state in the United States;

2. Fails or refuses to recall a product as directed by the department;

3. Conducts business with unauthorized entities or is not authorized to conduct business in the Commonwealth of Virginia;

4. Has been convicted of or pleaded nolo contendere to any crime as specified by § 18.2-340.34:2 B of the Code of Virginia; has had any license, permit, certificate, or other authority related to activities defined as charitable gaming in the Commonwealth suspended or revoked in the Commonwealth or in any other jurisdiction; has failed to file or has been delinquent in excess of one year in the filing of any tax returns or the payment of any taxes due the Commonwealth; or has failed to establish a registered office or registered agent in the Commonwealth if so required by § 13.1-634 or 13.1-763 of the Code of Virginia. As this provision relates to employees or agents, it shall only apply to individuals involved in sales to or solicitations of customers in the Commonwealth of Virginia;

5. Fails to notify the department within 20 days of the occurrence, knowledge, or receipt of the filing of any administrative or legal action relating to charitable gaming or network bingo involving or concerning the network bingo provider, any officers or directors, employees, agent, or owner during the term of its permit;

6. Fails to provide to the department upon request a current Letter for Company Registration on file with the U.S. Department of Justice, if required in accordance with the Gambling Devices Act of 1962 (15 USC §§ 1171-1178) for any device that it distributes in the Commonwealth of Virginia; or

7. Has been engaged in conduct that would compromise the department's objective of maintaining the highest level of integrity in charitable gaming.

C. A network bingo provider shall not distribute a network bingo system, network bingo supplies, or other incidental items to perform network bingo to anyone in the Commonwealth of Virginia or to an organization for use upon the premises owned or exclusively leased by the organization in which the portion of the premises are qualified to sell pull-tabs to members and their guests only as authorized by § 18.2-340.26:1 of the Code of Virginia. However, a network bingo provider may:

1. Distribute such a system, supply, or item to a qualified organization authorized to conduct charitable gaming for use during a session that is open to the public and not limited to members and their guests only.

2. Distribute such a system, supply, or item to an organization that expects to gross the amount set forth in § 18.2-340.23 of the Code of Virginia or less in any 12-month period, providing that the amount of such purchase would not be reasonably expected to produce more than the amount set forth in § 18.2-340.23 of the Code of Virginia in gross sales. For each such organization, the network bingo provider shall maintain the name, address, and telephone number. The network bingo provider shall also obtain a written and signed statement from an officer or game manager of such organization confirming that gross receipts are expected to be the amount set forth in § 18.2-340.23 of the Code of Virginia or less. Such statement shall be dated and kept on file for a minimum of three years from the close of a fiscal year.

All such distributions shall be documented pursuant to subsection G of this section and reported to the department pursuant to subsection I of this section.

D. No network bingo provider, its agents, or its employees may be involved in the management, operation, or conduct of charitable gaming in the Commonwealth of Virginia. A network bingo provider, its agents, or its employees may call a network bingo game or distribute network bingo prizes associated with the network bingo provider's network bingo system. No member of a network bingo provider's immediate family or person residing in the same household as a network bingo provider may be involved in the management, operation, or conduct of charitable gaming of any customer of the network bingo provider in the Commonwealth of Virginia. No network bingo provider, its agents, or its employees may participate in any charitable gaming of any customer of the network bingo provider in the Commonwealth of Virginia. For the purposes of this chapter, servicing of the network bingo system shall not be considered conduct or participation.

E. The department shall conduct a background investigation prior to the issuance of a permit to any network bingo provider. The investigation may include, but shall not be limited to, the following:

1. A search of criminal history records on all officers, directors, and owners; and

2. Verification of current compliance with Commonwealth of Virginia tax laws.

If the officers, directors, owners, or partners are domiciled outside of the Commonwealth of Virginia, or have resided in the Commonwealth of Virginia for fewer than five years, a criminal history search conducted by the appropriate authority in any state in which they have resided during the previous five years shall be provided by the applicant.

F. Appropriate information and authorizations shall be provided to the department to verify information cited in subsection E of this section.

G. Network bingo providers shall document each sale of network bingo supplies, equipment, and other incidental items to perform network bingo to any person for use in the Commonwealth of Virginia on an invoice, which reflects the following:

1. Name, address, and organization number of the organization;

2. Date of sale, lease, or rental and location where the network bingo supplies, equipment, and other incidental items to perform network bingo is shipped or delivered, if different from the billing address;

3. Form number, serial number, quantity, and purchase or rental price of the network bingo supplies, equipment, and other incidental items to perform network bingo;

4. Quantity of network bingo cards sold, the cost per card, and the selling price per card; and

5. Date of the network bingo game in which the qualified organization participated, the start time and end time of the game, and the number of balls called during the game.

H. Network bingo providers shall ensure that two copies of the detailed invoice are provided to the customer for the sale of network bingo supplies, equipment, and other incidental items to perform network bingo.

I. Each network bingo provider shall provide a report to the department by March 1 of each year on the sale of network bingo supplies, equipment, and other incidental items to perform network bingo for the fiscal year ending December 31 of the previous year to each organization in the Commonwealth of Virginia. This report shall be provided to the department via a department-approved electronic medium. The report shall include the name, address, and organization number of each organization and the following information for each sale or transaction:

1. Date of sale, lease, or rental and location where the network bingo supplies, equipment, and other incidental items to perform network bingo is shipped or delivered, if different from the billing address;

2. Serial number, quantity, and purchase or rental price of the network bingo supplies, equipment, and other incidental items to perform network bingo;

3. Quantity of network bingo cards sold, the cost per card, and the selling price per card;

4. Date of the network bingo game in which qualified organizations participated, the start time and end time of the game, the number of balls called during the game, the total gross receipts for the game; and

5. Prize amount awarded to the winning player and which organization sold the winning network bingo card.

J. A network bingo provider shall maintain documentation on all deposits and disbursements into the prize pool for the network bingo game.

K. A network bingo provider, its agents, and its employees; members of a network bingo provider's immediate family; or persons residing in a network bingo provider's household shall not make any loan directly or indirectly to any organization or officer, director, game manager, or entity involved in the management, operation, or conduct of charitable gaming of the network bingo provider's customer located in the Commonwealth of Virginia.

L. A network bingo provider, its agent, or its employee shall not directly or indirectly provide a rebate, discount, or refund to any person other than an organization that purchases, rents, or leases network bingo supplies, equipment, and other incidental items to perform network bingo. All such transactions shall be recorded on the network bingo provider's account books.

M. A network bingo provider shall not rent, sell, or otherwise provide network bingo supplies, equipment, and other incidental items to perform network bingo unless the network bingo provider possesses a valid permit in the Commonwealth of Virginia.

N. A written agreement specifying the terms of lease or rental between the network bingo provider and the qualified organization shall be required for any equipment used to perform network bingo.

O. A network bingo provider shall record the following information on each winner of a network bingo game:

1. Name and address of the winner;

2. Name of the qualified organization that sold the winning network bingo card;

3. Date and time when the winning network bingo card was purchased by the winner; and

4. Location where the winning network bingo card was purchased by the winner.

Article 2
General Requirements

**11VAC15-40-450. Approval of equipment used to perform network bingo.**

A. The department shall set manufacturing and testing criteria for all equipment used to perform network bingo. Equipment used to perform network bingo shall not be sold, leased, or otherwise furnished to any person in the Commonwealth of Virginia for use as part of network bingo until an identical sample equipment containing identical proprietary software has been certified by a testing facility that has been formally recognized by the department as a testing facility that upholds the standards of integrity established by the department. The testing facility must certify that the equipment conforms, at a minimum, to the requirements set forth in this chapter. Once the testing facility

reports the test results to the department, the department will either approve or disapprove the equipment and inform the network provider of the results. If any such equipment does not meet the department's criteria, it shall be recalled and shall not be distributed in the Commonwealth of Virginia. The cost of testing shall be borne by the network provider of such equipment.

B. No network bingo provider shall knowingly sell or otherwise provide to an organization and no organization shall knowingly use equipment to perform network bingo unless it conforms to the requirements set forth in this chapter.

C. If a defect in any equipment used to perform network bingo is discovered by or reported to the department, the department shall notify the network bingo provider that is using the equipment containing the alleged defect. Should the department, in consultation with the network bingo provider, determine that a defect exists and should the department determine the defect affects game security or otherwise threatens public confidence in the game, the department may, with respect to any equipment used to perform network bingo still located within the Commonwealth of Virginia, require the network bingo provider to issue a recall of all affected equipment.

D. Department employees shall have the right to inspect all equipment used to perform network bingo. The department, at its discretion, may require additional testing of any equipment to perform network bingo at any time. Such additional testing shall be at the network provider's expense and shall be a condition of the continued use of such equipment.

E. Equipment used to perform network bingo shall have a permanently affixed identification badge that cannot be removed without leaving evidence of tampering. This badge shall be affixed to the exterior of the equipment and shall include the following information:

1. Manufacturer name;

2. A unique serial number;

3. The equipment model number;

4. The date of manufacture; and

5. Any other information required by the department.

Article 3
System Requirements

**11VAC15-40-460. Location of equipment.**

All equipment used to perform network bingo must be physically located within the boundaries of the Commonwealth of Virginia.

**11VAC15-40-470. Communications and network requirements.**

A. Where the network bingo system components are linked with one another in a network, communication protocols shall be used that ensure that erroneous data or signals will not adversely affect the operations of any such system components.

B. All data communication shall incorporate error detection and correction scheme to ensure the data is transmitted and received accurately.

C. Connections between all components of the network bingo system shall only be through the use of secure communication protocols that are designed to prevent unauthorized access or tampering, employing Advanced Encryption Standard, or equivalent encryption.

D. A firewall or equivalent hardware device configured to block all inbound and outbound traffic that has not been expressly permitted and is not required for continued use of the network bingo system must exist between the network bingo system and any external point of access.

E. The minimum width (size) for encryption keys is 112 bits for symmetric algorithms and 1024 bits for public keys.

F. There must be a secure method implemented for changing the current encryption key set. It is not acceptable to only use the current key set to "encrypt" the next set.

G. There must be a secure method in place for the storage of encryption keys. Encryption keys must not be stored without being encrypted themselves.

H. If a wireless network is used, wireless products used in conjunction with any gaming system or system component must meet the following minimum standards:

1. Employ a security process that complies with the Federal Information Processing Standard 140-2 (FIPS 140-2); or

2. Employ an alternative method, as approved by the department.

**11VAC15-40-480. Backup and recovery.**

A. A network bingo system shall have a separate physical medium for securely storing data for the network bingo game, which shall be mirrored in real time by a backup medium.

B. All data required to be available or reported by this chapter must be retained for a period of not less than three years from the close of the fiscal year.

C. All storage of critical data shall utilize error checking and be stored on a nonvolatile physical medium.

D. The database shall be stored on redundant media so that no single failure of any portion of the system would result in the loss or corruption of data.

E. In the event of a catastrophic failure when the network bingo system cannot be restarted in any other way, it shall be possible to reload the network bingo system from the last viable backup point and fully recover the contents of that backup, to consist of at least the following information:

1. All significant events;

2. All accounting information;

3. Auditing information, including all sales and disbursements; and

4. Employee files with access levels.

**11VAC15-40-490. Security requirements.**

A. A network bingo system shall not permit the alteration of any accounting or significant event information that was communicated from a point-of-sale terminal without supervised access controls. In the event financial data is changed, an automated audit log must be capable of being produced to document the following:

1. Data element altered;

2. Data element value prior to alteration;

3. Data element value after alteration;

4. Time and date of alteration; and

5. Personnel that performed alteration.

B. A network bingo system must provide password security or other secure means of ensuring data integrity and enforcing user permissions for all system components through the following means:

1. All programs and data files must only be accessible via the entry of a password that will be known only to authorized personnel;

2. The network bingo system must have multiple security access levels to control and restrict different classes;

3. The network bingo system access accounts must be unique when assigned to the authorized personnel and shared accounts amongst authorized personnel must not be allowed;

4. The storage of passwords and PINs must be in an encrypted, nonreversible form; and

5. A program or report must be available that will list all registered users on the network bingo system including their privilege level.

C. All components of a network bingo system that allow access to users, other than the player, must have a password sign-on with at least two-level codes comprising the personal identification code and a personal password.

1. The personal identification code must have a length of at least six ASCII characters; and

2. The personal password must have a minimum length of six alphanumeric characters, which should include at least one nonalphabetic character.

D. A network bingo system must have the capability to control potential data corruption that can be created by multiple simultaneous log-ons by system management personnel.

1. A network bingo system shall specify which of the access levels allow for multiple simultaneous sign-ons by different users and which of the access levels do not allow for multiple sign-ons, and if multiple sign-ons are possible, what restrictions, if any, exist; or

2. If a network bingo system does not provide adequate control, a comprehensive procedural control document must be drafted for the department's review and approval.

E. Network bingo system software components/modules shall be verifiable by a secure means at the system level. A network bingo system shall have the ability to allow for an independent integrity check of the components/modules from an outside source and an independent integrity check is required for all control programs that may affect the integrity of the network bingo system. This must be accomplished by being authenticated by a third-party device, which may be embedded within the network bingo system software or having an interface or procedure for a third-party application to authenticate the component. This integrity check will provide a means for field verification of the network bingo system components.

F. A network bingo system may be used to configure and perform security checks on the point-of-sale terminals, provided such functions do not affect the security, integrity, or outcome of any game and meets the requirements set forth in this chapter regarding program storage devices.

**11VAC15-40-500. Randomization.**

A. As used in this section, unless the context requires a different meaning:

"Card position" means the first card dealt, second card dealt in sequential order.

"Number position" means the first number drawn in sequential order.

B. A network bingo system shall utilize randomizing procedures in the creation of network bingo cards.

C. Any random number generation, shuffling, or randomization of network bingo cards used in connection with a network bingo system must be by use of a random number generation application that has successfully passed standard tests for randomness and unpredictability including but not limited to:

1. Each card position or number position satisfies the 99% confidence limit using the standard chi-squared analysis. "Chi-squared analysis" is the sum of the ratio of the square difference between the expected result and the observed result to the expected result.

2. Each card position or number position does not produce a significant statistic with regard to producing patterns of occurrences. Each card position or number position will be considered random if it meets the 99% confidence level with regard to the "run test" or any similar pattern testing statistic. The "run test" is a mathematical statistic that determines the existence of recurring patterns within a set of data.

3. Each card position or number position is independently chosen without regard to any other card or number drawn within that game play. This test is the "correlation test." Each pair of card positions or number positions is

considered random if it meets the 99% confidence level using standard correlation analysis.

4. Each card position or number position is independently chosen without reference to the same card position or number position in the previous game. This test is the "serial correlation test." Each card position or number position is considered random if it meets the 99% confidence level using standard serial correlation analysis.

**11VAC15-40-510. Point of sale terminal.**

A. A network bingo system may utilize a point-of-sale terminal that is capable of facilitating the sale of network bingo cards. The point of sale may be entirely integrated into a network bingo system or exist as a separate entity.

B. Point-of-sale use is only permissible when the device is linked to an approved network bingo system.

C. If a network bingo system utilizes a point of sale, it shall be capable of printing a receipt for each sale or void. The receipt shall contain the following information:

1. Date and time of the transaction;

2. Dollar value of the transaction;

3. Validation number, if applicable;

4. Quantity of network bingo cards purchased;

5. Transaction number;

6. Point-of-sale identification number or name; and

7. Date and time when the network bingo game will begin.

D. The following point-of-sale reports shall be generated on demand. Sales Transaction History Report shall show all sales and voids by session and include the following information:

1. Date and time of the transaction;

2. Dollar value of the transaction;

3. Quantity of network bingo cards sold;

4. Transaction number;

5. Point of sale identification number or name; and

6. Date and time of the network bingo game.

**11VAC15-40-520. Game play requirements.**

A. Any device that sells network bingo cards shall be clearly labeled so as to inform the public or game worker that no one younger than 18 years of age is allowed to play or redeem a network bingo card.

B. A network bingo provider shall have physical on-site independent supervision while the numbers for a network bingo game are called by a live caller. This independent supervision shall be unbiased in verifying the outcome of the network bingo game and uphold the department's objective of maintaining the highest level of integrity in charitable gaming. A written agreement specifying the terms of any arrangement between the entity or person providing the physical on-site independent supervision and the network bingo provider shall be required prior to any supervision being performed on the network bingo game. This written agreement shall be maintained by the network bingo provider for a minimum of three years from the close of the fiscal year, unless otherwise specified.

C. A network bingo provider shall ensure qualified organizations participating in its network bingo comply with § 18.2-340.28:1 F of the Code of Virginia.

D. A network bingo provider or the live caller shall announce the prize amount and the predetermined pattern to players immediately before the start of the network bingo game. Each location where a qualified organization is selling network bingo cards shall be equipped to visually display the broadcast or signal of the numbers as they are being called by a live caller.

E. Gross receipts from the sale of network bingo cards shall be allocated in the following manner:

1. Up to 50% of such receipts to the organization selling network bingo cards;

2. Up to 50% of gross receipts to the prize pool; and

3. Any remaining amount to the network bingo provider.

However, if the prize pool reaches the maximum prize limitation, then the network bingo provider shall enable the organization to retain those gross receipts normally allocated to the prize pool.

F. All written agreements specifying the terms of any arrangement between the qualified organization and network bingo provider shall be maintained by both parties for a minimum of three years from the close of the fiscal year, unless otherwise specified.

G. Network bingo prizes must be claimed by the player within 30 days of winning the game and if not, the network bingo provider shall roll the unclaimed prize into the prize pool for the next network bingo game. The network bingo provider shall pay the prize by check to the winning player within 30 days. If the outcome of a network bingo game results in multiple winning players, then the prize amount shall be equally divided among them.

H. No single network bingo prize shall exceed the prize limitation set forth in § 18.2-340.28:1 I of the Code of Virginia.

Part VI
Administrative Process

**11VAC15-40-600. Procedural rules for the conduct of fact-finding conferences and hearings.**

A. As used in this part, "manufacturer" means a person or entity that assembles from raw materials or subparts an electronic games of chance system.

B. Fact-finding conference; notification, appearance, and conduct.

1. Unless automatic revocation or immediate suspension is required by law, no permit to conduct charitable gaming, sell charitable gaming supplies, or distribute electronic

games of chance shall be denied, suspended, or revoked except after review and approval of such proposed denial, suspension, or revocation action by the board, and upon notice stating the basis for such proposed action and the time and place for a fact-finding conference as set forth in § 2.2-4019 of the Administrative Process Act.

2. If a basis exists for a refusal to renew, suspend, or a revoke a permit, the department shall notify by certified mail or by hand delivery the interested persons at the address of record maintained by the department.

3. Notification shall include the basis for the proposed action and afford interested persons the opportunity to present written and oral information to the department that may have a bearing on the proposed action at a fact-finding conference. If there is no withdrawal, a fact-finding conference shall be scheduled at the earliest mutually agreeable date, but no later than 60 days from the date of the notification. Organizations, suppliers, or manufacturers who wish to waive their right to a conference shall notify the department at least 14 days before the scheduled conference.

4. If, after consideration of evidence presented during an informal fact-finding conference, a basis for action still exists, the interested persons shall be notified in writing within 60 days of the fact-finding conference via certified or hand-delivered mail of the decision and the right to a formal hearing. Parties to the conference may agree to extend the report deadline if more time is needed to consider relevant evidence.

C. Hearing; notification, appearance, and conduct.

1. If, after a fact-finding conference, a sufficient basis still exists to deny, suspend, or revoke a permit, interested persons shall be notified by certified or hand-delivered mail of the proposed action and of the opportunity for a hearing on the proposed action. If an organization, supplier, or manufacturer desires to request a hearing, it shall notify the department within 14 days of receipt of a report on the conference. Parties may enter into a consent agreement to settle the issues at any time prior to, or subsequent to, an informal fact-finding conference.

2. If an interested party or representative fails to appear at a hearing, the hearing officer may proceed in his absence and make a recommendation.

3. Oral and written arguments may be submitted to and limited by the hearing officer. Oral arguments shall be recorded in an appropriate manner.

D. Hearing location. Hearings before a hearing officer shall be held, insofar as practicable, in the county or city in which the organization, supplier, or manufacturer is located. If the parties agree, hearing officers may conduct hearings at locations convenient to the greatest number of persons or by telephone conference, video conference, or similar technology, in order to expedite the hearing process.

E. Hearing decisions.

1. Recommendations of the hearing officer shall be a part of the record and shall include a written statement of the hearing officer's findings of fact and recommendations as well as the reasons or basis for the recommendations. Recommendations shall be based upon all the material issues of fact, law, or discretion presented on the record.

2. The department shall review the recommendation of the hearing officer and render a decision on the recommendation within 30 days of receipt. The decision shall cite the appropriate rule, relief, or denial thereof as to each issue.

F. Agency representation. The commissioner's designee may represent the department in an informal conference or at a hearing.

**11VAC15-40-610. Reporting violations.**

A. Unless otherwise required by law, the identity of any individual who provides information to the department or its agents regarding alleged violations shall be held in strict confidence.

B. Any officer, director, or game manager of a qualified organization or any officer or director of a supplier or manufacturer shall immediately report to the department any information pertaining to the suspected misappropriation or theft of funds or any other violation of charitable gaming statutes or this chapter.

C. Failure to report the information required by subsection B of this section may result in the denial, suspension, or revocation of a permit.

D. Any officer, director, or game manager of a qualified organization involved in the management, operation, or conduct of charitable gaming shall immediately notify the department upon being convicted of a felony or a crime involving fraud, theft, or financial crimes.

E. Any officer, director, partner, or owner of a supplier or manufacturer shall immediately notify the department upon being convicted or of pleading nolo contendere to a felony or a crime involving gambling or an action against any license or certificate held by the supplier in any state in the United States.

F. Failure to report information required by subsection D or E of this section by any officer, director, or game manager of a qualified organization or by any supplier or manufacturer may result in the denial, suspension, or revocation of a permit.

G. Any officer, director, or game manager of a qualified organization involved in charitable gaming shall immediately report to the department any change the IRS makes in the tax status of the organization, or if the organization is a chapter of a national organization covered by a group tax exempt determination, the tax status of the national organization.

H. All organizations regulated by the department shall display prominently a poster advising the public of a phone number where complaints relating to charitable gaming may be made. Such posters shall be in a format prescribed by the department.

NOTICE: The following forms used in administering the regulation were filed by the agency. The forms are not being published; however, online users of this issue of the Virginia Register of Regulations may click on the name of a form with a hyperlink to access it. The forms are also available from the agency contact or may be viewed at the Office of the Registrar of Regulations, General Assembly Building, 2nd Floor, Richmond, Virginia 23219.

FORMS (11VAC15-40)

GAME MANAGEMENT FORMS

Bingo Session Reconciliation Summary, Form 103 (rev. 1/2011)

Admission Sales Reconciliation - Paper, Form 104-A (rev. 1/2011)

Floor Sales Reconciliation - Paper, Form 104-B (rev. 1/2011)

Decision Bingo Reconciliation, Form 104-C (rev. 1/2011)

Raffle/Treasure Chest Sales Reconciliation - Bingo Session, Form 104-D (rev. 1/2011)

Instant Bingo/Seal Cards/Pull-Tabs Reconciliation, Form 105 (rev. 1/2011)

Storeroom Inventory Issue - Paper, Form 106-A (rev. 7/2008)

Storeroom Inventory Issue - Instant Bingo/Seal Cards/Pull-Tabs, Form 106-B (rev. 7/2008)

List of Volunteer Workers, Form 107 (rev. 7/2008)

Prize Receipt, Form 108 (rev. 7/2008)

Storeroom Inventory - Paper, Form 109-A (rev. 1/2011)

Storeroom Inventory - Instant Bingo/Seal Cards/Pull-Tabs, Form 109-B (rev. 1/2011)

ORGANIZATION LICENSING FORMS

Charitable Gaming Permit Application - New Applicants Only, Form 201 - N (rev. 1/2011)

Charitable Gaming Permit Application - Renewal Applicants Only, Form 201 - R (rev. 1/2011)

Permit Amendment (rev. 1/2011)

Gaming Personnel Information Update (rev. 7/2008)

Report of Game Termination (rev. 7/2008)

MANUFACTURER OF ELECTRONIC GAMES OF CHANCE SYSTEMS ~~AND~~, SUPPLIER, AND NETWORK BINGO PROVIDER LICENSING FORMS

~~Manufacturer of Electronic Games of Chance Systems and Charitable Gaming Supplier Permit Application, Form 301 (rev. 6/12).~~

~~Annual Supplier/Manufacturer Sales and Transaction Report, Form 302 (rev. 6/12)~~

Charitable Gaming Supplier Permit Application, Form 301 (rev. 7/2013)

Annual Supplier/Manufacturer Sales and Transaction Report, Form 302 (rev. 8/2013)

Certification of Non-Permit Holder, Form 303 (rev. 7/2013)

Certification of Non-Charitable Gaming/Gambling, Form 304 (rev. 7/2013)

Manufacturer of Electronic Pull-tab System Permit Application, Form 305 (rev. 10/2012)

Manufacturer of Electronic Pull-tab System Permit Application - Personal Information, Form 305A (rev. 10/2012)

Manufacturer of Electronic Pull-tab System Permit Renewal Application, Form 306 (rev. 10/2013)

Manufacturer of Electronic Pull-tab System Permit Renewal Application - Personal Information, Form 306A (rev. 10/2013)

Network Bingo Provider Permit Application, Form 307 (eff. 5/2014)

Network Bingo Provider Permit Application - Personal Information, Form 307A (eff. 5/2014)

BINGO MANAGER AND BINGO CALLER REGISTRATION FORMS

Charitable Gaming Bingo Caller Certificate of Registration Application, Form 401 (rev. 1/2011)

Charitable Gaming Bingo Manager Certificate of Registration Application, Form 402 (rev. 1/2011)

Amendment to Certificate of Registration – Registered Bingo Callers and Bingo Managers (rev. 1/2011)

Personal Information Update – Registered Bingo Callers and Registered Bingo Managers, Form 404 (rev. 7/2007)

Bona Fide Member Verification, Form 405 (rev. 5/2011)

VA.R. Doc. No. R14-3873; Filed October 27, 2015, 5:23 p.m.

## TITLE 12. HEALTH

### STATE BOARD OF HEALTH

### Fast-Track Regulation

Title of Regulation: **12VAC5-31. Virginia Emergency Medical Services Regulations (amending 12VAC5-31-2810, 12VAC5-31-2830, 12VAC5-31-2840, 12VAC5-31-2860, 12VAC5-31-2880, 12VAC5-31-2900, 12VAC5-31-2920, 12VAC5-31-2930).**

Statutory Authority: §§ 32.1-12 and 32.1-111.3 of the Code of Virginia.

Public Hearing Information: No public hearings are scheduled.

Public Comment Deadline: December 16, 2015.

Effective Date: January 4, 2016.

Agency Contact: Michael Berg, Regulatory and Compliance Manager, Department of Health, 1041 Technology Park Drive, Glen Allen, VA 23059-4500, telephone (804) 888-9131, or email michael.berg@vdh.virginia.gov.

Basis: Sections 32.1-111.4 and 32.1-111.5 of the Code of Virginia authorize the State Board of Health, with the Emergency Medical Services (EMS) Advisory Board, to prescribe by regulation emergency services.

Purpose: The amendments are essential to protect the health, safety, and welfare of the citizens because they clarify the regulations by better defining the purpose, eligibility criteria, and approval process for certain grant applications. There are no substantive content changes being proposed. The changes have been reviewed by the Financial Assistance Review Committee and approved by the Rules and Regulations Committee of the Emergency Medical Services (EMS) Advisory Board.

Rationale for Using Fast-Track Process: The technical changes have been vetted through the standing committees of the EMS Advisory Board and are technical in nature only. There is no anticipated opposition to these changes as presented.

Substance: The amendments are technical in nature and intended to clarify existing language in the regulations without making any substantive changes. There is no new terminology or requirements to this section of the EMS regulations. Recommended changes include moving certain language to a more appropriate section of the regulations; improving the flow, understanding, and readability of the regulations; and better defining the purpose and approval process for the grant application.

Issues: The primary advantage to the public is a regulation that is easier to read and that provides a better understanding of the grant process. There are no disadvantages to the public. The primary advantage to the agency and the Commonwealth is a clearer, more understandable flow of the EMS regulations for the reviewer. There is no known disadvantage to the agency or the Commonwealth.

Department of Planning and Budget's Economic Impact Analysis:

Summary of the Proposed Amendments to Regulation. The State Board of Health (Board) proposes to: 1) require that the eligible designated regional Emergency Medical Services (EMS) council nominate three candidates to fill a vacancy on the Financial Assistance and Review Committee (FARC), 2) no longer require that length of nonrepresentation of geographic regions be explicitly considered for filling vacancies on FARC, 3) add to the regulation a requirement currently in the grant application and contract that a copy of the title for all EMS vehicles obtained through the grant be provided to the Virginia Office of EMS, and 4) make several language changes for clarity.

Result of Analysis. The benefits likely exceed the costs for all proposed changes.

Estimated Economic Impact. FARC was created in 1978 by the EMS Advisory Council to carry out the responsibility of reviewing Rescue Squad Assistance Fund (RSAF) grant applications and recommend funding. In 1996, FARC was statutorily established by § 32.1-111.12:01 in the Code of Virginia for the purposes of administering the Virginia RSAF grant funds. FARC reviews the RSAF grant applications from eligible licensed EMS agencies and other eligible not for profits involved in emergency medical service, and then make its recommendations for grant awards to the Commissioner of Health.

The current regulation specifies that the eligible designated regional Emergency Medical EMS council nominate one to three candidates to fill a vacancy on FARC. The EMS Advisory Board makes appointments to FARC from the nominations submitted by the designated regional EMS council. The Board proposes to require that the eligible designated regional Emergency Medical EMS council nominate specifically three candidates rather than the current one to three. The current regulation specifies that in regard to FARC, "Consideration for filling vacancies shall include length of nonrepresentation on FARC in an effort to provide reasonable geographic distribution." The Board proposes to eliminate this sentence from the regulation. Both of these proposed amendments are designed to give the EMS Advisory Board a broader pool of potential nominees from which to find those most qualified. Neither proposed amendment will necessarily change who is ultimately appointed in the majority of cases.

RSAF grant application and contract forms specify that a copy of the title for all EMS vehicles obtained through the grant be provided to the Virginia Office of EMS.[1] The Board proposes to include this requirement in the regulation. Including the language in the regulation will have no impact beyond informing potential applicants of the requirement and adding clarity. The Board proposes several other clarifying amendments that do not change requirements in practice. These amendments will likely produce a net benefit in that they may reduce potential confusion over requirements without adding any cost.

Businesses and Entities Affected. The proposed amendments affect approximately 600 EMS agencies, approximately 500 nonprofit entities that participate in EMS activities and approximately 100 local governments that provide EMS services.[2]

Localities Particularly Affected. The proposed amendments do not disproportionately affect particular localities.

Projected Impact on Employment. The proposed amendments will not significantly affect employment.

Effects on the Use and Value of Private Property. The proposed amendments will not significantly affect the use and value of private property.

Real Estate Development Costs. The proposed amendments will not affect real estate development costs.

[1] Source: Virginia Department of Health,

[2] Data Source: Ibid

Agency's Response to Economic Impact Analysis: The Department of Health concurs with the Department of Planning and Budget's economic impact analysis.

Summary:

*The amendments (i) require that the eligible designated regional Emergency Medical Services (EMS) council nominate three candidates to fill a vacancy on the Financial Assistance and Review Committee (FARC); (ii) remove the requirement that the length of nonrepresentation of geographic regions be explicitly considered for filling vacancies on FARC; (iii) add a requirement currently in the grant application and contract that a copy of the title for all EMS vehicles obtained through the grant be provided to the Virginia Office of EMS; and (iv) make several changes for clarity.*

Part VIII

Financial Assistance For Emergency Medical Services

**12VAC5-31-2810. The Financial Assistance and Review Committee (FARC).**

A. Financial Assistance and Review Committee appointments.

1. Appointments shall be made for terms of three years or the unexpired portions thereof in a manner to preserve, insofar as possible, the representation of the emergency medical services councils. No member may serve more than two successive terms. The chairman shall be elected from the membership of the FARC for a term of one year and shall be eligible for reelection.

2. The EMS Advisory Board may revoke appointment for failure to adhere to the standards set forth in ~~these regulations~~ this chapter, and the State and Local Government Conflict of Interests Act (§ 2.2-3100 et seq. of the Code of Virginia).

3. Members serving on the FARC on January 1, 2008, shall complete their current terms of office.

4. Midterm vacancies shall be filled by nominations submitted from the affected designated regional EMS council.

B. Geographical representation.

1. Designated regional EMS councils shall be eligible to submit nominations to the EMS Advisory Board for representation on the FARC.

2. The eligible designated regional EMS council shall nominate ~~one to~~ three candidates to fill a vacancy on the FARC. The EMS Advisory Board shall make appointments from the nominations submitted by the designated regional EMS council. ~~Consideration for filling vacancies shall include length of nonrepresentation on FARC in an effort to provide reasonable geographic distribution.~~

3. A designated regional EMS council whose representative has completed two successive terms on FARC shall not be eligible to submit a nomination for one full term (three years).

C. Meetings and attendance.

1. The FARC shall meet at least four times annually at the call of the chairman or the commissioner.

2. Attendance at FARC Grant Review meetings is mandatory for all members.

3. A quorum for a meeting of the FARC shall consist of not fewer than four members.

**12VAC5-31-2830. Award of RSAF General Grants.**

A. The requirements of this section shall apply to the disbursement of funds.

B. A nonprofit licensed EMS agency or other Virginia emergency medical service organization operating on a nonprofit basis exclusively for the benefit of the general public pursuant to § 32.1-111.12 of the Code of Virginia is eligible for an RSAF General Grant.

C. An applicant must be in compliance with ~~these regulations~~ this chapter.

~~C.~~ D. Programs, services, and equipment funded by the RSAF must comply with the plans, policies, procedures, and guidelines adopted by the ~~State~~ EMS Advisory Board. ~~Awards are based upon one or more of the following criteria~~ Grants may be approved for the following:

1. Establishment of a new EMS agency, program, or service where needed to improve emergency medical services offered in an area;

2. Expansion or improvement of an existing EMS agency, program, or service;

3. Replacement of equipment or procurement of new equipment~~. EMS vehicles purchased with funding from the RSAF shall meet the current state and/or federal standards for the type of vehicle purchased~~; or

4. Establishment, expansion or improvement of EMS training programs.

**12VAC5-31-2840. RSAF General Grant award cycle.**

A. The grant period shall be for a period of 12 months from the date of award and there shall be two review cycles per year;

B. Deadline for submission of applications shall be March 15 and September 15 of each year. Applications must be

received in the Office of EMS by 5 p.m. of the date of the deadline. In the event the deadline falls on a Saturday, Sunday, or state or federal holiday, the application must be received by 5 p.m. in the Office of EMS the next business day.

C. Applications shall be made to the Office of EMS on an approved application form.

~~C.~~ D. Dates of award shall be July 1 and January 1 of each year.

~~D.~~ E. Other dates in the award process shall be established by the Office of EMS.

**12VAC5-31-2860. EMS System Initiative Awards.**

EMS System Initiative Awards are based on priorities and needs identified by the EMS Advisory Board in ~~concert~~ consultation with the ~~office~~ Office of EMS to meet EMS system objectives as stipulated in § 32.1-111.3 of the Code of Virginia.

1. The Office of EMS or FARC, in consultation with EMS Advisory Board, may implement EMS System Initiative Awards at any time. Examples of such awards would include medically advanced equipment with broad application (automated external defibrillation) and information technology to enhance communications and data (computers).

2. ~~Applications must be made to the Office of EMS on an approved application form.~~ EMS System Initiative Award applications shall be submitted on the Office of EMS approved form, using approved pricing, application eligibility award criteria, and approved priorities.

3. The EMS System Initiative Award will be made or rejected by the Office of EMS within 30 business days after receiving an application on an approved form.

4. EMS System Initiative Awards ~~shall be~~ may be granted for the following purposes, based upon the demonstrated ~~needs from the following criteria~~ need:

a. Establishment of a new EMS agency, program, or service where needed to improve emergency medical services offered in an area;

b. Expansion or improvement of an existing EMS agency, program, or service;

c. Replacement of equipment or procurement of new equipment~~. EMS vehicles purchased with funding from the RSAF shall meet the current state and/or federal standards for the type of vehicle purchased~~; or

d. Establishment, expansion or improvement of EMS training programs.

**12VAC5-31-2880. Application for award.**

A. Applications ~~must~~ shall be made to the Office of EMS.

B. The Office of EMS will review applications for compliance with the EMS regulations and RSAF policies and procedures. The FARC reviews and grades applications and makes recommendations on general grant funding.

**12VAC5-31-2900. Awards.**

A. The Office of EMS shall make awards as approved by the commissioner.

B. Grantees will be notified of their award ~~by mail~~.

C. Funds may be disbursed to the grantee at any time within the grant period. Agreement to the award and any attached conditions shall be secured prior to any disbursements.

**12VAC5-31-2920. Use of funds.**

A. Awards ~~will~~ shall be made in accordance with § 32.1-111.12 of the Code of Virginia.

B. Funds ~~must~~ shall be used only for the specific items, service, or programs for which they were awarded~~. This includes~~ and in accordance with any conditions placed upon a grant award.

C. The grantee ~~is required to~~ shall sign an agreement form attesting that the award funds ~~will~~ shall be used as granted and the grantee meets all conditions placed upon the award.

D. Sale, trade, transfer, or disposal, within five years of vehicles or items specified by the Office of EMS in the notice of award purchased in whole or in part with the use of state moneys requires prior approval by the Office of EMS.

E. EMS vehicles purchased with funding from the RSAF shall meet the current state and federal standards for the type of vehicle purchased.

~~E.~~ F. Funds ~~must~~ shall not be used for expenditures or commitments made before the date of the grant award or after the conclusion of the grant period.

~~F.~~ G. Funds ~~will~~ shall not be approved or disbursed for:

1. Leased equipment or vehicle;

2. Equipment or vehicles secured by a lien;

3. Guarantees or warranties;

4. Used equipment or vehicles without prior approval; or

5. Fire suppression apparatus or law-enforcement equipment.

**12VAC5-31-2930. Ownership.**

~~The title for all~~ All equipment, including EMS vehicles, shall be in the name of the organization to which the award has been made or in the name of the local jurisdiction or government entity in which the organization is located. This requirement shall apply to the ownership of equipment purchased in whole or in part with the use of these funds.

A copy of the title for each EMS vehicle shall be provided to the Office of EMS.

NOTICE: The following forms used in administering the regulation were filed by the agency. The forms are not being published; however, online users of this issue of the Virginia Register of Regulations may click on the name of a form with a hyperlink to access it. The forms are also available from the

agency contact or may be viewed at the Office of the Registrar of Regulations, General Assembly Building, 2nd Floor, Richmond, Virginia 23219.

FORMS (12VAC5-31)

EMT Clinical Training Summary Record, EMS.TR.05 (rev. 8/2012)

Training Program Complaint Form, EMS.TR.30 (rev. 1/2011)

Course Approval Request, EMS.TR.01 (rev. 6/2011)

CTS Payment Request Form, EMS.TR.CTS.001 (rev. 6/2012)

EMS Variance/Exemption Application for Providers, EMS 6036 (rev. 6/2011)

EMS Variance/Exemption Application for Agencies, EMS 6037 (rev. 6/2011)

Course Summary Form, EMS.TR.03 (rev. 6/2011)

~~EMS Continuing Education (CE) Registration Card Scan Form, EM 156839:6543 (rev. 1/96).~~

~~Virginia EMS Training Program Enrollment Form, EM 234503 1:6543 (rev. 1/01).~~

~~Virginia EMS Certification Application, EM-210983-5:65432 (rev. 1/97).~~

EMS Certification Application, Form A (undated)

EMS Training Program Enrollment Form, Form E (undated)

EMS Continuing Education Registration Card (undated)

Application for EMS Agency License (rev. 8/2012)

Application for EMS Vehicle Permit and Instructions (rev. 8/2012)

Complaint Report Form (rev. 11/2010)

Operational Medical Director Agreement (rev. 8/2012)

ALS-Coordinator Application, EMS.TR.31 (rev. 11/2011)

Emergency Medical Services Medical Record (rev. 6/2010)

BLS Course Student Information Package, EMS.TR.09 (rev. 5/2012)

ALS Course Student Information Package, EMS.TR.10 (rev. 5/2012)

BLS Individual Age, Clinical and Skill Performance Verification, EMS.TR.33 (rev. 1/2011)

Student Permission Form For BLS Students Less Than 18 Years Old, EMS.TR.07 (rev. 7/2011)

Physician Assistant & Nurse Practitioner Paramedic Challenge Competency Summary, EMS.TR.37 (rev. 2/12)

Program Accreditation Application, Instructions and Self Study - Paramedic (rev, 7/2012)

Program Accreditation Application, Instructions and Self Study - Intermediate (rev. 7/2012)

Alternative Site Application for EMS Programs in Virginia (rev. 7/2012)

Rescue Squad Assistance Fund Grant Application, Office of Emergency Services (http://www.vdh.virginia.gov/OEMS/Agency/Grants/index.htm)

EMS System Initiative Award Application, Office of Emergency Services (http://www.vdh.virginia.gov/OEMS/Agency/Grants/index.htm)

OEMS Grant Program Memorandum of Agreement (rev. 1/2012)

VA.R. Doc. No. R16-3992; Filed October 26, 2015, 11:08 a.m.

## Final Regulation

Title of Regulation: **12VAC5-570. Commonwealth of Virginia Sanitary Regulations for Marinas and Boat Moorings (amending 12VAC5-570-10, 12VAC5-570-30 through 12VAC5-570-190; adding 12VAC5-570-200; repealing 12VAC5-570-20).**

Statutory Authority: § 32.1-246 of the Code of Virginia.

Effective Date: December 16, 2015.

Agency Contact: Preston Smith, Manager, Marina Programs, Department of Health, 109 Governor Street, Richmond, VA 23219, telephone (804) 864-7468, FAX (804) 864-7475, or email preston.smith@vdh.virginia.gov.

Summary:

*The Sanitary Regulations for Marinas and Boat Moorings establish minimum standards for sewage handling and disposal at regulated facilities to ensure that sewage generated from boats and onshore boating facilities is treated and disposed of properly. The amendments (i) provide an allowance for smaller boating facilities to construct unisex bathrooms, (ii) eliminate the distinction between transient and seasonal slips as the basis for determining sewerage fixture needs, (iii) establish a new live-aboard slip category with a higher wastewater flow number, (iv) provide an alternative to installing a sanitary waste dump station for owners with facilities that have proper sanitary waste pump-out services, and (v) allow the use of manually operated pumps at marinas and other places where boats are moored that offer fewer than 26 slips. Changes since the proposed stage move requirements for a construction permit and the department's policy regarding inspections into the regulation and adjust the requirements for minimum holding tank size.*

Summary of Public Comments and Agency's Response: A summary of comments made by the public and the agency's response may be obtained from the promulgating agency or viewed at the office of the Registrar of Regulations.

Part I
Introduction

Article 1
Definitions

**12VAC5-570-10. Definitions.**

~~As used in this chapter, the~~ The following words and terms ~~hereinafter set forth~~ when used in this chapter shall have the following meanings ~~respectively,~~ unless the context clearly ~~requires a different meaning.~~ indicates otherwise:

"Board" means the State Board of Health.

"Boat" means any vessel or other watercraft, privately owned or owned by the Commonwealth or any political subdivision thereof, whether moved by oars, paddles, sails, or other power mechanism, inboard or outboard, or any other vessel or structure floating on water in the Commonwealth of Virginia, whether or not capable of self-locomotion, including but not limited to cruisers, cabin cruisers, runabouts, houseboats and barges. Excluded from this definition are commercial, passenger and cargo carrying vessels subject to the Quarantine Regulation of the United States Public Health Service adopted pursuant to Title 42 of the United States Code and ships or vessels of the U.S. Government and boats which are tenders to larger boats moored or stored at the same facility.

"Boating access facility" means any installation operating under public or private ownership that provides a boat launching ramp and has 50 or more parking spaces for boat trailers.

"Certificate" [ or "certificate to operate" ] means a written approval from the ~~Commissioner~~ commissioner or his designated representative indicating that plans for ~~sanitary facilities and sewage~~ sewerage facilities, sewerage system, and treatment works meet or satisfy the minimum requirements of this chapter and § 32.1-246~~,~~ of the Code of Virginia.

"Commissioner" means the State Health Commissioner ~~whose duties are prescribed in § 32.1-19 of the Code of Virginia~~.

"Department" means the Virginia Department of Health.

"Division" means the Division of ~~Wastewater Engineering, Department of Health~~ Onsite Sewage and Water Services, Environmental Engineering, and Marina Programs, Office of Environmental Health Services of the department or its administrative successor.

"Dry storage" means ~~a~~ boat storage, including boatels, valet storage, pigeon hole storage, stackominiums, or ~~parking space~~ where boats rest on racks or trailers located on land, whether covered or uncovered, at a marina or other ~~place~~ places where boats are moored ~~for the purpose of storing boats on land between use~~.

"Expanded" means any change to a regulated facility that results in an increase in sewage volume or strength due to the addition of slips, dry storage spaces, boat trailer parking spaces, or ancillary operations.

"Live-aboard slip" means any slip where a boat is moored and used principally as a residence or a place of business. Charter and commercial fishing boats are not included unless used as a residence.

"Local health department" means the branch of the State Health Department, established in accordance with § 32.1-30 of the Code of Virginia, that has jurisdiction in the city or county where the regulated facility is located.

"Marina" means any installation operating~~,~~ under public or private ownership~~, which~~ that provides dockage or moorage for boats ~~(exclusive of~~, other than paddle or ~~rowboats)~~ rowboats, and provides~~,~~ through sale, rental ~~or~~, fee, or free basis~~,~~ any equipment, supply, or service ~~(fuel~~ including fuel, electricity, or ~~water)~~ water for the convenience of the public or ~~its lessee~~ the lessee, renters, or users of ~~its~~ the facilities.

"Marine sanitation device" means any equipment, piping, holding tanks, and appurtenances ~~such as holding tanks for installation on board~~ onboard a boat ~~which is~~ designed to receive, retain, treat, or discharge sewage ~~and any process to treat such sewage~~.

"No Discharge Zone" means an area where a state has received an affirmative determination from the U.S. Environmental Protection Agency that there are adequate facilities for the removal of sewage from vessels (holding tank pump-out facilities) in accordance with § 312(f)(3) of the Clean Water Act (33 USC § 1251 et seq.) and where federal approval has been received allowing a complete prohibition of all treated or untreated discharges of sewage from all vessels.

"Office" means the Office of Environmental Health Services.

"Other places where boats are moored" means any installation operating under public or private ownership~~, which~~ that provides dockage~~,~~ or moorage ~~or mooring~~ for boats, other than ~~(exclusive of~~ paddle or ~~rowboats)~~ rowboats, either on a free, rental, or fee basis or for the convenience of the ~~public~~ boater.

"Owner" means the Commonwealth or any of its political subdivisions and any public or private institution, corporation, association, firm, or company organized or existing under the laws of this or any other state ~~or county~~, or any person or group of persons acting individually or as a group who owns or proposes to own a marina, ~~or~~ other ~~place~~ places where boats are moored, or boating access facility.

"Pump-out ~~facilities~~ facility" means any device, equipment, or method ~~of~~ for removing sewage from a marine sanitation device~~. Also, it shall include~~ and conveying such sewage to a sewerage system or treatment works including any portable, movable, or permanent holding tanks ~~either portable, movable or permanently installed, and any sewage treatment method or~~

~~disposable equipment used to treat, or ultimately dispose of, sewage removed from boats~~.

~~"Sanitary facilities~~ "Sewerage facility" means bathrooms, toilets, closets and other enclosures, including portable toilets, where commodes, ~~stools,~~ water closets, lavatories, showers, urinals, sinks, or other such plumbing fixtures are installed.

~~"Seasonal slips" means any slip which is used, rented, leased, or otherwise made available for mooring or docking of boats during the normal boating season, usually from April through September, or for any period greater than 30 days.~~

"Sewage" means ~~the spent water or wastewater containing human excrement coming from toilets, bathrooms, commodes and holding tanks.~~ water-carried and nonwater-carried human excrement, kitchen, laundry, shower, bath, or lavatory waste, separately or together with such underground, surface, storm, and other water and liquid industrial wastes as may be present from residences, buildings, vehicles, boats, industrial establishments, or other places.

"Sewage dump station" means a facility specifically designed to receive waste from portable sewage containers carried on boats and to convey such sewage to a sewerage system or a treatment works.

~~"Sewage treatment or disposal systems" means device, process or plant designed to treat sewage and remove solids and other objectionable constituents which will permit the discharge to another approved system, or an approved discharge to state waters or disposal through an approved subsurface drainfield or other acceptable method, such as incineration.~~

"Sewerage ~~facilities~~ system" means ~~entire sewage collection and disposal system including commodes, toilets, lavatories, showers, sinks and all other plumbing fixtures which are connected to a collection system consisting of sewer pipe, conduit, holding tanks, pumps and all appurtenances, including the sewage treatment or disposal system~~ pipelines or conduits, pump stations and force mains, and all other construction, devices, and appliances used for the collection and conveyance of sewage to a treatment works or point of ultimate disposal.

"Slip" means a berth or space where a boat may be secured to a fixed or floating structure, including a dock, finger pier, boat lift, or mooring buoy.

~~"Transient slips" means temporary docking or mooring space which may be used for short periods of time, including overnight, days, or weeks, but less than 30 days.~~

"Treatment works" means any device or system used in the storage, treatment, disposal, or reclamation of sewage or combinations of sewage and industrial wastes, including but not limited to pumping, power and other equipment and appurtenances, septic tanks, and any works, including land, that are or will be (i) an integral part of the treatment process or (ii) used for ultimate disposal of residues or effluents resulting from such treatment.

"VMRC" means the Virginia Marine Resources Commission.

Article 2
General Information

**12VAC5-570-20. ~~Authority for regulations.~~ (Repealed.)**

~~Section 32.1-12 and 32.1-246 of the Code of Virginia provides that the State Board of Health is empowered and directed to promulgate all necessary rules and regulations establishing minimum requirements as to adequacy of sewerage facilities at marinas and other places where boats are moored. These facilities should be sufficient to serve the number of boat slips or persons such marinas and places are designed to accommodate, regardless of whether such establishments serve food.~~

**12VAC5-570-30. Purpose ~~of regulations~~.**

~~This chapter~~ The board has ~~been~~ promulgated ~~by the State Board of Health~~ this chapter to:

1. ~~Ensure~~ Protect public health and water quality by ensuring that adequate ~~sanitary~~ sewerage facilities ~~and~~, pump-out facilities, ~~as defined in 12VAC5-570-10 and required by 12VAC5-570-130 of this chapter,~~ sewage dump stations, and sewerage systems are provided at all marinas ~~and~~, other places where boats are moored~~;~~, and boating access facilities.

2. Establish minimum requirements as to the adequacy of sewerage facilities and sewerage systems at all marinas ~~and~~, other places where boats are moored~~;~~, and boating access facilities.

3. Protect public health and the environment by ensuring that all sewage generated from all regulated facilities is conveyed to an approved sewerage system or treatment works.

~~3.~~ 4. Guide the ~~State Board of Health~~ commissioner or his designee in ~~its~~ his determination of the adequacy of the sewerage systems and sewerage facilities ~~to serve~~ serving all marinas ~~and~~, other places where boats are moored~~;~~, and boating access facilities.

~~4.~~ 5. Guide the ~~State Board of Health~~ commissioner or his designee in ~~its approval~~ his evaluation of plans and other data and in the issuance of a certificate as to the adequacy of ~~sanitary and~~ sewerage facilities~~;~~ and sewerage systems.

~~5. Notify the Marine Resources Commission that a certificate has been issued; and~~

~~6. Assist the owner or his authorized engineer in the preparation of an application and supporting data, as may be required. (See 12VAC5-570-70)~~

**12VAC5-570-40. Administration ~~of regulations~~.**

~~This chapter is administered by the following parties:~~

~~1. The State Board of Health has responsibility for promulgating, amending, and repealing regulations which ensure minimum requirements as to adequacy of sewerage~~

~~facilities at marinas and other places where boats are moored~~.

~~2.~~ A. The ~~State Health Commissioner~~ commissioner is the chief executive officer of the Virginia Department of Health. The commissioner has the authority to act for the board when it is not in session. The commissioner may delegate his powers under this chapter with the exception of his power to issue variances under 12VAC5-570-90.

~~3.~~ B. The ~~Division of Wastewater Engineering~~ division is designated as the primary reviewing agent of the ~~board~~ commissioner for the purpose of administering this chapter. ~~It~~ Upon receipt of the application from the local health department, the division examines and ~~passes upon the technical aspects of all applications, plans and specifications~~ grants or denies the application for sewerage facilities to serve marinas ~~and,~~ other places where boats are moored, and boating access facilities. ~~It~~ The division issues all certificates attesting to the adequacy of the sewerage facilities and notifies the ~~Marine Resources Commission~~ VMRC when a certificate is issued or denied.

~~4. The Deputy Commissioner for Community Health Services directs and supervises the activities of the local health departments in the administration of assigned duties and responsibilities under the chapter.~~

~~5.~~ C. The local health department ~~in each jurisdiction, city, town or county in which there exists, or is proposed, a marina or other place where boats are moored~~ shall ~~(i)~~ be responsible for ~~the~~ processing ~~of~~ all applications submitted by owners~~, (ii) inspect~~ and for inspecting sites and facilities ~~provided, (iii) issue such permits as required by law, rules or regulations for sewerage facilities and, (iv) lacking in authority to issue a permit, will process such applications in accordance with the policies and procedures of the department. The local health department shall conduct a surveillance program and enforce the provisions of this chapter to ensure proper sanitation and cleanliness of the facilities provided~~ for compliance with this chapter.

~~6.The Office of Water Programs of the Department of Health of the Commonwealth of Virginia is responsible for the review and approval of sewage treatment works where there is a discharge to state waters, in accordance with the chapter, policies and procedures of the Health Department and the State Water Control Law, §§ 62.1-44.2 through 62.1-44.34 of the Code of Virginia.~~

**12VAC5-570-50. ~~Application of regulations to marinas and other places where boats are moored~~ Applicability.**

A. ~~Marinas or other places where boats are moored which are not in compliance with the Rules and Regulations of the Board of Health Governing Sanitary and Sewerage Facilities at Marinas and Other Places Where Boats Are Moored which became effective November 15, 1975 [repealed], shall comply with this chapter.~~ Marinas, other places where boats are moored, and boating access facilities in operation prior to the effective date of this chapter shall be subject to the regulations in effect at the time the marina, other places where boats are moored, or boating access facility was permitted unless such marina, other places where boats are moored, or boating access facility is expanded after [ ~~(insert the effective date of this chapter)~~ December 16, 2015 ].

B. ~~All planned or new marinas or other places where boats are moored which do not exist~~ This chapter shall apply to all marinas, other places where boats are moored, and boating access facilities placed into operation on or after [ ~~(insert the effective date of this chapter)~~ December 16, 2015 ] ~~shall comply with all provisions of this chapter prior to commencing operation~~.

C. All ~~sanitary or~~ sewerage facilities and sewerage systems shall conform to the requirements of this chapter when the marina ~~or,~~ other ~~place~~ places where boats are moored ~~are either~~, or boating access facility that is served by the sewerage facilities and sewerage systems is expanded~~, altered or modified~~.

D. This chapter shall apply to sewerage facilities and sewerage systems (i) serving marinas, other places where boats are moored, or boating access facilities and (ii) located on property owned by the marina, other places where boats are moored, or boating access facility. Sewerage systems or treatment works installed or proposed to be installed on property owned by someone other than the marina, other places where boats are moored, or boating access facility owner are regulated by Chapter 6 (§ 32.1-163 et seq.) of Title 32.1 of the Code of Virginia or Title 62.1 of the Code of Virginia, as applicable.

Article 3
Procedure

**12VAC5-570-60. ~~Certification general~~ Permits and certificate.**

No owner shall ~~operate~~ construct a marina ~~or,~~ other ~~place~~ places where boats are moored, or a boating access facility unless he ~~complies with the provisions of §§ 32.1-12 and 32.1-246 of the Code of Virginia and~~ has obtained a construction permit in accordance with this chapter. No owner shall operate a marina, other places where boats are moored, or a boating access facility until the local health department has inspected and approved construction and has issued a certificate to operate. Owners shall ~~have in their possession~~ obtain a permit from the ~~Marine Resources Commission~~ VMRC to operate a marina, ~~or place~~ other places where boats are moored, or a boating access facility when so required by § [ ~~62.1-3,~~ 62.1-44.15:5.01 ] of the Code of Virginia. Where state-owned bottom lands are involved, the owner shall submit a ~~plan approved~~ preliminary design and receive approval by the ~~department shall be issued~~ division prior to construction and the issuance of a certificate to operate.

**12VAC5-570-70. Application for ~~certificate~~ construction permit.**

A. Any owner, or his duly authorized representative, ~~may make application~~ shall apply for a ~~certificate of approval of sanitary or sewerage facilities~~ construction permit by ~~applying~~ submitting an application to the local health department in the jurisdiction where the proposed marina ~~or~~, other ~~place~~ places where boats are moored, or boating access facility is to be located. The application shall be made on a form ~~supplied by the local health department~~ approved by the division. The application shall consist of the following:

1. ~~A completed application form which shall set forth the essential~~ Essential data to determine the sewerage facilities and sewerage system necessary to serve the proposed installation~~;~~.

2. Maps, plans, and specifications of the ~~sanitary~~ sewerage facilities and sewerage ~~facilities~~ system describing ~~how and what~~ the type of facilities that will be provided and how the facilities will provide for the safe and sanitary disposal of all sewage generated at the facility. The preliminary design plans shall establish the location of the ~~sanitary~~ sewerage facilities and sewerage system in relation to other facilities~~;~~ they are intended to serve.

3. A description of the proposed ~~method of sewage~~ or existing offsite sewerage system or treatment works used for the ultimate treatment ~~or~~ and disposal~~. Approval~~ of sewage. The applicant shall apply for and obtain approval of ~~the~~ new offsite sewerage systems or treatment works ~~or disposal system must be applied for and obtained under other sections of the Code of Virginia and other regulations;~~ and demonstrate that the existing sewerage systems or treatment works are approved and in accordance with this chapter.

4. Any other data as may be pertinent to show the adequacy of ~~sanitary or~~ the sewerage facilities and sewerage system to be provided.

B. An application pursuant to this section shall contain sufficient detail and clarity necessary to demonstrate that the sewerage facility and sewerage system meet all the applicable requirements of this chapter.

[ C. The department shall issue a permit to construct the proposed marina, other place where boats are moored, or boating access facility after review of a complete application that demonstrates compliance with the requirements of this chapter and § 32.1-246 of the Code of Virginia. ]

**12VAC5-570-80. [ ~~Receipt of data~~ ~~application~~ Certificate to operate. ]**

~~Upon receipt of the data set forth in 12VAC5-570-70 in sufficient detail and clarity so as to show that the sewerage facilities meet requirements of this chapter, a plan approval or disapproval will be issued by the Department of Health.~~

A. ~~Construction.~~ Upon completion of construction of the ~~sanitary~~ sewerage facilities [ ~~and,~~ ] sewerage ~~facilities~~ systems [ , and treatment works ] at marinas ~~and,~~ other places where boats are moored, or boating access facilities, the owner ~~of the facility,~~ or his duly authorized representative~~,~~ shall notify the local health department so that it may inspect the construction. ~~A certificate to operate shall be issued by the Health Department when it~~ When the division, in consultation with the local health department, has ~~been~~ determined that construction is in compliance with the approved plan, it shall issue a certificate [ to operate to the owner of the marina, other place where boats are moored, or boating access facility. The certificate to operate shall remain valid in accordance with this section. ]

B. ~~Operation. All marinas and other places where boats are moored shall hold a valid certificate to operate in the Commonwealth of Virginia.~~ The owner shall post the certificate [ to operate ] in a place where it is readily observable by members of the public who transact business with the facility.

[ C. All marinas, other places where boats are moored, and boating access facilities shall be subject to a five-year, renewable certificate to operate. The owner of the marina, other place where boats are moored, and boating access facility shall request a new certificate to operate at least 90 days prior to the expiration date of the existing certificate to operate. The division shall issue the new certificate to operate provided the sewerage facilities, sewerage system, and treatment works meet or satisfy the minimum requirements of this chapter and § 32.1-246 of the Code of Virginia.

D. If the commissioner grants a variance, or the division approves any exception to this chapter, then the certificate to operate shall contain that information. The owner of the marina, other place where boats are moored, or boating access facility shall follow any condition or requirement listed on the certificate to operate.

E. As a condition of the certificate to operate, owners of marinas, other places where boats are moored, or boating access facilities shall allow the department to perform one or more inspections per year of the sewerage facilities, sewerage systems, and treatment works to ensure compliance with this chapter and § 32.1-246 of the Code of Virginia. The division may revoke the certificate to operate pursuant to 12VAC5-570-100. ]

**12VAC5-570-90. Variances.**

A. The commissioner may grant a variance to any requirement of this chapter if, after investigation, ~~it is determined~~ the commissioner determines that the hardship imposed upon the owner or the public by compliance with this chapter ~~outweigh~~ outweighs the benefits that the chapter confers~~, or that there is no~~ and that granting a variance will not result in a potential or actual public health hazard.

~~A. Effect of variance.~~ B. A variance is a conditional waiver of a specific regulation ~~which~~ that is granted to ~~a particular or designated marina or other place where boats are moored~~ an owner of a marina, other places where boats are moored, or a

boating access facility. ~~It is nontransferrable~~ Variances are not transferrable between owners, and ~~it~~ any variance shall be attached to the certificate of the marina ~~or~~, other ~~place~~ places where boats are moored, or boating access facility to which it was granted. The variance is a condition of the certificate, which is revoked if the certificate is revoked.

~~B. Application for a variance.~~ C. Any owner of a marina ~~or~~, other ~~place~~ places where boats are moored, or a boating access facility may apply in writing for a variance. This application shall be submitted to the local health department in the jurisdiction in which the marina ~~or~~, other ~~place~~ places where boats are moored, or boating access facility is located. This application shall include:

1. A citation ~~to~~ referencing the specific requirements of this chapter from which a variance is requested and a statement describing the hardships imposed by the specific requirements of this chapter;

2. A statement of reasons why the public health and environment would not be detrimentally affected if a variance is granted~~,~~ and a list of suggested measures that would be implemented to prevent any potential detrimental impacts; ~~and~~

3. Facts supporting the need and justification for the variance~~.~~;

4. The nature and duration of the variance request;

5. Other information, if any, believed by the applicant to be pertinent; and

6. Such other information as the division, local health department, or the commissioner may require.

D. If the commissioner denies any request for a variance, such denial shall be in writing and shall state the reasons for the denial.

**12VAC5-570-100. ~~Suspension or revocation~~ Revocation of a certificate.**

~~The board~~ Either by emergency order under the authority of § 32.1-13 of the Code of Virginia or following an opportunity for an informal fact-finding proceeding as provided by § 2.2-4019 of the Code of Virginia, the commissioner or his designee may revoke ~~or suspend~~ a certificate for failure to construct and operate the sewerage facilities and sewerage system in accordance with the conditions of the application and certificate issued or for any violation of this chapter.

**12VAC5-570-110. ~~Administration appeals~~ Applicability of the Administrative Process Act.**

~~Any applicant or certificate holder who is aggrieved by an adverse decision of the commissioner may appeal in writing within 30 days after the notification of the adverse decision and request a fair hearing. Within 30 days of receipt of notification of appeal, the commissioner shall set a date and place for such hearing. Not later than 30 days following the hearing, the commissioner shall issue a final order with respect to the disposition of the appeal. Such hearing, notice and proceedings shall be conducted pursuant to the~~ The Administrative Process Act~~, Chapter 1.1:1 (§ 9-6.14:1 et seq.) of Title 9 of the Code of Virginia.~~ (§ 2.2-4000 et seq. of the Code of Virginia) shall govern the decision of cases under this chapter.

Part II

Required Sewerage Facilities and Sewerage Systems for Marinas ~~and~~, Other Places Where Boats ~~are~~ Are Moored, and Boating Access Facilities and Their Operation

**12VAC5-570-120. General.**

A. All owners of marinas ~~or~~, other places where boats are moored, and boating access facilities shall provide the minimum number of ~~sanitary~~ sewerage facilities required by this chapter for their patrons. ~~These~~ Owners shall maintain their facilities ~~shall be maintained~~ in a clean and ~~sanitary~~ operable condition. ~~They shall be equipped~~ Owners shall equip their facilities with toilet tissue, lights where electricity is available, and soap and towels where handwashing facilities are required. ~~These~~ Owners shall make their facilities ~~shall be~~ available during normal business hours to patrons and users of these facilities ~~at all times~~ during the ~~normal~~ boating season for that facility.

B. Marinas ~~which are~~ located within 1,000 feet of the shore end of the pier that are operated as part of residential developments, overnight lodging facilities, restaurants, or commercial establishments~~, which are located within 1,000 feet of the shore end of the pier,~~ are ~~exempted~~ exempt from providing separate ~~sanitary~~ sewerage facilities, as long as the ~~sanitary~~ sewerage facilities at the residence, lodging establishment, restaurant, or commercial establishment are made available to all users of the marina. ~~This~~ The exemption set forth in this subsection does not apply to ~~(i) marinas~~:

1. Marinas associated with restaurants or commercial establishments ~~which~~ that allow overnight occupancy of boats; and ~~(ii) marinas~~

2. Marinas associated with overnight lodging establishments where overnight occupancy of boats is permitted by persons not registered at the overnight lodging establishment.

C. ~~Exempt from the requirements of subsection A of this section are other~~ Other places where boats are moored ~~which serve~~ and boating access facilities are exempt from the requirements of subsection A of this section, provided that the other places where boats are moored or boating access facility:

1. Serves residents of homes (houses, condominiums, apartments, or mobile homes), their bona fide house guests, or registered guests of tourist establishments ~~which provide~~; and

2. Provides adequate ~~sanitary~~ sewerage facilities ~~that are~~ located within 1,000 feet of the shore end of the pier.

D. In order to qualify for an exemption under ~~subsections~~ subsection B or C of this section, the owner of ~~such marinas~~

~~or~~ a marina, other places where boats are moored, or a boating access facility shall provide to the ~~department~~ division a signed, notarized statement that all conditions set forth in ~~the aforementioned sections~~ this section will be complied with by users of the facilities.

**12VAC5-570-130. Location.**

~~Adequate sanitary~~ Owners shall conveniently locate their sewerage facilities ~~shall be conveniently located~~ within 500 feet walking distance from the shore end of any dock ~~they~~ the facilities are intended to serve ~~or within a reasonable~~. On a case-by-case basis the division may approve a greater distance ~~under~~ if unusual circumstances ~~as determined by the division~~, such as topography or resource protection areas, prevent compliance with this requirement. ~~It~~ The division may ~~be necessary~~ require the owner to provide ~~sanitary~~ sewerage facilities in more than one location in order to meet the needs of the particular site ~~developed~~. In addition, the division may require additional fixtures, beyond the minimum number specified in Table 1 (12VAC5-570-150), if it determines that additional fixtures are necessary to accommodate the site layout and use of the marina, other places where boats are moored, or boating access facility.

**12VAC5-570-140. Availability ~~and marking of sanitary facilities~~.**

~~The sanitary~~ Owners shall locate the sewerage facilities ~~shall be~~ so that they are available and ~~readily~~ reasonably accessible to all users. ~~They shall be appropriately marked with signs readily identifiable to all personnel who might desire to use the facilities~~ The location and use of all sewerage facilities shall be clearly indicated by appropriate signage.

**12VAC5-570-150. ~~Marinas~~ Sewerage facilities for marinas.**

A. ~~Minimum~~ The minimum number of sewerage fixtures to be provided ~~in sanitary facilities. It shall be understood that~~ at marinas is found in ~~many instances the site layout and the use of the marina may require more fixtures than are shown in the table below. If the board, after observation and study, determines that additional fixtures or buildings housing sanitary facilities are necessary, the owner shall provide the additional fixtures so determined~~ Table 1.

B. Where dry storage space is provided, each dry storage space is equivalent to one-third of a ~~seasonal~~ slip. ~~The minimum number of fixtures required is contained in Table No. 1 and is based upon the total number of seasonal slips or their equivalent.~~ Separate sewerage facilities for male and female ~~personnel shall~~ employees may be provided ~~in a structure or structures~~, but shall not be counted toward the minimum number of fixtures required to accommodate users of the marina.

~~Table # 1~~

| ~~Number of Seasonal Slips~~ | ~~FIXTURES~~ | | | | | | |
|---|---|---|---|---|---|---|---|
| | ~~Commodes~~ | | ~~Urinals~~ | ~~Lavatories~~ | | ~~Showers~~ | |
| | ~~Male~~ | ~~Female~~ | ~~Male~~ | ~~Male~~ | ~~Female~~ | ~~Male~~ | ~~Female~~ |
| ~~0-49~~ | ~~1~~ | ~~1~~ | ~~0~~ | ~~1~~ | ~~1~~ | ~~0~~ | ~~0~~ |
| ~~50-99~~ | ~~1~~ | ~~2~~ | ~~1~~ | ~~1~~ | ~~1~~ | ~~0~~ | ~~0~~ |
| ~~100-149~~ | ~~2~~ | ~~3~~ | ~~1~~ | ~~2~~ | ~~2~~ | ~~1~~ | ~~1~~ |
| ~~150-199~~ | ~~2~~ | ~~4~~ | ~~2~~ | ~~3~~ | ~~3~~ | ~~2~~ | ~~2~~ |
| ~~200-249~~ | ~~3~~ | ~~5~~ | ~~2~~ | ~~4~~ | ~~4~~ | ~~2~~ | ~~2~~ |

Table 1

| Number of Slips | SEWERAGE FIXTURES | | | | | | |
|---|---|---|---|---|---|---|---|
| | Commodes | | Additional Urinal or Commode | Lavatories | | Showers | |
| | Male | Female | Male | Male | Female | Male | Female |
| 1 - 24 | 1 | | 0 | 1 | | 1 | |
| 25 - 49 | 1 | 2 | 1 | 2 | 2 | 1 | 1 |
| 50 - 99 | 2 | 3 | 1 | 2 | 2 | 1 | 1 |

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| 100 - 149 | 3 | 4 | 1 | 3 | 3 | 2 | 2 |
| 150 - 199 | 3 | 5 | 2 | 4 | 4 | 2 | 2 |
| 200 - 249 | 4 | 6 | 2 | 5 | 5 | 3 | 3 |

C. When the number of ~~seasonal~~ slips exceeds those ~~above on~~ prescribed by Table ~~No.~~ 1, the owner shall provide additional fixtures ~~shall be provided~~. ~~One~~ The owner shall provide one commode, lavatory, and shower ~~will be provided~~ for each ~~sex~~ gender for each 100 additional ~~seasonal~~ slips. ~~A urinal may be substituted for a commode when the number of seasonal slips exceeds 100 of the Table No. 1 values. Showers are not required for dry storage boat usage.~~

~~B. Transient slip. When transient slips are available additional sanitary facilities shall be provided. Table No. 2 below shows the minimum number of additional fixtures required. These fixtures may be included in a structure or structures with those fixtures provided for the seasonal slip, provided the accessibility and convenience standards of 12VAC5-570-130 and 12VAC5-570-140 of this chapter are met.~~

~~Table # 2~~

| ~~Number of Transient Slips~~ | ~~FIXTURES~~ | | | | | | |
|---|---|---|---|---|---|---|---|
| | ~~Commodes~~ | | ~~Urinals~~ | ~~Lavatories~~ | | ~~Showers~~ | |
| | ~~Male~~ | ~~Female~~ | ~~Male~~ | ~~Male~~ | ~~Female~~ | ~~Male~~ | ~~Female~~ |
| ~~0 1 24~~ | ~~1~~ | ~~1~~ | ~~1~~ | ~~1~~ | ~~1~~ | ~~1~~ | ~~1~~ |
| ~~25 49~~ | ~~1~~ | ~~2~~ | ~~1~~ | ~~2~~ | ~~2~~ | ~~2~~ | ~~2~~ |
| ~~50 74~~ | ~~2~~ | ~~3~~ | ~~1~~ | ~~2~~ | ~~2~~ | ~~2~~ | ~~2~~ |
| ~~75 100~~ | ~~2~~ | ~~4~~ | ~~2~~ | ~~3~~ | ~~3~~ | ~~3~~ | ~~3~~ |

~~For each 24 or fraction thereof of transient slips or moorings in excess of those shown in Table No. 2 above, one commode, lavatory, and shower shall be provided for each sex. In addition, one urinal shall be provided for each 50 or fraction thereof transient slips in excess of the number shown in Table No. 2.~~

**12VAC5-570-160. ~~Sanitary~~ Sewerage facilities at other places where boats are moored and boating access facilities.**

A. Sewerage facilities are required at other places where boats are moored and boating access facilities in accordance with this section.

B. Where piped potable water is available, ~~sanitary~~ sewerage facilities for other places where boats are moored shall consist of a minimum of one commode ~~and,~~ one lavatory, and one shower for ~~females and one commode and one lavatory for males for~~ each gender, for each 100 ~~seasonal~~ slips ~~or fraction thereof and each 50 transient slips or fraction thereof~~.

C. Requirements for dry storage ~~boat usage shall be~~ are identical to those specified in 12VAC5-570-150 for marinas.

~~Sanitary~~ D. Where piped potable water is not available, sewerage facilities for other places where boats are moored may consist of privies ~~where piped water is not available~~.

E. Sewerage facilities at boating access facilities shall consist of at least one privy or portable toilet and shall be sufficient in number to accommodate facility usage.

F. Walking distance to these facilities shall comply with 12VAC5-570-130.

**12VAC5-570-170. Sewage treatment.**

A. Public or municipal ~~sewage~~ sewerage systems and treatment ~~facilities shall~~ works should be used if there is reasonable access to sewers. When such municipal means of disposal ~~is~~ are not available, the owner shall have designed and installed an approved ~~method of sewage treatment. Approved methods of sewage treatment are set forth in the Sewerage Regulations (1977) (12VAC5-580-10 et seq.) Sewage Handling and Disposal Regulations (1982, as amended), 12VAC5-610-10 et seq. If permanent water conservation devices are provided, the sewage flow requirements specified in subsections A and B of this section may be reduced upon written approval of the division~~ sewerage system or treatment works. An approved sewerage system or treatment works is (i) a system for which a certificate to operate has been issued jointly by the department and the Department of Environmental Quality, (ii) a system approved by the Department of Environmental Quality in accordance with Title 62.1 of the Code of Virginia, or (iii) a system approved by the commissioner in accordance with Title 32.1 of the Code of Virginia.

~~A. The following shall be used to determine the amount of sewage flow. It is assumed that~~ B. The sewage design flow for each slip ~~or dry storage space represents two persons. At marinas providing toilet facilities only, the flow figure~~ shall

be ~~10~~ 25 gallons per ~~person~~ slip per day. ~~At marinas providing toilet and shower facilities, the flow figure shall be 16 gallons per person per day except at marinas with only seasonal slips, where the flow figure shall be 10 gallons per person per day for the first 99 slips, regardless of whether showers are available, and 16 gallons per person per day for all slips above the 99 slips. For dry storage facilities the sewage flow shall be calculated using one-third the number of dry storage spaces.~~ Where dry storage is provided, each dry storage space shall be equivalent to one-third of a slip. The sewage design flow for each live-aboard slip shall be 50 gallons per slip per day. When marinas or other places where boats are moored are constructed in conjunction with another structure or facility, the sewage design flows prescribed in this section shall be added to the sewage design flow governing the associated structure or facility.

~~In addition, for marinas~~ C. For marinas or other places where boats are moored ~~which have~~ that have a ~~boat launching ramp and provide boat trailer parking spaces only while the boat is in use~~ boating access facility, the design sewage flow shall be increased by 10 gallons per day per boat trailer parking space.

~~B. Where restaurants or motels are operated in connection with a marina or place where boats are moored the following shall be used as a basis for determining the amount of sewage flow:~~

~~Motels – 65 gallons per person per day or a minimum of 130 gallons per room per day.~~

~~Restaurant – 50 to 180 gallons per seat per day. Each installation will be evaluated according to conditions.~~

~~C. The occupancy level of boats used for design of sewage treatment or disposal facilities will be those levels listed in 12VAC5-570-170 A. It is recognized that the type of activity and utilization of marina or other places where boats are moored varies and, therefore, additional facilities to provide capacity up to maximum may be required if the need arises. The local health director serving the area in which the marina is located shall make such determination.~~

D. The division may approve a reduction in the sewage flow requirements specified in subsection B of this section if the owner provides documented flow data sufficient to justify the reduction.

**12VAC5-570-180. Pump-out.**

~~Other~~ A. Owners of other places where boats are moored ~~which~~ that allow overnight docking or mooring of boats and owners of all marinas, regardless of size or number of ~~boat moorings~~ slips, shall provide pump-out facilities for pumping or removing sewage from boats. These pump-out facilities shall include all the equipment, structures, and treatment or disposal facilities necessary to ultimately discharge or dispose of this boat sewage in an efficient and sanitary manner without causing an actual or potential public health hazard. Exempt from this requirement are marinas and other places where boats are moored ~~which~~ that do not have live-aboard slips or allow boats with ~~an installed toilet with a discharge overboard or a sewage holding tank~~ a marine sanitation device to use any of the services provided, ~~including moorage,~~ except in an emergency. In order to qualify for this exemption, the owner of such marina or other ~~place~~ places where boats are moored shall provide the department with a signed, notarized statement indicating that there are no live-aboard slips and that boats with ~~installed toilets with overboard discharges or sewage holding tanks~~ marine sanitation devices shall not be permitted to use the ~~marina or other places facilities~~ facility except in an emergency.

~~A. Availability and operation. Where pump-out facilities are required, the owner shall install, maintain in good operating condition and provide pump-out during normal working hours to users of the marina or other places where boats are moored except in those cases where adequate facilities are provided in accordance with subsection B of this section, then, the normal working hours requirement will apply to the facility using the agreement, as well as the facility with the alternate pump-out service.~~ B. The owner shall make sewage pump-out facilities available to all users of the marina or other places where boats are moored during normal operating hours. The owner shall maintain the pump-out equipment in serviceable condition and shall keep the equipment located in an area convenient for utilization.

C. The owner shall use placards or signs to identify the sewage pump-out location and use restrictions.

~~B. Alternate pump-out service.~~ D. Marinas and other places where boats are moored ~~which~~ that provide ~~less~~ fewer than 50 ~~seasonal (or transient)~~ slips ~~for boats of 26 feet or more in length and less than 20 seasonal (or transient) slips for boats of 40 feet or more in length~~ may be ~~exempted~~ exempt from the requirement to install pump-out facilities unless such marinas or other places where boats are moored are located in a No Discharge Zone. Such exemption ~~will~~ shall be granted by the ~~director of the~~ division whenever alternate pump-out service is provided at a nearby marina or other ~~place~~ places where boats are moored~~, and is~~ as evidenced by an agreement signed and notarized by both parties in accordance with the requirements of this section, and filed with the division. ~~Such~~ The division shall only approve such alternate pump-out service ~~will only be approved by the division when~~ in accordance with the following criteria ~~are met~~:

1. ~~That the~~ The alternate pump-out service ~~will~~ shall not require more than 20 minutes to complete from the time a boater has the boat ready to receive the service and has previously requested to have the ~~boat sewage holding tank~~ marine sanitation device pumped. The pump-out service for holding tanks of 50-gallon capacity or more (sewage holding) may exceed ~~twenty~~ 20 minutes~~;~~.

2. ~~That the~~ The alternate pump-out service shall be located within three nautical miles, as measured along the water route, of the exempt facility ~~using the agreement~~ unless the

alternate pump-out service is located along the normal travel route to open water, in which case the exempt facility ~~using the agreement~~ shall be within five nautical miles of the alternate pump-out service~~;~~.

3. ~~That the~~ The alternate pump-out service capacity ~~is~~ shall be sufficient to handle the demand for pump-out service~~, in accordance with subsection C of this section,~~ that is expected for all of the marinas or other places where boats are moored entering into the ~~above mentioned~~ agreement~~;~~ referenced in this subsection.

4. ~~That a notice shall be posted in a conspicuous location, at the marina or other place where boats are moored not installing pump-out service, that specifies the location of the alternate pump-out service; and~~ The owner of the exempt facility shall post in a conspicuous location appropriate signage that specifies the location of the alternate pump-out service and the associated charge for its use.

5. The terms of the agreement shall provide that:

a. ~~That the~~ The alternate pump-out service ~~will~~ shall be available to all boats moored at each facility and ~~it will state that~~ the alternate pump-out facility will furnish pump-out services to ~~anybody~~ boaters referred to it by the ~~establishment using the agreement to provide pump-out service,~~ exempt facility as specified by this chapter; and

b. ~~That the~~ The agreement ~~will~~ shall be valid for one year and will be automatically renewable on the anniversary date, unless either party gives at least a 60-day termination notice to the other and to the director of the division prior to the renewal date.

6. If a termination notice is issued to ~~a~~ an exempt facility ~~using an agreement to provide alternate pump-out service,~~ in accordance with ~~12VAC5-570-180-B~~ this subsection, then that facility shall either provide pump-out service or obtain a new written agreement~~,~~ in accordance with ~~12VAC5-570-180-B,~~ this subsection by the effective date of the termination of alternate pump-out service.

~~C. Minimum design criteria for pump-out facilities.~~ E. The purpose of these minimum design criteria is to provide the owner and the ~~Department of Health~~ department with acceptable methods for pumping, storing, and conveying ~~and treatment of~~ the contents from ~~boat holding tanks~~ marine sanitation devices. ~~The owner shall furnish the following information for each proposed pump-out facility~~ A proposed pump-out facility shall meet the following minimum design criteria:

1. ~~Pumping equipment.~~ Pump equipment may be fixed or portable; however, this equipment shall be ~~conveniently located for usage and~~ clearly identified or placarded by signs or other notices, indicating any fees, restrictions, or other operating instructions, as necessary. A minimum pump capacity of 10 ~~gpm~~ gallons per minute (gpm) is acceptable at the operating head required to transport the flow to the proper collection or treatment location with such residual head as may be required; however, at marinas with 51 or more slips, greater pumping capacity may be required. ~~Pumps~~ To prevent clogging, pumps shall be of a macerator type or ~~have sufficient size suction and discharge openings to prevent clogging~~ the pumps shall be able to pass a 2-inch spherical solid. Manually operated pumps are ~~not permitted~~ acceptable at marinas and other places where boats are moored that offer fewer than 26 slips. Pump data from the manufacturer shall include:

a. The type of pump ~~(diaphragm or (~~positive displacement, centrifugal, ~~and power)~~ vacuum, macerator, etc.);

b. ~~Rated capacity (gpm, hp. and head)~~ Pump power source (electric motor, gasoline engine, etc.) and output (HP);

c. ~~Motor type (electric or gas); and~~ Pump capacity, including a performance curve;

d. ~~Suction and discharge opening size.~~ Pump solids-handling ability; and

e. A schematic showing relevant pump dimensions, such as height, size, and location of suction and discharge openings, etc.

2. ~~Location schematic. If fixed pump-out equipment is proposed, a schematic of the location with elevations for subsections a, b, c, d and e, as described below, shall be included, or if portable pump-out equipment is proposed, a schematic shall indicate elevations for subsections a, c, f and g, as described below:~~ A schematic of the proposed facilities shall be provided and include the following minimum information:

a. Mean low water ~~level~~ elevation;

b. ~~Elevation of dock~~ Suction hose diameter, length, and highest elevation;

c. ~~Greatest elevation of suction center line of pump~~ Pump elevation;

d. ~~Elevation of discharge point~~ Discharge hose/pipe diameters, lengths, and highest elevation;

e. ~~Highest point in discharge line~~ Discharge point elevation;

f. Type of dock (floating or stationary); ~~and~~

g. Greatest elevation of any dock; and

h. Distance between pump-out location and slips.

All elevations shall be measured with respect to mean low water. If the elevation of mean low water is not known, assume it to be zero.

3. ~~Fittings and hose (piping). Fittings~~ This subdivision sets forth the minimum design criteria for fittings and hoses (piping) ~~which are~~ used in the operation of a pump-out facility ~~shall meet the following~~:

a. Suction ~~hose~~ hoses shall meet the following criteria:

(1) A friction nozzle (right angle preferred) or wand-type attachment is to be provided on the end of the suction hose. Adapters shall be provided to fit any discharge connection from ~~1.5~~ 1.25 to ~~4~~ 2 inches in diameter.

(2) A check valve shall be provided on the suction hose at the nozzle.

(3) The hose shall be made of flexible, heavy-duty material that will be noncollapsing and nonkinking. The length of this line shall be determined on an individual case basis by the division.

(4) If the suction line is to be installed in such a manner that sewage would discharge from the line when the pump is removed for service, a ~~gate~~ full port ball valve shall be provided on the pump end of the suction line.

b. Discharge hose and piping~~.~~ shall meet the following criteria:

(1) The discharge hose or piping shall be equipped with watertight, permanent or positive locking type fittings and connections.

(2) Where flexible discharge hose is used, the hose shall be made of heavy-duty material and be nonkinking and noncollapsing.

c. Discharge ~~line~~ lines shall meet the following criteria:

(1) A ~~gate~~ full port ball valve shall be provided on the discharge line at the pump;

(2) Suitable connections on the end of the discharge line shall be provided to prevent it from ~~coming loose~~ dislodging during discharge; all nozzles and fittings are to be positive locking, male and female.

(3) The discharge line ~~must~~ shall not be subject to freezing or leaking into the water course.

(4) Sewer lines on piers shall be located below water distribution lines. Water and sewer line separation and sewer line [ ~~,~~ ] and water source separation requirements are set forth in the Waterworks Regulations ~~(12VAC5-590-10 et seq.)~~ (12VAC5-590) and the Sewage Handling and Disposal Regulations ~~(12VAC5-610-10 et seq.)~~ (12VAC5-610).

(5) The discharge line connection to the pump-out receiving facility shall be fixed in place in such a manner as to prevent it from ~~coming loose~~ dislodging during discharge.

d. Pump-out facilities shall include equipment for rinsing ~~the boats'~~ holding tanks associated with marine sanitation devices. Where potable water will be used for rinsing the holding tank, a backflow prevention device shall be installed on the water service line. A minimum of a hose bib type vacuum breaker shall be provided.

4. ~~Other devices or methods of removal.~~ Other devices or methods of removal of contents from ~~boat holding tanks~~ marine sanitation devices may be approved by the ~~Commissioner~~ division on an individual case basis.

~~5. Onshore facilities. Contents from boat holding tanks shall be discharged to (i) a public wastewater collection system in which sewage is conveyed to an approved treatment facility; (ii) a holding tank whereby sewage may be stored until it is taken in an approved manner to an approved treatment facility; or (iii) directly to an approved sewage treatment facility.~~

~~a. For discharge to a public wastewater collection system, the following will be required: The owner of the marina or other place where boats are moored shall submit evidence, in writing, (i) of consent from the owner of the system, (ii) from the owner of any conveyance systems located downstream, which may be affected, and (iii) from the owner of the ultimate treatment facility. Verification shall be given that there are satisfactory provisions for emptying the contents from portable toilets in a sanitary manner.~~

~~b. If sewage is to be stored in a holding tank, the holding tanks shall be sized, constructed and located to meet the criteria.~~

~~(1) Size of holding tank.~~

~~Marinas or other places where boats are moored shall size the holding tanks based upon the following tabulations:~~

| ~~Total Number of Boats Serviced with Holding Tanks~~ | ~~Required Onshore Holding Tank - Volume (gallons) Minimum~~ |
|---|---|
| ~~1 - 20~~ | ~~250~~ |
| ~~21 - 40~~ | ~~500~~ |
| ~~41 - 60~~ | ~~725~~ |
| ~~61 - 80~~ | ~~1000~~ |
| ~~81 - 100~~ | ~~1200~~ |
| ~~100+~~ | ~~2000~~ |

~~(2) Construction of holding tank.~~

~~(a) The holding tank shall be designed so that it is watertight and not subject to any infiltration or any leakage.~~

~~(b) When holding tanks are made of material other than concrete, the internal surface of the holding tank shall be protected from corrosion. Materials used in the manufacture and installation of holding tanks shall be resistant to deterioration by prolonged or frequent contact with deodorizing chemicals, sewage decomposing chemicals, sewage, freshwater and saltwater.~~

~~(c) When holding tanks are made of material other than concrete, the outside surface of the holding tank shall be protected from corrosion.~~

~~(d) The holding tank shall be constructed of materials capable of withstanding the forces exerted on its walls.~~

~~(e) The holding tank shall be fixed in place unless it is part of an approved mobile pump-out unit.~~

~~(f) Provisions shall be made to assure that the holding tank can be completely emptied. The tank shall be essentially emptied when pumped out.~~

~~(g) The holding tank shall be adequately vented. Screened, elbowed down vents installed at the top of the tank will serve this requirement.~~

~~(h) The inlet/outlet of the holding tank shall be compatible with the proposed method of removal.~~

~~(i) There shall be satisfactory provisions for emptying the contents from portable toilets in a sanitary manner.~~

~~(3) Holding tank location.~~

~~Separation distance between holding tank and various structures and features are contained in Table 4.4 of the Sewage Handling and Disposal Regulations (12VAC5-610-10 et seq.)~~

~~(4) Any person who removes, or contracts to remove, and transport by vehicle, the contents of a holding tank shall have a written sewage handling permit issued by the Commissioner (see the Sewage Handling and Disposal Regulations, 12VAC5-610-10 et seq.).~~

~~c. Sewage treatment plant. Disposal of holding tank wastes shall not be allowed at small sewage treatment plants where shock loading may result or disinfectants and odor inhibitors will affect the operation of the treatment facility. Whenever feasible, the collected sewage shall be discharged directly to the sewer system of a large sewage treatment facility or transported for eventual treatment at a large plant.~~

**12VAC5-570-190. Sewage dump station.**

A. All marinas and other places where boats are moored, regardless of size or number of boat moorings, shall have ~~an acceptable~~ a proper and adequate receiving station for sewage from portable ~~toilets~~ containers used on boats. ~~The owner shall install, maintain in good operating condition and provide a sewage dump station to users of the marina or other places where boats are moored.~~ Exempt from this ~~provision~~ subsection are marinas or other places where boats are moored ~~which~~ that also qualify for the exemption contained in 12VAC5-570-120 B or C ~~exemption,~~ provided that the owner of the ~~sanitary~~ sewerage facility ~~will allow~~ consents to the dumping of the contents of portable ~~toilets~~ sewage containers into the ~~sanitary~~ sewerage facilities.

B. ~~Availability and operation.~~ Where a sewage dump station is required, the owner shall install~~,~~ and maintain ~~in good operating condition, and provide~~ it in a serviceable and sanitary condition and in compliance with this chapter. The owner shall make the facilities available to users of the marina or other places where boats are moored. The owner shall locate the sewage dump station in an area convenient for use, and the owner shall use placards or signs to identify its location and restrictions.

C. ~~Minimum design criteria for a sewage dump station.~~ The purpose of ~~these~~ the minimum design criteria is to provide the owner and the ~~Department of Health~~ department with acceptable methods of discharging sewage from ~~a~~ portable ~~container~~ containers into a sewage holding tank or a ~~sewage~~ sewerage treatment ~~system~~ works. The same criteria ~~as~~ set forth in ~~12VAC5-570-180 C 5~~ 12VAC5-570-200 A for contents from ~~boat holding tanks will~~ marine sanitation devices shall apply for sewage dump stations. The sewage dump station receiving unit shall be a minimum of 12 inches in diameter and be equipped with a cover that has a lip of sufficient size to ~~prevent it from accidentally being removed~~ prohibit accidental removal. If the unit is designed to drain, the drain shall be a minimum of four inches in diameter and equipped with a fly tight cover.

D. Marinas and other places where boats are moored that have an operational pump-out facility equipped with a device to pump portable sewage containers are exempt from the requirements of subsection C of this section.

**12VAC5-570-200. Onshore facilities.**

A. Contents from marine sanitation devices and portable sewage containers used on boats shall be discharged to:

1. A public sewerage system for conveyance to an approved treatment works as described in 12VAC5-570-170 A;

2. A holding tank whereby sewage may be stored until it is transported in accordance with the Sewage Handling and Disposal Regulations [ (12VAC5-610) ] to an approved treatment works as described in 12VAC5-570-170 A; or

3. An approved sewage treatment works as described in 12VAC5-570-170 A.

B. Disposal of sewage waste from a marine sanitation device shall be prohibited at small sewage treatment plants where shock loading may result or disinfectants and odor inhibitors will affect the operation of the treatment facility. Whenever feasible, the collected sewage shall be discharged directly to the sewerage system of a large sewage treatment facility or transported for eventual treatment at a large sewage treatment facility.

C. For discharge to a public sewerage system, the owner of the marina or other places where boats are moored shall submit to the division, in writing;

1. Evidence of consent to the discharge from the owner of the conveyance system;

2. Evidence of consent to discharge from the owner of any conveyance systems located downstream that may be affected; and

3. Evidence of consent to discharge from the owner of the treatment works where the sewage is to be disposed.

The owner shall verify that there are satisfactory provisions for emptying the contents from portable sewage containers in a sanitary manner.

D. If sewage is to be stored by the marina or other places where boats are moored in a holding tank, the holding tank or tanks shall be sized, constructed, and located to meet the following criteria:

1. Sewage holding tanks shall be sized in accordance with the requirements of Table 2.

Table 2: Minimum Holding Tank Volume

| Total Number of [ ~~Boats Serviced Annually with Marine Sanitation Devices~~ Slips ] | Minimum Holding Tank Volume (gallons) |
|---|---|
| [ ~~1 - 60~~ | ~~725~~ |
| ~~61 - 80~~ | ~~1000~~ |
| ~~81 - 100~~ | ~~1200~~ |
| ~~100+~~ | ~~2000~~ |
| 1 - 300 | 1000 |
| 301 - 450 | 1500 |
| 451+ | 2000 ] |

2. Holding tanks shall be constructed in accordance with the following criteria;

a. The holding tank shall be watertight and not subject to any infiltration or leakage.

b. When holding tanks are made of material other than concrete, the internal surface of the holding tank shall be protected from corrosion. Materials used in the manufacture and installation of holding tanks shall be resistant to deterioration by prolonged or frequent contact with deodorizing chemicals, sewage decomposing chemicals, sewage, freshwater, and saltwater.

c. When holding tanks are made of material other than concrete, the external surface of the holding tank shall be protected from corrosion.

d. The holding tank shall be constructed of materials capable of withstanding the forces exerted on its walls.

e. The holding tank shall be located onshore and fixed in place unless it is part of an approved mobile pump-out unit.

f. Provisions shall be made to the satisfaction of the department to assure that the holding tank can be completely emptied. The tank shall be essentially emptied when pumped out.

g. The holding tank shall be adequately vented. This requirement may be met with screened, elbowed down vents installed at the top of the tank.

h. The inlet/outlet of the holding tank shall be compatible with the proposed method of removal.

i. There shall be provisions for emptying the contents from portable sewage containers in a sanitary manner.

3. The required separation distances between holding tank and various structures and features are contained in Table 4.1 of the Sewage Handling and Disposal Regulations (12VAC5-610-597 D).

4. Any person who removes, or contracts to remove and transport by vehicle, the contents of a holding tank shall have a written sewage handling permit issued by the commissioner in accordance with the Sewage Handling and Disposal Regulations (12VAC5-610).

NOTICE: The following form used in administering the regulation was filed by the agency. The form is not being published; however, online users of this issue of the Virginia Register of Regulations may click on the name of the form with a hyperlink to access it. The form is also available from the agency contact or may be viewed at the Office of the Registrar of Regulations, General Assembly Building, 2nd Floor, Richmond, Virginia 23219.

[ FORMS (12VAC5-570)

Application for Construction Permit (eff. 12/2015) ]

VA.R. Doc. No. R11-2688; Filed October 26, 2015, 10:39 a.m.

## Final Regulation

Title of Regulation: **12VAC5-640. Alternative Discharging Sewage Treatment Regulations for Individual Single Family Dwellings (amending 12VAC5-640-20, 12VAC5-640-30, 12VAC5-640-40, 12VAC5-640-60, 12VAC5-640-70, 12VAC5-640-80, 12VAC5-640-110, 12VAC5-640-140, 12VAC5-640-150, 12VAC5-640-170, 12VAC5-640-180, 12VAC5-640-210 through 12VAC5-640-290, 12VAC5-640-400, 12VAC5-640-420 through 12VAC5-640-470, 12VAC5-640-490 through 12VAC5-640-520; adding 12VAC5-640-5, 12VAC5-640-262, 12VAC5-640-264, 12VAC5-640-266, 12VAC5-640-432, 12VAC5-640-434; repealing 12VAC5-640-10, 12VAC5-640-50, 12VAC5-640-100, 12VAC5-640-130, 12VAC5-640-190, 12VAC5-640-200, 12VAC5-640-300 through 12VAC5-640-380, 12VAC5-640-480).**

Statutory Authority: §§ 32.1-12 and 32.1-164 of the Code of Virginia.

Effective Date: December 16, 2015.

Agency Contact: Marcia Degen, Department of Health, 109 Governor Street, Richmond, VA 23219, telephone (804) 387-1883, FAX (804) 864-7475, or email marcia.degen@vdh.virginia.gov.

Summary:

*The amendments (i) require new owners of alternative discharging systems to have an operation and maintenance manual; (ii) add wetlands as a potential discharge point; (iii) expand the areas where systems may discharge under certain conditions; (iv) reduce the number of required analytical tests and maintenance visits for some homeowners; (v) no longer allow homeowners to conduct sampling of their own systems; (vi) expand the types of systems that must be considered, evaluated, and found unsatisfactory before a discharging system permit may be issued; (vii) increase the timeframe of a construction permit from 54 months to 60 months; and (viii) allow licensed alternative onsite sewage system operators as a licensed operator group.*

*Public comments on the proposed regulations resulted in two main changes to the final regulation. First, an allowance to reduce departmental inspections of systems from once a year to once in three years for regulatory compliant systems is added. Second, modifications are made to address the cost of maintenance contracts, including deleting references to terms of contracts and contract requirements, eliminating the requirement to submit a maintenance contract to the department, and redefining the duties of an operator and owner to focus on outcomes.*

Summary of Public Comments and Agency's Response: A summary of comments made by the public and the agency's response may be obtained from the promulgating agency or viewed at the office of the Registrar of Regulations.

Part I

General Provisions

**12VAC5-640-5. Definitions.**

The following words and terms when used in this chapter shall have the following meanings unless the context clearly indicates otherwise:

"Agent" means a legally authorized representative of the owner.

"All weather stream" means any stream that will, at all times, dilute point source discharge effluent from a pipe at least 10:1 as measured during a seven consecutive day average of a 10-year low flow (7-Q-10).

"Alternative discharging sewage treatment system" or "discharging system" means any device or system that results in a point source discharge of treated sewage for which the board may issue a permit authorizing construction and operation when such system is regulated by the SWCB pursuant to a general VPDES permit issued for an individual single family dwelling with flows less than or equal to 1,000 gallons per day on a monthly average.

"Alternative onsite sewage treatment system" means a treatment works that is not a conventional onsite sewage system and does not result in a point source discharge.

"Biochemical oxygen demand, five day" or "$BOD_5$" means the quantitative measure of the amount of oxygen consumed by bacteria while stabilizing, digesting, or treating biodegradable organic matter under aerobic conditions over a five-day incubation period; $BOD_5$ is expressed in milligrams per liter (mg/l).

"Biological treatment unit" means a method, technique, equipment, or process other than a septic tank or septic tanks that uses biological organisms to treat sewage to produce effluent of a specified quality.

"Board" means the State Board of Health.

"Combined Application" means a Virginia Department of Health Discharging System Application Form for Single Family Dwellings Discharging Sewage Less Than or Equal to 1,000 Gallons Per Day and a State Water Control Board Virginia Pollutant Discharge Elimination System General Permit Registration Statement for Domestic Sewage Discharges Less Than or Equal to 1,000 Gallons Per Day.

"Commissioner" means the State Health Commissioner or his subordinate who has been delegated powers in accordance with subdivision 2 of 12VAC5-640-80.

"Conventional onsite sewage system" means a treatment works consisting of one or more septic tanks with gravity, pumped, or siphoned conveyance to a gravity distributed subsurface drainfield.

"Dechlorination" means a process that neutralizes chlorine in the final effluent.

"Department" means the district or local health department with jurisdiction over the site or proposed site of the alternative discharging sewage treatment system.

"Disinfection" means a process used to destroy or inactivate pathogenic microorganisms in wastewater to render them noninfectious.

"Disinfection unit" means a separate treatment component that disinfects wastewater.

"District health department" means a consolidation of local health departments as authorized in § 32.1-31 C of the Code of Virginia.

"Division" means the Division of Onsite Sewage, Water Services, Environmental Engineering, and Marina Programs.

"Dry ditch" means a naturally occurring swale or channel that is topographically connected to an all weather stream. In some cases, a dry ditch may have a manmade component that provides a topographical connection to an existing, naturally occurring swale or channel. A dry ditch may have observable flow during or immediately after a storm event or snow melt. For the purposes of this chapter, all dry ditches shall have a well defined natural channel with sides that have at least a 1:10 (rise:run) slope.

"Emergency pump and haul" means an emergency condition to pump out the treatment systems tanks by a licensed sewage

handler as needed to not allow a discharge to protect public health and the environment.

"Failing alternative discharging sewage treatment system" means any alternative discharging sewage treatment system that discharges effluent having a $BOD_{5,}$ total suspended solids, pH, chlorine residual, dissolved oxygen, or bacteria value that is out of compliance with the General Permit or fails to comply with 12VAC5-640-430. The failure to discharge due to exfiltration may indicate system failure.

"Failing onsite sewage disposal system" means an onsite sewage disposal system where the presence of raw or partially treated sewage on the ground's surface or in adjacent ditches or waterways or exposure to insects, animals, or humans is prima facie evidence of a system failure. Pollution of the groundwater or backup of sewage into plumbing fixtures may also indicate system failure.

"General approval" means that a treatment unit has been evaluated and approved for TL-2 effluent or TL-3 effluent in accordance with the requirements of this chapter and 12VAC5-610.

"General Permit" means a Virginia Pollutant Discharge Elimination System (VPDES) General Permit for domestic sewage discharges less than or equal to 1,000 gallons per day on a monthly average issued by the State Water Control Board.

"Intermittent stream" means any stream that will not, at all times, dilute point source discharge effluent at least 10:1 as measured during a seven consecutive day average of a 10-year low flow (7-Q-10). For the purposes of this section, an intermittent stream is identified as a dashed or dotted line on a [ ~~U.S.~~ United States ] Geological Survey 7.5 minute topographic map or an all weather stream that provides less than 10:1 dilution of the effluent based on 7-Q-10 flow.

"Local health department" means the department established in each city and county in accordance with § 32.1-30 of the Code of Virginia.

"Maintenance" means performing adjustments to equipment and controls and in-kind replacement of normal wear and tear parts such as light bulbs, fuses, filters, pumps, motors, or other like components. Maintenance includes pumping the tanks or cleaning the building sewer on a periodic basis.

"Modify" means to alter a treatment works, excluding actions taken to "operate" the treatment works and "maintenance" activities as those terms are defined in § 32.1-163 of the Code of Virginia.

"National Pollutant Discharge Elimination System" or "NPDES" means the national program for (i) issuing, modifying, revoking and reissuing, terminating, monitoring, and enforcing permits and (ii) imposing and enforcing pretreatment requirements under §§ 307, 402, 318, and 405 of the Clean Water Act [ ~~(§ 33~~ (33 ] USC § 1251 et seq.). The term includes an approved program.

"Operate" means the act of making a decision on one's own volition to (i) place into or take out of service a unit process or unit processes or (ii) make or cause adjustments in the operation of a unit process at a treatment works.

"Operation" means the biological, chemical, and mechanical processes of transforming sewage or wastewater to compounds or elements and water that no longer possess an adverse environmental or health impact.

[ "Operation and maintenance contract" means an agreement between an owner and a licensed operator that the operator will provide services to operate, maintain, monitor, repair, and report on the treatment system in accordance with this chapter. ]

"Owner" means the Commonwealth or any of its political subdivisions, including sanitary districts, sanitation district commissions and authorities, or any individual, any group of individuals acting individually or as a group, or any public or private institution, corporation, company, partnership, firm, or association that owns or proposes to own a sewerage system or treatment works.

"Person" means any and all persons, including individuals, firms, partnerships, associations, public or private institutions, municipalities or political subdivisions, governmental agencies, or private or public corporations organized under the law of this Commonwealth or any other state or country.

"Point source discharge" means any discernible, confined, and discrete conveyance including, but not limited to, any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, landfill leachate collection system, vessel, or other floating craft from which pollutants are or may be discharged. This term does not include return flows from irrigated agriculture or agricultural stormwater run-off.

"Post-aeration unit" means a treatment component that is designed to add oxygen to an effluent.

"Post-filtration unit" means a treatment component that physically removes total suspended solids.

"Reliability" means a measure of the ability of a component or system to perform its designated function without failure or interruption of service. Overflow criteria, such as an allowable period of a noncompliant discharge, are utilized solely for the establishment of reliability classification for design purposes and are not to be construed as authorization for, or defense of, an unpermitted discharge to state waters. The reliability classification shall be based on the water quality and public health and welfare consequences of a component or system failure.

"Reliability Class I" means a measure of reliability that requires a treatment system design to provide continuous satisfactory operation during power failures, flooding, peak loads, equipment failure, and maintenance shut-down. For the purposes of this chapter, continuous operability shall be defined as restoring proper operation or otherwise eliminating

the out-of-compliance discharge within 24 hours. This class includes design features, such as additional electrical power sources, additional flow storage capacity, and additional treatment units that provide operation in accordance with the issued permit requirements.

"Reliability Class II" means a measure of reliability that requires a treatment design that limits out-of-compliance discharges due to power failures, flooding, peak loads, equipment failure, and maintenance shut-down to less than 36 hours. This class includes design features such as alarms with telemetry to the operator, additional treatment units, or additional flow storage capacity that provide operation in accordance with the issued permit requirements.

"Reliability Class III" means a measure of reliability that requires a treatment design that limits out-of-compliance discharges due to power failures, flooding, peak loads, equipment failure, and maintenance shut-down to less than 48 hours. This class includes design features such as onsite alarms and owner initiated operator notification to address the alarm condition to provide operation in accordance with the issued permit requirements.

"Sanitary survey" means an investigation of any condition that may affect public health.

"Sewage" means water carried and nonwater carried human excrement, kitchen, laundry, shower, bath, or lavatory wastes separately or together with such underground, surface, storm, and other water and liquid industrial wastes as may be present from residences, buildings, vehicles, industrial establishments, or other places.

"Site sketch" means a scale drawing of a proposed site for a discharge system, with pertinent distances shown. The scale shall typically be 1" = 50' for lots of three acres or less and 1" = 100' for larger lots. Site sketches may be made by the homeowner or any agent for the homeowner.

"Surface waters" means:

1. All waters that are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters that are subject to the ebb and flow of the tide;

2. All interstate waters, including interstate wetlands;

3. All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds and the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters:

a. That are or could be used by interstate or foreign travelers for recreational or other purposes;

b. From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

c. That are used or could be used for industrial purposes by industries in interstate commerce;

4. All impoundments of waters otherwise defined as surface waters under this definition;

5. Tributaries of waters identified in subdivisions 1 through 4 of this definition;

6. The territorial sea; and

7. Wetlands adjacent to waters, other than water that are themselves wetlands, identified in subdivisions 1 through 6 of this definition.

"SWCB" means the State Water Control Board and its designees.

[ "Total residual chlorine" or "TRC" means a measurement of the combined available chlorine and the free available chlorine available in a sample after a specified contact time. ]

"Total suspended solids" or "TSS" means solids in effluent samples that can be removed readily by standard filtering procedures in a laboratory and expressed as mg/l.

"Treatment level 2 effluent" or "TL-2 effluent" means effluent that has been treated to produce $BOD_5$ and TSS concentrations less than or equal to 30 mg/l each.

"Treatment level 3 effluent" or "TL-3 effluent" means effluent that has been treated to produce $BOD_5$ and TSS concentrations less than or equal to 10 mg/l each.

"Treatment system" means the combination of treatment components that together produce the required quality of effluent.

"Variance" means a conditional waiver of a specific regulation that is granted to a specific owner relating to a specific situation or facility and may be for a specified time period.

"VPDES permit" means a Virginia Pollutant Discharge Elimination System permit issued by the SWCB under the authority of the federal NPDES program.

"Water well" or "well" means any artificial opening or artificially altered natural opening, however made, by which [ ~~ground water~~ groundwater ] is sought or through which [ ~~ground water~~ groundwater ] flows under natural pressure or is intended to be artificially drawn. This definition shall not include wells drilled for the following purposes: (i) exploration or production of oil or gas, (ii) building foundation investigation and construction, (iii) elevator shafts, (iv) grounding of electrical apparatus, or (v) the modification or development of springs.

"Wetlands" means those areas that are inundated or saturated by surface water or [ ~~ground water~~ groundwater ] at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

~~Part I~~
~~General Framework for Regulations~~
~~Article 1~~
~~General Provisions~~

**12VAC5-640-10. ~~Authority for regulations.~~ (Repealed.)**

~~Title 32.1 of the Code of Virginia and specifically §§ 32.1-12, 32.1-163, and 32.1-164 provide that the State Board of Health, hereinafter referred to as the board, has the duty to protect the public health and the environment. In order to discharge this duty, the board is empowered to supervise and regulate the construction, location and operation of alternative discharging sewage treatment systems with flows less than or equal to 1,000 gallons per day on a yearly average for an individual single family dwelling within the Commonwealth when such a system is regulated by the Virginia State Water Control Board pursuant to a Virginia Pollutant Discharge Elimination System General Permit.~~

**12VAC5-640-20. Purpose of regulations.**

Title 32.1 of the Code of Virginia and specifically §§ 32.1-12, 32.1-163, and 32.1-164 of the Code of Virginia provide that the board has the duty to protect the public health and the environment. In order to discharge this duty, the board is empowered to supervise and regulate the construction, location, and operation of alternative discharging sewage treatment systems with flows less than or equal to 1,000 gallons per day on a monthly average for an individual single family dwelling within the Commonwealth when such a system is regulated by the Virginia State Water Control Board pursuant to a Virginia Pollutant Discharge Elimination System General Permit.

These regulations have been promulgated by the State Board of Health to:

1. Ensure that discharging systems are permitted, constructed, and operated in a manner which protects the environment and protects the public welfare, safety and health;

2. Guide the ~~State Health Commissioner~~ commissioner in his determination of whether a permit for construction and operation of a discharging system should be issued or denied;

3. Guide the owner or his agent in the requirements necessary to secure a permit for construction of a discharging system;

4. Guide the owner or his agent in the requirements necessary to secure an operation permit following construction;

5. Guide the owner or his agent in the requirements necessary to operate and maintain a discharging system;

6. Guide the ~~State Health Commissioner~~ commissioner in his determination of whether a discharging system is being operated in a manner which protects public health and the environment; and

7. Guide the ~~State Health Commissioner~~ commissioner in his determination of what actions are appropriate to correct violations of this chapter.

**12VAC5-640-30. Scope of regulations.**

A. ~~Systems served.~~ This chapter applies to all alternative discharging sewage treatment systems constructed and operated to serve an individual single family dwelling with flows less than or equal to 1,000 gallons per day on a ~~yearly~~ monthly average. This includes the following systems:

1. ~~New construction.~~ All new discharging systems described [ ~~above~~ in this subsection ] when such ~~system is~~ systems are regulated by the State Water Control Board pursuant to a ~~Virginia Pollutant Discharge Elimination System~~ General Permit.

2. ~~Existing systems with individual VPDES permits.~~ All existing discharging sewage treatment systems, as described [ ~~above~~ in this subsection ], constructed prior to July 30, 1992, and ~~which were~~ permitted by the State Water Control Board under its individual VPDES permit program shall be governed by this chapter, except ~~as to~~ for the monitoring requirements noted [ ~~below~~ in this subdivision ], effective upon the expiration date of their individual VPDES permit and approval of the owner's registration statement by the SWCB under the General Permit. Upon approval under the General Permit, the owners of such systems need only ~~to~~ comply with the monitoring requirements of the General Permit and the monitoring requirements in 12VAC5-640-510, and not 12VAC5-640-490 and 12VAC5-640-500, until (i) a change in ownership or (ii) the discharging system violates the effluent limitations of the General Permit for two consecutive quarters, whichever occurs first. After either event, the owner shall comply with 12VAC5-640-490 and 12VAC5-640-500.

3. ~~Existing systems without individual VPDES permits.~~ All existing discharging sewage treatment systems as described [ ~~above~~ in this subsection ] ~~which~~ that were operating without a valid VPDES permit on July 30, 1992, shall be governed by this chapter after the owner receives registration statement approval from the SWCB under the General Permit.

B. ~~Upgrading of existing systems.~~ Location criteria contained in this chapter shall not apply to systems legally installed prior to ~~this chapter~~ July 30, 1992. When extensive repairs, modifications, or replacement are required to bring a system into compliance with the discharge requirements of the General Permit, a construction permit and temporary operation permit must be obtained by the system owner. The construction permit and temporary operation permit shall be valid for the time specified on its face, at which time the repairs, modifications, or replacement must be completed.

C. Requirements for an operation and maintenance manual contained in this chapter shall only apply to alternative discharging systems with construction applications filed on or

after [ ~~(insert the effective date of this chapter)~~ December 16, 2015 ].

~~C. Evaluation of other options required.~~ D. The department will not [ ~~issue~~ consider issuance of ] a permit to construct a discharging system, unless all options for conventional and alternative onsite sewage treatment ~~and disposal~~ systems have been evaluated and found unsatisfactory in accordance with this section. ~~The~~ For the purposes of this section, the consideration of all options ~~include~~ means site evaluation(s) conducted by [ ~~the department~~ ] ~~and when appropriate, a report prepared by a person having a special knowledge of soil science as defined in § 54.1-2200 of the Code of Virginia and the methods and principles of soil evaluation as acquired by education or experience in the formation, description and mapping of soils~~ [ ~~or a licensed~~ an individual licensed in Virginia to evaluate and design onsite sewage systems such as an ] onsite soil evaluator or professional engineer indicating that no sewage disposal site exists on that property for the site and soil conditions allowed under the Sewage Handling and Disposal Regulations (12VAC5-610) or its successor including the use of TL-2 and TL-3 effluent to reduce footprint area as allowed under 12VAC5-613 or its successor. [ All evaluations must be completed in accordance with the methods and requirements of 12VAC5-610 and 12VAC5-613. ] ~~Options include a conventional onsite septic system using a pump, low pressure distribution (LPD), or an elevated sand mound or other systems which may be approved by the department under the Sewage Handling and Disposal Regulations, 12VAC5-600-10 et seq.~~

E. Pursuant to § 32.1-163.6 of the Code of Virginia, this chapter establishes performance requirements and horizontal setbacks for alternative discharging systems that are necessary to protect public health and the environment.

**12VAC5-640-40. Relationship to the Virginia Sewage Handling and Disposal Regulations.**

This chapter is supplemental to the Sewage Handling and Disposal Regulations ~~(12VAC5-600-10 et seq.) which~~ (12VAC5-610) or its successor that govern the treatment and disposal of sewage utilizing onsite systems. The Sewage Handling and Disposal Regulations shall govern the materials and construction practices used to install alternative discharging sewage treatment systems and all appurtenances associated with systems including but not limited to pipes and fittings whenever specifications are not contained in this chapter.

**12VAC5-640-50. ~~Relationship to the proposed Sewage Collection and Treatment Regulations.~~ (Repealed.)**

~~The proposed Sewage Collection and Treatment Regulations, upon final adoption, shall be used to establish design and construction criteria for systems, and portions of systems, not otherwise explicitly regulated within this chapter or the Sewage Handling and Disposal Regulations, 12VAC5-610-10 et seq. Prior to the adoption of the Sewage Collection and Treatment Regulations, the Sewerage Regulations, 12VAC5-580-10 et seq., shall be used in their place.~~

**12VAC5-640-60. Relationship to the State Water Control Board.**

This chapter contains administrative procedures and construction, location, monitoring and maintenance requirements which are supplementary to the State Water Control Board's VPDES General Permit Regulation for domestic sewage discharges less than or equal to 1,000 gallons per day. This chapter applies only to individual single family dwellings with flows less than or equal to 1,000 gallons per day on a ~~yearly~~ monthly average registered under this General Permit. Single family dwellings are a subset of the systems regulated by the State Water Control Board under this General Permit.

**12VAC5-640-70. Relationship to the Uniform Statewide Building Code.**

This chapter is independent of, and in addition to, the requirements of the [ Virginia ] Uniform Statewide Building Code (13VAC5-63). All persons having obtained a construction permit under this chapter shall furnish a copy of the permit to the local building official, upon request, when making application for a building permit. Prior to obtaining an occupancy permit, an applicant shall furnish the local building official with a copy of the operation permit demonstrating the system has been inspected and approved by the ~~district or local health~~ department.

**12VAC5-640-80. Administration of regulations.**

This chapter is administered by the following:

1. The State Board of Health has the responsibility to promulgate, amend, and repeal regulations necessary to ensure the proper construction, location, and operation of alternative discharging systems.

2. The ~~State Health Commissioner, hereinafter referred to as the~~ commissioner~~,~~ is the chief executive officer of the [ ~~State~~ Virginia ] Department of Health. The commissioner has the authority to act, within the scope of regulations promulgated by the board, and for the board when it is not in session. The commissioner may delegate his powers under this chapter ~~in writing~~ to any subordinate, with the exception of (i) his power to issue variances under § 32.1-12 of the Code of Virginia and 12VAC5-640-170~~,~~ and (ii) his power to issue orders under § 32.1-26 of the Code of Virginia and 12VAC5-640-140 and 12VAC5-640-150~~, and (iii) the power to suspend or revoke construction and operation permits under 12VAC5-640-280, which may only be delegated pursuant to 12VAC5-640-330~~. The commissioner has final authority to adjudicate contested case decisions of subordinates delegated powers under this section prior to appeal of such case decisions to the circuit court.

3. The [ ~~State~~ Virginia ] Department of Health~~, hereinafter referred to as the department,~~ is designated as the primary

agent of the commissioner for the purpose of administering this chapter.

4. The district or local health departments are responsible for implementing and enforcing the ~~regulatory activities required by~~ requirements of this chapter.

~~Article 2~~
~~Definitions~~

**12VAC5-640-100. ~~Definitions.~~ (Repealed.)**

~~The following words and terms, when used in this chapter, shall have the following meaning unless the context clearly indicates otherwise.~~

~~"Aerobic treatment unit" or "ATU" means any mechanical sewage treatment plant, designed to treat sewage from a single family dwelling utilizing the process of extended aeration with or without a means to return sludge to the aeration chamber.~~

~~"Agent" means a legally authorized representative of the owner.~~

~~"All weather stream" means any stream which will, at all times, dilute point source discharge effluent (from a pipe) at least 10:1 as measured during a 7 consecutive day average of a 10 year low flow (7-Q-10).~~

~~"Alternative discharging sewage treatment system" or "discharging system" means any device or system which results in a point source discharge of treated sewage for which the Department of Health may issue a permit authorizing construction and operation when such system is regulated by the SWCB pursuant to a general VPDES permit issued for an individual single family dwelling with flows less than or equal to 1,000 gallons per day on a yearly average. Such a system is designed to treat sewage from a residential source and dispose of the effluent by discharging it to an all weather stream, an intermittent stream, a dry ditch, or other location approved by the department.~~

~~"Commissioner" means the State Health Commissioner or his subordinate who has been delegated powers in accordance with 12VAC5-640-80-2 of this chapter.~~

~~"Disinfection" means the reduction of pathogenic organisms to a level that complies with the discharge limits of the general permit.~~

~~"District health department" means a consolidation of local health departments as authorized in § 32.1-31-C of the Code of Virginia.~~

~~"Division" means the Division of Sanitarian Services.~~

~~"Dry ditch" means a naturally occurring (i.e., not man made) swale or channel which ultimately leads to an all weather stream. A dry ditch may have observable flow during or immediately after a storm event or snow melt. For the purposes of this chapter all dry ditches shall have a well defined natural channel with sides that have at least a 1:10 (rise:run) slope.~~

~~"Family" means the economic unit which shall include the owner, the spouse of the owner, and any other person actually and properly dependent upon or contributing to the family's income for subsistence.~~

~~A husband and wife who have been separated and are not living together, and who are not dependent on each other for support, shall be considered separate family units.~~

~~The family unit which is based on cohabitation is considered to be a separate family unit for determining if an application fee is waiverable. The cohabitating partners and any children shall be considered a family unit.~~

~~"Failing alternative discharging sewage treatment system" means any alternative discharging sewage treatment system which either fails to discharge due to exfiltration or discharges effluent having a $BOD_5$, suspended solids, pH, chlorine residual, dissolved oxygen or fecal coliform greater than allowed by the General Permit as measured at the outfall. However, chlorine residual and dissolved oxygen content shall not be used for the purposes of determining whether a particular class of discharging systems complies with the requirements of 12VAC5-640-380.~~

~~"Failing onsite sewage disposal system" means an onsite sewage disposal system that is backing up in a house, or is discharging untreated or partially treated effluent on the ground surface, into surface waters, or into ground water.~~

~~"Five day biochemical oxygen demand ($BOD_5$)" means the quantity of oxygen used in the biochemical oxidation of organic matter in five days at 20°C under specified conditions and expressed as milligrams per liter (mg/l).~~

~~"General Permit" means a Virginia Pollutant Discharge Elimination System ("VPDES") General Permit for domestic sewage discharges less than or equal to 1,000 gallons per day on a yearly average issued by the State Water Control Board.~~

~~"Generic system design" means nonsite specific plans and specifications for a system designed to treat sewage flows of 1,000 GPD or less, or an equivalent $BOD_5$ loading rate, which have been reviewed and approved by the division for uses governed by this chapter.~~

~~"Income" means total cash receipts of the family before taxes from all sources. These include money wages and salaries before any deductions, but do not include food or rent in lieu of wages. These receipts include net receipts from nonfarm or farm self-employment (e.g., receipts from own business or farm after deductions for business or farm expenses). They include regular payments from public assistance (including Supplemental Security Income), social security or railroad retirement, unemployment and worker's compensation, strike benefits from union funds, veterans' benefits, training stipends, alimony, child support, and military family allotments or other regular support from an absent family member or someone not living in the household; private pensions, government employee pensions, and regular insurance or annuity payment; and income from~~

~~dividends, interest, rents, royalties, or periodic receipts from estates or trusts. These receipts further include funds obtained through college work study programs, scholarships, and grants to the extent said funds are used for current living costs. Income does not include the value of food stamps, WIC checks, fuel assistance, money borrowed, tax refunds, gifts, lump sum settlements, inheritances or insurance payments, withdrawal of bank deposits, earnings of minor children, or money received from the sale of property. Income also does not include funds derived from college work study programs, scholarships, loans, or grants to the extent such funds are not used for current living costs.~~

~~"Intermittent sand filter system" means a system designed to treat sewage by causing the sewage to be dosed through a properly designed bed of graded sand media.~~

~~"Intermittent stream" means any stream which cannot, at all times, dilute point source discharge effluent (from a pipe) at least 10:1 as measured during a 7 consecutive day average of a 10 year low flow (7 Q 10).~~

~~"Local health department" means the department established in each city and county in accordance with § 32.1 30 of the Code of Virginia.~~

~~"Onsite sewage disposal system" means a sewerage system or treatment works designed not to result in a point source discharge.~~

~~"Owner" means any person, who owns, leases, or proposes to own or lease an alternative discharging sewage treatment system.~~

~~"Person" means any and all persons, including individuals, firms, partnerships, associations, public or private institutions, municipalities or political subdivisions, governmental agencies, or private or public corporations organized under the law of this Commonwealth or any other state or country.~~

~~"Proprietary system design" means any group of discharging sewage treatment systems manufactured and installed following substantially similar engineering plans and specifications designed to treat a specific volume of sewage or $BOD_5$ loading rate as determined by the division.~~

~~"Pump and haul" means the temporary (less than one year) disposal of sewage conducted under a valid pump and haul permit issued in accordance with the Sewage Handling and Disposal Regulations.~~

~~"Recirculating sand filter system" means a system which treats sewage effluent by repeatedly passing the sewage through a pump chamber and sand filter to achieve alternating wetting and drying cycles.~~

~~"Sanitary survey" means an investigation of any condition that may effect public health.~~

~~"Settleable solids" means solids which settle after 30 minutes and expressed as milligrams per liter (mg/l).~~

~~"Sewage" means water carried and nonwater carried human excrement, kitchen, laundry, shower, bath, or lavatory wastes separately or together with such underground, surface, storm and other water and liquid industrial wastes as may be present from residences, buildings, vehicles, industrial establishments or other places.~~

~~"Sewer" means any sanitary or combined sewer used to convey sewage or municipal or industrial wastes.~~

~~"Site sketch" means a scale drawing of a proposed site for a discharge system, with pertinent distances shown. The scale shall typically be 1" = 50' for lots of three acres or less and 1" = 100' for larger lots. Site sketches may be made by the homeowner or any agent for the homeowner.~~

~~"Subdivision" means multiple building lots derived from a parcel(s) of land in conformance with local zoning or subdivision requirements.~~

~~"Subsurface soil absorption" means a process which utilizes the soil to treat and dispose of sewage effluent.~~

~~"SWCB" means the State Water Control Board and its designees.~~

~~"Total suspended solids" means solids in effluent samples which can be removed readily by standard filtering procedures in a laboratory and expressed as mg/l.~~

~~"Variance" means a conditional waiver of a specific regulation which is granted to a specific owner relating to a specific situation or facility and may be for a specified time period.~~

~~"VPDES permit" means a Virginia Pollutant Discharge Elimination System permit issued by the SWCB under the authority of the federal NPDES program.~~

~~"Well" means any artificial opening or artificially altered natural opening, however made, by which ground water is sought or through which ground water flows under natural pressure or is intended to be artificially drawn; provided this definition shall not include wells drilled for the following purposes: (i) exploration or production of oil or gas, (ii) building foundation investigation and construction, (iii) elevator shafts, (iv) grounding of electrical apparatus, or (v) the modification or development of springs.~~

Part II

~~Procedural Regulations~~

~~Article 1~~

Procedures

**12VAC5-640-110. Compliance with the Administrative Process Act.**

The provisions of the Virginia Administrative Process Act (§ ~~9 6.14:1~~ 2.2-4000 et seq. of the Code of Virginia) shall govern the promulgation and administration of this chapter and shall ~~be applicable to the appeal of any case decision based upon this chapter~~ govern the procedures pertaining to the decisions of cases under this chapter.

**12VAC5-640-130. ~~Effective date of regulations.~~ (Repealed.)**

~~The effective date of these regulations is July 30, 1992. Those permits issued under the emergency regulation VR355-34-400 are hereby recognized as modified, valid and covered by these regulations.~~

**12VAC5-640-140. Emergency order.**

If an emergency exists the commissioner may issue an emergency order as is necessary for preservation of public health, safety, and welfare or to protect environmental resources. The emergency order shall state the reasons and precise factual basis upon which the emergency order is issued. The emergency order shall state the time period for which it is effective. Emergency orders will be publicized in a manner deemed appropriate by the commissioner. The provisions of 12VAC5-640-150 ~~C and D~~ shall not apply to emergency orders issued pursuant to this section.

**12VAC5-640-150. Enforcement of regulations.**

A. ~~Notice. Subject to the exceptions below, whenever~~ Whenever the commissioner or the ~~district or local health~~ department ~~has reason to believe a violation of any of this chapter has occurred or is occurring, the alleged violator shall be notified. Such notice shall be made in writing, shall be delivered personally or sent by certified mail, shall cite the regulation or regulations that are allegedly being violated, shall state the facts which form the basis for believing the violation has occurred or is occurring, shall include a request for a specific action by the recipient by a specified time and shall state the penalties associated with such violation.~~ notifies a named party of an alleged violation of this chapter, the procedures and content of such notice shall be as follows:

1. Any notice of alleged violation shall be made in writing and shall be delivered personally or sent by certified mail to the named party.

2. The notice shall cite the regulation or regulations that are applicable to the situation.

3. The notice shall state the factual basis for the issuance of the notice.

4. The notice shall include a request for a specific action by the recipient by a specified time.

5. The notice shall include information on the process for obtaining an informal fact finding conference to determine whether or not a violation has occurred.

The issuance of a notice of alleged violation by the commissioner or the department shall not be considered a case decision as defined in § 2.2-4001 of the Code of Virginia. When the commissioner deems it necessary, he may initiate criminal prosecution or seek civil relief through mandamus or injunction prior to giving notice.

B. ~~Orders. Pursuant to the authority granted in § 32.1-26 of the Code of Virginia, the~~ The commissioner may issue orders in accordance with Title 32.1 (§ 32.1-1 et seq.) of the Code of Virginia to require any owner, or other person, to comply with the provisions of this chapter. The order shall be signed by the commissioner and may require:

1. The immediate cessation and correction of the violation;

2. Appropriate remedial action to ensure that the violation does not recur;

3. The submission of a plan to prevent future violation to the commissioner for review and approval;

4. The submission of an application for a variance; or

5. Any other corrective action deemed necessary for proper compliance with the chapter.

~~C. Hearing before the issuance of an order. Before the issuance of an order described in 12VAC5-640-150 B, a hearing must be held, with at least 30 days notice by certified mail to the affected owner or other person of the time, place and purpose thereof, for the purpose of adjudicating the alleged violation or violations of this chapter. The procedures at the hearing shall be in accordance with 12VAC5-640-180 A and B and with §§ 9-6.14:11 through 9-6.14:14 of the Code of Virginia.~~

~~D. Order – when effective. All orders issued pursuant to 12VAC5-640-150 B shall become effective not less than 15 days after mailing a copy thereof by certified mail to the last known address of the owner or person violating this chapter. Violation of an order is a Class 1 misdemeanor. See § 32.1-27 of the Code of Virginia.~~

~~E. Compliance with effective orders. The commissioner may enforce all orders. Should any owner or other person fail to comply with any order, the commissioner may:~~

~~1. Apply to an appropriate court for an injunction or other legal process to prevent or stop any practice in violation of the order;~~

~~2. Commence administrative proceedings to suspend or revoke the applicable permit;~~

~~3. Request the Attorney General to bring an action for civil penalty, injunction, or other appropriate remedy; or~~

~~4. Request the commonwealth attorney to bring a criminal action.~~

~~F. Not exclusive means of enforcement. Nothing contained in 12VAC5-640-140 or 12VAC5-640-150 shall be interpreted to require the commissioner to issue an order prior to commencing administrative proceedings or seeking enforcement of any regulations or statute through an injunction, mandamus or criminal prosecution.~~

**12VAC5-640-170. Variances.**

Only the commissioner or the deputy commissioners may grant a variance to this chapter. (See §§ 32.1-12 and 32.1-22 of the Code of Virginia and [ subdivision 2 of ] 12VAC5-640-80 [ ~~2~~ ].) The commissioner or the deputy commissioners shall follow the appropriate procedures set forth in this ~~subsection~~ [ ~~subdivision~~ section ] in granting a variance.

~~A. Requirements for a variance.~~ 1. The commissioner may grant a variance if a thorough investigation reveals that the hardship imposed by this chapter outweighs the benefits that may be received by the public. Further, the granting of such a variance shall not subject the public to unreasonable health risks or jeopardize environmental resources.

~~B. Application for a variance.~~ 2. Any owner who seeks a variance shall apply in writing within the time period specified in 12VAC5-640-210 ~~B~~ C. The application shall be signed by the owner~~, addressed and sent to the commissioner at the State Department of Health in Richmond~~. The application shall include:

~~1.~~ a. A citation to the regulation from which a variance is requested;

~~2.~~ b. The nature and duration of the variance requested;

~~3.~~ c. Any relevant analytical results including results of relevant tests conducted pursuant to the requirements of this chapter;

~~4.~~ d. Statements or evidence why the public health and welfare and environmental resources would not be degraded if the variance were granted;

~~5.~~ e. Suggested conditions that might be imposed on the granting of a variance that would limit the detrimental impact on the public health and welfare or environmental resources;

~~6.~~ f. Other information, if any, believed pertinent by the applicant; and

~~7.~~ g. Such other information as the ~~district or local health~~ department or commissioner may require.

~~C. Evaluation of a variance application.~~

~~1. The commissioner shall act on any variance request submitted pursuant to 12VAC5-640-170 B within 60 calendar days of receipt of the request.~~

~~2.~~ 3. In the evaluation of a variance application, the commissioner shall consider the following factors:

a. The effect that such a variance would have on the construction, location, or operation of the discharging system;

b. The cost and other economic considerations imposed by this requirement;

c. The effect that such a variance would have on protection of the public health;

d. The effect that such a variance would have on protection of environmental resources; and

e. Such other factors as the commissioner may deem appropriate.

~~D. Disposition of a variance request.~~ 4. The commissioner may grant or deny a variance request in accordance with the requirements of this subdivision.

~~1.~~ a. The commissioner may deny any application for a variance by sending a denial notice to the applicant by certified mail. The notice shall be in writing and shall state the reasons for the denial.

~~2.~~ b. If the commissioner proposes to grant a variance request submitted pursuant to ~~12VAC5-640-170 B~~ subdivision 2 of this section, the applicant shall be notified in writing of this decision. Such notice shall identify the variance~~,~~ and the discharging system covered, and shall specify the period of time for which the variance will be effective. The effective date of a variance shall be as stated in the variance.

~~3.~~ c. No owner may challenge the terms or conditions set forth in the variance after 30 calendar days have elapsed from the effective date of the variance.

~~E. Posting of variances.~~ 5. All variances granted to any discharging sewage treatment system are transferable from owner to owner unless otherwise stated. Each variance shall be attached to the permit to which it is granted. Each variance is revoked when the permit to which it is attached is revoked.

~~F. Hearings on disposition of variances.~~ 6. Subject to the time limitations specified in 12VAC5-640-210, informal conference or consultation proceedings or hearings on denials of an application for a variance or on challenges to the terms and conditions of a granted variance may be held pursuant to 12VAC5-640-180 A or B, except that informal ~~hearings~~ conference or consultation proceedings under 12VAC5-640-180 A shall be held before the commissioner or his designee.

**12VAC5-640-180. ~~Hearing types~~ Informal conferences and formal hearings.**

~~Hearings before the commissioner or the commissioner's designees shall include any of the following forms depending on the nature of the controversy and the interests of the parties involved.~~

A. ~~Informal hearings.~~ An informal ~~hearing~~ conference or consultation proceeding is a meeting ~~with a district or local health department with the district or local health director presiding and~~ held in conformance with § ~~9-6.14:11~~ 2.2-4019 of the Code of Virginia. The department shall ascertain the fact basis for its decisions of cases through informal conference or consultation proceedings unless the named party and the department consent to waive such a conference or proceeding to go directly to a formal hearing. ~~The district or local health department shall consider all evidence presented at the meeting which is relevant to the issue in controversy. Presentation of evidence, however, is entirely voluntary. The district or local health department shall have no subpoena power. No verbatim record need be taken at the informal hearing. The local or district health director shall review the facts presented and based on those facts render a decision. A written copy of the decision and the basis for the decision shall be sent to the appellant within 15 work days of the hearing, unless the parties mutually agree to a later date in order to allow the department to evaluate additional evidence.~~

~~If the decision is adverse to the interests of the appellant, an aggrieved appellant may request an adjudicatory hearing pursuant to 12VAC5-640-180 B.~~

B. ~~Adjudicatory hearing.~~ The adjudicatory hearing is a formal, public adjudicatory proceeding ~~before the commissioner, or a designated hearing officer, and~~ held in conformance with § ~~9-6.14:12~~ 2.2-4020 of the Code of Virginia. The commissioner may afford opportunity for an adjudicatory hearing in any case to the extent that informal procedures under § 2.2-4019 and subsection A of this section [ have not been ~~had or~~ ] have failed to dispose of a case by consent. ~~An adjudicatory hearing includes the following features:~~

~~1. Notice. Notice which states the time and place and the issues involved in the prospective hearing shall be sent to the owner or other person who is the subject of the hearing. Notice shall be sent by certified mail at least 15 calendar days before the hearing is to take place.~~

~~2. Record. A record of the hearing shall be made by a court reporter. A copy of the transcript of the hearing, if transcribed, will be provided within a reasonable time to any person upon written request and payment of the cost.~~

~~3. Evidence. All interested parties may attend the hearing and submit oral and documentary evidence and rebuttal proofs, expert or otherwise, that are material and relevant to the issues in controversy. The admissibility of evidence shall be determined in accordance with § 9-6.14:12 of the Code of Virginia.~~

~~4. Counsel. All parties may be accompanied by and represented by counsel and are entitled to conduct such cross-examination as may elicit a full and fair disclosure of the facts.~~

~~5. Subpoena. Pursuant to § 9-6.14:13 of the Code of Virginia, the commissioner or hearing officer may issue subpoenas on behalf of himself or any person or owner for the attendance of witnesses and the production of books, papers or maps. Failure to appear or to testify or to produce documents without adequate excuse may be reported by the commissioner to the appropriate circuit court for enforcement.~~

~~6. Judgment and final order. The commissioner may designate a hearing officer or subordinate to conduct the hearing as provided in § 9-6.14:12 of the Code of Virginia, and to make written recommended findings of fact and conclusions of law to be submitted for review and final decision by the commissioner. The final decision of the commissioner shall be reduced to writing and will contain the explicit findings of fact upon which his decision is based. Certified copies of the decision shall be delivered to the owner affected by it. Notice of a decision will be served upon the parties and become a part of the record. Service may be by personal service or certified mail return receipt requested.~~

**12VAC5-640-190. ~~Request for hearing.~~ (Repealed.)**

~~A request for an informal hearing shall be made by sending the request in writing to the district or local health department. A request for an adjudicatory hearing shall be made in writing and directed to the commissioner at the State Department of Health in Richmond. Requests for hearings shall cite the reason(s) for the hearing request and shall cite the section(s) of this chapter involved.~~

**12VAC5-640-200. ~~Hearing as a matter of right.~~ (Repealed.)**

~~Except as provided in 12VAC5-640-330, any owner or other person whose rights, duties, or privileges have been, or may be affected by any decision of the board or its subordinates in the administration of this chapter shall have a right to both informal and adjudicatory hearings. The commissioner may require participation in an informal hearing before granting the request for a full adjudicatory hearing. Exception: No person other than an owner shall have the right to an adjudicatory hearing to challenge the issuance of either a construction permit or operation permit unless the person can demonstrate at an informal hearing that the minimum standards contained in this chapter have not been applied and that he will be injured in some manner by the issuance of the permit.~~

**12VAC5-640-210. Appeals.**

A. Any appeal from a denial of a construction or operation permit for a discharging system must be made in writing and received by the department within ~~60~~ 30 days of the date of the denial.

~~A.~~ B. Any ~~request for hearing on~~ appeal from the denial of an application for a variance pursuant to subdivision 4 a of 12VAC5-640-170 ~~D 1~~ must be made in writing and received within ~~60~~ 30 days of receipt of the denial notice.

~~B.~~ C. Any request for a variance must be made in writing and received by the department prior to the denial of the discharging system permit, or within ~~60~~ 30 days after such denial.

~~C.~~ D. In the event a person applies for a variance within the ~~60-day~~ 30-day period provided by subsection ~~B above~~ C of this section, the date for appealing the denial of the permit, pursuant to subsection A of this section, shall commence from the date on which the department acts on the request for a variance.

~~D.~~ E. Pursuant to the Administrative Process Act (§ ~~9-6.14:1~~ 2.2-4000 et seq. of the Code of Virginia) an aggrieved owner may appeal a final decision of the commissioner to an appropriate circuit court.

**12VAC5-640-220. Permits; general.**

A. ~~Construction permit required. After July 30, 1992, no~~ No person shall construct, alter, rehabilitate, modify, or extend a discharging system or allow the construction, alteration, rehabilitation, or extension of a discharging system, without a written construction permit from the commissioner or the

department. ~~Furthermore, except as provided in 12VAC5-640-30 A 2 and 12VAC5-640-220 B, no person or owner shall cause or permit any discharging system to be operated without a written operation permit issued by the commissioner which authorizes the operation of the discharging system.~~ Conditions may be imposed on the issuance of any construction ~~or operation~~ permit and no discharging system shall be constructed ~~or operated~~ in violation of those conditions.

B. Except as provided in 12VAC5-640-30, 12VAC5-640-280, and 12VAC5-640-290, construction permits for a discharging system shall be deemed valid for a period of 60 months from the date of issuance or until the expiration of the General Permit, whichever comes first. [ The permit to construct may be renewed one time for an additional 18 months if the building permit has been obtained or building construction commenced, the General Permit is reissued, and the effluent requirements of the General Permit are unchanged. ]

~~B. Operation permit required.~~ C. Except as provided in ~~12VAC5-640-310~~ 12VAC5-640-30 A 2 and 12VAC5-640-266, no person shall place a discharging system in operation, or cause or allow a discharging system to be placed in operation, without obtaining a written operation permit. Conditions may be imposed on the issuance of any operation permit, and no discharging system shall be operated in violation of those conditions.

~~C. Construction permits validity. Except as provided in 12VAC5-640-30, 12VAC5-640-280 and 12VAC5-640-290, construction permits for a discharging system with general or preliminary system approval shall be deemed valid for a period of 54 months from the date of issuance. Construction permits for discharging systems with experimental approval shall be valid for 30 days except as provided in 12VAC5-640-30, 12VAC5-640-280 and 12VAC5-640-290.~~

D. ~~Operation permit validity.~~ Except as provided for in 12VAC5-640-280 and 12VAC5-640-290, operation permits shall be valid for a period of time not longer than the General Permit [ ~~and the maintenance contract required pursuant to 12VAC5-640-500 B or the monitoring contract required pursuant to 12VAC5-640-490~~ ] ~~F~~ [ ~~G, whichever expires first~~ ]. The operation permit ~~may be renewed~~ shall remain valid [ ~~upon written proof of a new or renewed maintenance contract or monitoring contract~~ when continued reporting of operation, maintenance, and monitoring occurs in accordance with 12VAC5-640-490, 12VAC5-640-500, and 12VAC5-640-510, ] provided ~~they are all valid for not less than 24 months~~ the facility is otherwise in compliance with this chapter. [ ~~The period of renewal shall coincide with the expiration date of the document with the shortest period of validity.~~ ]

E. ~~Permits not transferable.~~ Construction and operation permits for discharging systems shall not be transferable ~~from one person to another or from one location to another. Each new owner shall make a written application for a permit. Application forms are available at all local health departments~~ except as provided [ ~~below~~ in this subsection ]:

1. A construction permit for a specific discharging system will be issued to a new owner if the new owner (i) applies for the permit transfer on a form approved by the department, (ii) pays the applicable fee, (iii) provides the department with change of ownership documentation in accordance with the General Permit, and (iv) provides written certification that there are no new site conditions that will adversely impact the existing approved construction permit and documents or the original construction application.

2. An operation permit for a specific discharging system will be issued to a new owner if the new owner (i) applies for the permit transfer on a form approved by the department, (ii) pays the applicable fee, [ and ] (iii) provides the department with change of ownership documentation in accordance with the General Permit [ ~~, and (iv) provides a copy of a valid maintenance and monitoring contract as required~~ ].

[ 3. The expiration date of the transferred operation or construction permit shall not change. ]

**12VAC5-640-230. ~~Procedures~~ Application process for obtaining a ~~construction permit~~ Department of Environmental Quality General Permit using the Combined Application.**

~~The process for obtaining a construction permit for a discharging system consists of two steps. These are filing an application with fee to determine the suitability of a site and filing plans for the type of system being proposed.~~

~~A. Application fees. A fee of $50 shall be charged to the owner for filing an application for an alternative discharging sewage treatment system permit with the department. The fee shall be paid to the Virginia Department of Health by the owner or his agent at the time of filing the application and the application shall not be processed until the fee has been collected. Applications shall be limited to one site specific proposal. When site conditions change, or the needs of an applicant change, or the applicant proposes and requests another site be evaluated, and a new site evaluation is conducted, a new application and fee are required.~~

~~1. Waiver of fees. An owner whose income of his family is at or below the 1988 Poverty Income Guidelines For All States (Except Alaska and Hawaii) And The District of Columbia established by the Department of Health and Human Services, 53 FR 4213 (1988), or any successor guidelines, shall not be charged a fee for filing an application for an alternative discharging sewage treatment system permit.~~

~~2. Determining eligibility.~~

~~a. An owner seeking a waiver of an application fee shall request the waiver on the application form. The~~

~~department will require information as to income, family size, financial status and other related data. The department shall not process the application until final resolution of the eligibility determination for waiver.~~

~~b. It is the owner's responsibility to furnish the department with the correct financial data in order to be appropriately classified according to income level and to determine eligibility for a waiver of an application fee. The owner shall be required to provide written verification of income such as check stubs, written letter from an employer, W-2 forms, etc., in order to provide documentation for the application.~~

~~c. The proof of income must reflect current income which is expected to be available during the next 12 month period. Proof of income must include: name of employer, amount of gross earnings, pay period for stated earnings. If no pay stub, a written statement must include the name, address, telephone number and title of person certifying the income.~~

A. The process for obtaining a General Permit consists of (i) filing a Combined Application with fee to determine the suitability of a discharge point, (ii) obtaining confirmation of a suitable discharge point from the department, and (iii) obtaining coverage under the Department of Environmental Quality's General Permit. Once a General Permit registration has been received, the owner shall file an application for a construction permit as described in 12VAC5-640-240 and shall apply for an operation permit in accordance with 12VAC5-640-266 before a discharge is authorized.

B. ~~Written application required. Construction permits are issued by the authority of the commissioner.~~ All requests for ~~construction permits~~ review of a suitable discharge point for discharging systems shall be by written application on the Combined Application, signed by the owner or his agent, and shall be directed to the ~~district or local health~~ department. ~~All applications shall be made on the application form (Virginia Department of Health Discharging System Application Form for Single Family Dwellings Discharging Sewage Treatment Systems with Flows Less Than or Equal To 1,000 Gallons Per Day and State Water Control Board Virginia Pollutant Discharge Elimination System General Permit Registration Statement for Domestic Sewage Discharge Less Than or Equal to 1,000 Gallons Per Day).~~

C. ~~Application completeness.~~ An application shall be deemed complete upon receipt by the ~~district or local health~~ department of a signed and dated application~~, together with~~ and the appropriate fee, containing the following information:

1. The property owner's name, address, and telephone number;

2. The applicant's name, address, and phone number (if different from subdivision 1 of this subsection);

3. A statement signed by the property owner, or his agent, granting the ~~Health Department~~ department access to the site for the purposes of evaluating the suitability of the site for a discharging system and allowing the department access to inspect the construction, maintenance and operation of the discharging system after it is installed. The applicant must secure and produce written permission for the department to enter on any property necessary to evaluate the application;

4. A site sketch on a survey plat showing the ~~location of existing or proposed houses, property boundaries, existing and proposed wells, actual or proposed discharging systems within 600 feet of the discharge point, recorded easements, the slope and side slope of any proposed dry ditch channels, setback distances of proposed system components (such as ATU's, sandfilters, and dry ditches) to property lines, wells and other discharging systems public water supply intakes, and swimming or recreational water use areas within five miles. The drawing should be approximately to scale (plus or minus 10%) or drawn on a United States Geological Survey 7.5 minute topographic map;~~ locations of and setback distances from the proposed discharge point and discharging system components to the following:

a. Location of existing or proposed houses and other structures;

b. Property boundaries;

c. Location of proposed discharge point;

d. Existing and proposed wells, springs, cisterns, or other sources of potable water within 200 feet upslope or 1,600 feet downslope of the proposed discharge point;

e. Actual or proposed discharging systems within 600 feet of the proposed discharge point;

f. Recorded and proposed easements;

g. Existing and proposed overhead and buried utilities such as water lines, electrical lines, phone lines, gas lines, etc;

h. Sink holes located within 1,600 feet downslope of the proposed discharge point;

i. Other topographical features such as wetlands, lakes, ponds, rivers, streams, drainage ways, and swales, within 200 feet upslope and 600 feet downslope of the proposed discharge point;

j. Slope and side slope of any proposed dry ditch channels;

k. Public water supply intakes; and

l. Swimming or recreational water use areas within one mile upstream or five miles downstream of the proposed discharge point shown on a United States Geological Survey 7.5 minute topographic map or surveyed plat.

The site sketch should be to scale and accompanied by a United States Geological Survey 7.5 minute topographic map to provide information relevant to offsite setbacks.

~~5. A written statement from the SWCB that the owner's registration statement has been approved under the General Permit regulation;~~

~~6.~~ 5. Copies of all easements required by subdivision 2 of 12VAC5-640-450 ~~B~~; however, at the discretion of the department ~~district health director or the district sanitarian~~, the submission of easements may be postponed until submission of the construction plan if the property owner submits the name, address, and property location of each person that must grant an easement to the owner; ~~and~~

6. If the discharge is to a wetlands, the application must contain a wetland delineation map of the geographic area for wetlands, stream, and open water on site and any other correspondence, approval, or certifications from the U.S. Army Corps of Engineers or the Department of Environmental Quality that wetlands were properly identified and delineated;

7. A letter of denial from the department or a certified site and soil evaluation report from a qualified person showing that the requirements of 12VAC5-640-30 D have been satisfied; and

~~7.~~ 8. Other information ~~which~~ that the department deems necessary to comply with the intent of this chapter.

~~D. Application assistance. It is the policy of the department to assist persons applying for a discharging system permit by maintaining a supply of all appropriate forms in each local office. Department personnel will assist individuals in understanding how to fill out the form and provide information on the administrative process and technical requirements involved in obtaining a permit.~~

~~E. Site review.~~ D. Upon receipt of a completed ~~application~~ Combined Application the department will conduct a site review to determine if the site meets the minimum ~~siting~~ criteria contained in Part III (12VAC5-640-390 et seq.) of this chapter. The owner may opt to have a licensed professional engineer conduct the site review and submit appropriate documentation with the application for review by the department. The department may opt to conduct a site review to verify an application submitted by a licensed professional engineer. Upon ~~completing~~ conducting the site evaluation or upon reviewing the site evaluation conducted by a licensed professional engineer, the department will advise the owner in writing of the results of the evaluation.

1. ~~Satisfactory site found.~~ When a satisfactory site is found for a discharging system, the written notice to the applicant shall include the type of discharge point found (i.e., wetland, all weather stream, intermittent stream, or dry ditch). The completed Combined Application and a copy of the documentation pursuant to 12VAC5-640-30 D shall be forwarded to the Department of Environmental Quality to complete the application process for a General Permit.

2. ~~No satisfactory site found.~~ When no satisfactory discharge point site is found the department shall deny the application in accordance with 12VAC5-640-270 ~~owner shall be notified of all limiting factors restricting the use of a discharging system. Further, the applicant shall be notified of his right to appeal and what steps are necessary to initiate the process.~~ The department shall send a copy of the denial to the Department of Environmental Quality.

**12VAC5-640-240. ~~Construction plan~~ Application for a construction permit.**

A. After a satisfactory site for a discharging system has been found and a General Permit has been obtained from the Department of Environmental Quality, the applicant shall submit ~~a construction plan~~ an application, the appropriate fee, construction plans, specifications, design criteria and calculations, and documentation that coverage under the General Permit has been obtained. The documentation shall include the cover letter and copy of the General Permit issued by the Department of Environmental Quality. If the discharge is to a wetland, the construction submittal must include documentation that a Virginia Water Protection Permit from the Department of Environmental Quality or a permit under the U.S. Army Corps of Engineers has been obtained as needed. The purpose of the construction ~~plan~~ submittal is to demonstrate how the effluent limitations established by the SWCB and the ~~remaining criteria~~ construction, location, and performance requirements of this chapter can be met. ~~At a minimum the construction plan must show the following:~~

B. All plans for alternative discharging systems shall bear a suitable title showing the name of the owner and shall show the scale in feet, a graphical scale, the north point, date, revision dates (when applicable), and the name of the licensed professional engineer by or under whom prepared. The cover sheet and each plan sheet shall bear the same general title identifying the overall sewage disposal project and each shall be numbered. Appropriate subtitles shall be included on the individual sheets.

The plans shall be clear and legible. Plans shall be drawn to a scale that permits all necessary information to be plainly shown. The size of the plans shall be no larger than 30 inches by 48 inches. Data used should be indicated. The precise location of the proposed system shall be shown on the plans. Detailed plans shall consist of plan views, elevations, sections, and supplementary views that together with the specifications and general layouts provide the working information for the contract and construction of the work, including dimensions and relative elevations of structures, the location and outline form of equipment and components to be installed, the location and size of piping, water levels, ground elevations, and erosion control abatement facilities.

C. Complete technical specifications for the construction of the alternative discharging system and all appurtenances shall accompany the plans. The specifications accompanying construction drawings shall include, but not be limited to, all construction information not shown on the drawings, necessary to provide the installer with all detail of the design

requirements as to the quality of material workmanship and fabrication of the project; type, size, strength, operating characteristics, and rating of equipment; allowable infiltration, machinery, valves, piping, and jointing of pipe; electrical apparatus, wiring, and meters; operating tools and construction materials; special filter materials such as stone, sand, gravel, or slag; miscellaneous appurtenances; chemicals when used; instructions for testing materials and equipment deemed necessary to meet design standards; and operational testing for the complete works and component units.

D. At a minimum, the construction submittal must show the following:

1. Information gathered in the site review evaluation;

~~1. Type of system. The~~ 2. For each system component, the plan shall note the type of ~~system~~ component and, where applicable, the manufacturer, model number, ~~NSF~~ approval ~~and~~, status in accordance with 12VAC5-640-432, hydraulic capacity, and ~~capacity in pounds of $BOD_5$ per day~~ treatment capacity;

~~2. Location~~ 3. The specific location of the property including the county tax map number (where available), a copy of the United States Geological Survey 7.5 minute topographic map showing the discharge point and ~~down stream~~ downstream for one mile, and directions to the property;

~~3. Grades~~ 4. The elevation of the house sewer line where it exits the house and the elevation of the inlet and outlet ports or tees on all treatment units. Where discharges are to dry ditches or intermittent streams the site plan shall show the elevation of the discharge point, the point 500' downgrade from the discharge point and points every 50 feet between the discharge point and 500' downstream. This requirement may be met by drawing a flow diagram showing all elements listed [ ~~above~~ in this section ];

~~4. Distances.~~ 5. The distance between all elevation points required by 12VAC5-640-240 ~~3~~ D 4 so that the grade and setback distances can be established;

~~5. Pump specifications~~ 6. If a pump is proposed, specifications must be provided ~~which~~ that include the manufacturer, model number, and a pump curve with a system curve overlain on the pump curve;

~~6. Flood plain~~ 7. The location of the 100-year flood plain. All portions of a discharging system, except for the discharge pipe and step type post aeration, if required, shall be located above the 100-year flood plain;

~~7. Plans and specifications. Plans and specifications showing compliance~~ 8. Compliance with ~~subsections B through N (inclusive) of 12VAC5-640-470~~ 12VAC5-640-430 through 12VAC5-640-470; and

9. Other information as deemed appropriate by the department to verify the design.

**12VAC5-640-250. Issuance of the construction permit.**

A construction permit shall be issued to the owner by the commissioner or the department after receipt and review of a complete application submitted under ~~12VAC5-640-230 and~~ 12VAC5-640-240, a satisfactory site and construction plan review, and ~~approval under 12VAC5-640-240~~ verification of issuance of a General Permit from the Department of Environmental Quality. The construction permit shall note whether the permitted system has ~~experimental, preliminary, or~~ general approval or is not in accordance with 12VAC5-640-432. ~~Further, the construction permit will indicate that the operation and maintenance of the system is the owner's responsibility and that discharges in excess of the limits established by the General Permit, now or in the future, may cause the department to mandate the repair, expansion or replacement of the discharging system.~~

**12VAC5-640-260. Exception for failing onsite sewage disposal systems.**

~~When a failing onsite sewage disposal system is identified, and the site location criteria in this chapter cannot be met, the site location criteria in Article 1 of Part III and 12VAC5-640-240 F, 12VAC5-640-470 H and the dimensions of the easement specified in 12VAC5-640-450 B of this chapter may be waived, provided the following conditions are met.~~

When a failing onsite sewage disposal system is identified and the site location criteria in 12VAC5-640-400, 12VAC5-640-410, 12VAC5-640-420, and 12VAC5-640-470 H, and the dimensions of the easement specified in subdivision 2 of 12VAC5-640-450 cannot be met, the department may issue a written waiver that specifies the criteria that are being waived and the rationale for the waiver. In order to obtain this waiver, the owner must provide a written request for the waiver that includes justification and specifies any mitigating measures used to offset the reduced site conditions. The following conditions must apply in order for the waiver to be considered:

~~A. Reduce health hazard or environmental impact.~~

1. The issuance of a discharging system permit will reduce an existing health hazard or will improve or negate environmental impacts associated with the existing discharge. This determination shall be made by the ~~district health director or the district sanitarian manager~~ department.

~~B. No increase in waste load.~~

2. There will be no increase in the waste load generated by any additions to the dwelling except when necessary to provide for minimum facilities necessary for good sanitation. The minimum facilities for a single family dwelling are: a water closet, a bathroom sink, a bathtub or shower or both, and a kitchen sink. More than one bathroom may be added to a dwelling provided the potential occupancy of the structure is not increased.

~~C. Minimum facilities.~~

3. Where a failing onsite sewage disposal system already has more than the minimum facilities described [ ~~above~~ in subdivision 2 of this section ] , the discharging system may be designed and permitted to accommodate the entire existing sewage flow. In no event shall the system designed and permitted exceed the existing sewage flow unless all conditions and criteria of this chapter are met.

**12VAC5-640-262. Statements required upon completion of construction.**

A. Upon completion of the construction, alteration, or rehabilitation of a discharging system, the owner or agent shall submit to the department a completion statement signed by the contractor responsible for the construction and a completion statement signed by the licensed professional engineer responsible for the design, upon forms approved by the department, that the system was installed and constructed in accordance with the construction permit and complies with all applicable state and local regulations, ordinances, and laws. These completion statements shall be based upon inspections of the treatment works during and after construction or modification that are adequate to ensure the truth of the statements. Should the treatment works be modified from the approved construction plan, the licensed professional engineer shall submit as built drawings documenting the changes. The licensed professional engineer's completion statement shall certify that the treatment works as modified will comply with all applicable state and local regulations, ordinances, and laws.

B. No discharging system shall be placed in operation, except for the purposes of testing the mechanical soundness of the system, until an operation permit is issued by the department in accordance with 12VAC5-640-266.

**12VAC5-640-264. Operation and maintenance manual.**

A. Prior to issuance of the operation permit, the owner shall submit an operation and maintenance (O&M) manual for the discharging system. The general purpose of the manual is to present both technical guidance and regulatory requirements to facilitate operation and maintenance of the discharging system for both normal conditions and generally anticipated adverse conditions. The manual shall be designed as a reference document, being as brief as possible while presenting the information in a readily accessible manner. The manual shall be tailored to the specific system. The manual must state the minimum required frequencies for routine maintenance, operation, sampling, and monitoring frequencies in this chapter, but additional maintenance visits, sampling, and monitoring may be added as needed, depending on the design of the system. The manual should reflect the minimum operation and maintenance activities required to properly maintain the system and ensure compliance with the General Permit requirements.

B. The manual shall include the following minimum items:

1. Basic information relevant to the discharging system design including treatment unit capacities, pump operating conditions, a list of the components comprising the discharging system, a dimensioned site drawing, sampling locations, and contact information for replacement parts and chemicals for each unit process;

2. Safety considerations;

3. A list of all control functions and how to use them;

4. All operation, maintenance, sampling, and inspection schedules for the discharging system including any requirements that exceed the minimum requirements of this chapter;

6. The General Permit effluent sampling and reporting schedule;

7. The sampling location for each of the required General Permit parameters and for informal (process control) testing parameters;

8. The expected ranges of any recommended informal (process control) tests;

9. The limits of the discharging system and how to operate the system within those design limits; and

10. Other information deemed necessary or appropriate by the designer.

**12VAC5-640-266. Issuance of the operation permit.**

A. Prior to issuance of the operation permit, the department may inspect the discharging system to determine if the installation is in substantial compliance with the construction permit and the requirements of this chapter. Minor deviations from the permit or proposed plans and specifications, excluding the manufacturer's design and installation specification, that do not affect the quality of the sewage treatment process or endanger public health or the environment may be approved by the department.

B. Before receipt of an operation permit, the owner shall:

1. Submit the completion statements and as built drawings as required under 12VAC5-640-262; [ and ]

2. Submit the operation and maintenance manual as required under 12VAC5-640-264 [ ~~; and~~

~~3. Submit the maintenance and monitoring contracts as required under 12VAC5-640-490 G and 12VAC5-640-500 B~~ ].

C. Upon the owner's satisfactory completion of the requirements in subsection B of this section, the commissioner or department shall issue an operation permit to the owner. The issuance of an operation permit does not denote or imply any warranty or guarantee by the commissioner or department that the discharging system will function for any specified period of time. The operation permit shall note whether the permitted system has general or nongeneral approval.

**12VAC5-640-270. Denial of a construction or operation permit.**

A. ~~Construction permit.~~ If ~~it is determined~~ the commissioner or department determines that the proposed site does not comply with this chapter or that the design of the system would preclude the safe and proper operation of a discharging system, ~~or that~~ the installation and operation of the system would create an actual or potential health hazard ~~or nuisance~~, or the proposed design would adversely impact the environment, the permit shall be denied and the owner shall be notified in writing, by certified mail, of the basis for the denial, and a copy shall be sent to the Department of Environmental Quality. ~~The notification shall also state that the owner has the right to appeal the denial.~~

B. ~~Operation permit.~~ In addition to the grounds set forth in ~~12VAC5-640-270~~ subsection A of this section, the operation permit shall be denied if the discharging system is not constructed in accordance with the construction permit or the owner has failed to provide the completion ~~statement~~ statements required by ~~12VAC5-640-300~~ 12VAC5-640-262 [ ~~,~~ or ] the operation and maintenance manual required by 12VAC5-640-264 [ ~~, and a copy of a valid maintenance contract required by 12VAC5-640-500 or a valid monitoring contract as required in 12VAC5-640-490~~ ] ~~F~~ [ ~~G~~ ]. The owner shall be notified in writing, by certified mail, of the basis for the denial, and a copy of the denial shall be sent to the Department of Environmental Quality. ~~The notification shall also state that the owner has the right to appeal the denial.~~

**12VAC5-640-280. ~~Suspension or revocation~~ Revocation of construction permits and operation permits.**

~~The~~ After providing the owner with the notice and the opportunity to participate in an informal conference or consultation proceeding in accordance with § 2.2-4019 of the Code of Virginia and 12VAC5-640-180, the commissioner may ~~suspend or~~ revoke a construction permit or operation permit for any of the following reasons:

1. Failure to comply with the conditions of the permit including, but not limited to, the monitoring and maintenance requirements in Article 4 (12VAC5-640-490 et seq.) of Part III of this chapter and the payment of the inspection fee ~~under 12VAC5-640-320~~;

[ ~~2. Failure to keep a maintenance contract in force in accordance with 12VAC5-640-500, or keep a monitoring contract in force in accordance with 12VAC5-640-490~~ ] ~~F~~ [ ~~G;~~

~~3.~~ 2. ] Violation of any requirement of this chapter for which no variance has been issued;

[ ~~4.~~ 3. ] Facts become known which reveal that an actual or potential health hazard has been or would be created or that the environmental resources may be adversely affected by allowing the proposed discharging system to be installed or operated; or

[ ~~5.~~ 4. ] Failure to comply with the effluent limitations set forth by the SWCB in the General Permit as determined by the monitoring required by Article 4 of Part III.

**12VAC5-640-290. Voidance of construction or operation permits.**

~~A. Null and void.~~

~~All~~ After providing the owner with the notice and the opportunity to participate in an informal conference or consultation proceeding in accordance with § 2.2-4019 of the Code of Virginia and 12VAC5-640-180, the commissioner or the department may declare a discharging ~~system~~ system's construction ~~permits are~~ or operation permit null and void when any of the following conditions occur:

1. Conditions such as house location, well location, discharging system location, discharge point, discharge system design, topography, drainage ways, or other site conditions are changed from those shown on the application or site plan;

2. Conditions are changed from those shown on the construction permit;

3. More than ~~54~~ 60 months elapse from the date the permit was issued; or

4. The ~~suspension,~~ revocation or expiration of the General Permit or of the owner's approved registration by the SWCB.

~~B. Reapplication.~~

~~Reapplication for the purposes of having an expired construction permit reissued shall be the responsibility of the owner, and such reapplication shall be handled as an initial application and comply fully with 12VAC5-640-230.~~

**12VAC5-640-300. ~~Statement required upon completion of construction.~~ (Repealed.)**

~~Upon completion of the construction, alteration, or rehabilitation of a discharging system, the owner or agent shall submit to the district or local health department a statement, signed by the contractor, upon the form set out in Appendix II, that the system was installed and constructed in accordance with the permit, and further that the system complies with all applicable state and local regulations, ordinances and laws.~~

**12VAC5-640-310. ~~Inspection and correction.~~ (Repealed.)**

~~No discharging system shall be placed in operation, except for the purposes of testing the mechanical soundness of the system, until inspected by the district or local health department, corrections made if necessary, and the owner has been issued an operation permit by the district or local health department.~~

**12VAC5-640-320. ~~Issuance of the operation permit.~~ (Repealed.)**

~~Upon satisfactory completion of the requirements of 12VAC5-640-300, 12VAC5-640-310, 12VAC5-640-490 F and 12VAC5-640-500 B, the commissioner shall issue an operation permit to the owner. The issuance of an operation~~

permit does not denote or imply any warranty or guarantee by the department that the discharging system will function for any specified period of time. The operation permit shall note whether the permitted system has experimental, preliminary, or general approval. Further, the operation permit will indicate that the operation and maintenance of the system is the owner's responsibility and that discharges in excess of the limits established by the General Permit, now or in the future, may cause the department to mandate the repair, expansion or replacement of the discharging system.

A. Inspection fees. A fee of $50 shall be charged to the owner for each mandatory monitoring inspection of an alternative discharging sewage treatment system conducted by the department in accordance with 12VAC5-640-490 C, D, or E. The fee shall be paid to the Virginia Department of Health by the owner or his agent prior to receipt of the inspection results from the department. Each inspection fee shall apply to one site specific inspection of only one discharging system.

B. Waiver of fees. An owner whose income of his family is at or below the 1988 Poverty Income Guidelines For All States (Except Alaska and Hawaii) And The District of Columbia established by the Department of Health and Human Services, 53 Fed. Reg. 4213 (1988), or any successor guidelines, shall not be charged a fee for mandatory monitoring inspection of an alternative discharging sewage treatment system conducted by the Department of Health in accordance with 12VAC5-640-490 C, D, or E.

C. Determining eligibility.

1. An owner seeking a waiver of an inspection fee shall request the waiver in writing. The department will require information as to income, family size, financial status and other related data.

2. It is the owner's responsibility to furnish the department with the correct financial data in order to be appropriately classified according to income level and to determine eligibility for a waiver of an inspection fee. The owner shall be required to provide written verification of income such as check stubs, written letter from an employer, W-2 forms, etc., in order to provide documentation for the file.

3. The proof of income must reflect current income which is expected to be available during the next 12-month period. Proof of income must include: name of employer, amount of gross earnings, pay period for stated earnings. If no pay stub, a written statement must include the name, address, telephone number and title of person certifying the income.

**12VAC5-640-330. Suspension of an operation permit. (Repealed.)**

A. Suspension. The district health director or district sanitarian manager may suspend the operation permit held by the owner of any discharging system which discharges effluent in violation of the effluent limitations set forth in the General Permit provided the following conditions have been met:

1. The owner has received written notification, either in person or by certified mail, of the violation at least seven working days prior to the suspension;

2. The owner has been advised of the nature of the violation and, if known, what actions are necessary to correct the violation;

3. The owner has been advised of his right to a hearing pursuant to 12VAC5-640-180 B to appeal the suspension of the operation permit;

4. The owner has taken no significant demonstrable action to identify and correct the problem causing the system to fail; and

5. The owner has been issued an emergency pump and haul permit, or given another alternative method of sewage disposal, at least 24 hours prior to the suspension of the operation permit.

B. Discharge suspended. Upon suspension of an operation permit the owner shall immediately cease discharging effluent until corrections have been made to the discharging system which may be expected to bring the system into compliance with this chapter. The owner shall demonstrate to the health department that interim sewage disposal methods are in compliance with all federal, state and local laws governing public health and the environment. When pump and haul is utilized to prevent a discharge from occurring, the owner shall comply with the emergency pump and haul requirements found in the Sewage Handling and Disposal Regulations (12VAC5-610-10 et seq.) and provide the local health department with the name, address and phone number of the hauler and the frequency of pumping prior to initiating the emergency pump and haul process.

C. Modifications, alterations, or extensions. In addition to the remedies under 12VAC5-640-330 A and B, when any individual discharging system has exceeded its permitted discharge limitations three times in any one year or five times in any two consecutive years, the district health director or district sanitarian manager may require modifications, alterations or extensions to the system in order to improve the effectiveness of the system.

**12VAC5-640-340. Reinstatement of an operation permit. (Repealed.)**

Upon completion of repairs, modifications, alterations, or extensions to the discharging system, which may be reasonably expected to correct the cause of the violation, the department shall reinstate the operation permit. Upon reinstating the operation permit, the pump and haul permit shall be rescinded. The notice of reinstatement of the operation permit and rescinding of the pump and haul permit shall be made in writing and delivered in person or by certified mail.

**12VAC5-640-350. ~~System approval.~~ (Repealed.)**

~~Discharging systems will be classified by the division according to the data available to indicate the performance limits and reliability of various discharging systems. Systems may be classified as having an experimental system approval, a preliminary system approval, or a general system approval. The type and frequency of testing for each class of approval is designed to reflect the certainty with which the system has demonstrated its ability to meet the limits of the General Permit. Approval of generic system designs or of individual proprietary systems will be made by the division.~~

~~A. Experimental system approval. Experimental system approval indicates that a system, process, technology, or design has not been rigorously tested and proven capable of meeting either the discharge limits of the General Permit or the standards for Class 1 systems as defined by ANSI/NSF (American National Standards Institute/National Sanitation Foundation) International Standard 40, revised July 1990 ("Standard 40") hereby incorporated by reference. Products which have not been field tested or demonstrated in use as described in 12VAC5-640-350 B or C shall be considered experimental.~~

~~1. Notification of owner. All owners proposing experimental discharging systems shall sign a waiver of liability relieving, and agreeing to indemnify, the Department of Health and its employees for all liability associated with the design, operation, and performance of the system. Further, the owner shall agree to replace the experimental system with a system that has either general approval or preliminary approval in the event the experimental system fails and cannot be repaired. The cost of all repairs to, or replacement of, any experimental system shall be the responsibility of the system owner and shall not lie with the department.~~

~~2. Limit of 25 systems. A maximum of 25 experimental discharging systems of any one type or design may be installed at any one time in the Commonwealth.~~

~~3. Time limit for experimental system status. Experimental approval shall not extend for more than 18 months after the 15th experimental system of one type or design has been installed. After 18 months the experimental process, technology or design shall be reviewed by the division and either granted preliminary system approval or the experimental approval shall be revoked. Preliminary system approval shall be granted if the system complies with the requirements of 12VAC5-640-350 B 1 c.~~

~~B. Preliminary system approval. Preliminary approval of a particular model of a discharging system indicates that the specific model uses a method, technology, process or combination of methods, technologies or processes that has been demonstrated in full scale systems under controlled test conditions. The results of these tests indicate that the system may have the potential to treat residential sewage under actual residential conditions to the level required by the General Permit. Demonstrated in situ performance, to the level of treatment required by the General Permit, is necessary to maintain system approval.~~

~~1. A discharging system may receive preliminary system approval by one of three methods:~~

~~a. ANSI/NSF testing. A system may be tested by an entity accredited by the American National Standards Institute and demonstrated to comply with Standard 40; or~~

~~b. Accepted engineering practice. System designs such as intermittent dosed sand filters, recirculating sand filters, and other system concepts which use design concepts and loading rates proven in accordance with accepted industry standards and practices and which have been routinely used and have associated test results meeting or exceeding those required for experimental systems to receive preliminary approval, may be granted preliminary approval by the division; or~~

~~c. Successful experimental system testing. A system may receive preliminary system approval by successfully demonstrating as an experimental system it can meet the following requirements:~~

~~(1) Replicates. At a minimum 15 systems of the same type or design shall be tested under residential conditions for a minimum period of one year each (i.e., no individual system shall be tested for less than one year);~~

~~(2) Data collection. Data shall be collected and reported to the Division for each system in accordance with the requirements of 12VAC5-640-490; and~~

~~(3) Results. The data shall demonstrate that during the previous year, not less than 95% of all systems of any one type or design were functioning properly during any quarter. That is, during the previous one year there were no data indicating the need to suspend the preliminary system approval.~~

~~2. Time limit for preliminary system approval. Preliminary system approval shall not extend for more than 60 months after the 25th preliminary system of one type or design has been installed. After 60 months the preliminary system approval status shall be reviewed by the division and the system either granted general system approval or the preliminary system approval shall be revoked. General system approval shall be granted if the system complies with the requirements of 12VAC5-640-350.~~

~~C. General system approval. Systems that have demonstrated in actual residential use that they can consistently meet the limits of the General Permit shall be eligible for general system approval. To meet the intent of this section the system shall meet the following requirements:~~

~~1. Replicates. At a minimum 25 systems shall be tested under residential conditions for a minimum period of five~~

years each (i.e., no individual system shall be tested for less than five years);

2. Data collection. Data shall be collected and reported to the district health department for each system in accordance with the requirements of 12VAC5-640-490; and

3. Results. The data shall demonstrate that during the previous five years, not less than 95% of all systems of any one type or design were functioning properly during any quarter. That is, during the previous five years there were no data indicating the need to suspend the preliminary system approval. All systems installed and tested at the time of evaluation shall be included in the review. Nothing shall limit the department to basing its evaluation only on the first 25 systems installed.

**12VAC5-640-360. ~~Product registration.~~ (Repealed.)**

All aerobic treatment units shall be registered with the Division of Sanitarian Services in order to receive preliminary approval. In order to register a product, the manufacturer shall submit documentation showing the results of the Standard 40 testing and detailed plans and specifications of the product. Detailed plans and specifications shall include at a minimum a plan view of the ATU, a cross section of the ATU and any supplementary views which together with the specification and general installation guidelines will provide sufficient information for sanitarians to issue permits.

A. Health department review. The Division of Sanitarian Services will review requests for preliminary approval within 30 work days of receipt and respond to the applicant in writing. The department may approve, deny, conditionally approve, or request additional information on any request. When additional information is requested the division shall respond to the additional information within 30 days of receipt.

B. Certification mark or seal. All Class I ATU's in compliance with ANSI/NSF International Standard 40 shall have a registered certification mark or seal which must be affixed in a conspicuous location on the unit.

**12VAC5-640-370. ~~Submission of plans.~~ (Repealed.)**

A. Intermittent sand filter. All plans for an intermittent sand filter must use a design prepared by a professional engineer licensed to practice in Virginia, except for generic system designs which have been approved by the division. All plans and specifications shall bear the name, address, and occupation of the author and date of design.

B. Recirculating sand filter. All recirculating sand filters must use a design prepared by a professional engineer licensed to practice in Virginia, except for generic system designs which have been approved by the division. All plans and specifications shall bear the name, address, and occupation of the author and date of design.

C. Constructed wetlands. Constructed wetlands are considered experimental and will be considered on a case by case basis by the department. All constructed wetland systems shall be designed to meet or exceed 10 mg/l $BOD_5$ and 10 mg/l suspended solids.

**12VAC5-640-380. ~~Suspension and revocation of system approval.~~ (Repealed.)**

A. General. The experimental and preliminary approval of systems cited in 12VAC5-640-350 is based on the capability, or theoretical capability, of a particular method, technology or design to treat sewage under controlled conditions. Designs having general system approval have demonstrated their ability to meet the discharge limits of the General Permit; however, these systems still require routine maintenance and attention to their proper use such that they operate in a safe and sanitary manner. In order to protect public health and the environment, these systems must also be capable working properly under normal field conditions.

B. Suspension of approval. Anytime more than 5.0%, as measured statewide, of the discharging systems of any approved generic system or of any approved proprietary system design are found to be failing for two consecutive quarters, the approval of that design or model shall be suspended. Failure for the purposes of this section means the discharge of effluent that does not meet the effluent limitations set forth in the State Water Control Board's General Permit for all constituents except residual chlorine and dissolved oxygen.

1. When less than 100 systems of a single design have been installed, Table 2.1 shall be used determine the maximum acceptable failure rate. The 5.0% rule shall not apply because a small number of failures, or even a single failure, may violate this percentage without unduly endangering public health or the environment.

2. When the approval of a system has been suspended, no additional systems of that design or model shall be installed or approved unless construction or installation is already in progress and the system or materials to construct the system are already on the job site.

TABLE 2.1

| Number of systems Installed in VA | No. not to exceed for suspension | No. not to exceed for revocation |
|---|---|---|
| 0-10 | 1 | 3 |
| 11-25 | 2 | 6 |
| 26-50 | 3 | 9 |
| 51-75 | 4 | 12 |
| 76-99 | 5 | 15 |

~~C. Reinstatement of approval for a suspended system. The approval of a system under suspension may be reinstated by the division after the following conditions have been met:~~

~~1. Repairs have been made to all failing systems, and~~

~~2. Follow up testing, performed in accordance with 12VAC5-640-490 D 1, reveals that less than 2.0% of the systems are failing. When less than 100 systems have been installed, approval may be reinstated when repairs and testing as described above has been completed on all failing systems and the number of failures is less than that shown in Table 2.1.~~

~~D. Revocation of approval. Anytime more than 15%, as measured statewide, of the discharging systems of any approved generic system or of any approved proprietary system design are found to be failing for two consecutive quarters, the approval of that design shall be revoked. Failure for the purposes of this section means the discharge of effluent that does not meet the effluent limitations set forth in the State Water Control Board's General Permit for all constituents except residual chlorine and dissolved oxygen. Further, the division shall revoke the approval of any Class I ATU which fails to meet Standard 40 upon retesting for continued certification, when such testing has been performed by NSF or other third party which has been accredited by the American National Standards Institute.~~

~~1. When less than 100 systems of a single design have been installed, Table 2.1 shall be used determine the maximum acceptable failure rate. The 15% rule shall not apply because a small number of failures, or even a single failure, may violate this percentage without unduly endangering public health or the environment.~~

~~2. When the approval of a system has been revoked, no additional systems of that type shall be installed or approved.~~

~~E. Reinstatement of a revoked system. The approval of a system that has had its approval revoked may be reinstated by the division after the following conditions have been met:~~

~~1. Design flaws which led to the excessive failure rate have been corrected;~~

~~2. Repairs have been made to all systems to correct the design flaws;~~

~~3. Follow up testing, performed in accordance with 12VAC5-640-490 D 1 reveals that less than 2.0% of the systems are failing. When less than 100 systems have been installed, approval may be reinstated when repairs and testing as described above has been completed on all failing systems and the number of failures is less than that shown in Table 2.1; and~~

~~4. Retesting and recertification of any Class I ATU under Standard 40.~~

~~F. Notification by the department. When the approval for a system is suspended, or is revoked, the department will send notice of the suspension to all regional and district offices of the Health Department, the manufacturer (if applicable), and other interested parties who have notified the department in writing that they wish to be notified. The notice shall include the system name, failure rate, location of failing systems and what actions are necessary to return to an approved status.~~

**12VAC5-640-400. Classifications of discharge ~~point~~ points.**

The nature of the discharge point will determine what precautions must be taken to protect public health and environmental resources. ~~These regulations identify two classifications of discharge points.~~

~~A. All~~ 1. Where an all weather stream ~~required if possible~~ is available, it shall be used rather than discharging to an intermittent stream, dry ditch, or wetland. ~~The preferred point of discharge is an~~ An all weather stream ~~where effluent~~ can ~~be~~ readily ~~diluted~~ dilute the effluent at least 10:1 ~~as measured during a 7~~ at the seven consecutive day average of a ~~10 year~~ 10-year low flow (7-Q-10) and thereby minimize public health and water quality impacts. ~~Where an all weather stream is available for use it shall be used rather than discharging to an intermittent stream or dry ditch.~~

~~B. Stream type identification on USGS maps.~~ 2. An all weather stream ~~may generally be identified~~ is represented by a solid blue line on the most recently published 7.5 minute United States Geologic Survey ~~(U.S.G.S.)~~ topographic map and has a 7-Q-10 flow that can provide 10:1 dilution of the effluent. ~~The site evaluation shall include a review to verify that the stream is flowing at the time of the site evaluation. The USGS map shall not be the sole and final factor used to determine if a stream is an all weather stream when the department observes otherwise.~~ Intermittent streams ~~may be identified~~ are represented by a dotted and dashed blue line on the most recently published 7.5 minute United States Geologic Survey topographic map. An all weather stream that provides less than 10:1 dilution of the effluent based on 7-Q-10 flow shall be considered an intermittent stream. Intermittent streams and dry ditches have an assigned stream flow 7-Q-10 of zero.

~~C. Other means of determining stream flow.~~ 3. An owner may submit to the division additional hydrologic data, including but not limited to stream records and anecdotal evidence of long time residents, to support that a stream can provide a dilution ratio of 10:1. When in the opinion of the division, the evidence warrants a change, the division may determine that a stream is an all weather stream for the purposes of this chapter. The owner may also request site specific stream flow determinations from the Department of Environmental Quality.

~~D. Intermittent streams or dry ditches.~~ 4. Discharges into intermittent streams or dry ditches ~~which~~ that do not have the dilution capability cited in ~~12VAC5-640-400 A~~ subdivision 1 of this section shall be located entirely within the owner's property, or within a recorded easement as

described in subdivision 2 of 12VAC5-640-450 ~~B or a combination of the two~~.

~~1. Average slope.~~ a. The average slope for any intermittent stream or dry ditch discharge receiving effluent from a discharging system shall be ~~between~~ a minimum of 2.0% ~~and 30%~~ for the first 500 feet from the point of discharge. The intermittent stream or dry ditch shall be protected from erosion by the discharge as needed.

~~2. Minimum slope.~~ b. In order to prevent ponding, the minimum slope shall not be less than 1.0% at any point.

~~3. Grading of slopes.~~ c. All slope measurements described in subdivisions 1 and 2 of this [ ~~subsection~~ section ] shall be made prior to initiating any grading and are intended to reflect naturally occurring swales and drainage ways. Nothing contained herein however, is intended to prohibit a property owner from making minor grading improvements to prevent ponding in areas with minimal slopes. Naturally occurring swales and drainage ways may be extended with an engineered channel on a case-by-case basis, but any engineered channel must tie into the existing natural swale or drainage.

5. Wetlands shall be confirmed by the U.S. Army Corps of Engineers or the Department of Environmental Quality, as appropriate, based on the type of wetland. Confirmation of delineated wetlands shall be provided [ , ] and include a wetland delineation map, wetland field data sheets, and any other documentation from the U.S. Army Corps of Engineers or the Department of Environmental Quality indicating their approval of the wetland boundary. 7-Q-10 flows cannot be calculated for wetlands and therefore the assigned 7-Q-10 flow value is zero. Discharges to wetlands shall be located entirely within the owner's property, or within a recorded easement as described in subdivision 2 of 12VAC5-640-450.

**12VAC5-640-420. Setback distances from discharge points and downstream channels for the protection of public health.**

A. ~~Water supply intakes and recreational uses.~~ Discharges proposed within one mile (upstream or up channel) of any public water intake ~~or one mile (upstream or up channel) of any area explicitly designated for public swimming~~ shall not be permitted.

B. Discharges proposed within one mile upstream or up channel of any area explicitly designated for public swimming shall not be permitted.

C. When any river, stream, or other potential discharge area appears to receive significant primary contact use, such as, but not limited to, swimming, water skiing, tubing, or wet-wading, so that the discharge will pose a significant threat to public health ~~or create a nuisance~~, the district health director may require a higher level of treatment and reliability class for the permitted discharge facility.

D. The district health director, in consultation with the local governing authority and the department, may prohibit discharges into specified portions of the river, stream, or other potential discharge area. Prior to taking such action, the health director shall take the following steps:

1. Publish a notice announcing the department's intention to consider areas for restricting the use of discharging systems, establishing the date, time and [ ~~location(s)~~ location or locations ] of the public [ ~~meeting(s)~~ meeting or meetings ], and soliciting public comment on the proposed area or areas being reviewed;

2. Request the opinion of the local governing body and other appropriate government agencies concerning proposed restrictions to be submitted before the close of the public comment period;

3. Have a public comment period on the proposal of not less than 30 days;

4. Hold at least one public meeting, 30 days or more after publication of the notice specified in subdivision 1 of this [ ~~section~~ subsection ]; and

5. Evaluate the public comments received and staff evaluations regarding the use of the proposed area or areas for primary contact uses.

When in the best professional opinion of the health director the area or areas under consideration receives, for 30 days or more per year, significant primary contact uses, such that the discharge will pose a significant threat to public health ~~or create a nuisance~~, the director may designate areas where discharge systems are prohibited. Prohibited discharge areas may include areas upstream in the main channel and tributaries, from the area under review, for distances up to one mile if warranted by the evidence. Prohibited discharge areas shall be clearly defined in writing and delineated on a United States Geological Survey 7.5 minute topographic map. The prohibition on discharges, if any are found necessary, shall be effective upon notice after completion of the elements contained in this section.

~~B. Private and public water supplies.~~ E. The wastewater treatment system ~~(ATU, sandfilter etc.)~~ (tankage and components), shall be a minimum of 50 feet from private and public water wells and private cisterns. The discharge point and the channel of treated effluent flow shall be located in accordance with the distances given in Table 3.1 from private and public water ~~supplies~~ wells and cisterns. Where the bottom elevation of a cistern is located above the elevation of the discharge point, the setback distances shall not apply. The [ ~~set back~~ setback ] distances between the water ~~supply~~ well or cistern and the downstream channel established in Table 3.1 shall apply for 50 feet downstream of the discharge point for all weather streams and 500 feet downstream for intermittent stream or dry ditch discharges. For wetlands where the flow path can be established, generally where the slope is 10% or greater, the setback distances between the water well or the cistern and the "downstream channel" shall

apply for 250 feet downstream of the discharge point. For wetlands where the flow path cannot be established, generally where the slope is less than 10%, then the distance shall be measured radially for 250 feet from the point of discharge.

F. Setback distances to other wells not covered in Table 3.1 of this section, such as geothermal and gas wells, will be determined on a case-by-case basis.

~~C. Springs.~~ G. No discharging system ~~nor~~ or any portion of the channel carrying the treated effluent flow shall be within 100 feet of a spring. Further, no discharging system shall discharge within 1,500 feet upstream or 100 feet downstream of any spring used for human consumption.

~~D. Sink holes.~~ H. Discharging systems are prohibited from discharging directly into sink holes or into dry ditches, intermittent streams, wetlands, streams, or other waterways that flow into sink holes within 1,500 feet from the point of discharge~~, and dry ditches that flow into sink holes within one mile from the point of discharge~~.

~~E. Limestone outcrops.~~ I. Dry ditch discharges ~~to swales or drainage ways which have~~ shall not have limestone outcrops within ~~25 feet of~~ the dry ditch channel ~~bottom are prohibited~~. This provision shall apply for ~~the entire distance required for ownership or easement in 12VAC5-640-450-B~~ a distance of 50 feet along the channel.

~~F. Proximity to other discharge points. The~~ J. Except as noted below, the department will not approve discharging systems except where discharge points will be at least 500 feet apart. ~~If the proposed system utilizes aerobic biological treatment followed by sand filtration this distance may be reduced to 250 feet apart.~~ The separation distance may be reduced to 250 feet between discharge points in accordance with the following:

1. For discharges to an all weather stream, the distance may be reduced to 250 feet by providing a Reliability Class II facility.

2. For discharges to a dry ditch or intermittent stream, the distance may be reduced to 250 feet by providing a Reliability Class I system that produces a TL-3 effluent and a fecal coliform concentration of 100 col/100 ml or less.

3. No reduction in the distance between discharge points is allowed for discharges to wetlands.

~~G. Shellfish waters.~~ K. No discharge shall be permitted under this chapter which will result in the condemnation of shellfish waters or the continued condemnation of shellfish waters closed only because of inadequate water quality.

TABLE 3.1 SETBACK DISTANCES FROM PRIVATE AND PUBLIC WATER ~~SUPPLIES~~ WELLS AND CISTERNS
(All distances are in feet)

| Type of Water ~~Channel~~ Supply ~~Stream~~ | Distance from Point of Discharge | Distance from Downstream Channel | |
|---|---|---|---|
| | | ~~Downstream Channel With 7-Q-10~~ Discharge to All Weather Stream | ~~Downstream~~ Discharge to Wetland[2], Intermittent Stream, or Dry Ditch |
| Class I [ ~~and II[1]~~ ~~Wells~~ Well ] | 100 | 100 | 100 |
| [ Class II[1] Well | 100 | 100 | 100 ] |
| Class IIIA Well | 50 | 50 | 50 |
| Class IIIB Well | 50 | 50 | 50 |
| Class IIIC Well | 100 | 50 | 100 |
| Class IV Well | 100 | ~~25~~ 50 | ~~50~~ 100 |
| Cistern | 100 | 50 | 100 |

[1]Class I and II well specifications are found in the Waterworks Regulations (12VAC5-590). All other well specifications may be found in the Private Well Regulations (12VAC5-630).

[2]The downstream "channel" of a wetland where the flow path can be established shall be a minimum of 25 feet wide and approximately centered on the flow path. Where the flow path cannot be established in a wetland, then the distance shall be measured radially from the point of discharge.

Article 2
Design Requirements

**12VAC5-640-430. Performance requirements.**

A. ~~Discharge limits.~~ All systems operated under this chapter shall meet the effluent limitations set forth by the State Water Control Board in the General Permit. All systems operated under this chapter shall maintain the treatment system in accordance with the approved construction permit or as modified by the final construction permit in accordance with the operation permit, "as built" plans, and the operation and maintenance manual.

B. ~~Bypass flow.~~ No system shall be approved for use which provides a bypass pipe, or otherwise allows untreated or partially treated effluent to discharge in the event of a system failure.

**12VAC5-640-432. Treatment unit and additional system component classifications.**

A. Biological treatment units will be classified by the division according to the data available to demonstrate the performance limits and reliability of those treatment units. The division may classify treatment units as generally approved or not generally approved. The type and frequency of testing for each approval class is designed to reflect the certainty with which the system has demonstrated its ability to meet the limits of the General Permit or the performance requirements of this chapter.

1. General approval may be issued by the division for both TL-2 and TL-3 treatment units in accordance with the current policies of the division. Generally approved units shall be listed on the division's website.

2. Nongenerally approved biological treatment unit designs shall be properly supported with design calculations and one or more of the following:

a. Documentation from applicable engineering standards, texts, or other publications;

b. Relevant peer-reviewed research;

c. Technical guidance from other states (may be considered on a case-by-case basis); or

d. Technical guidance from the U.S. Environmental Protection Agency.

Scale drawings of the treatment unit, appropriate design calculations, and control system details shall be provided that demonstrate the ability of the unit to meet the required effluent limits and reliability standards at the proposed design flow.

B. Additional system components for discharging systems will be classified by the division as generally approved or not generally approved.

1. The division shall consider additional system components such as post-filtration, disinfection, dechlorination, and post-aeration to be generally approved if the unit has been tested and approved under a National Sanitation Foundation (NSF) or other recognized protocol for the proposed wastewater use or if the design complies with the design standards in 12VAC5-640-460.

2. Nongenerally approved system component designs shall be properly supported with design calculations and one or more of the following:

a. Documentation from applicable engineering standards, texts, or other publications;

b. Relevant peer-reviewed research;

c. Technical guidance from other states (may be considered on a case-by-case basis); or

d. Technical guidance from the U.S. Environmental Protection Agency.

Scale drawings of the treatment unit, appropriate design calculations, and control system details shall be provided that demonstrate the ability of the unit to meet the required effluent limits and reliability standards at the proposed design flow.

C. Discharging systems that are comprised entirely of generally approved treatment biological treatment units and system components as described in this section are considered generally approved treatment systems.

**12VAC5-640-434. Reliability.**

A. Reliability is a measure of the ability of a component or system to perform its designated function without failure or interruption of service. Overflow criteria, such as the allowable period of noncompliant discharge, are utilized solely for the establishment of reliability classification for design purposes and are not to be construed as authorization for, or defense of, an unpermitted discharge to state waters. The reliability classification shall be based on the water quality and public health and welfare consequences of a component or system failure.

B. Reliability Class I is required for dry ditch and intermittent stream discharges with 250 feet of easement available and wetland discharges with 100 feet of easement available.

1. For biological treatment processes, Reliability Class I shall be met by providing one of the following:

a. A passive, backup biological treatment system (e.g., an intermittent sand, peat, or media filter or a constructed wetlands);

b. A generator for the treatment system with automatic transfer switch;

c. A 24-hour holding tank for raw wastewater with telemetry system to immediately notify the operator of system failure; or

d. Any alternative means that limits the discharge of a noncompliant effluent to a maximum of 24 hours.

2. For disinfection, a Reliability Class I design shall ensure that the effluent is continually disinfected by providing

electronic or mechanical means of monitoring the process such that failure of disinfection systems may be corrected within 24 hours.

C. Reliability Class II is required for dry ditch and intermittent stream discharges with 500 feet of easement available and wetland discharges with 250 feet of easement available. Reliability Class II is also required for the reduction of the distance between discharge points to 250 feet on an all weather stream.

1. For biological treatment processes, Reliability Class II shall be met by providing:

a. A fixed film biological treatment process such as an intermittent sand filter, recirculating media filter, or a peat filter;

b. A suspended growth biological system followed by post-filtration;

c. Telemetry to relay alarm conditions to the operator; or

d. Any alternative means that limits the discharge of a noncompliant effluent to a maximum of 36 hours.

2. For disinfection, a Reliability Class II design shall ensure that the effluent is continually disinfected by providing electronic or mechanical means of monitoring the process such that failure of disinfection systems may be corrected within 36 hours.

D. Reliability Class III is required for all weather stream discharges with a separation distance between discharge points of 500 feet or greater. For the purposes of this chapter, noncompliant discharges must be limited to a maximum of 48 hours [ ~~in accordance with 12VAC5-640-500 C~~ ].

**12VAC5-640-440. ~~Factors~~ Special factors affecting system design.**

Each type of discharging system has its own unique advantages and disadvantages. These unique characteristics define the situations where a system may be used to advantage. The design of the system must be appropriate for the intended use and the site conditions where ~~it is placed~~ the system is to be installed. Subdivisions 1 through 6 of this section contain a list of factors that will require special design consideration. This list should not be considered all encompassing. There may be other design factors that require special consideration. A preliminary engineering conference may be scheduled with the department to discuss such factors prior to submitting designs for department review.

~~A. Discharge to a dry ditch or intermittent stream.~~ 1. When a discharge is proposed to a wetland, dry ditch, or intermittent stream, ~~the department shall require~~ restricted access to the wetland, dry ditch, or intermittent stream in accordance with 12VAC5-640-450 to protect public health.

~~B. Intermittent use.~~ 2. Intermittent use for the purposes of this chapter constitutes use of the system for less than three consecutive months. Systems serving weekend cottages~~,~~ or other intermittent uses ~~will not reliably treat effluent prior to discharge. Therefore, the use of discharging systems for dwellings subject to intermittent use is prohibited~~ require special design, operation, and maintenance consideration.

~~C. Infiltration.~~ 3. When a discharging system is proposed to be located in an area subject to infiltration by surface water or shallow [ ~~ground water~~ groundwater ], the department may require additional protection from infiltration, inflow, and flotation, including placement of the system above natural grade.

~~D. Erosion.~~ 4. Erosion must be controlled by the owner of the discharging system in accordance with any local erosion control ordinances ~~or the Soil Conservation Services recommendations~~.

~~E. Sewage design flows.~~ 5. All systems shall normally be designed to treat the $BOD_5$ loading rate of 0.4 lbs/day per bedroom and a flow of 150 gallons per day per bedroom for systems up to three bedrooms. Systems serving single family dwellings having more than three bedrooms shall be permitted and designed to treat the anticipated loading rate based on $BOD_5$ and be capable of handling anticipated peak loading and flow rates. All systems shall be designed to operate over the range of anticipated flow and loading rates. When a system is permitted with a design less than the maximum capacity of the dwelling, the owner shall have the construction permit recorded and indexed in the grantor index under the owner's name in the land records of the clerk of the circuit court having jurisdiction over the site of the discharging system.

6. All system designs must include protection of the components from freezing or other adverse weather conditions and ensure that the system will function properly year round.

**12VAC5-640-450. ~~Criteria~~ Design criteria for the use of intermittent streams ~~or~~, dry ditches, or wetlands.**

All owners of systems discharging to an intermittent stream, ~~or~~ dry ditch, or wetland shall ensure the following conditions are met:

1. ~~Restricted access.~~ Direct contact between minimally diluted effluent and insects, animals, and humans must be restricted for the life of the system. This will be achieved by reducing the chance of ponding and run-off and limiting access to the effluent. The department shall require fencing, rip-rap, or other barriers to restrict access to effluent discharging to a dry ditch ~~or~~, intermittent stream, or wetland as deemed necessary to protect public health. This determination shall be made by the ~~district health director or district sanitarian~~ department on a [ ~~case by case~~ case-by-case ] basis.

~~The~~ a. For dry ditch and intermittent stream discharges, the restricted access area shall begin at the point where the effluent is discharged and continue for 500 feet ~~or~~, until the effluent discharges into an all weather stream or is no longer visible during the wet season. The design

shall provide justification for the length of the restricted access channel if less than 500 feet.

b. For wetland discharges, the restricted access shall extend for a distance of 250 feet along the flow path of the discharge unless a 10:1 dilution with the wetland can be achieved. If the flow path cannot be established and a 10:1 dilution cannot be obtained, then access shall be restricted for 100 feet radially from the point of discharge. For wetland discharges, the access barrier may be a subsurface discharge point, but in no case shall the discharge point and diffuser be greater than 18 inches below the natural wetland surface.

2. ~~Ownership and easements.~~ When effluent is discharged to a dry ditch ~~or,~~ intermittent stream, or wetland, the owner shall ~~either~~ own the land or ~~have~~ acquire an easement from the downstream or downgradient land owner to discharge on all land below the point of discharge for the distance shown in Table 3.2. To allow for system construction and repair ~~of~~ within the restricted access area, ~~as well as~~ and to facilitate maintenance and monitoring, the ~~width of the~~ easement shall be a minimum of 25 feet wide and approximately centered on ~~either side of~~ the low point of the dry ditch or intermittent stream for the entire length of the restricted access area. For wetlands, the easement shall be measured radially from the point of discharge unless flow direction can be established. In those cases where flow direction can be established, the easement shall be a minimum of 25 feet wide and approximately centered on the discharge path and extend for a distance along the flow path as described in Table 3.2. If the slope across the discharge site is equal to or greater than 10%, the flow direction can be determined by observation. For slopes less than 10%, a site specific study must be conducted to document the direction of flow. All easements must be in perpetuity and shall be recorded by the owner with the clerk of the circuit court having jurisdiction over the property prior to issuance of the construction permit. For the purposes of complying with this chapter, ~~a CE-7 permit issued~~ written approval to utilize an easement owned by the Virginia Department of Transportation shall be ~~considered as equivalent to an easement in perpetuity~~ recorded by the owner with the clerk of the circuit court office having jurisdiction over the property.

~~TABLE 3.2~~
~~REQUIREMENTS FOR OWNERSHIP OR EASEMENTS DOWNSTREAM FROM DISCHARGING SYSTEMS~~

| | ~~Downstream or Down Channel Distance (feet)~~ | |
|---|---|---|
| ~~Process~~ | ~~No spring below~~ | ~~Spring below~~ |
| ~~Sandfilter, aerobic system (w/post filtration), constructed wetland, or other single process system~~ | ~~500'~~ | ~~1,500'~~ |
| ~~Aerobic system w/sand filter, or other combination process with equal treatment~~ | ~~250'~~ | ~~1,500'~~ |

3. ~~Public health and environmental impact reduction and nuisance abatement.~~ Each discharging system ~~which~~ that discharges to a dry ditch, ~~or~~ intermittent stream, or wetland must receive additional treatment beyond that required by the General Permit in order to reduce the increased potential for public health ~~and nuisance~~ problems which may result when partially treated effluent is not diluted. Such additional treatment shall be capable of producing an effluent with a quality of 10 mg/l of $BOD_5$, 10 mg/l of suspended solids and a fecal coliform level of less than or equal to 100 colonies per 100 ml. Treatment units approved as TL-3 are recognized as having the ability to meet this $BOD_5$ and TSS standard, but have not been tested for compliance with the fecal coliform standard. Therefore, the following reliability classifications in Table 3.2 must be met when designing discharge systems intended to discharge into dry ditches, intermittent streams, or wetlands.

TABLE 3.2
REQUIREMENTS FOR RELIABILITY CLASSIFICATION AND OWNERSHIP OR EASEMENTS DOWNSTREAM FROM SYSTEMS THAT DISCHARGE TO DRY DITCHES, INTERMITTENT STREAMS, OR WETLANDS

| Reliability Class | Downstream or Down Channel Distance for Dry Ditches or Intermittent Streams (feet) | | Wetlands from Discharge Point along Flow Path or Radially from Discharge Point |
|---|---|---|---|
| | No spring below | Spring below | |

| | | | |
|---|---|---|---|
| Reliability Class I | 250 ft | 1,500 ft | 100 ft |
| Reliability Class II | 500 ft | 1,500 ft | 250 ft |

**12VAC5-640-460. ~~Disinfection~~ Design requirements for system components.**

A. All discharging systems shall be equipped with a means of disinfecting the effluent which is acceptable to the division and meets the performance requirements of this chapter.

~~A.~~ 1. All discharging systems utilizing chlorine as a disinfectant shall be equipped with a chlorinator and contact chamber. Dechlorination is to be supplied if required by the General Permit.

a. Chlorinator capacity shall be based on the degree of treatment, flow variations, and other variables in the treatment processes. For disinfection, the capacity shall be adequate to maintain a total chlorine residual between 1.0 mg/l and 3.0 mg/l in the effluent after the required contact period. All chlorinators shall be designed to provide the appropriate dose of chlorine and mix the chlorine with the effluent. All chlorine products used to disinfect effluent from a discharging system shall be approved by the U.S. Environmental Protection Agency for use as a sewage disinfectant; products unapproved for wastewater disinfection are not acceptable. Use of unapproved products shall constitute a violation of this chapter.

b. The chlorine contact chamber shall have a length to width ratio of 20:1 and shall ~~be capable of maintaining a total chlorine residual between 1.0 mg/l and 3.0 mg/l in the effluent within the chlorine contact chamber for~~ provide a contact time of 30 minutes based on peak hourly flow, or 60 minutes based on peak daily flow. The length to width ratio may be reduced on a [ ~~case-by-case~~ case-by-case ] basis when increased chlorine contact times are utilized.

c. When required by the General Permit, dechlorination capacity shall be adequate to dechlorinate the maximum chlorine residual anticipated and achieve the required General Permit effluent limits for total residual chlorine by providing at least 1-1/2 parts sulfite salt to one part chlorine. Provisions shall be made to thoroughly mix the dechlorinating agent with the contact tank effluent within a period of approximately one minute.

d. To meet Reliability Class I or Class II, all chlorination and dechlorination units shall be alarmed to notify the operator when tablets are not present in the dosing chamber or equipped with duplicate units that automatically switch over to the redundant unit if the primary unit is not operating.

2. Disinfection can be achieved through exposure of microorganisms to a sufficient level of ultraviolet light (UV) irradiation at the germicidal wavelength for an adequate period of time.

a. UV disinfection equipment shall be capable of providing a minimum average calculated dose of 50,000 microwatt-seconds per square centimeter after the UV lamps have been in operation for 7,500 hours or more and at a 65% transmissivity. The dosage may be reduced on a case-by-case basis when sufficient information is provided to demonstrate that the required level of disinfection can be obtained at a lower dose level through test data.

b. UV lamps shall produce 90% or more of their emitted light output at the germicidal wavelength of 253.7 nanometers.

c. UV lamp assemblies shall be so located as to provide convenient access for lamp maintenance and removal.

d. UV lamps should not be viewed in the ambient air without proper eye protection as required by VOSH and other applicable regulations. The system design should prevent exposure of bare skin to UV lamp emission for durations exceeding several minutes.

e. An elapsed time meter shall be provided to indicate the total operating time of the UV lamps.

f. UV systems are sensitive to color and suspended solids. Precautions should be taken to protect the UV system from both color and excessive suspended solids.

g. To meet Reliability Class I or Class II, all UV units shall be equipped with [ ~~sensors~~ a sensor ] to detect bulb failure with an alarm or equipped with duplicate units that automatically switchover if the primary unit is not operating.

~~B. All chlorine used to disinfect effluent from a discharging system shall be approved by the Environmental Protection Agency for use as a sewage disinfectant.~~

~~C. Other methods of disinfection for the removal of bacteria and viruses, which have been demonstrated effective under field use, may be approved by the division.~~

B. Post-aeration as required by the General Permit shall be provided to ensure that the final effluent complies with the dissolved oxygen effluent limits in the General Permit. Post-aeration may involve diffused aeration or cascade type aeration. All post-aeration designs shall assume a zero dissolved oxygen concentration in the influent wastewater to the post-aeration unit.

1. Effluent post-aeration may be achieved by the introduction of diffused air into the effluent.

a. Diffused aeration basins shall be designed to eliminate short-circuiting and the occurrence of dead spaces. For maximum efficiencies, sufficient detention time shall be

provided to allow the air bubbles to rise to the surface of the wastewater prior to discharge from the basin.

b. When the detention time in the aeration basin exceeds 30 minutes, consideration shall be given to the oxygen requirements resulting from biological activity in the aeration unit.

c. Diffused air aeration systems shall be designed utilizing Fick's Law (the rate of molecular diffusion of a dissolved gas in a liquid) in the determination of oxygen requirements. Supporting experimental data shall be included with the submission of any proposal for the use of diffusers that are considered nonconventional. Such proposals will be evaluated on a case-by-case basis by the division.

d. Alternatively, an airflow of one cubic foot per minute at a diffuser submergence of one foot is sufficient to increase the dissolved oxygen of 1000 gallons per day of effluent to greater than five mg/l dissolved oxygen at 25°C.

e. If airflow is to be siphoned off the blower for the biological treatment unit, calculations shall be submitted to verify that there is sufficient air for both uses.

2. Effluent post-aeration may be achieved through a turbulent liquid-air interface established by passing the effluent downstream over either a series of constructed steps that produces a similar opportunity for transfer of dissolved oxygen to the effluent, otherwise known as cascade or step aeration.

a. The following equation shall be used in the design of cascade/step type aerators:

$r^n = (C_s - C_a)/(C_s - C_b)$

| | | |
|---|---|---|
| where: r | = | Deficit ratio |
| $C_s$ | = | Dissolved oxygen saturation (mg/l) |
| $C_a$ | = | Dissolved oxygen concentration above the weir, assumed to be 0.0 mg/l |
| $C_b$ | = | Dissolved oxygen concentration in the effluent from the last or preceding step |
| n | = | The number of equal size steps |
| r | = | 1 + (0.11) (ab) (1 + 0.046 T) (h) |
| where: T | = | Water temperature (°C) |
| h | = | Height of one step (ft) |
| a | = | 1.0 for effluents ($BOD_5$ of less than 15 mg/l) or 0.8 for effluents ($BOD_5$ of 15 mg/l to 30 mg/l) |
| b | = | 1.0 for free fall and 1.3 for step weirs |

b. The equation for determining the number of steps is dependent upon equidistant steps, and if unequal steps are used, transfer efficiencies must be determined for each separate step.

c. The effluent discharge to a cascade type aerator shall be over a sharp weir to provide for a thin sheet of wastewater. Consideration shall be given to prevention of freezing.

d. The final step of the cascade type aerator shall be above normal stream flow elevation and the cascade aerator shall be protected from erosion damage due to storm water drainage or flood/wave action.

e. When pumping is necessary prior to discharge over the cascade aerator, the range of the flow rate to the post-aeration unit must be accounted for in the design.

f. A step aerator with multiple steps each less than or equal to one foot and a total drop of five feet is sufficient to increase the dissolved oxygen in an effluent at 25°C to greater than five mg/l.

C. Post-filtration may be used to ensure compliance with the reliability standards in 12VAC5-640-434 and generally follow the biological treatment unit and are prior to disinfection in the treatment process. For granular media filters, the media depth shall not be less than 30 inches. Sand media for intermittently dosed and recirculated effluent, shall have an effective size of 0.30 mm to 1.0 mm and 0.8 mm to 1.5 mm, respectively. The uniformity coefficient should not exceed 4.0. No more than 2.0% shall be finer than 0.177 mm (80 mesh sieve) and not more than 1.0% shall be finer than 0.149 mm. No more than 2.0% shall be larger than 4.76 mm (4 mesh sieve). Larger granular media up to five mm in effective size may be considered on a case-by-case basis. The filter shall be equipped with an underdrain. The surface of the filter shall be accessible for maintenance. For the purposes of a filtration unit, the maximum surface hydraulic loading rate is 15 gpd/sf.

D. Constructed wetlands that are used as a passive backup biological treatment unit for the purposes of meeting Reliability Class I requirements of [ ~~12VAC5-640-350~~ 12VAC5-640-434 B ] shall be lined with a minimum surface area of 100 square feet, a depth of 18 inches, a length to width ratio of about [ ~~4~~ four ] to [ ~~1~~ one ], and shall have subsurface flow. Wastewater shall be disinfected prior to entering the constructed wetlands and sampling ports shall be provided to allow monitoring of the influent to the wetlands. Effluent dechlorination prior to entering the wetlands may be necessary to protect the plants from toxic levels of chlorine.

Article 3
Construction Requirements

**12VAC5-640-470. ~~Installation review~~ General construction requirements.**

A. ~~General.~~ No portion of any system may be covered or used until inspected, corrections made if necessary, and approved, by the ~~local health~~ department or unless expressly authorized in writing by ~~the local health~~ department. All applicable sections contained in the Sewage Handling and Disposal Regulations, ~~12VAC5-610-10 et seq.~~ 12VAC5-610, shall be used to establish design and construction criteria not contained in this chapter.

B. ~~Slope.~~ Gravity sewer lines and lines between components of the system shall be schedule 40 pipe and shall have a minimum grade of ~~1.35"~~ 1.25 inches per ~~10'~~ [ ~~ten~~ 10 ] feet for ~~3"~~ three-inch and ~~4"~~ four-inch sewer lines. Discharge lines after primary or secondary treatment units shall have a minimum grade of ~~6"~~ six inches per ~~100'~~ 100 feet. Where minimum grades cannot be maintained, detailed pump specifications shall be shown on the site plan in accordance with Article 4 (12VAC5-610-598 et seq.) of Part IV of the Sewage Handling and Disposal Regulations [ ~~, 12VAC5-610-10 et seq~~ ].

C. ~~Location.~~ The treatment unit and all piping and appurtenances shall be located in conformance with the approved plans. All changes in location shall be approved by the local department prior to the installation of the system.

D. ~~Pumps.~~ All pumps and appurtenances to the pump shall be installed according to the plans and specifications approved by the department and referenced in the permit.

E. ~~Electrical.~~ All wiring shall be approved by the local building official and shall be weather tight and permanent in nature (hard wired).

F. ~~Controls.~~ The control panel for the system shall be located within 15 feet of the treatment unit and shall be provided with a manual override switch. Each pumping station shall be provided with controls for automatically starting and stopping the pumps based on water level. When float type controls are utilized they shall be placed so as to be unaffected by the flow entering the wet well.

G. ~~Alarm.~~ All mechanical treatment units shall be provided with an alarm system on a separate electrical circuit from the remainder of the treatment unit. The alarm shall be both audio and visual and shall be located in an inhabited portion of the dwelling. Examples of alarm conditions to be monitored include aerator failure, blower failure, and high water level.

~~All ATU's shall be equipped with an alarm that detects aerator failure and a high water alarm to warn against the back up or overflow of sewage.~~

H. ~~Flood plain.~~ Except for the discharge pipe, and step type post aeration if ~~required~~ used for post-aeration, no portion of the discharging system may be located in the 100-year flood plain.

~~I. Sampling ports. All discharging systems shall be equipped with a six inch (or larger) sampling port connected to an approved effluent collection box at the chlorine contact chamber after the 30 or 60 minute contact time (i.e., the sampling port shall be located at the outlet end of the chamber. Additionally, a separate sampling port shall be required after the dechlorination unit. Other sampling ports may be required elsewhere on a case by case basis as required by the system design.~~

I. The design must allow for sampling to confirm the efficacy of the treatment process. Sampling ports shall be identified on the construction documents and shall meet the following minimum requirements:

1. All discharging systems utilizing chlorine as a disinfectant shall be equipped with a four inch or larger sampling port connected to an approved effluent collection box at the chlorine contact chamber after the 30-minute or 60-minute contact time (i.e., the sampling port shall be located at the outlet end of the chamber).

2. A separate sampling port shall be required after the dechlorination unit.

3. The sampling location is to be identified and a port provided if needed for sampling the final effluent prior to the effluent entering the discharge channel.

4. Other sampling ports may be required on a case-by-case basis due to the system design.

J. ~~Clean out port.~~ All discharging systems shall have a clean out port, accessible from the surface of the ground within ~~10'~~ 10 feet of the influent invert of the treatment unit.

K. ~~Ventilation.~~ Positive ventilation shall be provided at pumping stations when personnel are required to enter the station for routine maintenance.

L. ~~Filter liners.~~ Sand filter liners shall be constructed of clay having a permeability of $10^{-6}$ cm/sec. or less, a 28 mil vinyl or PVC plastic liner, concrete, or other material approved by the division. A watertight seal shall be provided where underdrain piping exits the filter.

~~M. Filter materials. Sandfilter materials shall meet the specifications described in 12VAC5-580-760 B of the Sewerage Regulations, or as amended.~~

~~N. Posting of discharge pipe.~~ M. The owner of each discharging system ~~that discharges to state waters, including either an all-weather stream or an intermittent stream,~~ shall post a permanent sign at the point of discharge with the following notice:

This pipe carries treated sewage effluent and is not suitable for human consumption. This system is owned by (FULL NAME OF PERMIT HOLDER) and is maintained by (NAME AND PHONE NUMBER OF [ ~~MAINTENANCE PROVIDER IN MAINTENANCE CONTRACT)~~ LICENSED OPERATOR WITH OVERSIGHT OF THE SYSTEM) ].

The sign shall be posted within three feet of the discharge pipe ~~and~~, shall be plainly visible to the public, and shall be constructed of durable material. All lettering shall be at least one-inch high and shall be clearly legible. The sign shall have black letters on a white background (or be painted in other contrasting colors) and be plainly visible at a distance of 25 feet to a person with normal vision. Failure to maintain this sign shall be grounds for suspending the owner's operation permit.

**12VAC5-640-480. ~~Compliance with plans.~~ (Repealed.)**

~~Prior to the issuance of an operation permit all discharging systems must be inspected by the health department and found to substantially comply with the intent of the chapter. Minor deviations from the permit or proposed plans and specifications (excluding the manufacturer's design and installation specifications) that do not affect the quality of the sewage treatment process or endanger public health or the environment may be approved. Where engineering plans were submitted and were incorporated in the construction permit, the design engineer, or other professional engineer designated by the design engineer, shall inspect the installation and submit written comments concerning the compliance of the installation with the design specifications prior to the issuance of the operation permit.~~

Article 4

Monitoring [ , Operation, ] and Maintenance Requirements

**12VAC5-640-490. Monitoring.**

A. ~~General.~~ Discharging systems that discharge improperly treated effluent can endanger public health and threaten environmental resources. All discharging systems shall be routinely inspected and the effluent sampled to determine compliance with the effluent limitations set forth by the State Water Control Board in the General Permit and in accordance with 12VAC5-640-430 and 12VAC5-640-510. All testing requirements contained in this chapter are the responsibility of the system owner to have collected, analyzed, and reported to the department.

B. ~~Types of testing.~~ There are two types of testing recognized by this chapter: formal compliance testing and informal (process control) testing. Formal testing is conducted to determine either compliance or noncompliance with ~~this chapter~~ the General Permit. Informal testing is conducted to ~~determine compliance with this chapter~~ assess the treatment system's performance and to determine when additional formal compliance testing is necessary. Informal testing may support but shall not be the sole basis for ~~suspending an operation permit pursuant to 12VAC5-640-330 or to suspend or revoke~~ [ ~~suspending or~~ ] revoking the approval of the system pursuant to ~~12VAC5-640-380 of this chapter~~ 12VAC5-640-280.

~~1. Formal compliance testing. Effluent from all discharging systems shall be tested for the following parameters at a frequency specified in Table 3.4: Five-day biochemical oxygen demand ($BOD_5$), total suspended solids, fecal coliform bacteria, dissolved oxygen and total chlorine residual (measured at the outfall and in the chlorine contact chamber if dechlorination is required). The tests shall be analyzed by a laboratory certified by the E.P.A. or the SWCB to conduct self-monitoring analysis to determine compliance limits for VPDES permit discharge limits. Samples shall be collected, stored, transported and analyzed in accordance with requirements set forth in Guidelines Establishing Test Procedures for the Analysis of Pollutants Under the Clean Water Act as published in 40 CFR Part 136 (July 1, 1991).~~

~~2. Informal testing. The following tests will be conducted on the effluent, except as noted, at a frequency specified in Table 3.4; 30-minute settleable solids (conducted on the mixed liquor suspended solids), odor, color, pH, and chlorine (after the chlorine contact chamber). In addition, systems requiring effluent dechlorination shall be tested for dechlorination at the point of discharge. These tests shall be run in the field during routine monitoring inspections. The criteria for satisfactory informal testing are contained in Table 3.3.~~

~~TABLE 3.3~~
~~INFORMAL TESTING CRITERIA~~
~~(FOR ALL CLASSES OF DISCHARGING SYSTEMS)~~

| | |
|---|---|
| ~~Settleable solids~~ | ~~less than 65% (mixed liquor suspended solids)~~ |
| ~~Odor~~ | ~~Slight musky odor (MLSS not septic)~~ |
| ~~Color~~ | ~~less than 15 units (measured at outfall - no solids present)~~ |
| ~~pH~~ | ~~Same as formal compliance test limits~~ |
| ~~Chlorine~~ | ~~1.0 mg/1-3.0 mg/1 (measured after chlorinator)~~<br>~~None detected (measured at the outfall)~~ |

~~C.~~ Frequency of mandatory testing.

~~1. Formal compliance testing. Formal compliance testing as described in12VAC5-640-490 B 1, shall be conducted at the frequency listed in Table 3.4 for all discharging systems for all constituents listed under 12VAC5-640-490 B 1. Additionally, formal compliance testing may be required anytime informal testing indicates a discharging system appears to be discharging effluent that exceeds the effluent limitations set forth in the State Water Control Board's General Permit. Compliance monitoring conducted pursuant to the SWCB General Permit requirements may be submitted for one of the mandatory tests to comply with this chapter.~~

~~2. Informal testing. Informal testing, as described in 12VAC5-640-490 B 2, shall be used as an inexpensive screening method to identify systems that are potentially in violation of the effluent limitations set forth in the State Water Control Board's General Permit. Informal testing~~

~~shall be conducted monthly for at least six consecutive months beginning the second full month after the issuance of the operation permit. After a discharging system has met the permit limits for six consecutive months the testing shall be conducted at the frequency listed in Table 3.4.~~

~~TABLE 3.4~~
~~FREQUENCY OF MANDATORY TESTING BEGINNING SIX MONTHS~~
~~AFTER SYSTEM START UP~~

| ~~System Approval Testing~~ | ~~Formal Testing~~ | ~~Informal Testing~~ |
|---|---|---|
| ~~Experimental[1]~~ | ~~Quarterly[2]~~ | ~~Monthly~~ |
| ~~Preliminary~~ | ~~Semi-Annually[2]~~ | ~~Quarterly~~ |
| ~~General~~ | ~~Annually[2]~~ | ~~Semi-Annually~~ |

~~[1]Testing on systems with experimental approval shall begin 3 months after installation and continue for 12 or more consecutive months. The initial sample testing at three months shall be formal testing and the formal testing shall continue quarterly from that time forward.~~

~~[2]Also see 12VAC5-640-490 D 1.~~

C. All treatment systems shall undergo startup testing to assess the ability of the system to comply with the established performance requirements.

1. Treatment systems are considered generally approved for the purposes of establishing startup testing requirements only when all treatment components (i.e., biological treatment unit, disinfection, dechlorination, post-aeration, etc.) of the system are considered generally approved as described in 12VAC5-640-432.

2. All new discharging systems shall undergo formal startup compliance testing for parameters limited by the General Permit. The collection, storage, transportation, and analysis of all formal compliance samples shall be in accordance with the requirements of the General Permit.

a. For generally approved systems, the first formal compliance testing event shall occur 45 to 90 days after the system begins discharging. If the formal compliance test data indicate the system is in compliance with the General Permit, then the system will revert to annual formal compliance sampling in accordance with the General Permit. The initial sample may be used to comply with the first annual sampling requirement. If the testing data indicates that any parameter is out of compliance, subsection E of this section shall apply.

b. For nongenerally approved systems, the first formal compliance testing event shall occur 45 to 90 days after the system begins discharging. Three additional formal compliance testing events are to occur quarterly and at least 60 days apart. If the four startup compliance test data indicate the system is in compliance with the General Permit, then the system will revert to annual formal compliance sampling in accordance with the General Permit. If the testing data indicates that any parameter is out of compliance, subsection E of this section shall apply.

3. Informal (process control) testing shall be conducted monthly for at least six consecutive months beginning the second full month after the issuance of the operation permit. After successful startup of the treatment system, informal testing shall be conducted semiannually at a minimum and any time formal testing is conducted. Informal testing shall be in accordance with the approved operation and maintenance manual, which shall include at a minimum the tests listed in Table 3.3. The specific test, sample location, and frequency shall be itemized in the operation and maintenance manual for the treatment system.

D. Both formal and informal routine monitoring is required after a system successfully completes startup testing.

1. After a system successfully completes startup testing, the system formal testing reverts to the General Permit monitoring frequency for the parameters limited by the General Permit. The collection, storage, transportation, and analysis of all formal testing shall be in accordance with the requirements of the General Permit.

2. Informal (process control) testing shall be conducted during routine maintenance visits. The specific test, sample location, and frequency shall be itemized in the operation and maintenance manual for the treatment system. When an operation and maintenance manual is not available, informal testing shall be sufficient to assess the treatment system's performance. Table 3.3 contains the minimum informal testing that must be conducted as appropriate for a given system.

TABLE 3.3
INFORMAL (PROCESS CONTROL) TESTING

| Treatment Unit | Informal Tests |
|---|---|
| Septic tank/trash tank | Sludge depth |
| Suspended growth biological treatment unit | Dissolved oxygen, settleabilty, pH, odor |
| Fixed film biological treatment unit | Dissolved oxygen (effluent from unit), pH, odor |
| Chlorine disinfection/dechlorination | TRC at end of contact tank (>1.0 mg/l), TRC after dechlorination |
| Ultraviolet disinfection [ UV ] | Turbidity prior to UV |
| Final effluent | Dissolved oxygen, pH, odor, color |

D. Nonroutine mandatory testing and inspection. E. The district health director or district sanitarian manager department may require additional formal compliance testing or informal testing, or both, as necessary to protect public health and the environment. Additional testing shall be based on observed problems and shall not be implemented routinely on all discharging systems.

1. Anytime a discharging system is found to exceed be out of compliance with the effluent limitations of the General Permit, follow-up formal compliance testing shall be repeated between 45 and 90 days after the original samples were collected and the results reported to the local health department. This follow-up formal compliance testing shall constitute a subsequent consecutive quarter for the purposes of determining compliance with12VAC5-640-380 B and D. Prior to resampling, the operator should attempt to determine the reason for the noncompliance and take corrective actions.

2. Anytime an informal test reveals an apparent a potential problem, additional formal or informal testing may be conducted to review the effectiveness of any repairs or adjustments.

3. Anytime the results of two consecutive formal compliance tests as specified in 12VAC5-640-490 B 1 subdivision C 2 or D 1 of this section result in a violat1on violation of the effluent limitations of the General Permit, informal testing shall revert to monthly frequency until satisfactory results are obtained for six consecutive months. Nothing in this section shall preclude requiring the collection of samples for formal compliance testing as described in 12VAC5-640-490 B 1 subdivisions C 2 and C D 1 of this section to determine compliance with the effluent limitations set forth in the General Permit.

E. Responsibility for testing. F. The owner of each system is responsible for ensuring that the collection, analysis, and reporting of all effluent sample tests are completed in a timely fashion and in accordance with 12VAC5-640-490 this section and 12VAC5-640-510. In addition to the mandated testing requirements contained in this chapter, the The department shall conduct, at a minimum, an annual inspection, which may include formal or informal testing at the option of the department and may conduct additional inspections at its discretion. Furthermore, the department may conduct or mandate formal or informal testing as deemed appropriate [ by the department ]. Nothing contained herein shall be construed to prohibit the department from mandating additional formal and informal testing as deemed appropriate by the department. Further, the department at its discretion may require split samples be collected at any time (i.e., for routine or nonroutine testing). [ If a system is in compliance three consecutive years, the department may reduce the department inspection frequency to a three-year cycle. Annual inspections by the department will resume if the department receives evidence that the system is out of compliance. Compliance for the purposes of this section is compliance with the testing, inspection, effluent limits, and reporting requirements of this chapter. Inspection by the department does not substitute for the required operation, maintenance, testing, and reporting requirements in 12VAC5-640-490, 12VAC5-640-500, and 12VAC5-640-510. ]

F. Monitoring contract. [ G. In order to assure that monitoring is performed in a timely and competent fashion, the owner of each system shall have a contract for the performance of all mandated sampling with a person capable of performing the sampling and analysis of the samples. This requirement may be met by including the performance of all testing and monitoring as part of the maintenance contract in accordance with 12VAC5-640-500 C 1. Failure to obtain or renew a monitoring contract shall result in the ] suspension or [ revocation of the operation permit as described in 12VAC5-640-280. ] When the district health director or the sanitarian manager find that the homeowner is capable of collecting and transporting samples to an approved laboratory in compliance with this chapter, the requirement for having a valid monitoring contract may be waived. Waiving of this requirement shall be done only on an individual basis and shall reflect the competency of the individual based on profession, training or other educational experience. [ Owners with existing waivers to the monitoring contract as of the effective date of the amendment to the regulations may be extended, but no new waivers shall be issued. In the event the individual for whom this section is waived fails to collect three or more of any of the required samples in any five-year period, the ] district sanitarian or the health director [ department may reinstate the requirement for a monitoring contract. ]

**12VAC5-640-500. [ Maintenance Operation and maintenance requirements ].**

A. General. Due to the potential for degrading surface water and [ ground water groundwater ] quality or jeopardizing the public health, or both, routine [ operation and ] maintenance of discharging systems is required. In order to assure [ maintenance is performed in a timely manner a maintenance contract between the treatment system is operated, maintained, monitored, and reported properly, ] the permit holder [ and a person capable of performing maintenance shall engage a licensed operator ] as defined in subsection E of this section [ is required ]. [ Reporting in accordance with 12VAC5-640-490 and 12VAC5-640-510 is sufficient evidence of an ongoing contract. Owners with existing monitoring waivers that allow the owner to collect formal compliance samples as of December 16, 2015, may be extended, but no new waivers shall be issued. In the event the individual fails to collect three or more of any of the required samples in any five-year period, the department will void the waiver and require evidence of an operation and maintenance contract that includes monitoring. ]

B. ~~Maintenance contract.~~ [ ~~A maintenance contract shall be kept in force at all times. Failure to obtain or renew a maintenance contract shall result in the suspension or revocation of the operation permit as described in 12VAC5-640-280. The operation permit holder shall be responsible for ensuring that the local health department has a current copy of a valid maintenance agreement. When a maintenance contract expires or is canceled or voided, by any party to the contract, the owner shall report the occurrence to the local health department within 10 work days.~~ It is the owner's responsibility to do the following:

1. Have the system operated and maintained by a licensed operator;

2. Have an operator visit the system at the frequency required by this chapter (at least semiannually);

3. Have an operator collect and analyze any samples required by this chapter;

4. Provide prompt maintenance and repair of the treatment works. If an owner is notified by the operator of a repair or maintenance need pursuant to subdivision C 4 of this section and the discharge does not comply with the effluent requirements of the General Permit, then the owner shall begin pump and haul of the sewage and take other actions as may be directed by the local health department until the treatment works returns to normal function;

5. Keep a copy of the log provided by the operator on the property where the system is located in electronic or hard copy form, make the log available to the department upon request, and make a reasonable effort to transfer the log to any future owner;

6. Follow the O&M manual (where available) and keep a copy of the O&M manual in electronic or hard copy form for the system on the property where the system is located, make the O&M manual available to the department upon request, and make a reasonable effort to transfer the O&M manual to any future owner; and

7. Comply with the VPDES permit requirements contained in 9VAC25-110. ]

[ ~~C.~~ ] ~~Elements of a maintenance contract.~~ [ ~~At a minimum each maintenance contract shall provide for the following:~~

~~1. Performance of all testing~~ ] ~~required in 12VAC5-640-490 B~~ [ ~~either Part I A or Part I B of the General Permit, as appropriate, and in this chapter, unless the owner maintains a separate monitoring contract in accordance with 12VAC5-640-490~~ ] ~~F~~ [ ~~G. Note: The treatment works should be sampled during normal discharging operations or normal discharging conditions (i.e., operations that are normal for that facility). The owner or maintenance provider should not force a discharge in order to collect a formal sample, but the informal sampling should be used to identify any operational problems;~~

~~2.~~ ] ~~Full and complete repairs to the system within 48 hours of notification that repairs are needed. Any deductible provision in a maintenance agreement shall not exceed $500 in any given year for repairs (including parts and labor).~~ [ ~~Periodic (at least semiannual) inspections of the treatment works or as needed to keep the treatment system functional and in compliance;~~

~~3.~~ ] ~~Twenty four months of consecutive coverage shall be the minimum time period a maintenance contract may be valid.~~ [ ~~A written notification to the owner within 24 hours whenever the contract provider becomes aware that maintenance or repair of the owner's treatment works is necessary. The owner is responsible for prompt maintenance and repair of the treatment works including all costs associated with the maintenance or repair. Immediately upon receipt of notice that repair or maintenance is required, the owner shall begin emergency pump and haul of all sewage generated in the dwelling if full and complete repairs cannot be accomplished within 48 hours; and~~

~~4. Electronic reporting to the department in accordance with 12VAC 640-510.~~

C. The operator has the following responsibilities:

1. Perform all testing required in either Part I A or Part I B (9VAC25-110-80) of the General Permit, as appropriate, and in this chapter, unless the owner maintains a waiver in accordance with subsection A of this section. Note: The treatment works will be sampled during normal discharging operations or normal discharging conditions (i.e., operations that are normal for that facility). The operator should not force a discharge in order to collect a formal sample, but the informal sampling should be used to identify any operational problems;

2. Whenever an operator performs a visit that is required by this chapter, he shall do so in such a manner as to accomplish the various responsibilities and assessments required by this chapter through visual or other observations and through laboratory and field tests that are required by this chapter or that he deems appropriate;

3. When performing activities pursuant to a visit that is required by this chapter, the operator is responsible for the entire system, and where applicable, the operator shall follow the approved O&M manual;

4. Provide a written or electronic notification to the owner within 24 hours whenever the operator becomes aware that maintenance or repair of the owner's treatment works is necessary; and

5. Document the results of each site visit in the log and report in accordance with 12VAC5-640-510. Each operator shall keep an electronic or hard copy log for each system for which he is responsible. The operator shall provide a copy of the log to the owner. In addition, the operator shall make the log available to the department upon request. At a minimum, the operator shall record the following items in the log:

a. Results of all testing and sampling;

b. A copy of the Discharge Monitoring Report required by the General Permit;

c. Maintenance, corrective actions, and repair activities that are performed;

d. Recommendations for repair and replacement of system components;

e. Sludge or solids removal; and

f. The date reports were given to the owner. ]

D. ~~Public utility.~~ In localities where a public service authority, sanitary district, or other public utility exists which [ ~~monitors or~~ operates and ] maintains the systems, ~~or monitors and maintains the systems,~~ permitted under this chapter, the requirements for the [ ~~monitoring or~~ operation and ] maintenance contract [ ~~or both~~ ] may be waived by the division provided the owner of the system subscribes to the service and the utility meets the minimum elements described in 12VAC5-640-490 [ ~~and,~~ ] 12VAC5-640-500 [ , and 12VAC5-640-510 ].

E. ~~Qualifications to perform maintenance.~~ In order to competently evaluate system performance, collect ~~and~~ samples, interpret sample results, ~~as well as~~ and repair and maintain discharging systems, an individual must be knowledgeable in sewage treatment processes. ~~Therefore, after July 1, 1994, all~~ All individuals who perform maintenance on discharging systems pursuant to 12VAC5-640-500~~,~~ are required to hold a valid Class IV or higher wastewater works operator license or an alternative onsite sewage system operator license issued by the Board for Waterworks and Wastewater Works Operators and Onsite Sewage System Professionals. ~~Until July 1, 1994, individuals that can demonstrate two years of practical experience with discharging systems, with flows under 1,000 GPD, may conduct maintenance on all systems.~~

**12VAC5-640-510. Information to be reported electronically.**

A. ~~Who is responsible for reporting. All owners~~ Every owner issued an operation permit for a discharging system ~~are~~ is responsible for ~~reporting~~ having the results of all mandated testing and inspections submitted to the department in the form and format acceptable to the department.

B. ~~What must be reported.~~ All formal compliance testing, informal testing, repairs, modifications, alterations, expansions and routine maintenance must be reported.

C. ~~When reports are due.~~ All reports and test results must be submitted ~~within 15 working days of the sample collection~~ by the 15th of the month following the month in which the activity occurred.

D. ~~Where to report results.~~ All reports and test results shall be submitted ~~to the local or district office of the health department~~ electronically. When formal testing indicates that a discharge limit established in the General Permit is being exceeded or when informal testing indicates a discharging system may be in violation of the General Permit requirements, the owner shall notify the maintenance provider and the department ~~shall be notified by the owner~~ within 24 hours.

**12VAC5-640-520. Failure to submit information.**

Failure to conduct mandatory monitoring or to report monitoring results as required in 12VAC5-640-490 and 12VAC5-640-510 may result in the ~~suspension or~~ revocation of the owner's operation permit. The department shall notify the Department of Environmental Quality of the revocation of the operation permit.

NOTICE: The following forms used in administering the regulation were filed by the agency. The forms are not being published; however, online users of this issue of the Virginia Register of Regulations may click on the name of a form with a hyperlink to access it. The forms are also available from the agency contact or may be viewed at the Office of the Registrar of Regulations, General Assembly Building, 2nd Floor, Richmond, Virginia 23219.

FORMS (12VAC5-640)

~~Appendix I Combined Application Virginia Department of Health Discharging System Application Form for Single Family Dwellings Discharging Sewage Treatment Systems With Flows Less Than or Equal to 1,000 Gallons Per Day and State Water Control Board Virginia Pollutant Discharge Elimination System General Permit Registration Statement for Domestic Sewage Discharges Less Than or Equal to 1,000 Gallons Per Day.~~

~~Appendix II Completion Statement.~~

Combined Application-Virginia Department of Health Discharging System Application for Single Family Dwellings Discharging Sewage Less Than or Equal to 1,000 Gallons Per Day and State Water Control Board Virginia Pollutant Discharge Elimination System General Permit Registration Statement for Domestic Sewage Discharges Less Than or Equal to 1,000 Gallons Per Day (rev. 9/11)

Permit Transfer under 12 VAC 5-640-220.E (undated)

Completion Statement (undated)

VA.R. Doc. No. R11-2735; Filed October 26, 2015, 10:40 a.m.

## DEPARTMENT OF MEDICAL ASSISTANCE SERVICES

### Fast-Track Regulation

Title of Regulation: **12VAC30-40. Eligibility Conditions and Requirements (amending 12VAC30-40-280).**

Statutory Authority: § 32.1-325 of the Code of Virginia; 42 USC § 1396 et seq.

Public Hearing Information: No public hearings are scheduled.

Public Comment Deadline: December 16, 2015.

Effective Date: December 31, 2015.

Agency Contact: Victoria Simmons, Regulatory Coordinator, Department of Medical Assistance Services, 600 East Broad Street, Suite 1300, Richmond, VA 23219, telephone (804) 371-6043, FAX (804) 786-1680, TTY (800) 343-0634, or email victoria.simmons@dmas.virginia.gov.

Basis: Section 32.1-325 of the Code of Virginia grants to the Board of Medical Assistance Services the authority to administer and amend the State Plan for Medical Assistance. Section 32.1-324 of the Code of Virginia authorizes the Director of the Department of Medical Assistance Services (DMAS) to administer and amend the State Plan for Medical Assistance according to the board's requirements. The Medicaid authority, as established by § 1902(a) of the Social Security Act (42 USC § 1396a), provides governing authority for payments for services.

Purpose: The purpose of this action is to conform the Virginia Administrative Code to the federally approved State Plan Attachment 2.6-A, Supplement 8b, More Liberal Income Disregards. This action does not affect the health, safety, or welfare of citizens of the Commonwealth.

Rationale for Using Fast-Track Process: This action is noncontroversial because it is beneficial to disabled Medicaid individuals who wish to be employed.

Substance: The section of the State Plan for Medical Assistance affected by this action is 12VAC30-40-280.

MEDICAID WORKS was created under the flexibility permitted by the Deficit Reduction Act of 2005 (DRA). One of the issues faced by Medicaid enrollees who have disabilities is that while many have the capacity to be gainfully employed, the extra income earned has caused them to lose their Medicaid eligibility. Retaining Medicaid eligibility is very important to individuals who have disabilities because of the extremely high costs of their medical care. Because one purpose of the program is to provide incentives for Medicaid individuals to be employed, eligible enrollees who have disabilities are permitted higher income limits.

A previous regulatory action implemented an increase in the maximum allowable gross earnings for participants in the program to the maximum gross income amount allowed under the Ticket to Work and Work Incentives Improvement Act before a premium is required. This amount is calculated to be $75,000 in gross annual earnings. This previous change was mandated by Chapter 506 of the 2011 Acts of the Assembly. The previous regulatory action also adjusted MEDICAID WORKS policy to mitigate the negative impact (i.e., loss of Medicaid eligibility) of higher earned income or higher unearned income as a result of participating in this work incentive program. The State Plan was amended to enable a disregard for any increase in the amount of unearned income in the Social Security Disability Insurance (SSDI) payment resulting from employment as a worker with disabilities eligible for assistance under the Ticket to Work and Work Incentives Improvement Act, or as a result of a cost of living adjustment to the SSDI payment.

To disregard increases of monthly SSDI payments, the enrollee will be required to routinely deposit the amount of the monthly increase into his designated Work Incentive (WIN) Account. Additional policy also will disregard unemployment insurance payments received by an enrollee as a result of loss of employment through no fault of his own. This will protect the individual's MEDICAID WORKS eligibility for the existing six-month safety net or "grace" period triggered by loss of employment. A final policy change under this regulatory action is to discontinue the deeming of a spouse's income, or if the individual is younger than 21 years of age, the deeming of the income of the parents with whom he lives. This particular change will apply to eligibility determinations of both applicants and existing enrollees in the MEDICAID WORKS program.

Issues: The MEDICAID WORKS program permits individuals who are disabled, and Medicaid eligible as a result of their disabilities, to be employed. The advantage of this action is that it will permit such individuals to earn and retain more income without risking the loss of their Medicaid eligibility. There are no disadvantages to the public, the Commonwealth, or provider groups.

Department of Planning and Budget's Economic Impact Analysis:

Summary of the Proposed Amendments to Regulation. Pursuant to direction from the federal Centers for Medicare and Medicaid Services (CMS), the Department of Medical Assistance Services (DMAS) proposes to: 1) specify an action to be taken in order for certain types of income to be disregarded when determining Medicaid Works program eligibility, and 2) disregard parental income when determining Medicaid Works program eligibility for individuals under 21.

Result of Analysis. The benefits likely exceed the costs for all proposed changes.

Estimated Economic Impact.

Medicaid Works program: The Medicaid Works program is a work incentive opportunity offered by the Virginia Medicaid program for individuals with disabilities who are employed or who want to go to work. It is a voluntary Medicaid plan option that enables workers with disabilities to earn higher income and retain more in savings, or resources, than is usually allowed by Medicaid. The program provides the support of continued health care coverage so that people can work, save and gain greater independence. To qualify for Medicaid Works, applicants must be determined to meet the income, asset and eligibility requirements for the Aged, Blind and Disabled (80% of the Federal Poverty Level) Medicaid covered group by their local Department of Social Services.

To enroll in Medicaid Works, applicants must first establish a Work Incentive (WIN) account at a bank or other financial

institution. The WIN account is not a special account available at a bank, but can be a regular checking or savings account that the enrollee identifies for this purpose. Only earned income may be deposited in the WIN account. One or more WIN accounts must be designated by enrollees and used to deposit all earned income and to keep any resources, or savings, above $2,000 in order to remain eligible for this Medicaid program. By placing the earned income in the WIN account, enrollees can have resources in the account of up to $34,543 during calendar year 2015 and annual earnings of up to $75,000. There are no restrictions on use of funds in the above WIN account(s); so they may be used as needed.

Disregarded income for Medicaid Works eligibility: In determining continued eligibility for the Medicaid Works program, the current regulation indicates that the Commonwealth will disregard any increase in the amount of unearned income in Social Security Disability Insurance (SSDI) payment resulting from employment as a worker with disabilities eligible for assistance under the Social Security Act, or as a result of a cost of living adjustment to the SSDI payment. Per CMS' direction, DMAS proposes to specify that the increase in the amount of unearned income in SSDI payment must be deposited in the WIN account in order for it to be disregarded.

The current regulation also indicates that for the purpose of determining Medicaid Works eligibility, the Commonwealth will disregard any increase in the amount of unearned income due to the receipt of unemployment benefits. Per CMS' direction, DMAS also proposes to specify that the increase in the amount of unearned income from the unemployment cash benefit must be deposited in the WIN account in order for it to be disregarded.

Since there are no restrictions on the use of funds in WIN accounts, the proposals to add the language specifying that these increases in unearned income must be deposited in the WIN account in order for them to be disregarded for Medicaid Works eligibility will likely not be significantly burdensome for Medicaid Works participants. The Commonwealth's receipt of federal funds for Medicaid is partially dependent on federal approval of the state's programs. Thus the proposal to comply with this federal requirement should produce a net benefit.

CMS also requires that if the Commonwealth elects to disregard parental income when determining continuing eligibility of Medicaid Works' enrollees who are under the age of 21, then the Commonwealth must also apply the same disregard for applicants to the program who are under the age of 21. Thus DMAS proposes to exempt such income when determining eligibility for applicants and ongoing enrollees. Though this proposed change will not likely affect many people, it may help enable a few additional individuals with disabilities to benefit from the Medicaid Works program and be able to work without risking loss of health insurance.

Businesses and Entities Affected. The proposed amendments affect individuals with disabilities eligible or potentially eligible for the Medicaid Works program. Currently fewer than 100 individuals participate.

Localities Particularly Affected. The proposed amendments do not disproportionately affect particular localities.

Projected Impact on Employment. The proposal to disregard parental income for individuals under 21 may enable some young people with disabilities to become newly eligible for the Medicaid Works program. This would allow such individuals to increase working without losing health insurance.

Effects on the Use and Value of Private Property. The proposed amendment does not significantly affect the use and value of private property.

Small Businesses: Costs and Other Effects. The proposed amendments do not significantly affect costs for small businesses.

Small Businesses: Alternative Method that Minimizes Adverse Impact. The proposed amendments will not adversely affect small businesses.

Real Estate Development Costs. The proposed amendments will not affect real estate development costs.

Agency's Response to Economic Impact Analysis: The agency has reviewed the economic impact analysis prepared by the Department of Planning and Budget. The agency concurs with this analysis.

Summary:

*The amendments, which (i) specify certain types of income to be disregarded when determining Medicaid Works program eligibility and (ii) disregard parental income when determining Medicaid Works program eligibility for individuals younger than 21 years, are required by the Centers for Medicare and Medicaid Services for approval of the Department of Medical Assistance Services State Plan Amendment for Medicaid Works.*

**12VAC30-40-280. More liberal income disregards.**

A. For children covered under §§ 1902(a)(10)(A)(i)(III) and 1905(n) of the Social Security Act (Act), the Commonwealth of Virginia will disregard one dollar plus an amount equal to the difference between 100% of the AFDC payment standard for the same family size and 100% of the federal poverty level for the same family size as updated annually in the Federal Register.

B. For ADC-related cases, both categorically and medically needy, any individual or family applying for or receiving assistance shall be granted an income exemption consistent with the Act (§§ 1902(a)(10)(A)(i)(III), (IV), (VI), (VII); §§ 1902(a)(10)(A)(ii)(VIII), (IX); § 1902(a)(10)(C)(i)(III)). Any interest earned on one interest-bearing savings or investment account per assistance unit not to exceed $5,000, if the applicant, applicants, recipient or recipients designate

that the account is reserved for purposes related to self-sufficiency, shall be exempt when determining eligibility for medical assistance for so long as the funds and interest remain on deposit in the account. For purposes of this section, "purposes related to self-sufficiency" shall include, but are not limited to, (i) paying for tuition, books, and incidental expenses at any elementary, secondary, or vocational school, or any college or university; (ii) for making down payment on a primary residence; or (iii) for establishment of a commercial operation that is owned by a member of the Medicaid assistance unit.

C. For the group described in §§ 1902(a)(10)(A)(i)(VII) and 1902(l)(1)(D), income in the amount of the difference between 100% and 133% of the federal poverty level (as revised annually in the Federal Register) is disregarded.

D. For aged, blind, and disabled individuals, both categorically and medically needy, with the exception of the special income level group of institutionalized individuals, the Commonwealth of Virginia shall disregard the value of in-kind support and maintenance when determining eligibility. In-kind support and maintenance means food, clothing, or shelter or any combination of these provided to an individual.

E. For all categorically needy and medically needy children covered under the family and children covered groups, (§§ 1902(a)(10)(A)(i)(I), 1902(a)(10)(A)(i)(III), 1902(a)(10)(A)(i)(VI), 1902(a)(10)(A)(i)(VII), 1902(a)(10)(A)(ii)(VIII), 1902(a)(10)(C)(ii)(I) and 1905(n) of the Act), the Commonwealth will disregard all earned income of a child under the age of 19 who is a student.

F. For all categorically needy and medically needy individuals covered under the family and children covered groups (§§ 1902(a)(10)(A)(i)(I), 1902(a)(10)(A)(i)(III), 1902(a)(10)(A)(i)(IV), 1902(a)(10)(A)(i)(V), 1902(a)(10)(A)(i)(VI), 1902(a)(10)(A)(i)(VII), 1902(a)(10)(A)(ii)(VIII), 1902(a)(10)(C)(ii)(I) and 1905(n) of the Act), the Commonwealth will disregard the fair market value of all in-kind support and maintenance as income in determining financial eligibility. In-kind support and maintenance means food, clothing or shelter or any combination of these provided to an individual.

G. Working individuals with disabilities eligible for assistance under § 1902(a)(10)(A)(ii)(XV) of the Act who wish to increase their earnings while maintaining eligibility for Medicaid must establish Work Incentive (WIN) accounts (see 12VAC30-40-290).

1. The Commonwealth shall disregard any increase in the amount of unearned income in Social Security Disability Insurance (SSDI) payment resulting from employment as a worker with disabilities eligible for assistance under § 1902(a)(10)(A)(ii)(XVI) of the Act, or as a result of a ~~COLA~~ cost of living adjustment (COLA) to the SSDI payment, if this additional amount of unearned income in SSDI payment from work or COLA, or both, is deposited into the individual's designated WIN account.

2. The Commonwealth shall disregard any amount of unearned income of an enrollee as a result of the receipt of unemployment insurance benefits due to loss of employment through no fault of his own if this unearned income from unemployment insurance payments is deposited into the individual's designated WIN account. This disregard shall only apply while an enrollee is in the six-month safety net, or "grace" period.

3. The Commonwealth shall disregard earned income up to $75,000 for workers with disabilities eligible for assistance under § 1902(a)(10)(A)(ii)(XV) of the Act. To be eligible for this earned income disregard, the income is subject to the following provisions:

a. Only earnings that are deposited into a Work Incentive (WIN) account can be disregarded for eligibility purposes.

b. All funds deposited and their source will be identified and registered with the department, for which prior approval has been obtained from the department, and for which the owner authorizes regular monitoring ~~and/or~~ and reporting of these earnings and other information deemed necessary by the department for the proper administration of this provision.

c. ~~A spouse's income will not be deemed to the applicant~~ Income from the individual's spouse, or if the individual is younger than 21 years, the individual's parents with whom he lives, will not be deemed to an applicant for MEDICAID WORKS or to an existing enrollee in MEDICAID WORKS when determining whether or not the individual meets the financial eligibility requirements for eligibility under this section.

H. For aged, blind and disabled individuals, both categorically and medically needy, with the exception of the special income level group of institutionalized individuals, the Commonwealth of Virginia shall disregard the value of income derived from temporary employment with the United States Census Bureau for a decennial census.

I. For all categorically needy and medically needy individuals covered under the family and children covered groups (§§ 1902(a)(10)(A)(i)(I), 1902(a)(10)(A)(i)(III), 1902(a)(10)(A)(i)(IV), 1902(a)(10)(A)(i)(V), 1902(a)(10)(A)(i)(VI), 1902(a)(10)(A)(i)(VII), 1902(a)(10)(A)(ii)(VIII), 1902(a)(10)(C)(ii)(I) and 1905(n) of the Act), the Commonwealth will disregard income derived from the temporary employment with the United States Census Bureau for a decennial census.

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### Fast-Track Regulation

Titles of Regulations: **12VAC30-50. Amount, Duration, and Scope of Medical and Remedial Care Services (amending 12VAC30-50-200, 12VAC30-50-225).**

**12VAC30-60. Standards Established and Methods Used to Assure High Quality Care (amending 12VAC30-60-120, 12VAC30-60-150).**

**12VAC30-130. Amount, Duration and Scope of Selected Services (repealing 12VAC30-130-10 through 12VAC30-130-60).**

Statutory Authority: § 32.1-325 of the Code of Virginia; 42 USC § 1396 et seq.

Public Hearing Information: No public hearings are scheduled.

Public Comment Deadline: December 16, 2015.

Effective Date: January 1, 2016.

Agency Contact: Emily McClellan, Regulatory Supervisor, Department of Medical Assistance Services, Policy Division, 600 East Broad Street, Suite 1300, Richmond, VA 23219, telephone (804) 371-4300, FAX (804) 786-1680, or email emily.mcclellan@dmas.virginia.gov.

Basis: Section 32.1-325 of the Code of Virginia grants to the Board of Medical Assistance Services the authority to administer and amend the Plan for Medical Assistance. Section 32.1-324 of the Code of Virginia authorizes the Director of the Department of Medical Assistance Services to administer and amend the Plan for Medical Assistance according to the board's requirements. The Medicaid authority as established by § 1902(a) of the Social Security Act (42 USC § 1396a) provides governing authority for payments for services.

42 CFR 440.130(d) establishes rehabilitative services as a covered service under the authority of Title XIX of the Social Security Act. "Rehabilitative services …. includes any medical or remedial services recommended by a physician or other licensed practitioner of the healing arts, within the scope of his practice under State law, for maximum reduction of physical or mental disability and restoration of a recipient to his best possible functional level."

Purpose: This regulatory action updates and clarifies the provision of inpatient and outpatient rehabilitation services and provider documentation requirements, conflates several regulatory sections into fewer sections by moving some existing requirements, and repeals several regulation sections that are no longer needed. The new text addresses health and safety issues regarding physician orders by other licensed practitioners of the healing arts in order to eliminate service delays for Medicaid individuals while awaiting physician signatures in patients' records. The new additions and changes to the regulations will provide a continuum of regulatory support by encompassing existing federal regulations and clarifying current Virginia Medicaid Rehabilitation Manual interpretive guidelines.

The goals of this regulatory action are to provide overall clarification of rehabilitation requirements based on provider feedback and utilization review findings, to eliminate delays in services while obtaining necessary signed/dated orders for services, and to reduce the volume of potential monetary retractions from providers when they are audited. Providers' patient documentation is the basis for all Medicaid claims payments and provider audit retractions.

Rationale for Using Fast-Track Process: The agency is using the fast-track rulemaking process because these changes are beneficial to both providers and enrollees and no controversy is expected. The new regulations preserve the health and safety of enrollees while enabling licensed practitioners other than physicians to originate service orders as permitted by their state professional licenses. These proposed changes also provide clarification on several key issues where there has been provider confusion, such as record documentation considered suitable to support filed claims and physician admission certification for inpatient rehabilitation. The clarifications are expected to assist providers with creating and maintaining improved patient records, which will ultimately avoid payment retractions from providers. These clarifications also streamline the process of service initiation and renewal of physician-ordered services to Medicaid individuals.

Substance: DMAS has covered inpatient rehabilitation services since 1987 and outpatient rehabilitation since 1978 under the authority of 42 CFR 440.130(d). These services are federally defined as "…any medical or remedial services recommended by a physician or other licensed practitioner of the healing arts, within the scope of his practice under State law, for maximum reduction of physical or mental disability and restoration of a recipient to his best possible functional level." Medicaid individuals may receive medically necessary rehabilitative services as a result of either illnesses or injuries.

DMAS' coverage of all Medicaid services, including these rehabilitative services, must be based upon providers' documentation of services rendered and how such documentation supports providers' claims for reimbursement. DMAS conducted an internal review of these regulations and determined that they required updating and streamlining. In instances when providers' documentation did not support their claims, then providers have been subject to repayment of some of the amounts that they have received. These repayment determinations are made in the context of either DMAS' or its contractors' audits of providers' records. This action addresses those issues and is expected to reduce provider repayments.

DMAS' coverage of these rehabilitative services depends on either physicians' or other licensed practitioners' signed orders. Other licensed practitioners can be either nurse practitioners or physician assistants who are permitted by their Commonwealth-issued professional licenses to initiate such orders. Requiring physicians' or other practitioners'

orders for rehabilitation services is identical to requiring physicians' orders for prescription drugs before pharmacists are permitted to provide drugs to patients. DMAS cannot claim federal matching dollars on services that have not been appropriately ordered; therefore, it does not cover any services that have not been ordered by either physicians or other licensed practitioners of the healing arts. Permitting physicians to use their nurse practitioners or physician assistants, or both, to write and sign orders for rehabilitation services makes it easier for these enrolled providers to meet DMAS' signature timeframe requirements.

These regulations set out the service limits and provider requirements for the Medicaid coverage of inpatient rehabilitation services, including comprehensive outpatient rehabilitation facilities (CORFs) services, and outpatient rehabilitation services. Because these rehabilitative services regulations have not been recently substantially revised, some of the elements have become outdated as compared to current industry standards and newer care criteria. For example, several of these changes are being proposed to match the industry standard McKesson Interqual® Criteria for prior service authorization of intensive rehabilitation/CORF and outpatient rehabilitation.

CORFs, even though outpatient rehabilitation providers, render services at such an intensive rehabilitative level that they are treated in these regulations as inpatient rehabilitation facilities. CORFs are intensive day rehabilitation programs where patients receive full day long therapy services but they do not stay overnight as they would in an inpatient rehabilitation hospital.

The new regulation text intends to decrease delays in service delivery while obtaining physician signed orders for the provision of rehabilitation services. Previously, providers were required to obtain physician signed orders for many rehabilitation services. Due to changes in federal regulations and state law, physician providers can now rely upon orders from other types of licensed practitioners, including nurse practitioners and physician assistants, for many types of rehabilitation services.

For inpatient intensive and CORF services, new regulations are added and existing regulations clarified for (i) services ordered by licensed nurse practitioners or physician assistants for consistency with federal regulations and state law, (ii) requirements for physician admission certification and recertification, (iii) 60-day renewal of plans of care, (iv) physician verbal order timeframe limitations, (v) utilization review plans, (vi) discharge summary requirements, (vii) interdisciplinary team meetings and plans within seven days of admission, and (viii) corrective action plans that are the result of quality management review activities.

For outpatient rehabilitation services, amendments (i) add new regulations and clarify existing regulations for the 21-day physician plan of care signature requirement, (ii) make consistent with federal regulations and state law services ordered by licensed nurse practitioners or physician assistants, (iii) add no guarantee of reimbursement based on service authorization limitations, (iv) add timeframe limitations related to claims and service authorizations, (v) direct reimbursement to enrolled rehabilitation providers for provision of services to nursing facility residents, (vi) address coverage of speech-language assistants, and (vii) address therapy evaluations and reevaluations.

The limit on covered outpatient therapy service visits (i.e., physical therapy, occupational therapy, and speech-language therapy) before requesting service prior authorization was changed in 2003 from 24 visits to five visits. At the time of that policy change, DMAS did not change every regulatory occurrence of the 24-visit limit. This action also corrects that oversight.

Issues: The primary advantages are to the Virginia Medicaid individual who needs rehabilitation services and the providers who render these services. The additional language will expedite services so individuals may begin treatment as promptly as may be needed. The primary advantage to the Virginia enrolled Medicaid provider is more access of different types of licensed practitioners to meet the physician order requirements as well as clarification of documentation requirements.

There are no disadvantages to Medicaid individuals, Medicaid providers, the public, or the Commonwealth. These changes represent no expansion or reduction of currently existing services. The advantage for providers and consumers is that the new regulations allow for expansion of more licensed practitioner types who can order the rehabilitation services.

Department of Planning and Budget's Economic Impact Analysis:

Summary of the Proposed Amendments to Regulation. The proposed changes will clarify regulations for inpatient and outpatient rehabilitation services to reflect current practices.

Result of Analysis. The benefits likely exceed the costs for all proposed changes.

Estimated Economic Impact. The proposed changes will clarify regulations for inpatient and outpatient rehabilitation services, including services provided in comprehensive outpatient rehabilitation facilities, to reflect current practices. The proposed changes will incorporate in the regulations mainly 1) criteria already in the guidance documents such as McKesson InterQual® Criteria to define medical necessity standards, 2) procedures already allowed under federal and state statutes such as permitting nurse practitioners and physician assistants to order rehabilitation related services, and 3) clarifications of various other rules and procedures already followed in practice.

Since the proposed changes have already been followed in practice, no significant direct effect on providers, recipients, or the Department of Medical Assistance Services is expected

other than improving the clarity of the regulations and reducing possible billing mistakes and payment retractions that would follow.

Businesses and Entities Affected. These regulations apply to 35 rehabilitation hospitals, 3 comprehensive outpatient rehabilitation facilities, and 161 outpatient rehabilitation providers.

Localities Particularly Affected. The proposed regulations apply throughout the Commonwealth.

Projected Impact on Employment. No significant direct effect on employment is expected.

Effects on the Use and Value of Private Property. No significant direct effect on the use and value of private property is expected.

Small Businesses: Costs and Other Effects. About 120 of the 161 outpatient rehabilitation providers are estimated to be small businesses. The same effects discussed above apply to these small businesses.

Small Businesses: Alternative Method that Minimizes Adverse Impact. The proposed regulations are not anticipated to have adverse impact on small businesses.

Real Estate Development Costs. No impact on real estate development costs is expected.

Agency's Response to Economic Impact Analysis: The agency has reviewed the economic impact analysis prepared by the Department of Planning and Budget and concurs with this analysis.

Summary:

*The amendments update regulations for inpatient and outpatient rehabilitation services, including services provided in comprehensive outpatient rehabilitation facilities, to reflect current practices. The amendments (i) incorporate in the regulations McKesson InterQual® Criteria to define medical necessity standards, (ii) provide for procedures already allowed under federal and state statutes such as permitting nurse practitioners and physician assistants to order rehabilitation related services, and (iii) clarify various other rules and procedures already followed in practice.*

**12VAC30-50-200. Physical therapy, occupational therapy, and ~~related~~ services for individuals with speech, hearing, and language disorders.**

A. Definitions. The following words and terms when used in this section shall have the following meanings unless the context clearly indicates otherwise:

"Acute conditions" means conditions that are expected to be of brief duration (less than 12 months) and in which progress toward established goals is likely to occur frequently.

"DMAS" means the Department of Medical Assistance Services.

"Evaluation" means a thorough assessment completed by a licensed therapist that is signed and fully dated and includes the following components: a medical diagnosis, clinical signs and symptoms, medical history, current functional status, summary of previous rehabilitative treatment and the result, and the therapist's recommendation for treatment.

"Nonacute conditions" means conditions that are of long duration (greater than 12 months) and in which progress toward established goals is likely to occur slowly.

"Physical rehabilitation services" means any medical or remedial services, as defined in 42 CFR 440.130, recommended by a physician or other licensed practitioner of the healing arts, within the scope of his practice under state law, for maximum reduction of physical or mental disability and restoration of an eligible individual to his best possible functional level.

"Plan of care" means a treatment plan developed by a licensed therapist, which shall include medical diagnosis; current functional status; individualized, measurable, participant-oriented goals (long-term and short-term goals) that describe the anticipated level of functional improvement; achievement timeframes for all goals; therapeutic interventions or treatments to be utilized by the therapist; frequency and duration of the therapies; and a discharge plan and anticipated discharge date.

"Reevaluation" means an assessment that contains all of the same components as an evaluation and that shall be completed when an individual has a significant change in his condition or when an individual is readmitted to a rehabilitative service.

"SLP" means speech-language pathology.

B. Amount, duration, and scope of outpatient rehabilitation therapy services. The application of a national standardized set of medical necessity criteria in use in the industry, such as McKesson InterQual® Criteria or an equivalent standard authorized in advance by DMAS, shall be required for this service.

1. DMAS covers outpatient rehabilitation therapy services provided in outpatient settings of acute care and rehabilitation hospitals, nursing facilities, home health agencies, and rehabilitation agencies. All providers of outpatient rehabilitation therapy services shall have a current provider agreement with DMAS. All practitioners and providers of services shall be required to meet applicable state and federal licensing or certification requirements, or both.

2. Outpatient rehabilitation therapy evaluations or therapy treatment, or both, when rendered solely for vocational or educational purposes shall not be covered under the authority of this section. Developmental or behavioral assessments shall not be covered under the authority of this section. Individuals shall have a medical diagnosis, as determined by a licensed physician or other licensed practitioner of the healing arts within the scope of his practice under state law, and meet the medical necessity

criteria in order to qualify for a Medicaid-covered outpatient rehabilitation therapy evaluation or therapy treatment, or both.

~~A. Physical therapy and related~~ 3. Outpatient rehabilitation services shall ~~be defined as~~ include physical therapy (PT), occupational therapy (OT), and speech-language pathology (SLP) services. These services shall be prescribed by a physician or a licensed practitioner of the healing arts within the scope of his practice under state law, such as a nurse practitioner or a physician assistant within the scope of his practice under state law, and be part of a written ~~physician's order/plan~~ plan of care that is personally and legibly signed and dated by the licensed practitioner who ordered the services. Supervision for a licensed practitioner shall be provided by a physician as required by 18VAC90-30 and 18VAC90-40 for nurse practitioners and 18VAC85-50 for physician assistants. Any ~~one~~ of these services may be offered as the sole rehabilitation service and ~~shall~~ is not ~~be~~ contingent upon the provision of another service. ~~All practitioners and providers of services shall be required to meet state and federal licensing and/or certification requirements. Services shall be provided according to guidelines found in the Virginia Medicaid Rehabilitation Manual.~~

~~B. Physical therapy.~~

~~1. Services for individuals requiring physical therapy are provided only as an element of hospital inpatient or outpatient service, nursing facility service, home health service, or when otherwise included as an authorized service by a cost provider who provides rehabilitation services.~~

~~2. Effective with dates of service on and after October 24, 1995, DMAS will provide for the direct reimbursement to enrolled rehabilitation providers for physical therapy services when such services are rendered to patients residing in nursing facilities. Such reimbursement shall not be provided for any sums that the rehabilitation provider collects, or is entitled to collect, from the nursing facility or any other available source, and provided further, that this amendment shall in no way diminish any obligation of the nursing facility to DMAS to provide its residents such services, as set forth in any applicable provider agreement.~~

~~C. Occupational therapy.~~

~~1. Services for individuals requiring occupational therapy are provided only as an element of hospital inpatient or outpatient service, nursing facility service, home health service, or when otherwise included as an authorized service by a cost provider who provides rehabilitation services.~~

~~2. Effective with dates of service on and after October 24, 1995, DMAS will provide for the direct reimbursement to enrolled rehabilitation providers for occupational therapy services when such services are rendered to patients residing in nursing facilities. Such reimbursement shall not be provided for any sums that the rehabilitation provider collects, or is entitled to collect, from the nursing facility or any other available source, and provided further, that this amendment shall in no way diminish any obligation of the nursing facility to DMAS to provide its residents such services, as set forth in any applicable provider agreement.~~

~~D. Services for individuals with speech, hearing, and language disorders (provided by or under the supervision of a speech pathologist or audiologist.)~~

~~1. These services are provided by or under the supervision of a speech pathologist or an audiologist only as an element of hospital inpatient or outpatient service, nursing facility service, home health service, or when otherwise included as an authorized service by a cost provider who provides rehabilitation services.~~

~~2. Effective with dates of service on and after October 24, 1995, DMAS will provide for the direct reimbursement to enrolled rehabilitation providers for speech/language therapy services when such services are rendered to patients residing in nursing facilities. Such reimbursement shall not be provided for any sums that the rehabilitation provider collects, or is entitled to collect, from the nursing facility or any other available source, and provided further, that this amendment shall in no way diminish any obligation of the nursing facility to DMAS to provide its residents such services, as set forth in any applicable provider agreement.~~

4. DMAS shall provide for the direct reimbursement to enrolled rehabilitation providers for covered outpatient rehabilitation therapy services when such services are rendered to individuals residing in nursing facilities. Such reimbursement shall not be provided for any sum that the rehabilitation provider collects, or is entitled to collect, from the nursing facility or any other available source, and provided further that the reimbursement shall in no way diminish any obligation of the nursing facility to DMAS to provide its residents such services as set forth in any applicable provider agreement.

5. The provision of physical therapy services shall meet all of the following conditions:

a. The services that the individual needs shall be directly and specifically related to a written plan of care developed, signed, and dated by a licensed physical therapist.

b. The services shall be of a level of complexity and sophistication or the condition of the individual shall be of a nature that the services can only be performed by a physical therapist licensed by the Virginia Board of Physical Therapy or a physical therapy assistant licensed by the Virginia Board of Physical Therapy and who is under the direct supervision of a licensed physical therapist.

c. When physical therapy services are provided by a qualified physical therapy assistant, such services shall be provided under the supervision of a qualified physical therapist who makes an onsite supervisory visit at least once every 30 days and documents the findings of the visit in the medical record. The supervisory visit shall not be reimbursable.

6. The provision of occupational therapy services shall meet all of the following conditions:

a. The services that the individual needs shall be directly and specifically related to a written plan of care developed, signed, and dated by a licensed occupational therapist.

b. The services shall be of a level of complexity and sophistication or the condition of the individual shall be of a nature that the services can only be performed by an occupational therapist certified by the National Board for Certification in Occupational Therapy and licensed by the Virginia Board of Medicine or an occupational therapy assistant certified by the National Board for Certification in Occupational Therapy who is under the direct supervision of a licensed occupational therapist.

c. When occupational therapy services are provided by a qualified occupational therapy assistant, such services shall be provided under the supervision of a qualified occupational therapist who makes an onsite supervisory visit at least once every 30 days and documents the visit findings in the medical record. The supervisory visit shall not be reimbursable.

7. The provision of speech-language pathology services shall meet all of the following conditions:

a. The services that the individual needs shall be directly and specifically related to a written plan of care developed, signed, and dated by a licensed speech-language pathologist.

b. The services shall be of a level of complexity and sophistication or the condition of the individual shall be of a nature that the services can only be performed by a speech-language pathologist licensed by the Virginia Board of Audiology and Speech-Language Pathology or who, if exempted from licensure by statute, meets the requirements in 42 CFR 440.110(c).

c. DMAS shall reimburse for the provision of speech-language pathology services when provided by a person considered by DMAS as a speech-language assistant (i.e., has a bachelor's level or a master's level degree without licensure by the Virginia Board of Audiology and Speech-Language Pathology and who does not meet the qualifications required for billing as a speech-language therapist). Speech-language assistants shall work under the direct supervision of a licensed professional therapist holding a Certificate of Clinical Competence (CCC) in SLP or a speech-language pathologist who meets the licensing requirements of the Virginia Board of Audiology and Speech-Language Pathology.

d. When services are provided by a therapist who is in his Clinical Fellowship Year (CFY) of an SLP Program or a speech-language assistant, a licensed professional therapist holding a CCC in SLP or a speech-language pathologist who shall make a supervisory visit at least every 30 days while therapy is being conducted and document the findings in the medical record. The supervisory visit shall not be reimbursable.

~~E.~~ C. Authorization for outpatient rehabilitation services.

1. Physical therapy, occupational therapy, and speech-language pathology services provided in outpatient settings of acute and rehabilitation hospitals, rehabilitation agencies, ~~school divisions~~ nursing facilities, or home health agencies shall include authorization for up to ~~24~~ five allowed visits, which do not require preceding service authorization, by each ordered rehabilitative service annually as long as the individual meets the medical necessity criteria as set out in subsection B of this section for the particular service. In situations when individuals require more than the initial five visits, providers shall submit to either DMAS or the service authorization contractor requests for service authorization and the required demonstration of medical necessity for such individuals. The provider shall maintain documentation to justify the need for services.

2. The provider shall request from DMAS or its contractor authorization for treatments deemed necessary by a physician or other licensed practitioner of the healing arts within the scope of his practice under state law beyond the ~~number authorized~~ initial five visits. Documentation for medical justification must include ~~physician orders/plans of care~~ plans of care signed and dated by a physician or other licensed practitioner. Authorization for extended services shall be based on individual need. Payment shall not be made for additional ~~service~~ services beyond the initial five visits unless the extended provision of services has been authorized by DMAS or its contractor.

3. Covered outpatient rehabilitative services for acute conditions shall include physical therapy, occupational therapy, and speech-language pathology services. ~~"Acute conditions" shall be defined as conditions which are expected to be of brief duration (less than 12 months) and in which progress toward goals is likely to occur frequently.~~

4. Covered outpatient rehabilitation services for long-term, nonacute conditions shall include physical therapy, occupational therapy, and speech-language pathology services. ~~"Nonacute conditions" shall be defined as those conditions which are of long duration (greater than 12 months) and in which progress toward established goals is likely to occur slowly.~~

5. Payment shall not be made for reimbursement requests submitted more than 12 months after the termination of services.

~~F.~~ D. Service limitations. The following general conditions shall apply to reimbursable physical therapy, occupational therapy, and speech-language pathology services:

1. ~~Patient~~ The individual must be under the care of a physician or other licensed practitioner who is legally authorized to practice and who is acting within the scope of his license.

2. The ~~physician~~ orders for evaluation of the need for therapy services shall ~~include the specific procedures and modalities to be used,~~ identify the specific therapy discipline ~~to carry out the physician's order/plan of care, and indicate the frequency and duration for services. Physician orders/plans of care~~ and must be personally signed and dated prior to the initiation of rehabilitative services. ~~The certifying physician may use a signature stamp, in lieu of writing his full name, but the stamp must, at minimum, be initialed and dated at the time of the initialing (within 21 days of the order).~~

3. ~~Services shall be furnished under a written plan of treatment and must be established, signed and dated (as specified in this section) and periodically reviewed by a physician. The requested services or items must be necessary to carry out the plan of treatment and must be related to the patient's condition.~~ The plan of care shall include the specific procedures and modalities to be used and indicate the frequency and duration for services. A written plan of care shall be reviewed by the physician or licensed practitioner every 60 days for acute conditions, as defined in subsection A of this section, or annually for nonacute conditions. The requested services shall be necessary to carry out the plan of care and shall be related to the individual's condition. The plan of care shall be signed and dated, as specified in this section, by the physician or other licensed practitioner who reviews the plan of care.

4. ~~A physician recertification shall be required periodically and must be signed and dated (as specified in this section) by the physician who reviews the plan of treatment. The physician recertification statement must indicate the continuing need for services and should estimate how long rehabilitative services will be needed. Certification and recertification must be signed and dated (as specified in this section) prior to the beginning of rehabilitation services.~~ Quality management reviews, pursuant to 12VAC30-60-150, shall be performed by DMAS or its contractor.

~~5. Utilization review shall be performed to determine if services are appropriately provided and to ensure that the services provided to Medicaid recipients are medically necessary and appropriate. Services not specifically documented in the patient's medical record as having been rendered shall be deemed not to have been rendered and no coverage shall be provided~~.

~~6.~~ 5. Physical therapy, occupational therapy, and speech-language services are to be considered for termination regardless of the ~~preauthorized~~ service authorized visits or services when any of the following conditions are met:

a. No further potential for improvement is demonstrated. ~~(The patient~~ and the individual has reached his maximum progress ~~and a safe and effective maintenance program has been developed.)~~

b. ~~There is limited motivation of~~ Lack of participation on the part of the individual ~~or caregiver~~ is evident.

c. The individual has an unstable condition that affects his ~~or her~~ ability to actively participate in a rehabilitative plan of care.

d. Progress toward an established goal or goals cannot be achieved within a reasonable period of time as determined by the licensed therapist.

e. The established goal serves no purpose to increase meaningful functional or cognitive capabilities.

f. The service ~~can be provided by someone other than a skilled rehabilitation professional~~ no longer requires the skills of a qualified therapist.

g. A home maintenance program has been established to maintain the individual's function at the level to which it has been restored.

E. All providers of outpatient rehabilitation services shall be required to enroll as Medicaid providers using the outpatient rehabilitation services provider agreement.

**12VAC30-50-225. Rehabilitative services; intensive physical rehabilitation and CORF services.**

A. Definitions. The following words and terms when used in this section shall have the following meanings unless the context clearly indicates otherwise:

"Actively participate" means the individual regularly, as may be ordered by the physician, attends planned therapeutic activities and demonstrates progress towards goals established in the plan of care.

"Admission certification statement" means that the physician signs and dates an initial written statement in the individual's medical record of the need for intensive rehabilitation services. This statement shall be documented at the time of the rehabilitation admission.

"Comprehensive outpatient rehabilitation facility" or "CORF" means a facility that offers a coordinated intensive rehabilitation day program that uses an interdisciplinary team approach and includes, at a minimum, physicians' services and rehabilitation nursing in addition to at least two of the following four therapy services: (i) physical therapy, (ii) occupational therapy, (iii) cognitive rehabilitation therapy, or (iv) speech-language pathology.

"Licensed practitioner of the healing arts" means either a nurse practitioner, a physician assistant, or other practitioner as licensed by the Commonwealth to render covered services.

"Physical rehabilitation services" means medically prescribed treatments for improving or restoring functions that have been impaired by illness or injury, or where function has been permanently lost or reduced by illness or injury, for improving the individual's ability to perform those tasks required for independent functioning.

"Plan of care" means a written order signed and dated by a physician or other licensed practitioner that is specific to the individual that includes orders for rehabilitation therapies, including the frequency and duration of services; required medications; treatments; diet; and other services as needed, for example, psychological services, social work services, or therapeutic recreation services.

"Recertification" means that the physician or other licensed practitioner shall sign and date at least every 60 days a written statement in the individual's medical record of the continuing need for intensive rehabilitation services.

"Therapist plan of care" means a written treatment plan, developed by each licensed therapist involved with the individual's care, to include measurable long-term and short-term goals, interventions or modalities, frequency and duration, and a discharge disposition. These therapist plans of care shall be written, signed, and dated by either a licensed physical or occupational therapist, speech-language pathologist, cognitive rehabilitative therapist, psychologist, social worker, or certified therapeutic recreational specialist.

~~A.~~ B. Medicaid covers intensive inpatient physical rehabilitation services ~~as defined in subsection D of this section~~ in facilities certified as physical rehabilitation hospitals or physical rehabilitation units in acute care hospitals ~~which have been certified by the Department of Health to meet the requirements to be excluded from the Medicare Prospective Payment System~~.

~~B.~~ C. Medicaid covers intensive outpatient physical rehabilitation services ~~as defined in subsection D of this section~~ in facilities ~~which~~ that are certified as ~~Comprehensive Outpatient Rehabilitation Facilities~~ comprehensive outpatient rehabilitation facilities (CORFs). With the exception of the physician admission certification statement, all of the service criteria for intensive rehabilitation services also apply to CORFs.

~~C. These facilities are excluded from the 21 day limit otherwise applicable to inpatient hospital services. Cost reimbursement principles are defined in 12VAC30-70-10 through 12VAC30-70-130.~~

D. The application of a national standardized set of medical necessity criteria in use in the industry, such as McKesson InterQual® Criteria or an equivalent standard authorized in advance by DMAS, shall be required for this service. In addition, an individual qualifies for intensive inpatient rehabilitation or comprehensive outpatient physical rehabilitation as provided in a CORF if all of the following criteria are met:

1. Adequate treatment of the individual's medical condition requires an intensive physical rehabilitation program consisting of an interdisciplinary coordinated team approach to improve his ability to function as independently as possible.

2. It has been established that the rehabilitation program cannot be safely and adequately carried out in a less intensive setting.

3. In addition to the medical condition requirement, individuals shall meet the following criteria in order to be eligible for intensive inpatient rehabilitation or comprehensive outpatient physical rehabilitation provided in a CORF:

a. The individual shall require at least two of these four therapies in addition to requiring rehabilitative skilled nursing:

(1) Occupational therapy;

(2) Physical therapy;

(3) Cognitive rehabilitation therapy; or

(4) Speech-language pathology services.

b. The individual's medical condition shall be stable and compatible with an active rehabilitation program.

4. The individual shall (i) have a rehabilitation potential such that the individual's condition can be expected, based on the physician's assessment, to improve significantly in a reasonable and generally predictable period of time or (ii) require rehabilitation services as necessary toward the establishment of a safe and effective home maintenance therapy program required in connection with a specific diagnosis.

E. Within 24 hours of an individual's admission to intensive physical rehabilitation services, all of the physician requirements of 12VAC30-60-120 A shall be met.

~~D.~~ F. An intensive physical rehabilitation program provides medically necessary intensive skilled rehabilitation nursing, physical therapy, occupational therapy, and, if needed, speech-language pathology, cognitive rehabilitation, prosthetic-orthotic services, psychology, social work, and therapeutic recreation services. With the exception of CORF services, the physician or other licensed practitioner shall be responsible for admission and discharge orders. If verbal orders are given, written plans of care shall be signed and dated within 72 hours of the verbal order. The nursing staff ~~must~~ shall support the other disciplines in carrying out the ~~activities of daily living, utilizing correctly the training received in therapy,~~ individual's interdisciplinary plan of care treatment activities on the medical nursing unit and furnishing other needed nursing services. The ~~day to day activities~~ individual interdisciplinary plan of care must be carried out

under the continuing direct supervision of a physician or other licensed practitioner with special training or experience in the field of physical medicine and rehabilitation. For CORF services, only physicians shall be permitted to initiate plans of care or orders.

1. For an individual with a potential for physical rehabilitation for which an outpatient assessment cannot be adequately performed, an admission to intensive inpatient rehabilitation for an evaluation of no more than seven calendar days in duration shall be allowed. During this admission, a comprehensive rehabilitation evaluation shall be made of (i) the individual's medical condition, functional limitations, prognosis, possible need for corrective surgery, and ability to participate in rehabilitation and (ii) the existence of any social problems affecting rehabilitation. After these evaluations have been made, the physician, in consultation with the interdisciplinary rehabilitation team, shall determine and justify the level of care required to achieve the stated goals.

2. If during a previous hospital admission the individual completed a rehabilitation program for essentially the same condition for which inpatient hospital rehabilitation care is now being considered, reimbursement for the evaluation shall not be covered unless there is a documented intervening circumstance, such as an injury or serious illness, that necessitates a reevaluation.

3. Admissions for evaluation or training, or both, for solely vocational or educational purposes or for developmental or behavioral assessments shall not be covered services under the authority of this section.

~~E. Nothing in this regulation is intended to preclude DMAS from negotiating individual contracts with in-state intensive physical rehabilitation facilities for those individuals with special intensive rehabilitation needs.~~

G. All providers of rehabilitation services shall be enrolled as a Medicaid provider. Inpatient rehabilitation providers and CORFS shall enroll via the Rehabilitation Hospital Participation Agreement, and Comprehensive Outpatient Rehab Facility Participation Agreement, respectively.

~~F~~ H. To receive continued intensive rehabilitation services, the ~~patient~~ individual must demonstrate an ability to actively participate in goal-related therapeutic interventions developed by the interdisciplinary team. This shall be evidenced by regular attendance in planned therapy activities and demonstrated progress toward the established goals.

~~G.~~ I. Intensive rehabilitation services shall be considered for termination regardless of the ~~preauthorized~~ service authorized length of stay when ~~any~~ one or more of the following conditions are met:

1. No further potential for improvement is demonstrated~~. The patient~~ and the individual has reached his maximum progress ~~and a safe and effective maintenance program has been developed.~~;

2. ~~There is limited motivation~~ Lack of participation on the part of the individual ~~or caregiver.~~ is evident;

3. ~~The individual has an~~ An unstable condition ~~that~~ affects ~~his~~ the individual's ability to actively participate, as defined in subsection A of this section, in a rehabilitative plan~~.~~ of care;

4. Progress toward an established goal or goals cannot be achieved within a reasonable period of time~~.~~ as determined by the licensed therapist;

5. The established goal serves no purpose to increase meaningful functional or cognitive capabilities~~.~~;

6. The service ~~can be provided by someone other than a skilled rehabilitation professional~~ no longer requires the skills of a qualified therapist; or

7. A home maintenance program has been established to maintain the individual's function to the level to which it has been restored.

NOTICE: The following forms used in administering the regulation were filed by the agency. The forms are not being published; however, online users of this issue of the Virginia Register of Regulations may click on the name of a form with a hyperlink to access it. The forms are also available from the agency contact or may be viewed at the Office of the Registrar of Regulations, General Assembly Building, 2nd Floor, Richmond, Virginia 23219.

FORMS (12VAC30-50)

Virginia Uniform Assessment Instrument, UAI, Virginia Long-Term Care Council (1994).

I.V. Therapy Implementation Form, DMAS-354 (eff. 6/98).

Health Insurance Claim Form, Form HCFA-1500 (12/90).

Certificate of Medical Necessity-Durable Medical Equipment and Supplies, DMAS-352 (rev. 7/10).

Questionnaire to Assess an Applicant's Ability to Independently Manage Personal Attendant Services in the CD-PAS Waiver or DD Waiver, DMAS-95 Addendum (eff. 8/00).

DD Waiver Enrollment Request, DMAS-453 (eff. 1/01).

DD Waiver Consumer Service Plan, DMAS-456 (eff. 1/01).

DD Medicaid Waiver -- Level of Functioning Survey -- Summary Sheet, DMAS-458 (eff. 1/01).

Documentation of Recipient Choice between Institutional Care or Home and Community-Based Services (eff. 8/00).

Comprehensive Outpatient Rehab Facility Participation Agreement (undated; filed 11/2015)

Rehabilitation Hospital Participation Agreement (undated; filed 11/2015)

**12VAC30-60-120. ~~Utilization control~~ Quality management: Intensive physical rehabilitative rehabilitation or CORF services.**

~~A. A patient qualifies for intensive inpatient rehabilitation or comprehensive outpatient physical rehabilitation as provided in a comprehensive outpatient rehabilitation facility (CORF) if the following criteria are met:~~

~~1. Adequate treatment of his medical condition requires an intensive rehabilitation program consisting of an interdisciplinary coordinated team approach to improve his ability to function as independently as possible; and~~

~~2. It has been established that the rehabilitation program cannot be safely and adequately carried out in a less intense setting.~~

~~B. In addition to the disability requirement, participants shall meet the following criteria:~~

~~1. Require at least two of the listed therapies in addition to rehabilitative nursing:~~

~~a. Occupational therapy.~~

~~b. Physical therapy.~~

~~c. Cognitive rehabilitation.~~

~~d. Speech/language pathology services.~~

~~2. Medical condition stable and compatible with an active rehabilitation program.~~

~~3. For continued intensive rehabilitation services, the patient must demonstrate an ability to actively participate in goal related therapeutic interventions developed by the interdisciplinary team. This is evidenced by regular attendance in planned activities and demonstrated progress toward the established goals.~~

~~4. Intensive rehabilitation services are to be considered for termination regardless of the preauthorized length of stay when any of the following conditions are met:~~

~~a. No further potential for improvement is demonstrated. The patient has reached his maximum progress and a safe and effective maintenance program has been developed.~~

~~b. There is limited motivation on the part of the individual or caregiver.~~

~~c. The individual has an unstable condition that affects his ability to participate in a rehabilitative plan.~~

~~d. Progress toward an established goal or goals cannot be achieved within a reasonable length of time.~~

~~e. The established goal serves no purpose to increase meaningful function or cognitive capabilities.~~

~~f. The service can be provided by someone other than a skilled rehabilitation professional.~~

A. Within 24 hours of an individual's admission for either intensive inpatient rehabilitation or CORF services, a physician shall be required to complete and sign and date the admission certification statement, as defined in 12VAC30-50-225 and 42 CFR 456.60, of the need for intensive rehabilitation or CORF services and the initial plan of care or orders.

1. Excluding CORF services, all other plans of care for inpatient rehabilitation services, including 60-day recertifications and the 60-day plan of care renewal orders shall be ordered by either a physician or a licensed practitioner of the healing arts including, but not limited to, nurse practitioners or physician assistants, within the scope of their licenses under state law.

2. If therapy services are recertified by a practitioner of the healing arts other than a physician, supervision shall be performed by a physician as required by §§ 54.1-2952 and 54.1-2957.01 of the Code of Virginia and 42 CFR 456.60.

3. For CORF providers, federal requirements do not permit nurse practitioners or physician assistants to order CORF intensive rehabilitation services. A physician shall be responsible for all documentation requirements including, but not limited to, admission certifications, recertifications, plans of care, progress notes, discharge orders, and any other required documentation (42 CFR 485.58(a)(i)).

4. Admission certification requirements shall apply to all individuals who are currently Medicaid eligible and to those individuals for whom a retroactive Medicaid eligibility determination is anticipated for coverage of an inpatient rehabilitative stay or for CORF services.

~~C.~~ B. Within 72 hours of ~~a patient's~~ an individual's admission to an intensive rehabilitation or CORF program~~,~~ or ~~within 72 hours of~~ upon notification to the ~~facility~~ provider of the ~~patient's~~ individual's Medicaid eligibility or that his Medicare benefits are exhausted, the ~~facility~~ provider shall notify ~~the Department of Medical Assistance Services~~ DMAS or its contractor in writing, or as required, of the ~~patient's~~ individual's admission and the medical need for service authorization.

1. This notification shall include a description of the admitting ~~diagnoses~~ diagnosis, plan of ~~treatment~~ care, and expected progress and a physician's written admission certification statement that the ~~patient~~ individual meets the rehabilitation admission criteria. ~~The Department of Medical Assistance Services will make a determination as to the appropriateness of the admission for Medicaid payment~~ DMAS or its contractor shall review such requests for service authorization and make a determination based on medical necessity criteria (see 12VAC30-50-225) as designated by DMAS, and notify the ~~facility~~ provider of its decision. If ~~payment is~~ services are approved, ~~the department will~~ DMAS or its contractor shall establish and notify the ~~facility~~ provider of an approved length of stay. Additional lengths of stay shall be requested ~~in writing~~ by the provider prior to the end date of the initial service authorization and must be approved by ~~the department~~ DMAS or its contractor for reimbursement. Admissions or lengths of stay not authorized by ~~the Department of Medical Assistance Services will~~ DMAS or

its contractor shall not be approved for ~~payment~~ reimbursement.

2. For continued intensive rehabilitation or CORF services, the individual must demonstrate an ability to actively participate in goal-related therapeutic interventions developed by the interdisciplinary team.

~~D.~~ C. Documentation of rehabilitation services ~~shall, at a minimum~~ required by DMAS for reimbursement for all disciplines of intensive rehabilitation or CORF services shall include all of the following:

1. A written physician admission certification statement.

2. A 60-day written recertification statement if a continued stay is determined to be medically necessary by the physician or other licensed practitioner of the healing arts within the scope of his license. Admission certification or recertification statements for CORF services shall be signed and dated only by licensed physicians.

3. A physician's written initial plan of care shall include orders for medications, the frequency and duration of services, required rehabilitation therapies, diet, medically necessary treatments, and other required services such as psychology, social work, and therapeutic recreation services.

a. Except for CORF services, the plan of care may be written by either a physician or by a licensed practitioner of the healing arts within the scope of his license.

b. For CORF services, the plan of care shall be written, signed, and dated only by a licensed physician.

~~1. Describe~~ 4. An initial evaluation that describes the individual's clinical signs and symptoms ~~of the patient~~ necessitating admission to the rehabilitation program~~;~~.

~~2. Describe~~ 5. A description of any prior treatment and attempts to rehabilitate the ~~patient;~~ individual.

~~3. Document an~~ 6. An accurate and complete chronological ~~picture~~ description of the ~~patient's~~ individual's clinical course and progress in treatment~~;~~.

7. Documentation, by each participating therapy discipline, of a comprehensive plan of care developed by the licensed therapist.

~~4. Document~~ 8. Documentation that an interdisciplinary coordinated ~~treatment~~ team plan of care specifically designed for the ~~patient~~ individual has been developed~~;~~ within seven days of admission.

~~5. Document in detail~~ 9. Detailed documentation of all treatment rendered to the ~~patient~~ individual in accordance with ~~the interdisciplinary~~ each discipline's plan of care with specific attention to frequency, duration, modality, the individual's response to treatment, and ~~identify~~ the identification of the licensed therapist or therapy assistant and dated signature of who provided such treatment~~;~~.

~~6. Document change~~ 10. Documentation of all changes in the ~~patient's~~ individual's condition or conditions~~;~~.

~~7. Describe responses to and the outcome of treatment; and~~

~~8. Describe~~ 11. Documentation describing a discharge plan ~~which~~ that includes the anticipated improvements in functional levels, the ~~time frames~~ timeframes necessary to meet ~~these~~ the individual's goals, and the ~~patient's~~ individual's discharge destination.

12. Discharge summary shall be completed by each licensed discipline offering services to include goal outcomes. The provider may complete the discharge summary before the individual's discharge or up to 30 days after the date of the individual's discharge.

D. Services not specifically documented in the ~~patient's~~ individual's medical record as having been rendered will be deemed not to have been rendered and no reimbursement will be provided. ~~All intensive rehabilitative services shall be provided in accordance with guidelines found in the Virginia Medicaid Rehabilitation Manual~~.

~~E For a patient with a potential for physical rehabilitation for which an outpatient assessment cannot be adequately performed, an intensive evaluation of no more than seven calendar days will be allowed. A comprehensive assessment will be made of the patient's medical condition, functional limitations, prognosis, possible need for corrective surgery, attitude toward rehabilitation, and the existence of any social problems affecting rehabilitation. After these assessments have been made, the physician, in consultation with the rehabilitation team, shall determine and justify the level of care required to achieve the stated goals.~~

~~If during a previous hospital stay an individual completed a rehabilitation program for essentially the same condition for which inpatient hospital care is now being considered, reimbursement for the evaluation will not be covered unless there is a justifiable intervening circumstance which necessitates a reevaluation.~~

~~Admissions for evaluation or training, or both, for solely vocational or educational purposes or for developmental or behavioral assessments are not covered services.~~

E. Intentional altering of medical record documentation shall be prohibited. If corrections in medical records are indicated, then they shall be made consistent with the procedures in the agency's provider-specific rehabilitation guidance documents (see https://www.virginiamedicaid.dmas.virginia.gov/wps/portal/ProviderManual).

F. The interdisciplinary rehabilitative team shall meet and prepare written documentation of the interdisciplinary team plan of care within seven days of admission. Interdisciplinary rehabilitative team conferences shall be held as needed but at least every two weeks to assess and document the ~~patient's~~ individual's progress or problems impeding progress. The interdisciplinary rehabilitative team shall assess the validity of the rehabilitation goals established at the time of the initial evaluation, determine if rehabilitation criteria continue to be met, and revise ~~patient~~ the individual's goals as needed. A

simple reading review by the various interdisciplinary rehabilitative team members of each others' notes ~~does~~ shall not constitute ~~a~~ an interdisciplinary rehabilitative team conference. Where practical, the ~~patient~~ individual or family or both shall participate in the interdisciplinary rehabilitative team conferences. A dated summary of the conferences, ~~noting~~ documenting the names and professional titles of the interdisciplinary rehabilitative team members present, shall be recorded in the clinical record and shall reflect the reassessments of the various ~~contributors~~ interdisciplinary rehabilitative team members.

~~Rehabilitation care is to be considered for termination, regardless of the approved length of stay, when further progress toward the established rehabilitation goal is unlikely or further rehabilitation can be achieved in a less intensive setting.~~

~~Utilization review shall be performed~~ G. DMAS or its contractor shall perform quality management reviews to determine if services ~~are~~ were appropriately provided as verified in the medical record documentation and to ensure that the services provided to Medicaid ~~recipients are~~ individuals were medically necessary and appropriate and that the ~~patient continues~~ individual continued to meet intensive rehabilitation criteria throughout the entire admission in the rehabilitation program. ~~Services not specifically documented in the patient's medical record as having been rendered shall be deemed not to have been rendered and no reimbursement shall be provided.~~

H. When a provider has been determined during a quality management review as not complying with DMAS regulations, DMAS or its contractor may request corrective action plans from the provider. The corrective action plan shall address how the provider will become compliant with DMAS regulations and requirements in the areas for which the provider has been cited for noncompliance.

~~C.~~ I. Properly documented medical reasons for furlough visits away from the inpatient rehabilitation provider may be included as part of an overall rehabilitation program. Unoccupied beds (or days) resulting from an overnight therapeutic furlough ~~will~~ shall not be reimbursed by ~~the Department of Medical Assistance Services~~ DMAS.

~~H.~~ J. Discharge planning shall be an integral part of the overall ~~treatment~~ plan ~~which~~ of care that is developed at the time of admission to the program. The plan shall identify the anticipated improvements in functional abilities and the probable discharge destination. The ~~patient~~ individual, unless unable to do so, or the responsible party shall participate in the discharge planning. Notations concerning changes in the discharge plan shall be entered into the record at least every two weeks, as a part of the required interdisciplinary team conference.

~~I. Rehabilitation services are medically prescribed treatment for improving or restoring functions which have been impaired by illness or injury or, where function has been permanently lost or reduced by illness or injury, to improve the individual's ability to perform those tasks required for independent functioning. The rules pertaining to them are:~~ K. Each of the following intensive rehabilitation professionals have specific licensure and documentation requirements based on their disciplines that shall be adhered to. This subsection outlines these requirements for physician, nursing, physical therapy, occupational therapy, speech-language pathology, cognitive rehabilitation therapy, psychology, social work, therapeutic recreation, and prosthetic/orthotic services as follows:

1. Physician services are those services furnished to an individual that meet all of the following conditions:

a. The individual shall be under the care of a physician who is legally authorized to practice and is acting within the scope of his license, or a licensed practitioner of the healing arts as defined in 12VAC30-50-225. The physician shall be licensed by the Virginia Board of Medicine and have specialized training or experience in the field of physical medicine and rehabilitation;

b. Within 24 hours of an individual's admission, the physician shall provide a written initial admission certification consistent with 42 CFR 456.60. The physician shall provide a 60-day written recertification statement of the continued need for intensive physical rehabilitation services. DMAS shall not provide reimbursement for services that are not supported by physician written admission certifications and 60-day recertifications;

c. The physician plan of care shall be written to include orders for medications, rehabilitation therapies, treatments, diet, and other required services pursuant to 42 CFR 456.80. Failure to obtain the physician written renewal of the plan of care every 60 days shall result in nonpayment for services rendered; and

d. The service shall be specific and provide effective treatment for the individual's condition in accordance with accepted standards of medical practice.

~~1.~~ 2. Rehabilitative nursing requires education, training, ~~or~~ and experience that provides special knowledge and clinical skills to diagnose nursing needs and treat individuals who have health problems characterized by alteration in either cognitive ~~and~~ or functional ability, or both. Rehabilitative nursing services are those services furnished ~~a patient which~~ to an individual that meet all of the following conditions:

a. The services shall be directly and specifically related to ~~an active~~ a written ~~treatment~~ plan ~~approved by a physician after any needed consultation with~~ of care developed by a registered nurse licensed by the Virginia Board of Nursing who is experienced in physical rehabilitation;

b. The services shall be of a level of complexity and sophistication~~,~~ or the individual's condition ~~of the patient~~ shall be of a nature~~,~~ that the services can only be performed by a registered nurse or licensed professional nurse, nursing assistant, or rehabilitation technician under the direct supervision of a registered nurse who is experienced in physical rehabilitation;

c. The services shall be provided with the expectation, based on the physician's assessment ~~made by the physician~~ of the ~~patient's~~ individual's rehabilitation potential, that the individual's condition ~~of the patient~~ will improve significantly, as determined by the physician and the interdisciplinary rehabilitative team, in a reasonable and generally predictable period of time as determined by the nurse or therapist, or these services shall be necessary to the establishment of a safe and effective maintenance therapy program required in connection with a specific diagnosis; and

d. The service shall be specific and provide effective treatment for the ~~patient's~~ individual's condition. The amount, frequency, and duration of the service shall comport ~~in accordance~~ with accepted standards of medical practice ~~and include the intensity of rehabilitative nursing services which can only be provided in an intensive rehabilitation setting~~.

~~2.~~ 3. Physical therapy services are those services furnished ~~a patient which~~ to an individual that meet all of the following conditions:

a. The services shall be directly and specifically related to ~~an active~~ a written ~~treatment~~ plan ~~designed by a physician after any needed consultation with~~ of care developed by a physical therapist licensed by the Virginia Board of ~~Medicine~~ Physical Therapy;

b. The services shall be of a level of complexity and sophistication~~,~~ or the individual's condition ~~of the patient~~ shall be of a nature~~,~~ that the services can only be performed by a physical therapist licensed by the Virginia Board of ~~Medicine~~ Physical Therapy or a physical therapy assistant who is licensed by the Virginia Board of ~~Medicine~~ Physical Therapy and under the direct supervision of a qualified licensed physical therapist ~~licensed by the Board of Medicine~~;

c. The services shall be provided with the expectation, based on the physician's assessment ~~made by the physician~~ of the ~~patient's~~ individual's rehabilitation potential, that the individual's condition ~~of the patient~~ will improve significantly, as determined by the physician and the interdisciplinary rehabilitative team, in a reasonable and generally predictable period of time, or these services shall be necessary to the establishment of a safe and effective maintenance therapy program required in connection with a specific diagnosis; and

d. The services shall be specific and provide effective treatment for the ~~patient's~~ individual's condition. The amount, frequency, and duration of the services shall comport ~~in accordance~~ with accepted standards of medical practice~~; this includes the requirement that the amount, frequency and duration of the services shall be reasonable~~.

~~3.~~ 4. Occupational therapy services are those services furnished ~~a patient which~~ to an individual that meet all of the following conditions:

a. The services shall be directly and specifically related to ~~an active~~ a written ~~treatment~~ plan ~~designed by the physician after any needed consultation with~~ of care developed by an occupational therapist ~~registered and~~ certified by the ~~American Occupational Therapy Certification Board~~ National Board for Certification in Occupational Therapy and licensed by the Virginia Board of Medicine;

b. The services shall be of a level of complexity and sophistication~~,~~ or the individual's condition ~~of the patient~~ shall be of a nature~~,~~ that the services can only be performed by an occupational therapist registered and certified by the ~~American Occupational Therapy Certification Board~~ National Board for Certification in Occupational Therapy or an occupational therapy assistant certified by the ~~American Occupational Therapy Certification Board~~ National Board for Certification in Occupational Therapy and licensed by the Virginia Board of Medicine under the direct supervision of a qualified occupational therapist as defined ~~above~~ in subdivision 4 a of this subsection;

c. The services shall be provided with the expectation, based on the physician's assessment ~~made by the physician~~ of the ~~patient's~~ individual's rehabilitation potential, that the individual's condition ~~of the patient~~ will improve significantly, as determined by the physician and the interdisciplinary rehabilitative team, in a reasonable and generally predictable period of time, or these services shall be necessary to the establishment of a safe and effective maintenance therapy program required in connection with a specific diagnosis; and

d. The services shall be specific and provide effective treatment for the ~~patient's~~ individual's condition. The amount, frequency, and duration of the services shall comport ~~in accordance~~ with accepted standards of medical practice~~; this includes the requirement that the amount, frequency and duration of the services shall be reasonable~~.

~~4.~~ 5. Speech-language pathology therapy services are those services furnished ~~a patient which~~ to an individual that meet all of the following conditions:

a. The services shall be directly and specifically related to ~~an active~~ a written ~~treatment~~ plan ~~designed by a physician after any needed consultation with~~ of care developed by a speech-language pathologist licensed by the Virginia Board of Audiology and Speech-Language

Pathology or, if exempted from licensure by statute, meeting the requirements in ~~42 CFR 440.1109 (c)~~ 42 CFR 440.110(c);

b. The services shall be of a level of complexity and sophistication~~,~~ or the individual's condition ~~of the patient~~ shall be of a nature~~,~~ that the services can only be performed by either a speech-language pathologist licensed by the Virginia Board of Audiology and Speech-Language Pathology or by a speech-language assistant who has been certified by the board and who is under the direct supervision of the speech-language pathologist;

c. The services shall be provided with the expectation, based on the physician's assessment ~~made by the physician~~ of the ~~patient's~~ individual's rehabilitation potential, that the individual's condition ~~of the patient~~ will improve significantly, as determined by the physician and the interdisciplinary rehabilitative team, in a reasonable and generally predictable period of time, or these services shall be necessary to the establishment of a safe and effective maintenance therapy program required in connection with a specific diagnosis; and

d. The services shall be specific and provide effective treatment for the ~~patient's~~ individual's condition. The amount, frequency, and duration of the services shall comport ~~in accordance~~ with accepted standards of medical practice~~; this includes the requirement that the amount, frequency and duration of the services shall be reasonable~~.

~~5.~~ 6. Cognitive rehabilitation therapy services are those services furnished ~~a patient which~~ to an individual that meet all of the following conditions:

a. The services shall be directly and specifically related to ~~an active~~ a written ~~treatment~~ plan ~~designed by the physician after any needed consultation with~~ of care developed by a clinical psychologist experienced in working with the neurologically impaired and licensed by the Virginia Board of ~~Medicine~~ Psychology;

b. The services, based on the findings of the neuropsychological evaluation, shall be of a level of complexity and sophistication~~,~~ or the individual's condition ~~of the patient~~ shall be of a nature, that the services can only be rendered after a neuropsychological evaluation administered by a licensed clinical psychologist or licensed physician experienced in the administration of neuropsychological assessments ~~and licensed by the Board of Medicine~~ and in accordance with a plan of care ~~based on the findings of the neuropsychological evaluation~~;

c. Cognitive rehabilitation therapy services ~~may~~ shall be provided by occupational therapists, speech-language pathologists, ~~and~~ or psychologists, or all of these, who have experience in working with ~~the~~ neurologically impaired individuals when ~~provided under a plan recommended and coordinated by a physician or clinical psychologist licensed by the Board of Medicine~~ such services have been ordered by a physician or other licensed practitioner;

d. The cognitive rehabilitation services shall be an integrated part of the individual's interdisciplinary ~~patient care plan~~ plan of care and shall relate to information processing deficits which are a consequence of and related to a neurologic event;

e. The services include therapeutic activities to improve a variety of cognitive functions ~~such as~~, for example orientation, attention/concentration, reasoning, memory, recall, discrimination, and behavior; and

f. The services shall be provided with the expectation, based on the physician's or psychologist's assessment ~~made by the physician~~ of the ~~patient's~~ individual's rehabilitation potential, that the individual's condition ~~of the patient~~ will improve significantly in a reasonable and generally predictable period of time, or these services shall be necessary to the establishment of a safe and effective maintenance therapy program required in connection with a specific diagnosis.

~~6. Psychology~~ 7. Psychological services are those services furnished ~~a patient which~~ to an individual that meet all of the following conditions:

a. ~~The services~~ Services shall be ~~directly and specifically related to an active written treatment plan~~ ordered by a physician or other licensed practitioner;

b. The services shall be of a level of complexity and sophistication~~,~~ or the individual's condition ~~of the patient~~ shall be of a nature~~,~~ that the services as set out in the written plan of care can only be developed and performed by a qualified, licensed psychologist as required by ~~state law~~ the Virginia Board of Psychology or a licensed clinical social worker, a licensed professional counselor, or a licensed clinical nurse specialist-psychiatric;

c. The services shall be provided with the expectation, based on the assessment ~~made by the physician~~ of the ~~patient's~~ individual's rehabilitation potential, that the individual's condition ~~of the patient~~ will improve significantly in a reasonable and generally predictable period of time, or these services shall be necessary to the establishment of a safe and effective maintenance therapy program required in connection with a specific diagnosis; and

d. The services shall be specific and provide effective treatment for the ~~patient's~~ individual's condition. The amount, frequency, and duration of the services shall comport ~~in accordance~~ with accepted standards of medical practice~~; this includes the requirement that the amount, frequency and duration of the services shall be reasonable~~.

~~7.~~ 8. Social work services are those services furnished ~~a patient which~~ to an individual that meet all of the following conditions:

a. ~~The services~~ Services shall be ~~directly and specifically related to an active written treatment plan~~ ordered by a physician or other licensed practitioner;

b. The services shall be of a level of complexity and sophistication~~,~~ or the individual's condition ~~of the patient~~ shall be of a nature~~,~~ that the services as set out in the written plan of care can only be performed by a qualified social worker ~~as required~~ licensed by ~~state law~~ the Virginia Board of Social Work;

c. The services shall be provided with the expectation, based on the assessment ~~made by the physician~~ of the ~~patient's~~ individual's rehabilitation potential, that the condition of the ~~patient~~ individual will improve significantly in a reasonable and generally predictable period of time, or these services shall be necessary to the establishment of a safe and effective maintenance therapy program required in connection with a specific diagnosis; and

d. The services shall be specific and provide effective treatment for the ~~patient's~~ individual's condition. The amount, frequency, and duration of the services shall comport ~~in accordance~~ with accepted standards of practice~~; this includes the requirement that the amount, frequency and duration of the services shall be reasonable~~.

~~8. Recreational therapy~~ 9. Therapeutic recreation services are those services furnished ~~a patient which~~ to an individual that meet all of the following conditions:

a. ~~The services~~ Services shall be ~~directly and specifically related to an active written treatment plan~~ ordered by a physician or other licensed practitioner;

b. The services shall be of a level of complexity and sophistication~~,~~ or the individual's condition ~~of the patient~~ shall be of a nature~~,~~ that the services as set out in the written plan of care are performed as an integrated part of a comprehensive rehabilitation plan of care by a recreation therapist certified with the National Council for Therapeutic Recreation at the professional level;

c. The services shall be provided with the expectation, based on the assessment ~~made by the physician~~ of the ~~patient's~~ individual's rehabilitation potential, that the individual's condition ~~of the patient~~ will improve significantly in a reasonable and generally predictable period of time, or these services shall be necessary to the establishment of a safe and effective maintenance therapy program required in connection with a specific diagnosis; and

d. The services shall be specific and provide effective treatment for the ~~patient's~~ individual's condition. The amount, frequency, and duration of the services shall comport ~~in accordance~~ with accepted standards of practice~~; this includes the requirement that the amount, frequency and duration of the services shall be reasonable~~.

~~9.~~ 10. Prosthetic/orthotic services.

a. Prosthetic services furnished to a patient include prosthetic devices that replace all or part of an external body member~~,~~ and services necessary to design the device, including measuring, fitting, and instructing the patient in its use.

b. Orthotic device services furnished to a patient include orthotic devices that support or align extremities to prevent or correct deformities, or to improve functioning, and services necessary to design the device, including measuring, fitting and instructing the patient in its use.

c. Maxillofacial prosthetic and related dental services are those services that are specifically related to the improvement of oral function not to include routine oral and dental care.

d. The services shall be directly and specifically related to ~~an active written treatment~~ a written plan of care approved by a physician after consultation with a prosthetist, orthotist, or a licensed, board eligible prosthodontist~~,~~ who shall be certified in ~~Maxillofacial~~ maxillofacial prosthetics.

e. The services shall be provided with the expectation, based on the physician's or other licensed practitioner's assessment ~~made by the physician~~ of the ~~patient's~~ individual's rehabilitation potential, that the individual's condition ~~of the patient~~ will improve significantly in a reasonable and predictable period of time, or these services shall be necessary to ~~establish an improved functional state of maintenance~~ the establishment of a safe and effective maintenance therapy program.

f. The services shall be specific and provide effective treatment for the ~~patient's~~ individual's condition. The amount, frequency, and duration of the services shall comport ~~in accordance~~ with accepted standards of medical and dental practice~~; this includes the requirement that the amount, frequency, and duration of the services be reasonable~~.

**12VAC30-60-150. ~~General outpatient physical~~ Quality management review of outpatient rehabilitation therapy services.**

A. ~~Scope.~~ The following general conditions shall apply to reimbursable outpatient rehabilitation therapy services:

1. ~~Medicaid covers general outpatient physical rehabilitative services provided in outpatient settings of acute and rehabilitation hospitals, in school divisions, by home health agencies, and by rehabilitation agencies which have a provider agreement with the Department of Medical Assistance Services (DMAS).~~ The covered services and medical necessity criteria as set out in 12VAC30-50-200

shall apply to these outpatient rehabilitation therapy services.

2. Outpatient rehabilitative therapy services, as defined in 42 CFR 440.130, shall be prescribed by a licensed physician or a licensed practitioner of the healing arts, specifically either a nurse practitioner or physician assistant, and be part of a written plan of care.

3. ~~Outpatient rehabilitative services shall be provided in accordance with guidelines found in the Virginia Medicaid Rehabilitation Manual with the exception of such services provided in school divisions which shall be provided in accordance with guidelines found in the Virginia Medicaid School Division Manual. Utilization review shall include determinations that providers meet all the requirements of Virginia state regulations found in (12VAC30-130-10 through 12VAC30-130-80). Utilization review~~ Quality management reviews shall be performed by DMAS or its contractor to ensure that all rehabilitative services ~~are appropriately provided and that services~~ provided to Medicaid ~~recipients~~ individuals are medically necessary and appropriate. Services not specifically documented in the individual's medical record as having been rendered shall be deemed not to have been rendered and no reimbursement shall be provided.

B. Covered outpatient rehabilitative therapy services. Rehabilitation services shall be initiated by a physician or licensed practitioner for the evaluation and plan of care. Both require a physician or licensed practitioner signature, title, and full date.

~~1. Covered outpatient rehabilitative services for acute conditions shall include physical therapy, occupational therapy, and speech language pathology services. Any one of these services may be offered as the sole rehabilitative service and shall not be contingent upon the provision of another service. Such services may be provided by outpatient settings of hospitals, rehabilitation agencies, and home health agencies~~

~~2. Covered outpatient rehabilitative services for long-term, chronic conditions shall include physical therapy, occupational therapy, and speech language pathology services. Any one of these services may be offered as the sole rehabilitative service and shall not be contingent upon the provision of another service. Such services may be provided by outpatient settings of acute and rehabilitation hospitals, rehabilitation agencies, and school divisions.~~

~~C. Eligibility criteria for outpatient rehabilitative services. To be eligible for general outpatient rehabilitative services, the patient must require at least one of the following services: physical therapy, occupational therapy, speech language pathology services, and respiratory therapy. All rehabilitative services must be prescribed by a physician.~~

A plan of care for therapy services shall (i) include the specific procedures and modalities to be used (ii) identify the specific discipline to carry out the plan of care and (iii) indicate the frequency and duration of services.

~~D. Criteria for the provision of outpatient rehabilitative services.~~ C. All practitioners and providers of therapy services shall be required to meet state and federal licensing ~~and/or~~ or certification requirements, or both as may be applicable. ~~Services not specifically documented in the patient's medical record as having been rendered shall be deemed not to have been rendered, and no coverage shall be provided.~~

D. Documentation of physical therapy, occupational therapy, and speech-language pathology services provided in outpatient settings of acute and rehabilitation hospitals, nursing facilities, home health agencies, and rehabilitation agencies shall at a minimum include:

1. An initial evaluation that describes the clinical signs and symptoms of the individual's condition, including an accurate and complete chronological picture of the individual's clinical course and treatments. The initial evaluation or the reevaluation shall be signed, titled, and dated by the licensed therapist (i) when an individual is initially admitted to a service, (ii) when there is a significant change in the individual's condition, or (iii) when an individual is readmitted to a service.

2. A written plan of care specifically developed for the individual shall be signed, titled, and fully dated by a licensed therapist. Within 21 days of the plan of care start date, the physician or a licensed practitioner shall sign, title, and fully date the plan of care and it shall:

a. Describe specifically the anticipated goal-related improvements in functional level, frequency and duration of the ordered therapy or therapies, and the anticipated timeframes necessary to meet these long-term and short-term individual goals, including participation by the appropriate rehabilitation therapist or therapists, the individual, and the family or caregiver, as may be appropriate; and

b. Include a discharge plan that contains the anticipated improvements in functional levels and the anticipated timeframes necessary to meet the individual goals:

(1) For outpatient rehabilitative services for acute conditions, as defined in 12VAC30-50-200, the plan of care must be reviewed, updated, and signed and dated at least every 60 days by the licensed therapist and the physician or other licensed practitioner;

(2) For outpatient services for long-term, nonacute conditions, as defined in 12VAC30-50-200, the plan of care must be reviewed, updated, and signed and dated at least every 12 months by the licensed therapist and the physician or other licensed practitioner.

3. The documentation of all treatment rendered to the individual in the progress notes, in accordance with the written plan of care with specific attention to frequency,

duration, modality, and the individual's response to treatment. The licensed therapist must sign, title, and fully date all progress notes in the medical record. If therapy assistants provide the treatment under the supervision of a licensed therapist, the assistant shall also sign, title, and fully date the progress notes in the medical record.

4. A description of all changes in the individual's condition, response to the rehabilitative written plan of care, and appropriate revisions to the written plan of care.

5. A discharge summary to be completed by the licensed therapist who is providing the service at the time that the service is terminated, including a description of the individual's response to services, level of independence in carrying out learned skills and abilities, assistive technology necessary to carry out and maintain activities and skills, and recommendations for continued services (i.e., referrals to alternate providers, home maintenance programs, training to individuals or caregivers, etc.).

6. The therapist's signature, title, and full date (month/day/year) shall appear on all documentation; if therapy assistants provide the treatment, under the supervision of a licensed therapist, the supervising licensed therapist must document the findings of the supervisory onsite visit every 30 days.

E. Restrictions.

1. The intentional altering of medical record documentation shall be prohibited and is fraudulent. If corrections are indicated, then they shall be made in medical records consistent with the procedures in the agency's provider-specific guidance documents (see https://www.virginiamedicaid.dmas.virginia.gov/wps/portal/ProviderManual).

2. DMAS shall not reimburse for evaluations provided prior to the date of the physician's or other licensed practitioner's signature. DMAS shall not reimburse for provider-initiated additional reevaluations that are not specific to DMAS requirements and that are in excess of DMAS' requirements.

Part I

Outpatient Physical Rehabilitative Services (Repealed)

**12VAC30-130-10. ~~Scope.~~ (Repealed.)**

~~A. Medicaid covers outpatient physical rehabilitative services provided in outpatient settings. Services may be provided by acute and rehabilitation hospitals, by home health agencies, and by rehabilitation agencies which have a provider agreement with the Department of Medical Assistance Services.~~

~~B. Physical therapy and related services shall be prescribed by a physician and be part of a written plan of care that is personally signed and dated by the physician prior to the initiation of rehabilitation services. The physician may use a signature stamp, in lieu of writing his full name, but the stamp must, at a minimum, be initialed and dated at the time of the initialing within 21 days of the order.~~

~~C. Any one of these services may be offered as the sole rehabilitative service and is not contingent upon the provision of another service.~~

~~D. All practitioners and providers of services shall be required to meet State and Federal licensing or certification requirements.~~

~~E. Covered outpatient rehabilitative services for short-term, acute conditions shall include physical therapy, occupational therapy, and speech-language pathology services. "Acute conditions" shall be defined as conditions which are expected to be of brief duration (less than 12 months) and in which progress toward established goals is likely to occur frequently.~~

~~F. Covered outpatient rehabilitative services for long-term, nonacute conditions shall include physical therapy, occupational therapy, and speech-language pathology services. "Nonacute conditions" shall be defined as those conditions which are of long duration (greater than 12 months) and in which progress toward established goals is likely to occur slowly.~~

~~G. All services shall be specific and provide effective treatment for the patient's condition in accordance with accepted standards of medical practice; this includes the requirement that the amount, frequency, and duration of the services shall be reasonable.~~

~~H. Rehabilitative services may be provided when all the following conditions are evidenced:~~

~~1. There is potential for improvement in the patient's condition or the patient has reached his maximum progress and requires the development of a safe and effective maintenance program;~~

~~2. There is motivation on the part of the patient and caregiver;~~

~~3. The patient's medical condition is stable; and~~

~~4. Progress toward goal achievement is expected within a reasonable time frame consistent with expectations for acute conditions and nonacute conditions.~~

~~I. Continued rehabilitation services may be provided when there is documentation of a positive history of response to previous therapy or evidence that a change in patient potential for improvement has occurred, or that a new or different therapeutic approach may effect a positive outcome.~~

~~J. Rehabilitative services shall be provided according to guidelines found in the Virginia Medicaid Rehabilitation Manual.~~

**12VAC30-130-15. ~~Eligibility criteria for outpatient rehabilitative services.~~ (Repealed.)**

~~To be eligible for outpatient rehabilitative services for an acute or long-term, nonacute condition, the patient must require at least one of the following services: physical~~

~~therapy, occupational therapy, and speech-language pathology services.~~

**12VAC30-130-20. ~~Physical therapy.~~ (Repealed.)**

~~A. Services for individuals requiring physical therapy are provided only as an element of hospital outpatient service, nursing facility service, home health service, rehabilitation agency service; or when otherwise included as an authorized service by a cost provider who provides rehabilitation services.~~

~~B. Effective July 1, 1988, the Program will not provide direct reimbursement to enrolled providers for physical therapy service rendered to patients residing in long-term care facilities. Reimbursement for these services is and continues to be included as a component of the nursing facilities' operating cost.~~

~~C. Physical therapy services meeting all of the following conditions shall be furnished to patients:~~

~~1. The services shall be directly and specifically related to an active written treatment plan designed and personally signed and dated (as in 12VAC30-130-10 B) by a physician after any needed consultation with a physical therapist licensed by the Board of Physical Therapy; and~~

~~2. The services shall be of a level of complexity and sophistication, or the condition of the patient shall be of a nature that the services can only be performed by a physical therapist licensed by the Board of Physical Therapy, or a physical therapy assistant who is licensed by the Board of Physical Therapy and is under the direct supervision of a physical therapist licensed by the Board of Physical Therapy. When physical therapy services are provided by a qualified physical therapy assistant, such services shall be provided under the supervision of a qualified physical therapist who makes an onsite supervisory visit at least once every 30 days. This supervisory visit shall not be reimbursable.~~

**12VAC30-130-30. ~~Occupational therapy.~~ (Repealed.)**

~~A. Services for individuals requiring occupational therapy are provided only as an element of hospital outpatient service, nursing facility service, home health service, rehabilitation agency; or when otherwise included as an authorized service by a cost provider who provides rehabilitation services.~~

~~B. Effective September 1, 1990, Virginia Medicaid will not make direct reimbursement to providers for occupational therapy services for Medicaid recipients residing in long-term care facilities. Reimbursement for these services is and continues to be included as a component of the nursing facilities' operating cost.~~

~~C. Occupational therapy services shall be those services furnished a patient which meet all the following conditions:~~

~~1. The services shall be directly and specifically related to an active written treatment plan designed and personally signed and dated (as in 12VAC30-130-10 B) by the physician after any needed consultation with an occupational therapist registered and certified by the American Occupational Therapy Certification Board; and~~

~~2. The services shall be of a level of complexity and sophistication, or the condition of the patient shall be of a nature that the services can only be performed by an occupational therapist registered and certified by the American Occupational Therapy Certification Board, a graduate of a program approved by the Council on Medical Education of the American Medical Association and engaged in the supplemental clinical experience required before registration by the American Occupational Therapy Association under the supervision of an occupational therapist as defined above, or an occupational therapy assistant who is certified by the American Occupational Therapy Certification Board under the direct supervision of an occupational therapist as defined above. When occupational therapy services are provided by a qualified occupational therapy assistant or a graduate engaged in supplemental clinical experience required before registration, such services shall be provided under the supervision of a qualified occupational therapist who makes an onsite supervisory visit at least once every 30 days. This supervisory visit shall not be reimbursable.~~

**12VAC30-130-40. ~~Services for individuals with speech, hearing, and language disorders.~~ (Repealed.)**

~~A. These services are provided by or under the supervision of a speech pathologist or an audiologist only as an element of hospital outpatient service, nursing facility service, home health service, rehabilitation agency; or when otherwise included as an authorized service by a cost provider who provides rehabilitation services.~~

~~B. Effective September 1, 1990, Virginia Medicaid will not make direct reimbursement to providers for speech-language pathology services for Medicaid recipients residing in long-term care facilities. Reimbursement for these services is and continues to be included as a component of the nursing facilities' operating cost.~~

~~C. Speech-language therapy services shall be those services furnished a patient which meet all the following conditions:~~

~~1. The services shall be directly and specifically related to an active written treatment plan designed and personally signed and dated by a physician after any needed consultation with a speech-language pathologist licensed by the Board of Audiology and Speech-Language Pathology, or, if exempted from licensure by statute, meeting the requirements in 42 CFR 440.110(c); and~~

~~2. The services shall be of a level of complexity and sophistication, or the condition of the patient shall be of a nature that the services can only be performed by a speech-language pathologist licensed by the Board of Audiology and Speech-Language Pathology.~~

**12VAC30-130-42. ~~Service limitations.~~ (Repealed.)**

~~The following general conditions shall apply to reimbursable outpatient physical therapy, occupational therapy, and speech-language pathology services:~~

~~1. Patient must be under the care of a physician who is legally authorized to practice and who is acting within the scope of his license.~~

~~2. Services shall be furnished under a written plan of treatment and must be established, personally signed and dated (as in 12VAC30-130-10 B), and periodically reviewed by a physician. The requested services or items must be necessary to carry out the plan of treatment and must be related to the patient's condition.~~

~~3. A physician recertification shall be required at least every 60 days for acute rehabilitation services and at least annually for long-term, nonacute services and must be personally signed and dated (as in 12VAC30-130-10 B) by the physician who reviews the plan of treatment. The physician recertification statement must indicate the continuing need for services and should estimate how long rehabilitative services will be needed. Certification and recertification must be personally signed and dated (as in 12VAC30-130-10 B) prior to the initiation or continuation of rehabilitation services.~~

~~4. The physician orders for therapy services shall include the specific procedures and modalities to be used, identify the specific discipline to carry out the plan of care, and indicate the frequency and duration of services.~~

~~5. Utilization review shall be performed to determine if services are appropriately provided and to ensure that services provided to Medicaid recipients are medically necessary and appropriate. Services not specifically documented in the patient's medical record as having been rendered shall be deemed not to have been rendered and no coverage shall be provided.~~

~~6. Rehabilitation services are to be considered for termination regardless of the preauthorized visits or services when any of the following conditions are met:~~

~~a. No further potential for improvement is demonstrated.~~

~~b. Limited motivation on the part of the individual or caregiver is evident.~~

~~c. The individual has an unstable condition that affects his ability to participate in a rehabilitative plan.~~

~~d. Progress toward an established goal or goals cannot be achieved within a reasonable period of time.~~

~~e. The established goal or goals serve no purpose toward achieving a significant, meaningful improvement in functional or cognitive capabilities.~~

~~f. The service can be provided by someone other than a skilled rehabilitation professional.~~

**12VAC30-130-50. ~~Authorization for services.~~ (Repealed.)**

~~A. Physical therapy, occupational therapy, and speech-language pathology services provided in outpatient settings of acute and rehabilitation hospitals, rehabilitation agencies, or home health agencies shall include authorization for up to five visits by each ordered rehabilitative service annually. School-based rehabilitation services shall not be subject to any prior authorization requirements. The provider shall maintain documentation to justify the need for services. A visit shall be defined as the treatment session that a rehabilitative therapist is with a client to provide services prescribed by the physician. Visits shall not be defined as modality-specific or in measurements or in increments of time.~~

~~B. The provider shall request from DMAS authorization for visits deemed necessary by a physician beyond the number of visits not requiring preauthorization (five). Documentation for medical justification must include personally signed and dated (as in 12VAC30-130-10 B) physician orders or a plan of care signed and dated by the physician which includes the elements described in 12VAC30-130-42. Authorization for extended services shall be based on individual need. Payment shall not be made for additional service unless the extended provision of services has been authorized by DMAS. Care rendered beyond the five visits allowed annually which have not been authorized by DMAS shall not be approved for payment.~~

~~C. Payment shall not be made for requests submitted more than 12 months after the termination of services.~~

**12VAC30-130-60. ~~Documentation requirements.~~ (Repealed.)**

~~A. Documentation of physical therapy, occupational therapy, and speech-language pathology services provided by a hospital-based outpatient setting, home health agency, a rehabilitation agency, or a school division shall, at a minimum:~~

~~1. Describe the clinical signs and symptoms of the patient's condition;~~

~~2. Include an accurate and complete chronological picture of the patient's clinical course and treatments;~~

~~3. Document that a plan of care specifically designed for the patient has been developed based upon a comprehensive assessment of the patient's needs;~~

~~4. Include all treatment rendered to the patient in accordance with the plan with specific attention to frequency, duration, modality, response, and shall identify who provided care (include full name and title);~~

~~5. Include a copy of the personally signed and dated (as in 12VAC30-130-10 B) physician's orders / plan of care;~~

~~6. Describe changes in the patient's condition, response to the rehabilitative treatment plan, and appropriate revisions to the plan of care;~~

~~7. Describe a discharge plan which includes the anticipated improvements in functional levels and the time frames necessary to meet the goals;~~

~~8. Include an individualized plan of care which describes the anticipated goal related improvements in functional level and the time frames necessary to meet these goals. The plan of care shall include participation by the appropriate rehabilitation therapist or therapists, the patient, and the family or caregiver:~~

~~a. For outpatient rehabilitative services for acute conditions, the plan of care must be reviewed and updated at least every 60 days by the interdisciplinary team.~~

~~b. For outpatient services for long-term, nonacute conditions, the plan of care must be reviewed and updated at least annually. In school divisions, the plan of care shall cover outpatient rehabilitative services provided during the school year, and~~

~~9. Include discharge summary to be completed by the discipline providing the service at the time that the service is terminated and to include a description of the patient's response to services, level of independence in carrying out learned skills and abilities, assistive technology necessary to carry out and maintain activities and skills, and recommendations for continued services (i.e., referrals to alternate providers, training to caregivers, etc.). When services are provided by school divisions, a discharge summary shall not be required when services are interrupted at the end of a school term; a discharge summary shall be necessary when rehabilitative services are terminated because the patient no longer needs the services.~~

~~B. Services not specifically documented in the patient's medical record as having been rendered shall be deemed not to have been rendered and no coverage shall be provided.~~

VA.R. Doc. No. R16-2606; Filed October 23, 2015, 2:10 p.m.

## Fast-Track Regulation

Title of Regulation: **12VAC30-90. Methods and Standards for Establishing Payment Rates for Long-Term Care (amending 12VAC30-90-20, 12VAC30-90-70, 12VAC30-90-257).**

Statutory Authority: § 32.1-325 of the Code of Virginia; 42 USC § 1396 et seq.

Public Hearing Information: No public hearings are scheduled.

Public Comment Deadline: December 16, 2015.

Effective Date: December 31, 2015.

Agency Contact: Emily McClellan, Regulatory Supervisor, Policy Division, Department of Medical Assistance Services, 600 East Broad Street, Suite 1300, Richmond, VA 23219, telephone (804) 371-4300, FAX (804) 786-1680, or email emily.mcclellan@dmas.Virginia.gov.

Basis: Section 32.1-325 of the Code of Virginia grants to the Board of Medical Assistance Services the authority to administer and amend the State Plan for Medical Assistance. Section 32.1-324 of the Code of Virginia authorizes the Director of the Department of Medical Assistance Services (DMAS) to administer and amend the State Plan for Medical Assistance according to the board's requirements. The Medicaid authority, as established by § 1902(a) of the Social Security Act (42 USC § 1396a), provides governing authority for payments for services.

42 CFR 430.10 et seq. requires states to modify Title XIX State Plans whenever material changes are made in state policies for the Medicaid program. The Title XIX State Plan is the Commonwealth's comprehensive written statement that describes the nature and scope of the Virginia Medicaid program and is the basis upon which the Commonwealth claims its federal financial participation.

Purpose: This action modifies three sections in the nursing facility (NF) reimbursement methodology to reflect updated policies resulting from the closure of state operated intermediate care facilities for individuals with intellectual disabilities (ICF/IIDs) and more current policies for NFs reporting and resolution of credit balances. The third change is a technical correction of an incorrect internal citation that has been incorporated.

None of these changes has any effect on the health, safety, or welfare of citizens of the Commonwealth or Medicaid individuals. The change to the calculation of the ICF/IID per diem reimbursement has no effect because none of these types of facilities are being paid their potential ceiling amounts. The changes to NF credit balance reporting may affect enrolled nursing facility providers. The technical correction affects neither individuals nor providers.

Rationale for Using Fast-Track Process: This regulatory action is noncontroversial because it has no effect on Medicaid individuals. The changes to the ICF/IID rate setting and the credit balance reporting are expected to be well received by providers as they facilitate their processes.

Substance: The sections of the State Plan for Medical Assistance that are affected by this action are the 12VAC30-90-20, 12VAC30-90-70, and 12VAC30-90-257.

12VAC30-90-20. Nursing home payment system; generally. This section establishes the payment methodology that DMAS uses for nursing facilities. It includes three separate cost components: plant or capital costs, operating costs (direct patient care costs), and nurse aide training and competency evaluation and competency evaluation costs.

Subsection D provides for the separate treatment of state-owned (the Department of Behavioral Health and Developmental Services) or federal government-owned (Department of Veterans Services) nursing facilities. All of these types of nursing facilities are exempt from the prospective payment system and instead reimbursed retrospectively on the basis of reasonable costs in accordance

with the Medicare principles of reimbursement. These institutions are limited to the highest rate paid to a state ICF/IID institution as determined each July 1 by DMAS.

The need for the changes to 12VAC30-90-20 derives from the U.S. Department of Justice (DOJ) lawsuit against the Department of Behavioral Health and Developmental Services, which is resulting in the closure of the state's training centers. Most of the individuals who have been residing in these facilities are being transitioned into community settings to be cared for by one of the Medicaid home and community-based care waiver programs. This transition to communities is set out in the settlement agreement between the Commonwealth and DOJ.

As the training centers' individual populations are declining, the centers' operating and overhead costs are increasing. These centers' operating and overhead costs include: (i) utility payments; (ii) staff salaries and health and welfare benefits, and (iii) administrative costs. As the individual populations decline, they generate fewer and fewer patient care days for which these facilities can bill DMAS. At the same time patient care days are declining and generating fewer billable days, these centers are experiencing increasing overhead costs from employees who are retiring or are eligible for severance pay.

This extreme imbalance of rapidly declining billable patient care days with rapidly increasing operating costs is causing the ratio between these two items to drive higher and higher per day costs. Since DMAS uses this per day cost from these state centers to set the reimbursement rates for both public and private intermediate care facilities for individuals with intellectual disabilities, this rate setting methodology must be changed.

DMAS recommends that the current methodology be replaced with one that uses a benchmark amount (from state fiscal year (SFY) 2012) which is then slightly increased by the annual nursing facility inflation factor based on the percentage of change in the moving average of a nursing facility's market basket of routine service costs. This revised methodology will be appropriate in the long term for the declining number of state-owned ICF/IIDs and the increasing number of private ICF/IIDs.

12VAC30-90-70. Cost report submission. This section is included to modify an incorrect internal regulatory citation. Currently, subdivision A 6 cites 12VAC30-90-37; it should cite 12VAC30-90-38.

12VAC30-90-257. Credit balance reporting. No later than 30 days after the close of every quarter, NFs are required to report credit balances to DMAS. Then the NF issues a check for the credit amount to DMAS or submits claim adjustments to rectify the credit balance. In the absence of either of these two repayment options, DMAS retracts the credit amount owed from future payments owed to the NF. DMAS is also permitted to impose penalties for NF failures to report and repay such Medicaid credit balances.

Beginning in 2003, CMS required that all state Medicaid agencies conduct this activity for hospitals. At that time, DMAS promulgated these regulations, which follow the Medicare model for hospitals of reporting and recovery. For several reasons, this approach has been found to be unworkable.

There are differences in how Medicare covers NF services as compared to Medicaid. Medicare covers only relatively short lengths of NF stays for its beneficiaries whereas Medicaid's lengths of NF stays can range over years. Medicare patients are responsible for annual deductible and coinsurance amounts determined at discharge. Medicaid patients have patient pay requirements (individuals are required to contribute towards the costs of their NF care) that reduces allowable costs by an individual's financial means, including Social Security payments, since Medicaid is a payer of last resort.

Furthermore, there are 262 nursing facilities that are currently enrolled in Virginia Medicaid. Continuing to require NFs to make quarterly reports to DMAS would generate annually 1048 reports, each of which would require manual review and adjudication. This manual review and adjudication process would require an additional two or three more full-time staff members, at salaries and fringe benefit costs exceeding $150,000.

A recently completed audit by the U.S. Department of Health and Human Services Office of the Inspector General determined that NFs owe only a small amount, at any one time, of overpayments (less than $25,000) back to DMAS.

DMAS proposes to regularly remind NF providers, via their weekly remittance advice documents (computer-generated reports that explain the resolution of submitted claims), that they are expected to review their account ledgers, at least quarterly, to determine if they have any credit balances with DMAS. If providers do identify credit balances, they are able to easily adjust such amounts through the claims processing system by filing claim adjustments.

DMAS also proposes to follow up, during site visits at NFs for audits of Personal Fund Accounts, to ensure that this activity has been occurring and that the NF's account books are balanced. DMAS believes that combining this credit balance look-behind with Personal Fund Audits with nursing facilities is the most efficient and least cumbersome way to ensure that NFs are not inappropriately retaining large amounts of tax dollars.

Issues: There are no advantages or disadvantages to citizens in any of these actions. The primary advantages to the agency and the Commonwealth for the recommended changes to 12VAC30-90-20 and 12VAC30-90-257 are the judicious use of tax dollars with the more appropriate reimbursement levels for ICF/IID services and improved collections associated with NF credit balance reporting. Businesses may not like not being able to keep Medicaid payments for longer periods of time but are expected to appreciate the reduced penalties.

Department of Planning and Budget's Economic Impact Analysis:

Summary of the Proposed Amendments to Regulation. The proposed changes update 1) the calculation of the per diem reimbursement ceilings for Intermediate Care Facilities for Individuals with Intellectual Disabilities (ICF/IID) to account for state facility closures and 2) the nursing facility credit balance reporting requirements to reflect more current Medicaid policies.

Result of Analysis. The benefits likely exceed the costs for all proposed changes.

Estimated Economic Impact. One of the proposed changes updates the calculation of the per diem reimbursement ceilings for ICF/IID to account for state facility closures. Facilities that are owned by the Commonwealth or by the federal government are reimbursed retrospectively on the basis of their reasonable costs in accordance with the Medicare principles of reimbursement. The private facilities on the other hand are reimbursed prospectively. However, the private facility rates are limited to the highest rate paid to a state ICF/IID institution as determined for each fiscal year.

The need for the proposed changes derives from the Department of Justice (DOJ) suit against the Department of Behavioral Health and Developmental Services which is resulting in the closure of the state's training centers. According to the Department of Medical Assistance Services (DMAS), most of the individuals who have been residing in these facilities are being transitioned into community settings to be cared for by one of the Medicaid home and community based care waiver programs. This transition to communities is set out in the settlement agreement between the Commonwealth and DOJ.

As the training centers' individual populations are declining, the centers' per diem operating and overhead costs are increasing. These centers' operating and overhead costs include utility payments, staff salaries and health/welfare benefits, and administrative costs. Declining facility populations generate fewer and fewer patient care days for which these facilities can bill DMAS. At the same time that declining patient care days are generating fewer billable days, these centers are experiencing increasing costs from employees who are retiring or are eligible for severance pay.

This imbalance of declining billable patient care days with increasing operating costs is causing the ratio between these two items to drive per diem costs higher and higher. Since DMAS uses this per day cost from these state centers to set the reimbursement rates for both public and private facilities, this rate setting methodology is proposed to be updated.

DMAS proposes that the current methodology be replaced with one that uses a benchmark amount (from fiscal year 2012) which is then slightly increased by the annual nursing facility inflation factor that is based on the percentage of change in the moving average of a nursing facility's market basket of routine service costs. This revised methodology will be more appropriate in the long term for the declining number of state-owned ICF/IIDs and the increasing number of private ICF/IIDs. However, no significant economic impact is expected from this change upon promulgation of these regulations because currently none of these types of facilities are being paid their potential ceiling amounts.

The proposed changes also update the nursing facility credit balance reporting requirements to reflect more current Medicaid policies. Nursing facilities are required to report credit balances to DMAS no later than 30 days after the close of every quarter. Then either the facility issues a check for the credit amount to DMAS or submits claim adjustments to rectify the credit balance. In the absence of either of these two repayment options, DMAS retracts the credit amount owed from future payments owed to the facility. DMAS is also permitted to impose penalties for failures to report and repay such Medicaid credit balances.

Beginning in 2003, the Centers for Medicare and Medicaid Services required that all state Medicaid agencies conduct this activity for hospitals. At that time, DMAS promulgated these regulations for nursing facilities which follow the Medicare model for hospitals of reporting and recovery. For several reasons, this approach has been found to be problematic.

There are differences in how Medicare covers nursing facility services as compared to Medicaid. Medicare covers only relatively short lengths of nursing facility stays for its beneficiaries whereas Medicaid's lengths of nursing facility stays can range over years. Also, Medicare patients are responsible for annual deductible and coinsurance amounts determined at discharge. Medicaid patients have patient pay requirements that reduce allowable costs by individuals' financial means including Social Security payments since Medicaid is a payer of last resort.

Furthermore, there are 262 nursing facilities that are currently enrolled in Virginia Medicaid. DMAS estimates continuing to require nursing facilities to make quarterly reports would generate annually 1,048 reports that would require manual review and adjudication. This manual review/adjudication process would require an additional two to three more full-time staff at salaries and fringe benefit costs exceeding $150,000 per year. Similarly, the facilities would be required to devote additional staff time to prepare and submit these reports.

According to DMAS, a recently completed federal audit determined that nursing facilities owe only a small amount, at any one time, of overpayments (less than $25,000) back to DMAS.

DMAS proposes to regularly remind nursing facilities providers, via their weekly remittance advice documents (computer generated reports that explain the resolution of submitted claims), that they are expected to review their account ledgers, at least quarterly, to determine if they have any credit balances with DMAS. If providers identify credit balances, they would be able to easily adjust such amounts

through the claims processing system by filing claim adjustments.

DMAS also proposes to follow up, during site visits at nursing facilities for audits of personal fund accounts, to ensure that this activity has been occurring and that the nursing facility account books are balanced.

DMAS believes that combining this credit balance look-behind with personal fund audits with nursing facilities is the most efficient and least cumbersome way to ensure that nursing facilities are not inappropriately retaining large amounts of credit balances.

Businesses and Entities Affected. The proposed regulations apply to 252 nursing facilities and 46 private and five state-owned Intermediate Care Facilities for Individuals with Intellectual Disabilities.

Localities Particularly Affected. The proposed regulations are not expected to have a disproportional impact on any locality.

Projected Impact on Employment. The proposed credit balance reporting is expected to reduce facilities' and DMAS' demand for labor as they will not have to hire staff to create and review quarterly reports.

Effects on the Use and Value of Private Property. Reduced credit balance reporting would provide some administrative savings to the facilities and should have a positive impact on their asset values.

Small Businesses: Costs and Other Effects. The proposed changes do not introduce additional costs on small businesses. Other effects on small business would be the same as discussed above.

Small Businesses: Alternative Method that Minimizes Adverse Impact. The proposed changes do not have adverse impact on small businesses.

Real Estate Development Costs. No impact on real estate development costs is expected.

Agency's Response to Economic Impact Analysis: The agency has reviewed the economic impact analysis prepared by the Department of Planning and Budget. The agency concurs with this analysis.

Summary:

*The amendments, which modify the nursing facility (NF) reimbursement methodology, (i) update the calculation of the per diem ceilings reimbursements for intermediate care facilities for individuals with intellectual disabilities to account for closure of state facilities, (ii) make a technical correction to an incorporation by reference included in nursing facility cost reporting requirements, and (iii) update NF credit balance reporting requirements to reflect more current Medicaid policies.*

**12VAC30-90-20. Nursing home payment system; generally.**

A. Effective July 1, 2001, the payment methodology for nursing facility (NF) reimbursement by the Virginia Department of Medical Assistance Services (DMAS) is set forth in this part.

B. Three separate cost components are used: plant or capital, as appropriate, cost; operating cost; and nurse aide training and competency evaluation program and competency evaluation program (NATCEPs) costs. The rates, which are determined on a facility-by-facility basis, shall be based on annual cost reports filed by each provider.

C. Effective July 1, 2001, in determining the ceiling limitations, there shall be direct patient care medians established for nursing facilities in the Virginia portion of the Washington DC-MD-VA Metropolitan Statistical Area (MSA), the Richmond-Petersburg Metropolitan Statistical Area (MSA), and in the rest of the state. There shall be indirect patient care medians established for nursing facilities in the Virginia portion of the Washington DC-MD-VA MSA, for NFs with less than 61 beds in the rest of the state, and for NFs with more than 60 beds in the rest of the state. The Washington DC-MD-VA MSA and the Richmond-Petersburg MSA shall include those cities and counties as listed and changed from time to time by the Centers for Medicare and Medicaid Services (CMS). A nursing facility located in a jurisdiction which CMS adds to or removes from the Washington DC-MD-VA MSA or the Richmond-Petersburg MSA shall be placed in its new peer group, for purposes of reimbursement, at the beginning of its next fiscal year following the effective date of HCFA's final rule.

D. Nursing facilities operated by the Department of Behavioral Health and Developmental Services (DBHDS) and the Department of Veterans Services (DVS) shall be exempt from the prospective payment system as defined in Articles 1 (12VAC30-90-29), 3 (12VAC30-90-35 et seq.), 4 (12VAC30-90-40 et seq.), 6 (12VAC30-90-60 et seq.), and 8 (12VAC30-90-80~~-et seq.)~~) of this subpart. All other sections of this payment system relating to reimbursable cost limitations shall apply. These facilities operated by DBHDS and DVS shall continue to be reimbursed retrospectively on the basis of reasonable costs in accordance with Medicare principles of reimbursement.

E. Reimbursement to Intermediate Care Facilities for ~~the Mentally Retarded (ICF/MR)~~ Individuals with Intellectual Disabilities (ICF/IID) shall be ~~reimbursed retrospectively~~ retrospective on the basis of reasonable costs in accordance with Medicare principles of reimbursement ~~but~~. Nonstate facilities shall be limited to a ceiling based on the highest as filed rate paid to ~~a state ICF/MR~~ an ICF/IID institution~~, approved each July 1 by DMAS~~ in state fiscal year 2012 and annually adjusted thereafter with the application of the NF inflation factor, as set out in 12VAC30-90-41 B.

~~E.~~ F. Except as specifically modified ~~herein~~ in this section, Medicare principles of reimbursement, as amended from time to time, shall be used to establish the allowable costs in the rate calculations. Allowable costs must be classified in accordance with the DMAS uniform chart of accounts (see

12VAC30-90-270 through 12VAC30-90-276) and must be identifiable and verifiable by contemporaneous documentation.

All matters of reimbursement which are part of the DMAS reimbursement system shall supersede Medicare principles of reimbursement. Wherever the DMAS reimbursement system conflicts with Medicare principles of reimbursement, the DMAS reimbursement system shall take precedence. Appendices are a part of the DMAS reimbursement system.

Article 7
Cost Reports

**12VAC30-90-70. Cost report submission.**

A. Cost reports are due not later than 150 days after the provider's fiscal year end. If a complete cost report is not received within 150 days after the end of the provider's fiscal year, it is considered delinquent. The cost report shall be deemed complete for the purpose of cost settlement when DMAS has received all of the following (note that if the audited financial statements required by subdivisions 3 a and 7 b of this subsection are received not later than 120 days after the provider's fiscal year end and all other items listed are received not later than 90 days after the provider's fiscal year end, the cost report shall be considered to have been filed at 90 days):

1. Completed cost reporting ~~form(s)~~ forms provided by DMAS, with signed ~~certification(s)~~ certifications;

2. The provider's trial balance showing adjusting journal entries;

3. a. The provider's audited financial statements including, but not limited to, a balance sheet, a statement of income and expenses, a statement of retained earnings (or fund balance), a statement of cash flows, the auditor's report in which he expresses his opinion or, if circumstances require, disclaims an opinion based on generally accepted auditing standards, footnotes to the financial statements, and the management report. Multi-facility providers shall be governed by subdivision 7 of this subsection;

b. Schedule of restricted cash funds that identify the purpose of each fund and the amount;

c. Schedule of investments by type (stock, bond, etc.), amount, and current market value;

4. Schedules ~~which~~ that reconcile financial statements and trial balance to expenses claimed in the cost report;

5. Depreciation schedule;

6. Schedule of assets as defined in ~~12VAC30-90-37~~ 12VAC30-90-38;

7. Nursing facilities ~~which~~ that are part of a chain organization must also file:

a. Home office cost report;

b. Audited consolidated financial statements of the chain organization including the auditor's report in which he expresses his opinion or, if circumstances require, disclaims an opinion based on generally accepted auditing standards, the management report and footnotes to the financial statements;

c. The nursing facility's financial statements including, but not limited to, a balance sheet, a statement of income and expenses, a statement of retained earnings (or fund balance), and a statement of cash flows;

d. Schedule of restricted cash funds that identify the purpose of each fund and the amount;

e. Schedule of investments by type (stock, bond, etc.), amount, and current market value; and

8. Such other analytical information or supporting documentation that may be required by DMAS.

B. When cost reports are delinquent, the provider's interim rate shall be reduced to zero. For example, for a September 30 fiscal year end, payments will be reduced starting with the payment on and after March 1.

C. After the overdue cost report is received, desk reviewed, and a new prospective rate established, the amounts withheld shall be computed and paid. If the provider fails to submit a complete cost report within 180 days after the fiscal year end, a penalty in the amount of 10% of the balance withheld shall be forfeited to DMAS.

**12VAC30-90-257. Credit balance reporting.**

A. Definitions. The following words and terms when used in this regulation shall have the following meanings unless the context clearly indicates otherwise:

"Claim" means a bill consistent with 12VAC30-20-180 submitted by a provider to the department for services furnished to a recipient.

"Credit balance" means an excess or overpayment made to a provider by Medicaid as a result of patient billings.

~~"Interest at the maximum rate" means the interest rate specified in § 32.1-312 or § 32.1-313 of the Code of Virginia depending on the facts of the excess payment.~~

~~"Negative balance transaction" means the reduction of a payment or payments otherwise due to a provider by amounts or portions of amounts owed the department from previous overpayments to the provider.~~

~~"Overpayment" means payments to a provider in excess of the amount that was or is due to the provider.~~

~~"Weekly remittance" means periodic (usually weekly) payment to a provider of amounts due to the provider for claims previously submitted by the provider.~~

B. ~~NFs shall be required to report Medicaid credit balances on a quarterly basis no later than 30 calendar days after the close of each quarter.~~ Credit balances may occur when a provider's reimbursement for services it provides exceeds the allowable amount or when the reimbursement has been for unallowable costs, resulting in an overpayment. Credit balances also may occur when a provider receives payments

from Medicaid or another third party payer for the same services.

C. For a credit balance arising on a Medicaid claim within three years of the date paid by the department, the NF shall submit an adjustment claim. ~~If the NF does not want the claim retracted from future DMAS payments, a check in the amount of the credit balance or the adjustment claim or claims shall be submitted with the report.~~ For credit balances arising on claims over three years old, the NF shall submit a check for the balance due and a copy of the original DMAS payment. ~~Interest at the maximum rate allowed shall be assessed for those credit balances (overpayments) that are identified on the quarterly report but not reimbursed with the submission of the quarterly report. Interest will begin to accrue 30 days after the end of the quarter and will continue to accrue until the overpayment has been refunded or adjusted.~~

~~C. A penalty shall be imposed for failure to submit the quarterly credit balance report timely as follows:~~

~~1. NFs that have not submitted their Medicaid credit balance data within the required 30 days after the end of a quarter shall be notified in writing by the department. If the required report is not submitted within the next 30 days, there will be a 20% reduction in the Medicaid per diem payment.~~

~~2. If the required report is not submitted within the next 30 days (60 days after the due date), the per diem payments shall be reduced to zero until the report is received.~~

~~3. If the credit balance has not been refunded within 90 days of the end of a quarter, it shall be recovered, with interest, from the due date through the use of a negative balance transaction on the weekly remittance.~~

~~4.~~ D. A periodic audit shall be conducted of ~~the NFs' quarterly submission~~ an NF's claim adjustments of Medicaid credit balance data. NFs shall maintain an audit trail back to the underlying accounts receivable records supporting each ~~quarterly report~~ claim adjusted for credit balances.

VA.R. Doc. No. R16-3773; Filed October 16, 2015, 10:35 a.m.

## Proposed Regulation

Title of Regulation: **12VAC30-120. Waivered Services (amending 12VAC30-120-1000; adding 12VAC30-120-1012, 12VAC30-120-1062, 12VAC30-120-1072, 12VAC30-120-1082).**

Statutory Authority: § 32.1-325 et seq. of the Code of Virginia; 42 USC § 1396 et seq.

Public Hearing Information: No public hearings are scheduled.

Public Comment Deadline: January 15, 2016.

Agency Contact: Emily McClellan, Regulatory Supervisor, Department of Medical Assistance Services, Policy Division, 600 East Broad Street, Suite 1300, Richmond, VA 23219, telephone (804) 371-4300, FAX (804) 786-1680, or email emily.mcclellan@dmas.virginia.gov.

Basis: Section 32.1-325 of the Code of Virginia grants to the Board of Medical Assistance Services the authority to administer and amend the Plan for Medical Assistance. Section 32.1-324 of the Code of Virginia authorizes the Director of the Department of Medical Assistance Services (DMAS) to administer and amend the Plan for Medical Assistance according to the board's requirements. The Medicaid authority as established by § 1902(a) of the Social Security Act (42 USC § 1396a) provides governing authority for payments for services.

Item 301 III of Chapter 2 of the 2014 Acts of the Assembly, Special Session I, stated "Effective July 1, 2013, the Department of Medical Assistance Services shall have the authority to establish a 25 percent higher reimbursement rate for congregate residential services for individuals with complex medical or behavioral needs currently residing in an institution and unable to transition to integrated settings in the community due to the need for services that cannot be provided within the maximum allowable rate, or individuals whose needs present imminent risk of institutionalization and enhanced waiver services are needed beyond those available within the maximum allowable rate. The department shall have authority to promulgate regulations to implement this change within 280 days or less from the enactment of this act." With the Governor's approval, DMAS adopted its emergency regulation effective November 1, 2014.

Purpose: The purpose of this action is to enable providers of congregate residential support services, currently covered in the Intellectual Disability (ID) waiver, to render, in a more fiscally sound manner, services to individuals who have complex medical and behavioral care needs and protect their health, safety, and welfare. Such individuals, who may have long been institutionalized in the Commonwealth's training centers, will transition into community settings over the next several years in response to the settlement agreement between the Commonwealth and the Department of Justice. These affected individuals have exceptional medical and behavioral support needs that cannot be paid for under the current maximum reimbursement rate for congregate residential services. For providers to render services for such individuals, it is requiring substantially more staff time and skills than for individuals who do not have exceptional care needs; thus the need for the exceptional reimbursement rate.

Substance: The current ID waiver regulations became effective July 4, 2013, and constituted major revisions jointly agreed to between DMAS and the Department of Behavioral Health and Developmental Services (DBHDS). The revised waiver and regulations represented several years of work between the two agencies. This waiver is funded through Title XIX of the Social Security Act and administered daily by DBHDS.

This waiver program covers (i) assistive technology, (ii) companion services (both consumer-directed and agency-directed), (iii) crisis stabilization, (iv) day support, (v) environmental modifications, (vi) personal assistance services (both consumer-directed and agency-directed), (vii) personal emergency response systems (PERS), (viii) prevocational services, (ix) residential support services, (x) respite services (both consumer-directed and agency-directed), (xi) services facilitation (only for consumer-directed services), (xii) skilled nursing services, (xiii) supported employment, (xiv) therapeutic consultation, and (xv) transition services.

This waiver program currently serves 8,621 individuals with intellectual disabilities and has a list of 6,512 individuals waiting to be served. It has 1,573 providers enrolled with DMAS to render all of this waiver's covered services.

DMAS and DBHDS estimate, based on DBHDS data, that approximately 250 individuals will need and qualify for the additional support services that are to be covered by this exceptional reimbursement rate. The total additional expenditures estimated for this reimbursement expansion is $7.4 million, with approximately $3.7 million being General Funds, per year.

In 2008, the U.S. Department of Justice (DOJ) began an investigation, pursuant to the Civil Rights of Institutionalized Persons Act, in the Commonwealth and in 2010 expanded it to examine the Commonwealth's compliance with the Americans with Disabilities Act and the U.S. Supreme Court Olmstead ruling (http://www.law.cornell.edu/supct/html/98-536.ZS.html). This expansion covered Virginia's entire system of services for citizens with intellectual and developmental disabilities, including all five state training centers and community services serving these individuals. The Olmstead decision requires that individuals with disabilities be served in the most integrated settings possible. The DOJ investigation concluded that Virginia needed to improve service provision to better integrate community services, and that Virginia's training centers' discharge process required improvement.

The agreement reached between DOJ and the Commonwealth directly ties to this regulatory action. According to DBHDS, the individuals who have exceptional medical care and behavioral health issues and are being discharged from training centers require additional supports in order to successfully transition into their communities and remain there safely. Residential support services providers, who will be accepting many of these exceptional care individuals, are facing significant challenges in rendering services for such individuals within the existing rate structure. They are consistently providing services and staff time in excess of the waiver's service maximum reimbursement limits.

This action recommends an increase of 25% in the reimbursement rate to residential support services providers to better compensate them for caring for these exceptional care individuals.

Issues: The greatest advantage is expected to be to the affected individuals, who have complex medical and behavioral care needs and who also reside in training centers, in enabling them to transition to community living. This additional reimbursement will also be an advantage to the congregate residential providers who agree to accept these individuals with complex care needs.

There are no disadvantages to the citizens of the Commonwealth in this regulatory action. The disadvantage to the Commonwealth of not enabling these individuals to transition into community living would be the failure to implement the settlement agreement with DOJ.

Department of Planning and Budget's Economic Impact Analysis:

Summary of the Proposed Amendments to Regulation. Pursuant to Chapter 2 of the 2014 Acts of the Assembly, Special Session I, Item 301 III, the proposed regulation permanently establishes a 25 percent higher reimbursement rate for congregate residential services for individuals with complex medical or behavioral needs currently residing in an institution and unable to transition to integrated settings in the community due to the need for services that cannot be provided within the maximum allowable rate, or for individuals whose needs present imminent risk of institutionalization and who need enhanced waiver services beyond those available within the maximum allowable rate.

Result of Analysis. The benefits likely exceed the costs for all proposed changes.

Estimated Economic Impact. In 2008, the Department of Justice (DOJ) began an investigation, pursuant to the Civil Rights of Institutionalized Persons Act, in the Commonwealth and in 2010 expanded it to examine the Commonwealth's compliance with the Americans with Disabilities Act and the U.S. Supreme Court "Olmstead" ruling. This expansion covered Virginia's entire system of services for citizens with intellectual and developmental disabilities, including all five state training centers and community services serving these individuals.[1] The DOJ investigation concluded that Virginia needed to improve service provision to better integrate community services, and that Virginia's training centers' discharge process required improvement.

The agreement reached between DOJ and the Commonwealth directly ties to this regulatory action. According to the Department of Behavioral Health and Developmental Services (DBHDS), individuals who have exceptional medical care and behavioral health issues, and are being discharged from training centers, require additional supports in order to successfully transition into their communities and remain there safely. Residential support services providers, who will be accepting many of these exceptional care individuals, are facing significant challenges in rendering services for such individuals within the existing rate structure. They are consistently providing services and staff time in

excess of the waiver's service maximum reimbursement limits.

As a result, Chapter 2 of the 2014 Acts of the Assembly, Special Session I, Item 301 III mandated the Department of Medical Assistance Services (DMAS) to establish a 25 percent higher reimbursement rate for congregate residential services for individuals with complex medical or behavioral needs currently residing in an institution and unable to transition to integrated settings in the community due to the need for services that cannot be provided within the maximum allowable rate, or for individuals whose needs present imminent risk of institutionalization and who need enhanced waiver services beyond those available within the maximum allowable rate.

DMAS adopted its emergency regulation effective November 1, 2014 and now proposes to permanently adopt the 25 percent additional congregate residential services reimbursement rate for qualifying individuals. In order to receive the additional 25 percent reimbursement rate, interested providers must demonstrate they can meet the support needs of qualifying individuals, be approved by DBHDS to receive the exceptional rate, and provide the documentation in support of their exceptional claims for reimbursement.

DMAS and DBHDS estimate, based on DBHDS' data, that approximately 250 individuals will need, and qualify for, the additional support services that are to be covered by this exceptional reimbursement rate. The main economic effect is expected to be on the affected individuals, who have complex medical and behavioral care needs and who also reside in training centers, in enabling them to transition to community living. In addition, the providers who agree to accept these individuals with complex care needs could be inferred to benefit from these changes as their participation is voluntary.

The total additional expenditures estimated for this reimbursement expansion is $7.4 million, with approximately $3.7 million from state funds and the rest from federal funds, per year. In addition, with the proposed changes the Commonwealth would be on track to implement the settlement agreement with DOJ.

Businesses and Entities Affected. Approximately 250 individuals are estimated to need, and qualify for, the payment of the exceptional congregate residential rate established by this action. The total number of congregate residential services providers is 363. At this time, there are 33 approved providers, 26 approved individuals, and 27 individuals' requests are currently being reviewed for the exceptional services and the reimbursement.

Overall there are about 8,621 individuals being served in this waiver and another 6,512 individuals on the waiting list. For all of the services covered by this waiver, there are 1,573 providers that participate.

Localities Particularly Affected. The proposed changes apply throughout the Commonwealth.

Projected Impact on Employment. As the qualifying individuals are transitioned from state training centers to community settings, training centers' demand for labor is expected to decrease and approved providers' demand for labor is expected to increase. In fact, all but one of the five state training centers are planned to be closed by 2020.

Effects on the Use and Value of Private Property. The proposed exceptional rate is expected to increase revenues of approved congregate residential services providers and have a positive impact on their asset values.

Real Estate Development Costs. The proposed amendments are unlikely to significantly affect real estate development costs.

Small Businesses[2]:

Costs and Other Effects. The proposed exceptional rate is expected to have a positive economic effect on approved congregate residential services providers as discussed above.

Alternative Method that Minimizes Adverse Impact. The proposed amendments will not adversely affect small businesses.

Adverse Impacts:

Businesses: The proposed amendments will not adversely affect businesses.

Localities: The proposed amendments will not adversely affect localities.

Other Entities: The proposed amendments will contribute to closure of all but one of the five training center in the Commonwealth.

[1] The Olmstead decision requires that individuals with disabilities be served in the most integrated settings possible.

[2] Pursuant to § 2.2-4007.04 of the Code of Virginia, small business is defined as "a business entity, including its affiliates, that (i) is independently owned and operated and (ii) employs fewer than 500 full-time employees or has gross annual sales of less than $6 million."

Agency's Response to Economic Impact Analysis: The agency has reviewed the economic impact analysis prepared by the Department of Planning and Budget and raises no issues with this analysis.

Summary:

*Item 301 III of Chapter 2 of the 2014 Acts of the Assembly, Special Session I, authorizes the Department of Medical Assistance Services to establish a 25% higher reimbursement rate, within the intellectual disability waiver program, for congregate residential services for individuals with complex medical or behavioral needs currently residing in an institution and unable to transition to integrated settings in the community due to the need for services that cannot be provided within the maximum allowable rate or for individuals whose needs present imminent risk of institutionalization, and enhanced waiver services are needed beyond those available with the*

*maximum allowable rate. The amendments conform the regulation to these requirements.*

Part X
Intellectual Disability Waiver

Article 1
Definitions and General Requirements

**12VAC30-120-1000. Definitions.**

"AAIDD" means the American Association on Intellectual and Developmental Disabilities.

"Activities of daily living" or "ADLs" means personal care tasks, e.g., bathing, dressing, toileting, transferring, and eating/feeding. An individual's degree of independence in performing these activities is a part of determining appropriate level of care and service needs.

"ADA" means the American with Disabilities Act pursuant to 42 USC § 12101 et seq.

"Agency-directed model" means a model of service delivery where an agency is responsible for providing direct support staff, for maintaining individuals' records, and for scheduling the dates and times of the direct support staff's presence in the individuals' homes.

~~"ADA" means the American with Disabilities Act pursuant to 42 USC § 12101 et seq.~~

"Appeal" means the process used to challenge actions regarding services, benefits, and reimbursement provided by Medicaid pursuant to 12VAC30-110 and 12VAC30-20-500 through 12VAC30-20-560.

"Applicant" means a person (or his representative acting on his behalf) who has applied for or is in the process of applying for and is awaiting a determination of eligibility for admission to a home and community-based waiver or is on the waiver waiting list waiting for a slot to become available.

"Assistive technology" or "AT" means specialized medical equipment and supplies, including those devices, controls, or appliances specified in the Individual Support Plan but not available under the State Plan for Medical Assistance, which enable individuals to increase their abilities to perform ADLs, or to perceive, control, or communicate with the environment in which they live, or that are necessary to the proper functioning of the specialized equipment.

"Barrier crime" means those crimes listed in §§ 32.1-162.9:1 and 63.2-1719 of the Code of Virginia.

"Behavioral health authority" or "BHA" means the local agency, established by a city or county under § 37.2-100 of the Code of Virginia that plans, provides, and evaluates mental health, intellectual disability (ID), and substance abuse services in the locality that it serves.

"Behavioral specialist" means a person who possesses any of the following credentials: (i) endorsement by the Partnership for People with Disabilities at Virginia Commonwealth University as a positive behavioral supports facilitator; (ii) board certification as a behavior analyst (BCBA) or board certification as an associate behavior analyst (BCABA); or (iii) licensure by the Commonwealth as either a psychologist, a licensed professional counselor (LPC), a licensed clinical social worker (LCSW), or a psychiatric clinical nurse specialist.

~~"CMS" means the Centers for Medicare and Medicaid Services, which is the unit of the federal Department of Health and Human Services that administers the Medicare and Medicaid programs.~~

"Case management" means the assessing and planning of services; linking the individual to services and supports identified in the Individual Support Plan; assisting the individual directly for the purpose of locating, developing, or obtaining needed services and resources; coordinating services and service planning with other agencies and providers involved with the individual; enhancing community integration; making collateral contacts to promote the implementation of the Individual Support Plan and community integration; monitoring to assess ongoing progress and ensuring services are delivered; and education and counseling that guides the individual and develops a supportive relationship that promotes the Individual Support Plan.

"Case manager" means the person who provides case management services on behalf of the community services board or behavioral health authority, as either an employee or a contractor, possessing a combination of (ID) work experience and relevant education that indicates that the individual possesses the knowledge, skills, and abilities as established by DMAS in 12VAC30-50-450.

"CMS" means the Centers for Medicare and Medicaid Services, which is the unit of the federal Department of Health and Human Services that administers the Medicare and Medicaid programs.

"Community services board" or "CSB" means the local agency, established by a city or county or combination of counties or cities under Chapter 5 (§ 37.2-500 et seq.) of Title 37.2 of the Code of Virginia, that plans, provides, and evaluates mental health, ID, and substance abuse services in the jurisdiction or jurisdictions it serves.

"Companion" means a person who provides companion services for compensation by DMAS.

"Companion services" means nonmedical care, support, and socialization provided to an adult (ages 18 years and over). The provision of companion services does not entail routine hands-on care. It is provided in accordance with a therapeutic outcome in the Individual Support Plan and is not purely diversional in nature.

"Complex behavioral needs" means conditions requiring exceptional supports in order to respond to the individual's significant safety risk to self or others and documented by the Supports Intensity Scale (SIS) Virginia Supplemental Risk Assessment form (2010) as described in 12VAC30-120-1012.

"Complex medical needs" means conditions requiring exceptional supports in order to respond to the individual's significant health or medical needs requiring frequent hands-on care and medical oversight and documented by the Supports Intensity Scale (SIS) Virginia Supplemental Risk Assessment form (2010) as described in 12VAC30-120-1012.

"Comprehensive assessment" means the gathering of relevant social, psychological, medical, and level of care information by the case manager and is used as a basis for the development of the Individual Support Plan.

"Congregate residential support" or "CRS" means those supports in which the residential support services provider renders primary care (room, board, general supervision) and residential support services to the individual in the form of continuous (up to 24 hours per day) services performed by paid staff who shall be physically present in the home. These supports may be provided individually or simultaneously to more than one individual living in that home, depending on the required support. These supports are typically provided to an individual living (i) in a group home, (ii) in the home of the ID Waiver services provider (such as adult foster care or sponsored residential), or (iii) in an apartment or other home setting.

"Consumer-directed model" means a model of service delivery for which the individual or the individual's employer of record, as appropriate, is responsible for hiring, training, supervising, and firing of the person or persons who render the direct support or services reimbursed by DMAS.

"Crisis stabilization" means direct intervention to individuals with ID who are experiencing serious psychiatric or behavioral challenges that jeopardize their current community living situation, by providing temporary intensive services and supports that avert emergency psychiatric hospitalization or institutional placement or prevent other out-of-home placement. This service shall be designed to stabilize the individual and strengthen the current living situation so the individual can be supported in the community during and beyond the crisis period.

"DBHDS" means the Department of Behavioral Health and Developmental Services.

"DBHDS staff" means persons employed by or contracted with DBHDS.

"DMAS" means the Department of Medical Assistance Services.

"DMAS staff" means persons employed by or contracted with DMAS.

"DRS" means the Department of Rehabilitative Services.

"Day support" means services that promote skill building and provide supports (assistance) and safety supports for the acquisition, retention, or improvement of self-help, socialization, and adaptive skills, which typically take place outside the home in which the individual resides. Day support services shall focus on enabling the individual to attain or maintain his highest potential level of functioning.

"Developmental risk" means the presence before, during, or after an individual's birth, of conditions typically identified as related to the occurrence of a developmental disability and for which no specific developmental disability is identifiable through existing diagnostic and evaluative criteria.

"Direct marketing" means either (i) conducting directly or indirectly door-to-door, telephonic, or other "cold call" marketing of services at residences and provider sites; (ii) mailing directly; (iii) paying "finders' fees"; (iv) offering financial incentives, rewards, gifts, or special opportunities to eligible individuals and the individual's family/caregivers, as appropriate, as inducements to use the providers' services; (v) continuous, periodic marketing activities to the same prospective individual and the individual's family/caregiver, as appropriate - for example, monthly, quarterly, or annual giveaways as inducements to use the providers' services; or (vi) engaging in marketing activities that offer potential customers rebates or discounts in conjunction with the use of the providers' services or other benefits as a means of influencing the individual's and the individual's family/caregivers, as appropriate, use of the providers' services.

"Employer of record" or "EOR" means the person who performs the functions of the employer in the consumer directed model. The EOR may be the individual enrolled in the waiver, or a family member, caregiver or another person, as appropriate, when the individual is unable to perform the employer functions.

"Enroll" means that the individual has been determined by the case manager to meet the level of functioning requirements for the ID Waiver and DBHDS has verified the availability of an ID Waiver slot for that individual. Financial eligibility determinations and enrollment in Medicaid are set out in 12VAC30-120-1010.

"Entrepreneurial model" means a small business employing a shift of eight or fewer individuals who have disabilities and usually involves interactions with the public and coworkers who do not have disabilities.

"Environmental modifications" or "EM" means physical adaptations to a primary place of residence, primary vehicle, or work site (when the work site modification exceeds reasonable accommodation requirements of the Americans with Disabilities Act) that are necessary to ensure the individual's health and safety or enable functioning with greater independence when the adaptation is not being used to bring a substandard dwelling up to minimum habitation standards. Such EM shall be of direct medical or remedial benefit to the individual.

"EPSDT" means the Early Periodic Screening, Diagnosis and Treatment program administered by DMAS for children under the age of 21 according to federal guidelines (that

prescribe preventive and treatment services for Medicaid eligible children) as defined in 12VAC30-50-130.

"ES service authorization" means the process of approving an individual, by either DMAS or its designated service authorization contractor, for the purpose of receiving exceptional supports. ES service authorization shall be obtained before exceptional supports to the individual are rendered.

"Exceptional reimbursement rate" or "exceptional rate" means a rate of reimbursement for congregate residential supports paid to providers who qualify to receive the exceptional rate set out in 12VAC30-120-1062.

"Exceptional supports" or "exceptional support services" means a qualifying level of supports, as more fully described in 12VAC30-120-1012, that are medically necessary for individuals with complex medical or behavioral needs, or both, to safely reside in a community setting. The need for exceptional supports is demonstrated when the funding required to meet the individual's needs has been expended on a consistent basis by providers in the past 90 days for medical or behavioral supports, or both, over and above the current maximum allowable CRS rate in order to support the individual in a manner that ensures his health and safety.

"Fiscal employer/agent" means a state agency or other entity as determined by DMAS to meet the requirements of 42 CFR 441.484 and the Virginia Public Procurement Act (Chapter 43 (§ 2.2-4300 et seq.) of Title 2.2 of the Code of Virginia).

"Freedom of choice" means the right afforded an individual who is determined to require a level of care specified in a waiver to choose (i) either institutional or home and community-based services provided there are available CMS-allocated and state-funded slots; (ii) providers of services; and (iii) waiver services as may be limited by medical necessity.

"Health planning region" or "HPR" means the federally designated geographical area within which health care needs assessment and planning takes place, and within which health care resource development is reviewed.

"Health, safety, and welfare standard" means that an individual's right to receive a waiver service is dependent on a finding that the individual needs the service, based on appropriate assessment criteria and a written individual plan for supports, and that services can be safely provided in the community.

"Home and community-based waiver services" or "waiver services" means the range of community services approved by the CMS, pursuant to § 1915(c) of the Social Security Act, to be offered to persons as an alternative to institutionalization.

"IDOLS" means Intellectual Disability Online System.

"In-home residential support services" means support provided in a private residence by a DBHDS-licensed residential provider to an individual enrolled in the waiver to include: (i) skill building and supports and safety supports to enable individuals to maintain or improve their health; (ii) developing skills in daily living; (iii) safely using community resources; (iv) being included in the life of the community and home; (v) developing relationships; and (vi) participating as citizens of the community. In-home residential support services shall not replace the primary care provided to the individual by his family and caregiver but shall be supplemental to it.

"Incremental step-down provisions" means procedures normally found in plans for supports in which an individual's supports are gradually altered or reduced based upon progress towards meeting the goals of the individual's behavior plan.

"Individual" means the person receiving the services or evaluations established in these regulations.

"Individual Support Plan" or "ISP" means a comprehensive plan that sets out the supports and actions to be taken during the year by each service provider, as detailed in the provider's Plan for Supports, to achieve desired outcomes. The Individual Support Plan shall be developed by the individual enrolled in the waiver, the individual's family/caregiver, as appropriate, other service providers such as the case manager, and other interested parties chosen by the individual, and shall contain essential information, what is important to the individual on a day-to-day basis and in the future, and what is important for the individual to be healthy and safe as reflected in the Plan for Supports. The Individual Support Plan is known as the Consumer Service Plan in the Day Support Waiver.

"Instrumental activities of daily living" or "IADLs" means tasks such as meal preparation, shopping, housekeeping, laundry, and money management.

"Intellectual disability" or "ID" means a disability as defined by the American Association on Intellectual and Developmental Disabilities (AAIDD) in the Intellectual Disability: Definition, Classification, and Systems of Supports (11th edition, 2010).

~~"ICF/ID"~~ "ICF/IID" means a facility or distinct part of a facility certified by the Virginia Department of Health as meeting the federal certification regulations for an ~~Intermediate Care Facility for the Intellectually Disabled~~ intermediate care facility for individuals with intellectual disability and persons with related conditions and that addresses the total needs of the residents, which include physical, intellectual, social, emotional, and habilitation providing active treatment as defined in 42 CFR 435.1010 and 42 CFR 483.440.

"Licensed practical nurse" or "LPN" means a person who is licensed or holds multi-state licensure privilege pursuant to Chapter 30 (§ 54.1-3000 et seq.) of Title 54.1 of the Code of Virginia to practice practical nursing as defined.

"Medicaid Long-Term Care Communication Form" or "DMAS-225" means the form used by the case manager to report information about changes in an individual's situation.

"Medically necessary" means an item or service provided for the diagnosis or treatment of an individual's condition consistent with community standards of medical practice as determined by DMAS and in accordance with Medicaid policy.

"Parent" or "parents" means a person or persons who is or are biologically or naturally related, a foster parent, or an adoptive parent to the individual enrolled in the waiver.

"Participating provider" means an entity that meets the standards and requirements set forth by DMAS and has a current, signed provider participation agreement with DMAS.

"Pend" means delaying the consideration of an individual's request for services until all required information is received by DBHDS.

"Person-centered planning" means a fundamental process that focuses on the needs and preferences of the individual to create an Individual Support Plan that shall contain essential information, a personal profile, and desired outcomes of the individual to be accomplished through waiver services and included in the providers' Plans for Supports.

"Personal assistance services" means assistance with ADLs, IADLs, access to the community, self-administration of medication or other medical needs, and the monitoring of health status and physical condition.

"Personal assistant" means a person who provides personal assistance services.

"Personal emergency response system" or "PERS" means an electronic device and monitoring service that enable certain individuals at high risk of institutionalization to secure help in an emergency. PERS services shall be limited to those individuals who live alone or are alone for significant parts of the day and who have no regular caregiver for extended periods of time and who would otherwise require extensive routine supervision.

"Personal profile" means a point-in-time synopsis of what an individual enrolled in the waiver wants to maintain, change, or improve in his life and shall be completed by the individual and another person, such as his case manager or family/caregiver, chosen by the individual to help him plan before the annual planning meeting where it is discussed and finalized.

"Plan for Supports" means each service provider's plan for supporting the individual enrolled in the waiver in achieving his desired outcomes and facilitating the individual's health and safety. The Plan for Supports is one component of the Individual Support Plan. The Plan for Supports is referred to as an Individual Service Plan in the Day Support and Individual and Family with Developmental Disability Services (IFDDS) Waivers.

"Prevocational services" means services aimed at preparing an individual enrolled in the waiver for paid or unpaid employment. The services do not include activities that are specifically job-task oriented but focus on concepts such as accepting supervision, attendance at work, task completion, problem solving, and safety. Compensation for the individual, if provided, shall be less than 50% of the minimum wage.

"Primary caregiver" means the primary person who consistently assumes the role of providing direct care and support of the individual enrolled in the waiver to live successfully in the community without compensation for providing such care.

"Qualified mental retardation professional" or "QMRP" for the purposes of the ID Waiver means the same as defined at 12VAC35-105-20.

"Qualifying individual" means an individual who has received an ES service authorization from DMAS or its service authorization contractor to receive exceptional supports.

"Registered nurse" or "RN" means a person who is licensed or holds multi-state licensure privilege pursuant to Chapter 30 (§ 54.1-3000 et seq.) of Title 54.1 of the Code of Virginia to practice professional nursing.

"Residential support services" means support provided in the individual's home by a DBHDS-licensed residential provider or a VDSS-approved provider of adult foster care services. This service is one in which skill-building, supports, and safety supports are routinely provided to enable individuals to maintain or improve their health, to develop skills in daily living and safely use community resources, to be included in the community and home, to develop relationships, and to participate as citizens in the community.

"Respite services" means services provided to individuals who are unable to care for themselves, furnished on a short-term basis because of the absence or need for relief of those unpaid persons normally providing the care.

"Review committee" means DBHDS staff, including a trained SIS® specialist approved by DBHDS, a behavior specialist, a registered nurse, and a master's level social worker, and other staff as may be otherwise constituted by DBHDS, who will evaluate and make a determination about applications for the congregate residential support services and CRS exceptional reimbursement rate for compliance with regulatory requirements.

"Risk assessment" means an assessment that is completed by the case manager to determine areas of high risk of danger to the individual or others based on the individual's serious medical or behavioral factors. The required risk assessment for the ID Waiver shall be found in the state-designated assessment form which may be supplemented with other information. The risk assessment shall be used to plan risk mitigating supports for the individual in the Individual Support Plan.

"Safety supports" means specialized assistance that is required to assure the health and welfare of an individual.

"Service authorization" means the process of approving by either DMAS or its designated service authorization

contractor, for the purpose of DMAS' reimbursement, the service for the individual before it is rendered.

"Services facilitation" means a service that assists the individual or the individual's family/caregiver, or EOR, as appropriate, in arranging for, directing, and managing services provided through the consumer-directed model of service delivery.

"Services facilitator" means the DMAS-enrolled provider who is responsible for supporting the individual or the individual's family/caregiver, or EOR, as appropriate, by collaborating with the case manager to ensure the development and monitoring of the CD Services Plan for Supports, providing employee management training, and completing ongoing review activities as required by DMAS for consumer-directed companion, personal assistance, and respite services.

"Significant change" means, but shall not be limited to, a change in an individual's condition that is expected to last longer than 30 calendar days but shall not include short-term changes that resolve with or without intervention, a short-term acute illness or episodic event, or a well-established, predictive, cyclical pattern of clinical signs and symptoms associated with a previously diagnosed condition where an appropriate course of treatment is in progress.

"Skilled nursing services" means both skilled and hands-on care, as rendered by either a licensed RN or LPN, of either a supportive or health-related nature and may include, but shall not be limited to, all skilled nursing care as ordered by the attending physician and documented on the Plan for Supports, assistance with ADLs, administration of medications or other medical needs, and monitoring of the health status and physical condition of the individual enrolled in the waiver.

"Slot" means an opening or vacancy in waiver services for an individual.

"State Plan for Medical Assistance" or "Plan" means the Commonwealth's legal document approved by CMS identifying the covered groups, covered services and their limitations, and provider reimbursement methodologies as provided for under Title XIX of the Social Security Act.

"Supports" means paid and nonpaid assistance that promotes the accomplishment of an individual's desired outcomes. There shall be three types of supports: (i) routine supports that assist the individual in daily activities; (ii) skill building supports that help the individual gain new abilities; and (iii) safety supports that are required to assure the individual's health and safety.

"Supported employment" means paid supports provided in work settings in which persons without disabilities are typically employed. Paid supports include skill-building supports related to paid employment, ongoing or intermittent routine supports, and safety supports to enable an individual with ID to maintain paid employment.

"Support plan" means the report of recommendations resulting from a therapeutic consultation.

"Supports Intensity Scale®" or "SIS®" means a tool, developed by the American Association on Intellectual and Developmental Disabilities that measures the intensity of an individual's support needs for the purpose of assessment, planning, and aligning resources to enhance personal independence and productivity.

"Therapeutic consultation" means covered services designed to assist the individual and the individual's family/caregiver, as appropriate, with assessments, plan design, and teaching for the purpose of assisting the individual enrolled in the waiver.

"Transition services" means set-up expenses as defined in 12VAC30-120-2010.

"VDSS" means the Virginia Department of Social Services.

**12VAC30-120-1012. Individuals enrolled in the ID waiver who are receiving congregate residential support services and require exceptional levels of supports.**

A. Exceptional supports shall be available for individuals who:

1. Are currently enrolled in or are qualified to enroll in the ID waiver;

2. Are currently receiving or qualify to receive congregate residential support; and

3. Have complex medical or behavioral needs, or both, and who require additional staffing support or professional services enhancements (i.e., the ongoing involvement of medical or behavioral professionals).

B. In addition to the requirements in subsection A of this section, in order for an individual to qualify for the receipt of exceptional supports, the individual shall either:

1. Currently reside in an institution, such as a training center or a nursing facility, and be unable to transition to integrated community settings because the individual cannot access sufficient community waiver supports due to the individual's complex medical or behavioral needs, or both. In addition to meeting the requirements of this section, in order to qualify for exceptional support, case managers for an individual who is currently residing in a training center or nursing facility shall document in the individual's ES service authorization request to DMAS or its service authorization contractor that, based on supports required by the individual in the last 90 days while he resided in a training center or nursing facility, the individual is unable to transition to the community. This inability to transition shall be due to the anticipated need for services that cannot be provided within the maximum allowable CRS rate upon discharge into the community; or

2. Currently reside in the community and the individual's medical or behavioral needs, or both, present an imminent risk of institutionalization and an exceptional level of

congregate residential supports is required to maintain the individual in the community. In addition to meeting the requirements in subsection C of this section, in order to qualify for exceptional supports, an individual currently residing in the community shall provide, as a part of the ES service authorization request, documented evidence for the 90 days immediately prior to the exceptional supports request that one or more of the following has occurred:

a. Funding has been expended on a consistent basis by providers in the past 90 days for medical or behavioral supports, or both, over and above the current maximum allowable CRS rate in order to ensure the health and safety of the individual;

b. The residential services plan for supports has been approved and authorized by DMAS or its service authorization contractor for the maximum number of hours of support, as in 24 hours per day seven days a week, yet the individual still remains at imminent risk of institutionalization;

c. The staff to individual ratio has increased in order to properly support the individual (e.g., the individual requires a 2:1 staff to individual ratio for some or all of the time); or

d. Available alternative community options have been explored and utilized but the individual still remains at imminent risk of institutionalization.

C. In addition to the requirements in subsections A and B of this section, in order to qualify for exceptional supports individuals shall have the following numbered assessment values on the most recently completed Supports Intensity Scale® (SIS) Virginia Supplemental Risk Assessment form (2010):

1. The individual requires frequent hands-on staff involvement to address critical health and medical needs (#1a), and the individual has medical care plans in place that are documented in the ISP process (#1c);

2. The individual has been found guilty of a crime or crimes related to severe community safety risk to others through the criminal justice system (#2a) (e.g., convicted of actual or attempted assault or injury to others, property destruction due to fire setting or arson, or sexual aggression), and the individual's severe community safety risk to others requires a specially controlled home environment, direct supervision at home or direct supervision in the community, or both (#2b), and the individual has documented restrictions in place related to these risks through a legal requirement or order (#2c);

3. The individual has not been found guilty of a crime related to a severe community safety risk to others (e.g., actual or attempted assault or injury to others, property destruction due to fire setting or arson, or sexual aggression) but displays the same severe community safety risk as a person found guilty through the criminal justice system (#3a), and the individual's severe community safety risk to others requires a specially controlled home environment, direct supervision at home or direct supervision in the community, or both (#3b), and the individual has documented restrictions in place related to these risks within the ISP process (#3c); or

4. The individual engages in self-directed destructiveness related to self-injury, pica (eating nonfood substances), or suicide attempts, or all of these, with the intent to harm self (#4a), the individual's severe risk of injury to self currently requires direct supervision during all waking hours (#4b), and the individual has prevention and intervention plans in place that are documented within the ISP process (#4c); and

5. The individual demonstrates a score of 2 (extensive support needed) on any two items in the AAIDD Supports Intensity Scale® (version 2010) in either:

a. Section #3a Exceptional Medical and Behavioral Support Needs: Medical Supports Needed except for item 11 (seizure management) or item 15 (therapy services); or

b. Section #3b Exceptional Medical and Behavioral Support Needs: Behavioral Supports Needed except for item 12 (maintenance of mental health treatments).

D. The entire SIS® submitted as documentation in support of the individual's ES service authorization request shall have been completed no more than 12 months prior to submission of the ES service authorization request.

E. The individual's case manager shall submit an ES service authorization request to DMAS or its service authorization contractor that shall make the final determination as to whether the individual qualifies for exceptional supports. If the ES service authorization request fails to demonstrate that the individual's support needs meet the criteria described in this section, the ES service authorization shall be denied. Individuals may appeal the denial of an ES service authorization request in accordance with the DMAS client appeal regulations, 12VAC30-110-10 through 12VAC30-110-370.

**12VAC30-120-1062. Exceptional rate congregate residential supports provider requirements.**

A. In addition to the general provider requirements set out in 12VAC30-120-1040, in order to qualify for exceptional rate reimbursement, providers shall meet the requirements of this section.

B. Providers shall receive the exceptional rate only for exceptional supports provided to qualifying individuals. Providers shall not contest the determination that a given individual is not eligible for exceptional support services.

C. Providers requesting approval to provide and receive reimbursement for exceptional supports shall have a DBHDS license in good standing per 12VAC35-105. Provisional licenses shall not qualify a provider for the receipt of the

exceptional rate. Providers shall demonstrate in writing on the exceptional rate application that they can meet the support needs of a specified qualifying individual through qualified staff trained to provide the extensive supports required by the qualified individual's exceptional support needs. Providers may qualify for exceptional rate reimbursement only when the CRS providers staff (either employed or contracted) directly performs the support activity or activities required by a qualifying individual.

D. Providers shall work with local case managers in order to file an application for exceptional rate reimbursement. Provider requests for the exceptional rate shall be set out on the DBHDS-designated exceptional rate application and shall be directed to the CSB case manager for the qualifying individual requesting services from the provider. The qualifying individual's case manager shall consult with the DBHDS staff if the individual is currently residing in a training center. Case managers shall work directly with those qualifying individuals who are residing in the community. The case manager shall refer the provider's exceptional rate application to the DBHDS review committee, which shall make a determination on the application within 10 business days.

1. The review committee shall deny an exceptional rate application if it determines that:

a. A provider has not demonstrated that it can safely meet the exceptional support needs of the qualifying individual;

b. The provider's active protocols for the delivery of exceptional supports to the qualifying individual are not sufficient;

c. The provider fails to meet the requirements of this section; or

d. The application otherwise fails to support the payment of the exceptional rate.

2. If the review committee denies an exceptional rate application, it shall notify the provider in writing of such denial and the reason or reasons for the denial.

E. Providers requesting the exceptional reimbursement rate shall describe the exceptional supports the providers have the capacity to provide to a qualifying individual on the exceptional rate application. Providers shall ensure that the exceptional reimbursement rate application has been approved by DBHDS prior to submitting claims for the exceptional rate. Payment at the exceptional reimbursement rate shall be made to the CRS provider effective the date of DBHDS approval of the provider's exceptional rate application and upon completion of the ES service authorization for the individual, whichever comes later. Providers may appeal the denial of a request for the exceptional rate in accordance with the DMAS provider appeal regulations, 12VAC30-20-500 through 12VAC30-20-560.

F. Requirements for providers currently providing exceptional supports to qualifying individuals.

1. Providers who have been approved to receive the exceptional rate and are currently supporting qualifying individuals shall document in each of the qualifying individuals' plans for supports how that provider will respond to the individuals' specific exceptional needs. Providers shall update the plans for supports as necessary to reflect the current status of these individuals. Providers shall address each complex medical and behavioral support need of the individual through specific and documented protocols that may include, for example (i) employing additional staff to support the individual or (ii) securing additional professional support enhancements, or both, beyond those planned supports reimbursed through the maximum allowable CRS rate. Providers shall document in a qualifying individual's record that the costs of such additional supports exceed those covered by the standard CRS rate.

2. CRS providers delivering exceptional rate supports for qualifying individuals due to their medical support needs shall employ or contract with a registered nurse (RN) for the delivery of exceptional supports. The RN shall be licensed in the Commonwealth or hold multi-state licensure privilege pursuant to Chapter 30 (§ 54.1-3000 et seq.) of Title 54.1 of the Code of Virginia and shall have a minimum of two years of related clinical experience. This related clinical experience may include work in an acute care hospital, public health clinic, home health agency, rehabilitation hospital, nursing facility, or an ICF/IID. The RN shall administer or delegate in accordance with 18VAC90-20-430 through 18VAC90-20-460 the required complex medical supports.

a. All staff who will be supporting a qualifying individual shall receive individual-specific training regarding the individual's medical condition or conditions, medications (including training about side effects), risk factors, safety practices, procedures that staff are permitted to perform under nurse delegation, and any other training the RN deems necessary to enable the individual to be safely supported in the community. The provider shall arrange for the training to be provided by qualified professionals and document the training in the provider's record.

b. The RN shall also monitor the staff including, but not limited to, observing staff performing the needed complex medical supports.

3. Providers providing exceptional supports for a qualifying individual due to the individual's behavior support needs shall consult with a qualified behavioral specialist. This qualified behavior specialist shall develop a behavior plan based upon the qualifying individual's needs and train the provider's staff in its implementation consistent with the requirements defined in 12VAC30-120-

1060. Both the behavior plan and staff receipt of training shall be documented in the provider record.

4. Providers who will be supporting a qualifying individual with complex behavioral issues shall have training policies and procedures in place and demonstrate that staff has received appropriate training including, but not limited to, positive support strategies, in order to support an individual with mental illness or behavioral challenges, or both.

a. Staff who will be supporting qualifying individuals shall be identified on the exceptional rate application with a written description of the staff's abilities to meet the needs of qualifying individuals and the training received related to such needs.

b. Providers shall ensure that the physical environment of the home is appropriate to accommodate the needs of the qualifying individual with respect to the behavioral and medical challenges typical to this population.

5. Providers shall have on file crisis stabilization plans for all qualifying individuals with complex behavioral needs. These plans shall provide direct interventions that avert emergency psychiatric hospitalizations or institutional placement and include appropriate admission to crisis response services that are provided in the Commonwealth. These plans shall be approved by DBHDS and reviewed by the review committee as set out in this section.

6. The provider and the case manager records shall also contain the following for each qualifying individual to whom they are providing services:

a. The active protocol for qualifying individuals currently enrolled in the ID waiver that demonstrates extensive supports are being delivered in the areas of extensive support needs in the SIS®. For those qualifying individuals who are new to the waiver, a protocol shall be developed;

b. An ISP developed by the qualifying individual's support team that demonstrates the needed supports and contains support activities to address these; and

c. Evidence of the provider's ability to meet the qualifying individual's exceptional support needs, for all that apply: documentation of staff training, employment of or contract with an RN, involvement of a behavior or psychological consultant or crisis team involvement, and other additional requirements as set forth in this section.

**12VAC30-120-1072. Exceptional CRS rate reimbursement for certain congregate residential support services.**

A. CRS providers that obtain authorization to receive the exceptional reimbursement rate for qualifying individuals shall receive the rate only for services provided in accordance with a qualifying individual's Plan for Supports.

B. At any time that there is a significant change in the qualifying individual's medical or behavioral support needs, the provider shall notify the qualifying individual's case manager and document such changes in the qualifying individual's Plan for Supports. Upon receiving provider notification, the case manager shall confer with DBHDS about these changes to determine what modifications are indicated in the Plan for Supports, including whether the individual continues to qualify for receipt of the exceptional supports.

C. This exceptional rate shall be established in the DMAS fee schedule as posted on http://www.dmas.virginia.gov/Content_pgs/pr-ffs_new.aspx.

D. As of November 1, 2014, this exceptional CRS rate reimbursement is 25% higher than the standard CRS rate.

**12VAC30-120-1082. Exceptional rate utilization review.**

A. In addition to the utilization review and level of care review requirements in 12VAC30-120-1080, the case manager shall conduct face-to-face monthly contacts with the qualifying individual.

B. The case manager shall provide to DBHDS updated versions of the required documentation consistent with the requirements of 12VAC30-120-1012 at least every three years or whenever there is a significant change in the qualifying individual's needs or status. The provider shall be responsible for transmitting this information to the case manager.

1. This updated version shall include:

a. A review of the qualifying individual's response to the provision of exceptional supports developed with the qualifying individual and the CRS provider; and

b. A description of the incremental step-down provisions included in the qualifying individual's Plan for Supports.

2. The DBHDS review committee shall make a determination about the provider's continued eligibility for exceptional rate reimbursement for a given qualifying individual.

VA.R. Doc. No. R15-3839; Filed October 23, 2015, 2:13 p.m.

## Fast-Track Regulation

Title of Regulation: **12VAC30-120. Waivered Services (amending 12VAC30-120-2000, 12VAC30-120-2010).**

Statutory Authority: § 32.1-325 of the Code of Virginia; 42 USC § 1396 et seq.).

Public Hearing Information: No public hearings are scheduled.

Public Comment Deadline: December 16, 2015.

Effective Date: January 1, 2016.

Agency Contact: Emily McClellan, Regulatory Supervisor, Policy Division, Department of Medical Assistance Services, 600 East Broad Street, Suite 1300, Richmond, VA 23219, telephone (804) 371-4300, FAX (804) 786-1680, or email emily.mcclellan@dmas.virginia.gov.

Basis: Section 32.1-325 of the Code of Virginia grants to the Board of Medical Assistance Services the authority to administer and amend the State Plan for Medical Assistance. Section 32.1-324 of the Code of Virginia authorizes the Director of the Department of Medical Assistance Services (DMAS) to administer and amend the State Plan for Medical Assistance according to the board's requirements. The Medicaid authority, as established by § 1902(a) of the Social Security Act (42 USC § 1396a), provides governing authority for payments for services.

An amendment to the Social Security Act (42 USC § 1396n(k)(1)(D)) and Item FFFF of Chapter 2 of the 2014 Acts of Assembly, Special Session I, gives DMAS the authority to modify its Transition Services, in the Money Follows the Person waiver, to provide coverage of the first month's rent for qualified housing as an allowable cost.

Purpose: The Money Follows the Person demonstration program is intended to facilitate individuals moving into their communities from institutional settings such as nursing facilities or residential care facilities.

Enabling individuals to move into community settings is both an economic strategy and one of welfare for the individual. Community living provides the individuals more autonomy and control over their personal care and life experiences. Individuals responding to quality of life surveys during institutional residence and then during their first and second years of community living tend to report higher satisfaction with life and increased happiness. Cost-savings are realized when individuals successfully live in a community setting versus institutional residence. The amount of cost savings varies depending on what Medicaid services an individual needs but can range from as low as $14,262 to $109,578 or higher.

For some individuals, payment of their first month's rent is the only barrier to living in a community setting. This barrier exists largely due to the timing of the receipt of Social Security income and other supports arriving after the initial move into the community.

Other permissible services and supports for which expenditures can be made in this program include, but are not limited to, rent and utility deposits, bedding, and basic kitchen supplies.

Rationale for Using Fast-Track Process: This regulatory action is noncontroversial because the Centers for Medicare and Medicaid Services (CMS) revised its national policy so that both stakeholders and consumers in the Commonwealth have advocated for this change. Since the stakeholders have advocated for this change, it is not likely that they would object to DMAS using of the fast-track rulemaking process. The affected provider community is not expected to object because the coverage of the first month's rent will enable a small number of additional individuals to transition from institutions into their communities.

Furthermore, it is highly desirable to enable institutionalized individuals who wish to transition into their communities to do so as expeditiously as possible. Community living fosters individual independence and control, self-direction, and person-centered planning, thereby creating a higher level of happiness and greater sense of well-being.

Substance: The Money Follows the Person demonstration program is intended to facilitate individuals moving into their communities from institutions, typically nursing facilities or residential care facilities. "Transition services" means "set-up expenses for individuals who are transitioning from an institution to a living arrangement in a private residence." Transition Services has paid for security deposits that are required to obtain a lease on an apartment or home.

For some individuals, payment of their first month's rent is the only barrier to living in a community setting. This barrier exists largely due to the timing of the receipt of Social Security income and other supports arriving after the initial move into the community.

The CMS now allows for the payment of both security deposit and the first month's rent from funds allocated for transition services.

The amendments revise Transition Services, 12VAC30-120-2010, to include language that allows for the payment of the first month's rent for persons who cannot meet this expense and make technical corrections to outdated acronyms (changing "ICF/MR" to "ICF/IID," for example) and update internal citations to the Virginia Administrative Code.

Issues: The primary advantage is to enable individuals to live in a community setting versus institutional setting. In addition, property owners are able to rent to individuals who are using home and community-based waivers since they now have the ability to pay their first month's rent. Systems already exist to provide approval and reimbursement for payments of first month's rent. There are no known disadvantages to the public or the Commonwealth.

Department of Planning and Budget's Economic Impact Analysis:

Summary of the Proposed Amendments to Regulation. The proposed amendments 1) provide coverage for the first month's rent for individuals in the Money Follows the Person (MFP) program who are transitioning from an institution to a community based living and 2) update references and acronyms used in the regulations.

Result of Analysis. The benefits likely exceed the costs for all proposed changes.

Estimated Economic Impact. The MFP program facilitates individuals moving into communities from institutions, typically nursing or residential care facilities. Under this program, Medicaid pays for transition services which are set-up expenses involved in such transition. These expenses include security deposits to obtain a lease, utility deposits, moving expenses, pest eradication and cleaning services, and

essential household furnishings to occupy and use a private residence. These expenditures are currently covered. However, according to Department of Medical Assistance Services (DMAS), payment of the first month's rent is a barrier to moving into a community setting for some individuals. This barrier exists largely due to the timing of the receipt of Social Security income and/or other supports arriving after the initial move into the community.

In 2010, an amendment to the Social Security Act, 42 USC 1396n(k)(1)(D), authorized states to pay for the first month's rent as a transition service. Following the federal authorization, Item 301 FFFF of the 2014 Acts of the Assembly authorized DMAS to provide for the coverage of the first month's rent for qualified housing as an allowable cost. The proposed change implements the authority to cover the first month's rent for individuals in the MFP program.

Based on data from last two fiscal years, DMAS estimates that approximately 40 individuals will receive the first month's rent per year at a total cost of $33,706. Since MFP program expenditures are subject to enhanced federal match, the Commonwealth will pay $8,427 of this amount while $25,279 will be paid by the federal government. On the other hand, providing health care coverage in community settings is cheaper than providing care in institutional settings. The amount of cost savings varies depending on what Medicaid services an individual needs but can range from as low as $14,262 to as high as $109,578 or higher per person per year. Thus, cost savings from this change would probably exceed the additional costs it will create. Since the federal match for long term care costs is 50%, the Commonwealth will accrue half of any savings from this change.

Additionally, community living provides the individuals more autonomy and control over their personal care and life experiences. According to DMAS, individuals responding to quality of life surveys during institutional residence and then during their first and second years of community living tend to report higher satisfaction with life and increased happiness. Community living fosters individual independence and control, self-direction and person-centered planning, thereby creating a higher level of happiness and greater sense of well-being.

Furthermore, businesses that offer rental properties will have an increased demand for their services and likely benefit from the proposed coverage of the first month's rent for about 40 individuals.

Finally, the proposed changes update references and acronyms used in the regulations. These changes are not expected to create any significant economic effects other than improving the clarity of the regulations.

Businesses and Entities Affected. The proposed amendments will primarily affect individuals in MFP program who cannot currently pay for the first month's rent to transition into a community based living. DMAS estimates that there are approximately 40 such individuals. In addition, some of approximately 2,500 providers offering medical/pharmacy services to individuals in the MFP program will serve 40 more individuals. On the other hand, some of the 271 long term care providers will serve 40 less individuals.

Localities Particularly Affected. The proposed changes apply throughout the Commonwealth.

Projected Impact on Employment. The proposed amendments are anticipated to increase demand for rental properties and have a positive impact on employment in that sector. The proposed amendments will increase demand for services offered by the providers to individuals in the MFP program. A positive impact on employment in that sector may be expected. However, the proposed amendments are also anticipated to reduce demand for services offered by institutions such as nursing homes and residential care facilities. A negative impact on employment in that sector may be expected.

Effects on the Use and Value of Private Property. Due to increased demand for their services, businesses that offer rental properties may see an increase in their asset values. Similarly, the providers serving MFP program population may see an increase in their asset values due to increase in demand for their services. On the other hand, institutions such as nursing homes and residential care facilities may see a decrease in their asset values due to likely reduction in demand for their services.

Small Businesses: Costs and Other Effects. Most of the businesses that offer rental properties and the providers serving MFP program population are believed to be small businesses. About 25% of the long term care facilities are believed to be small businesses. The costs and other effects on affected small businesses are the same as discussed above.

Small Businesses: Alternative Method that Minimizes Adverse Impact. There is no alternative method that minimizes adverse impact on nursing homes and residential care facilities while accomplishing the same goals.

Real Estate Development Costs. The proposed amendments are unlikely to affect real estate development costs.

Agency's Response to Economic Impact Analysis: The agency has reviewed the economic impact analysis prepared by the Department of Planning and Budget. The agency concurs with this analysis.

Summary:

*Pursuant to an amendment to the Social Security Act (42 USC § 1396n(k)(1)(D)) and Item 301 FFFF of Chapter 2 of the 2014 Acts of the Assembly, Special Session I, the amendments (i) provide coverage of the first month's rent for qualified housing as an allowable cost for persons moving from institutional settings to community settings and (ii) update and correct acronyms and a citation to Virginia Administrative Code.*

Part XX
Money Follows the Person

**12VAC30-120-2000. Transition coordinator.**

A. Service description.

1. Transition coordination means the DMAS-enrolled provider who is responsible for supporting the individual and family/caregiver, as appropriate, with the activities associated with transitioning from an institution to the community pursuant to the Elderly or Disabled with Consumer Direction waiver.

2. Transition coordination services include, but are not limited to, the development of a transition plan; the provision of information about services that may be needed, in accordance with the timeframe specified by federal law, prior to the discharge date, during and after transition; the coordination of community-based services with the case manager if case management is available; linkage to services needed prior to transition such as housing, peer counseling, budget management training, and transportation; and the provision of ongoing support for up to 12 months after discharge date.

B. Criteria.

1. In order to qualify for these services, the individual shall have a demonstrated need for transition coordination of any of these services. Documented need shall indicate that the service plan cannot be implemented effectively and efficiently without such coordination from this service. Transition coordination services must be prior authorized by DMAS or its designated agent.

2. The individual's service plan shall clearly reflect the individual's needs for transition coordination provided to the individual, family/caregivers, and providers in order to implement the service plan effectively. The service plan includes, at a minimum: (i) a summary or reference to the assessment; (ii) goals and measurable objectives for addressing each identified need; (iii) the services, supports, and frequency of service to accomplish the goals and objectives; (iv) target dates for accomplishment of goals and objectives; (v) estimated duration of service; (vi) the role of other agencies if the plan is a shared responsibility; and (vii) the staff responsible for coordination and integration of services, including the staff of other agencies if the plan is a shared responsibility.

C. Service units and limitations. The unit of service shall be specified by the DMAS fee schedule. The services shall be explicitly detailed in the supporting documentation. Travel time is an in-kind expense within this service and is not billable as a separate item. Transition coordination may not be billed solely for purposes of monitoring. Transition coordination shall be available to individuals who are transitioning from institutional care to the community. Transition coordination service providers shall be reimbursed according to the amount and type of service authorized in the service plan based on a monthly fee for service.

D. Provider requirements. In addition to meeting the general conditions and requirements for home and community-based care participating providers as specified in ~~12VAC30-120-217 and 12VAC30-120-219~~ 12VAC30-120-730 and 12VAC30-120-740, transition coordinators shall meet the following qualifications:

1. Transition coordinators shall be employed by one of the following: a local government agency; a private, nonprofit organization qualified under 26 USC § 501(c)(3); or a fiscal management service with experience in providing this service.

2. A qualified transition coordinator shall possess, at a minimum, a bachelor's degree in human services or health care and relevant experience that indicates the individual possesses the following knowledge, skills, and abilities. These shall be documented on the transition coordinator's job application form or supporting documentation, or observable in the job or promotion interview. The transition coordinator shall be at least 21 years of age.

3. Transition coordinators shall have knowledge of (i) aging, independent living, the impact of disabilities, and transition planning; (ii) individual assessments ~~(including~~ including psychosocial, health, and functional ~~factors)~~ factors, and their uses in service planning, (iii) interviewing techniques, (iv) individuals' rights, (v) local human and health service delivery systems, including support services and public benefits eligibility requirements, (vi) principles of human behavior and interpersonal relationships, (vii) interpersonal communication principles and techniques, (viii) general principles of file documentation, and (ix) the service planning process and the major components of a service plan.

4. Transition coordinators shall have skills in negotiating with individuals and service providers; observing, and reporting behaviors; identifying and documenting an individual's needs for resources, services and other assistance; identifying services within the established services system to meet the individual's needs; coordinating the provision of services by diverse public and private providers; analyzing and planning for the service needs of the individual; and assessing individuals using DMAS' authorized assessment forms.

5. Transition coordinators shall have the ability to demonstrate a positive regard for individuals and their families or designated guardian; be persistent and remain objective; work as a team member, maintaining effective interagency and intraagency working relationships; work independently, performing position duties under general supervision; communicate effectively, both verbally and in writing; develop a rapport; communicate with different

types of persons from diverse cultural backgrounds; and interview.

**12VAC30-120-2010. Transition services.**

A. Service description. "Transition services" means set-up expenses for individuals who are transitioning from an institution or licensed or certified provider-operated living arrangement to a living arrangement in a private residence, which may include an adult foster home, where the person is directly responsible for his own living expenses. ~~12VAC30-120-2010~~ 12VAC30-120-2000 provides the service description, criteria, service units and limitations, and provider requirements for this service.

The individual's transition from an institution to the community shall have a transition coordinator in order to receive EDCD Waiver services or a case manager or health care coordinator if he shall be receiving services through either the ~~HIV/AIDS,~~ IFDDS, ~~MR~~ ID, or Technology Assisted Waivers.

B. Criteria for receipt of services. In order to be provided, transition services shall be prior authorized by DMAS or its designated agent. These services include rent or utility deposits, basic furniture and appliances, health and safety assurances, and other reasonable expenses incurred as part of a transition. For the purposes of transition services, an institution means an ~~ICF/MR~~ ICF/IID, a nursing facility, or a specialized care facility/hospital as defined at 42 CFR 435.1009. Transition services do not apply to an acute care admission to a hospital.

C. Service units and limitations.

1. Services are available for one transition per individual and must be expended within nine months from the date of authorization. The total cost of these services shall not exceed $5,000, per person lifetime limit coverage of transition costs to residents of nursing facilities, specialized care facility/hospitals, or ~~ICF/MR~~ ICF/IID, who are Medicaid recipients and are able to return to the community. The $5,000 maximum allowance must be expended within nine months from the date of authorization for transition services. It shall not be available to the individual after that period of time. The DMAS designated fiscal agent shall manage the accounting of the transition service. The transition coordinator for the EDCD Waiver or the case manager or health care coordinator, as appropriate to the waiver, shall ensure that the funding spent is reasonable and does not exceed the $5,000 maximum limit.

2. Allowable costs include~~, but are not limited to~~:

a. Security deposits and the first month's rent that are required to obtain a lease on an apartment or home;

b. Essential household furnishings required to occupy and use a community domicile, including furniture, window coverings, food preparation items, and bed/bath linens;

c. Set-up fees or deposits for utility or services access, including telephone, electricity, heating and water;

d. Services necessary for the individual's health, safety, and welfare such as pest eradication and one-time cleaning prior to occupancy;

e. Moving expenses;

f. Fees to obtain a copy of a birth certificate or an identification card or driver's license; and

g. Activities to assess need, arrange for, and procure needed resources.

3. The services are furnished only to the extent that they are reasonable and necessary as determined through the service plan development process, are clearly identified in the service plan and the person is unable to meet such expense, or when the services cannot be obtained from another source.

4. The expenses ~~do~~ shall not include ongoing monthly rental or mortgage expenses, food, regular utility charges, or household items that are intended for purely diversional/recreational purposes. This service ~~does~~ shall not include services or items that are covered under other waiver services such as chore, homemaker, environmental modifications and adaptations, or specialized supplies and equipment.

D. Provider requirements. Providers must be enrolled as a Medicaid Provider for Transition Coordination or Case Management and work with the DMAS designated agent to receive reimbursement for the purchase of appropriate transition goods or services on behalf of the individual.

VA.R. Doc. No. R16-4145; Filed October 23, 2015, 2:06 p.m.

# TITLE 14. INSURANCE

## STATE CORPORATION COMMISSION

### Proposed Regulation

REGISTRAR'S NOTICE: The State Corporation Commission is claiming an exemption from the Administrative Process Act in accordance with § 2.2-4002 A 2 of the Code of Virginia, which exempts courts, any agency of the Supreme Court, and any agency that by the Constitution is expressly granted any of the powers of a court of record.

Title of Regulation: **14VAC5-130. Rules Governing the Filing of Rates for Individual and Certain Group Accident and Sickness Insurance Policy Forms (amending 14VAC5-130-40 through 14VAC5-130-70, 14VAC5-130-81).**

Statutory Authority: §§ 12.1-13 and 38.2-223 of the Code of Virginia.

Public Hearing Information: A public hearing will be scheduled upon request.

Public Comment Deadline: November 30, 2015.

Agency Contact: Robert Grissom, Chief Insurance Market Examiner, Bureau of Insurance, Life and Health Division, State Corporation Commission, P.O. Box 1157, Richmond, VA 23218, telephone (804) 371-9152, FAX (804) 371-9944, or email bob.grissom@scc.virginia.gov.

Summary:

*The proposed amendments define and clarify the requirements applicable to the filing of rates for student health insurance coverage, including that rates (i) may be based on school-specific community rating and (ii) are not included in the Unified Rate Review Template.*

AT RICHMOND, OCTOBER 16, 2015

COMMONWEALTH OF VIRGINIA, ex rel.

STATE CORPORATION COMMISSION

CASE NO. INS-2015-00174

Ex Parte: In the matter of Amending
Rules Governing the Filing of Rates for
Individual and Certain Group Accident
and Sickness Insurance Policy Forms

ORDER TO TAKE NOTICE

Section 12.1-13 of the Code of Virginia ("Code") provides that the State Corporation Commission ("Commission") shall have the power to promulgate rules and regulations in the enforcement and administration of all laws within its jurisdiction, and § 38.2-223 of the Code provides that the Commission may issue any rules and regulations necessary or appropriate for the administration and enforcement of Title 38.2 of the Code.

The rules and regulations issued by the Commission pursuant to § 38.2-223 of the Code are set forth in Title 14 of the Virginia Administrative Code. A copy may also be found at the Commission's website: http://www.scc.virginia.gov/boi/laws.aspx.

The Bureau of Insurance ("Bureau") has submitted to the Commission a proposal to amend certain sections found in Chapter 130 of Title 14 of the Virginia Administrative Code entitled "Rules Governing the Filing of Rates for Individual and Certain Group Accident and Sickness Insurance Policy Forms" ("Rules"), which are set out at 14 VAC 5-130-40, 14 VAC 5-130-50, 14 VAC 5-130-60, 14 VAC 5-130-65, 14 VAC 5-130-70, and 14 VAC 5-130-81.

The amendments to these sections are necessary to define and clarify the requirements applicable to the filing of rates for student health insurance coverage, which is a type of individual health insurance coverage.

NOW THE COMMISSION is of the opinion that the proposed amendments to 14 VAC 5-130-40, 14 VAC 5-130-50, 14 VAC 5-130-60, 14 VAC 5-130-65, 14 VAC 5-130-70, and 14 VAC 5-130-81 as submitted by the Bureau should be considered for adoption.

Accordingly, IT IS ORDERED THAT:

(1) The proposed amendments to the "Rules Governing the Filing of Rates for Individual and Certain Group Accident and Sickness Insurance Policy Forms," which amend the Rules at 14 VAC 5-130-40, 14 VAC 5-130-50, 14 VAC 5-130-60, 14 VAC 5-130-65, 14 VAC 5-130-70, and 14 VAC 5-130-81, are attached hereto and made a part hereof.

(2) All interested persons who desire to comment in support of or in opposition to, or request a hearing to consider the proposed amendments, shall file such comments or hearing request on or before November 30, 2015, with Joel H. Peck, Clerk, State Corporation Commission, c/o Document Control Center, P.O. Box 2118, Richmond, Virginia 23218. Interested persons desiring to submit comments electronically may do so by following the instructions at the Commission's website: http://www.scc.virginia.gov/case. All comments shall refer to Case No. INS-2015-00174.

(3) If no written request for a hearing on the proposal to amend the Rules as outlined in this Order is received on or before November 30, 2015, the Commission, upon consideration of any comments submitted in support of or in opposition to the proposal, may adopt the Rules as submitted by the Bureau.

(4) The Bureau forthwith shall provide notice of the proposal to amend the Rules by sending, by e-mail or U.S. mail, a copy of this Order, together with the proposal, to all insurers, health maintenance organizations and health services plans licensed in Virginia to sell accident and sickness insurance, and to all interested persons.

(5) The Commission's Division of Information Resources forthwith shall cause a copy of this Order, together with the proposal to amend the Rules, to be forwarded to the Virginia Registrar of Regulations for appropriate publication in the Virginia Register of Regulations.

(6) The Commission's Division of Information Resources shall make available this Order and the attached proposal on the Commission's website: http://www.scc.virginia.gov/case.

(7) The Bureau shall file with the Clerk of the Commission an affidavit of compliance with the notice requirements of Ordering Paragraph (4).

(8) This matter is continued.

AN ATTESTED COPY hereof shall be sent by the Clerk of the Commission to: Kiva B. Pierce, Assistant Attorney General, Division of Consumer Counsel, Office of the Attorney General, 900 East Main Street, Second Floor, Richmond, Virginia 23219; and a copy hereof shall be delivered to the Commission's Office of General Counsel and

the Bureau of Insurance in care of Deputy Commissioner Althelia P. Battle.

**14VAC5-130-40. Definitions.**

As used in this chapter:

"Actuarial value" or "AV" means the anticipated covered medical spending for essential health benefits (EHB) coverage paid by a health plan for a standard population, computed in accordance with the plan's cost-sharing, divided by the total anticipated allowed charges for EHB coverage provided to a standard population, and expressed as a percentage.

"Anticipated loss ratio" means the ratio of the present value of the future benefits to the present value of the future premiums of a policy form over the entire period for which rates are computed to provide coverage.

"Grandfathered plan" means coverage provided by a health carrier in which an individual was enrolled on March 23, 2010, for as long as such plan maintains that status in accordance with federal law.

"Group health insurance coverage" means in connection with a group health plan, health insurance coverage offered in connection with such plan.

"Group health plan" means an employee welfare benefit plan (as defined in § 3 (1) of the Employee Retirement Income Security Act of 1974 (29 USC § 1002 (1)), to the extent that the plan provides medical care and including items and services paid for as medical care to employees or their dependents (as defined under the terms of the plan) directly or through insurance, reimbursement, or otherwise.

"Group Medicare supplement policy" means a group policy of accident and sickness insurance, or a group subscriber contract of hospital, medical or surgical plans, covering individuals who are entitled to have payment made under Medicare, which is designed primarily to supplement Medicare by providing benefits for payment of hospital, medical or surgical expenses, or is advertised, marketed or otherwise purported to be a supplement to Medicare. Such term does not include:

1. A policy or contract of one or more employers or labor organizations, or of the trustees of a fund established by one or more employers or labor organizations, or combination thereof, for employees or former employees, or combination thereof, or for members or former members, or combination thereof, of the labor organizations; or

2. A policy or contract of any professional, trade or occupational association for its members or former retired members, or combination thereof, if such association:

a. Is composed of individuals all of whom are actively engaged in the same profession, trade, or occupation;

b. Has been maintained in good faith for purposes other than obtaining insurance; and

c. Has been in existence for at least two years prior to the date of its initial offering of such policy or plan to its members.

"Health benefit plan" means any accident and health insurance policy or certificate, health services plan contract, health maintenance organization subscriber contract, plan provided by a MEWA, or plan provided by another benefit arrangement. "Health benefit plan" does not mean accident only, credit, or disability insurance; coverage of Medicare services or federal employee health plans, pursuant to contracts with the United States government; Medicare supplement or long-term care insurance; Medicaid coverage; dental only or vision only insurance; specified disease insurance; hospital confinement indemnity coverage; limited benefit health coverage; coverage issued as a supplement to liability insurance; insurance arising out of a workers' compensation or similar law; automobile medical payment insurance; medical expense and loss of income benefits; or insurance under which benefits are payable with or without regard to fault and that is statutorily required to be contained in any liability insurance policy or equivalent self-insurance.

"Health insurance coverage" means benefits consisting of medical care (provided directly, through insurance or reimbursement, or otherwise and including items and services paid for as medical care) under any hospital or medical service policy or certificate, hospital or medical service plan contract, or health maintenance organization contract offered by a health insurance issuer.

"Health insurance issuer" means an insurance company, or insurance organization (including a health maintenance organization) that is licensed to engage in the business of insurance in this Commonwealth and that is subject to the laws of this Commonwealth that regulate insurance within the meaning of § 514 (b) (2) of the Employee Retirement Income Security Act of 1974 (29 USC § 1144 (b) (2)). Such term does not include a group health plan.

"Health maintenance organization" means:

1. A federally qualified health maintenance organization;

2. An organization recognized under the laws of this Commonwealth as a health maintenance organization; or

3. A similar organization regulated under the laws of this Commonwealth for solvency in the same manner and to the same extent as such a health maintenance organization.

"Individual accident and sickness insurance" means insurance against loss resulting from sickness or from bodily injury or death by accident or accidental means or both when sold on an individual rather than group basis.

"Individual health insurance coverage" means health insurance coverage offered to individuals in the individual market, that includes a health benefit plan provided to individuals through a trust arrangement, association, or other discretionary group that is not an employer plan, but does not include coverage defined as "excepted benefits" in § 38.2-

3431 of the Code of Virginia or short-term limited duration insurance. Student health insurance coverage shall be considered a type of individual health insurance coverage.

"Individual market" means the market for health insurance coverage offered to individuals other than in connection with a group health plan. Coverage that would be regulated as individual market coverage if it were not sold through an association is individual market coverage.

"Individual Medicare supplement policy" means an individual policy of accident and health insurance or a subscriber contract of hospital, medical or surgical plans, offered to individuals who are entitled to have payment made under Medicare, which is designed primarily to supplement Medicare by providing benefits for hospital, medical or surgical expenses, or is advertised, marketed or otherwise purported to be a supplement to Medicare.

"Member" means an enrollee, member, subscriber, policyholder, certificate holder, or other individual who is participating in a health benefit plan or covered under health insurance.

"Premium" means all moneys paid by an employer, eligible employee, or member as a condition of coverage from a health insurance issuer, including fees and other contributions associated with a health benefit plan.

"Qualified Actuary" means a member of the American Academy of Actuaries, or other individual qualified as described in the American Academy of Actuaries' U.S. Qualification Standards and the Code of Professional Conduct to render statements of actuarial opinion in the applicable area of practice.

"SERFF" means the National Association of Insurance Commissioner's (NAIC) System for Electronic Rate and Form Filing.

"Small employer" means in connection with a group health plan or health insurance coverage with respect to a calendar year and a plan year, an employer who employed an average of at least one but not more than 50 employees on business days during the preceding calendar year and who employs at least one employee on the first day of the plan year. Effective January 1, 2016, "small employer" means in connection with a group health plan or health insurance coverage with respect to a calendar year and a plan year, an employer who employed an average of at least one but not more than 100 employees on business days during the preceding calendar year and who employs at least one employee on the first day of the plan year.

"Small group market" means the health insurance market under which individuals obtain health insurance coverage (directly or through any arrangement) on behalf of themselves (and their dependents) through a group health plan maintained by a small employer. Coverage that would be regulated as small group market coverage if it were not sold through an association is small group market coverage.

"Student health insurance coverage" means a type of individual health insurance coverage offered in the individual market that is provided pursuant to a written agreement between an institution of higher education, as defined by the Higher Education Act of 1965 (Public Law No. 89-329), and a health carrier and provided to students enrolled in that institution of higher education and their dependents, and that does not make health insurance coverage available other than in connection with enrollment as a student or as a dependent of a student in the institution of higher education, and does not condition eligibility for health insurance coverage on any health status-related factor related to a student or a dependent of the student.

**14VAC5-130-50. General rules on rate filing; experience records and data.**

A. Every policy, rider or endorsement form affecting benefits which is submitted for approval shall be accompanied by a rate filing unless such rider or endorsement form does not require a change in the rate. Any subsequent addition to or change in rates applicable to such policy, rider or endorsement form shall also be filed.

B. Each rate submission shall include an actuarial memorandum describing the basis on which rates were determined and shall indicate and describe the calculation of the anticipated loss ratio. Except for coverage issued in the small group market, interest at a rate consistent with that assumed in the original determination of premiums, shall be used in the calculation of this loss ratio. Each rate submission must also include a certification by a qualified actuary that to the best of the actuary's knowledge and judgment, the rate filing is in compliance with the applicable laws and regulations of this Commonwealth and that the benefits are reasonable in relation to the premiums.

C. Health insurance issuers shall maintain records of earned premiums and incurred benefits for each calendar year for each policy form, including data for rider and endorsement forms which are used with the policy form, on the same basis, including all reserves, as required for the Accident and Health Policy Experience Exhibit. Separate data may be maintained for each rider or endorsement form to the extent appropriate. Experience under forms which provide substantially similar coverage may be combined. The data shall be for each calendar year of experience since the year the form was first issued.

D. In determining the credibility and appropriateness of experience data, due consideration must be given to all relevant factors, such as:

1. Statistical credibility of premiums and benefits, e.g., low exposure, low loss frequency.

2. Experienced and projected trends relative to the kind of coverage, e.g., inflation in medical expenses, economic cycles affecting disability income experience.

3. The concentration of experience at early policy durations where select morbidity and preliminary term reserves are applicable and where loss ratios are expected to be substantially lower than at later policy durations.

4. The mix of business by risk classification.

E. Rates for coverage issued in the individual or small group markets are required to meet the following:

1. Premium rates with respect to a particular plan or coverage may only vary by:

a. Whether the plan or coverage covers an individual or family;

b. Rating area, as may be established by the commission;

c. Age, consistent with the Uniform Age Rating Curve table below; and

d. Tobacco use, except that the rate shall not vary by more than 1.5 to 1. Employees of a small employer may avoid this surcharge by participating in a wellness program that complies with § 2705(j) of the Public Health Service Act (42 USC § 300gg-4).

Uniform Age Rating Curve

| AGE | PREMIUM RATIO | AGE | PREMIUM RATIO | AGE | PREMIUM RATIO |
|---|---|---|---|---|---|
| 0-20 | 0.635 | 35 | 1.222 | 50 | 1.786 |
| 21 | 1.000 | 36 | 1.230 | 51 | 1.865 |
| 22 | 1.000 | 37 | 1.238 | 52 | 1.952 |
| 23 | 1.000 | 38 | 1.246 | 53 | 2.040 |
| 24 | 1.000 | 39 | 1.262 | 54 | 2.135 |
| 25 | 1.004 | 40 | 1.278 | 55 | 2.230 |
| 26 | 1.024 | 41 | 1.302 | 56 | 2.333 |
| 27 | 1.048 | 42 | 1.325 | 57 | 2.437 |
| 28 | 1.087 | 43 | 1.357 | 58 | 2.548 |
| 29 | 1.119 | 44 | 1.397 | 59 | 2.603 |
| 30 | 1.135 | 45 | 1.444 | 60 | 2.714 |
| 31 | 1.159 | 46 | 1.500 | 61 | 2.810 |
| 32 | 1.183 | 47 | 1.563 | 62 | 2.873 |
| 33 | 1.198 | 48 | 1.635 | 63 | 2.952 |
| 34 | 1.214 | 49 | 1.706 | 64 and older | 3.000 |

2. A premium rate shall not vary by any other factor not described in this subsection.

3. With respect to family coverage, the rating variations permitted in this subsection shall be applied based on the portion of the premium that is attributable to each family member covered under the plan. With respect to family members under age 21, the premiums for no more than the three oldest covered children shall be taken into account in determining the total family premium.

4. The premium charged shall not be adjusted more frequently than annually, except that the premium rate may be changed to reflect changes to (i) the family composition of the member, (ii) the coverage requested by the member, or (iii) the geographic location of the member.

5. Premium rates for student health insurance coverage may be based on school-specific community rating and are exempt from subdivisions 1 through 4 of this subsection.

F. In the event of disapproval or withdrawal of approval by the commission of a rate submission, a health insurance issuer may proceed as indicated in § 38.2-1926 of the Code of Virginia.

**14VAC5-130-60. Filing of rates for a new policy form.**

A. Each rate submission shall include: (i) the applicable policy or certificate form, application and endorsements required by § 38.2-316 of the Code of Virginia, (ii) a rate sheet, (iii) an actuarial memorandum, and (iv) all information required in SERFF. ~~For~~ The Unified Rate Review Template shall also be filed for coverage issued in the individual or small group markets, ~~the Unified Rate Review Template shall also be filed~~ except for student health insurance coverage.

B. The actuarial memorandum shall contain the following information:

1. A description of the type of policy or coverage, including benefits, renewability, general marketing method, and issue age limits.

2. A description of how rates were determined, including the general description and source of each assumption used.

3. The estimated average annual premium per policy and per anticipated member.

4. The anticipated loss ratio and a description of how it was calculated.

5. The minimum anticipated loss ratio presumed reasonable in this chapter, as specified in 14VAC5-130-65.

6. If the anticipated loss ratio in subdivision 4 of this subsection is less than the minimum loss ratio in subdivision 5 of this subsection, supporting documentation for the use of such premiums shall also be included.

7. For coverage issued in the individual or small group market, a certification by a qualified actuary of the actuarial value of each plan of benefits included and the AV calculation summary.

8. A certification by a qualified actuary that, to the best of the actuary's knowledge and judgment, the rate filing is in compliance with the applicable laws and regulations of this Commonwealth and the premiums are reasonable in relation to the benefits provided.

**14VAC5-130-65. Reasonableness of benefits in relation to initial premiums.**

A. Benefits shall be deemed reasonable in relation to premiums provided the anticipated loss ratio of the policy form, including riders and endorsements, is at least as great as specified below:

1. If the expected average annual premium is at least $200 but less than $1,000:

| Type of Coverage | Renewal Clause | | | | |
|---|---|---|---|---|---|
| | OR | CR | GR | NC | Other |
| Hospital Confinement Indemnity | 60% | 55% | 55% | 50% | 60% |
| Disability Income Protection, Accident Only, Specified Disease and Other, whether paid on an expense incurred or indemnity basis | 60% | 55% | 50% | 45% | 60% |

Definitions of renewal clause:

OR - Optionally renewable: individual policy renewal is at the option of the insurance company.

CR - Conditionally renewable: renewal can be declined by the insurance company only for stated reasons other than deterioration of health or renewal can be declined on a geographic territory basis.

GR - Guaranteed renewable: renewal cannot be declined by the insurance company for any reason, but the insurance company can revise rates on a class basis.

NC - Noncancellable: renewal cannot be declined nor can rates be revised by the insurance company.

Other - Any other renewal or nonrenewal clauses (e.g., short term nonrenewable policies).

2. If the expected average annual premium is $100 or more but less than $200, subtract five percentage points from the numbers in the table in subdivision 1 of this subsection.

3. If the expected average annual premium is less than $100, subtract 10 percentage points from the numbers in the table in subdivision 1 of this subsection.

4. If the expected average annual premium is $1,000 or more, add five percentage points to the numbers in the table in subdivision 1 of this subsection.

5. Notwithstanding subdivision 1 of this subsection, group Medicare supplement policies, shall be expected to return to policyholders in the form of aggregate benefits under the policy at least 75% of the aggregate amount of premiums collected.

6. Notwithstanding subdivisions 1 and 5 of this subsection, for Medicare supplement policies issued prior to July 30, 1992, as a result of solicitation of individuals through the mails or by mass media advertising, which shall include both print and broadcast advertising, shall be expected to return to policyholders in the form of aggregate benefits under the policy at least 60% of the aggregate amount of premiums collected.

7. Notwithstanding subdivision 1 of this subsection, for Medicare supplement policies issued prior to July 30, 1992, sold on an individual rather than group basis shall be expected to return to policyholders in the form of aggregate benefits under the policy at least 60% of the aggregate amount of premiums collected.

8. Notwithstanding subdivisions 1 through 4 of this subsection, all health insurance coverage issued in the individual market shall be originally priced to meet a minimum 75% loss ratio and, except for student health insurance coverage, such coverage, shall be guaranteed renewable or noncancellable.

9. Notwithstanding subdivisions 1 through 4 of this subsection, all health insurance coverage issued in the small group market shall be originally priced to meet a

minimum 75% loss ratio and shall be guaranteed renewable or noncancellable.

The above anticipated loss ratio standards do not apply to a type of coverage where such standards are in conflict with specific statutes or regulations.

B. The average annual premium per policy and per member shall be computed by the health insurance issuer based on an anticipated distribution of business by all applicable criteria having a price difference, such as age, sex, amount, dependent status, rider frequency, etc., except assuming an annual mode for all policies (i.e., the fractional premium loading shall not affect the average annual premium or anticipated loss ratio calculation).

**14VAC5-130-70. Filing a rate revision.**

A. Each rate revision submission shall include: (i) a new rate sheet; (ii) an actuarial memorandum; and (iii) all information required in SERFF. ~~For~~ The Unified Rate Review Template shall be filed for coverage issued in the individual or small group markets, ~~the Unified Rate Review Template shall also be filed~~ except for student health insurance coverage.

B. The actuarial memorandum shall contain the following information:

1. A description of the type of policy, including benefits, renewability, issue age limits, and if applicable, whether the policy includes grandfathered or nongrandfathered plans or both.

2. The scope and reason for the premium or rate revision.

3. A comparison of the revised premiums with the current premium scale, including all percentage rate changes and any rating factor changes.

4. A statement of whether the revision applies only to new business, only to in-force business, or to both.

5. The estimated average annual premium per policy and per member, before and after the proposed rate revision. Where different changes by rating classification are being requested, the rate filing shall also include (i) the range of changes and (ii) the average overall change with a detailed explanation of how the change was determined.

6. Except for coverage issued in the small group market, historical and projected experience, submitted on Form 130 A, including:

a. Virginia and national historical experience as specified in 14VAC5-130-50 C and projections for future experience;

b. A statement indicating the basis for determining the rate revision (Virginia, national or blended);

c. If the basis is blended, the credibility factor assigned to the national experience;

d. Earned Premiums (EP), Incurred Benefits (IB), Increase in Reserves (IR), and Incurred Loss Ratio = (IB + IR) ÷ (EP); and

e. Any other available data the health insurance issuer may wish to provide. The additional data may include, if available and appropriate, the ratios of actual claims to the claims expected according to the assumptions underlying the existing rates; substitution of actual claim run-offs for claim reserves and liabilities; accumulations of experience funds; substitution of net level policy reserves for preliminary term policy reserves; adjustments of premiums to an annual mode basis; or other adjustments or schedules suited to the form and to the records of the company. All additional data must be reconciled, as appropriate, to the required data.

7. Details and dates of all past rate revisions, including the annual rate revisions members will experience as a result of this filing. For companies revising rates only annually, the rate revision should be identical to the current submission. For companies that have had more frequent rate revisions, the annual revision should reflect the compounding impact of all such revisions for the previous 12 months.

8. A description of how revised rates were determined, including the general description and source of each assumption on Form 130A. For claims, provide historical and projected claims by major service category for both cost and utilization on Form 130B.

9. If the rate revision applies to new business, provide the anticipated loss ratio and a description of how it was calculated.

10. If the rate revision applies to in-force business:

a. The anticipated loss ratio and a description of how it was calculated; and

b. The estimated cumulative loss ratio, historical and anticipated, and a description of how it was calculated.

11. The loss ratio that was originally anticipated for the policy.

12. If 9, 10a, or 10b is less than 11, supporting documentation for the use of such premiums or rates.

13. The current number of Virginia and national members to which the revision applies for the most recent month for which such data is available, and either premiums in force, premiums earned, or premiums collected for such members in the year immediately prior to the filing of the rate revision.

14. Certification by a qualified actuary that, to the best of the actuary's knowledge and judgment, the rate filing is in compliance with applicable laws and regulations of this Commonwealth and the premiums are reasonable in relation to the benefits provided.

15. For coverage issued in the individual or small group markets, a certification by a qualified actuary of the actuarial value of each plan of benefits included and the AV calculation summary.

**14VAC5-130-81. Risk pools and index rate.**

A. A health insurance issuer shall consider the claims experience of all enrollees in all health benefit plans, other than grandfathered plans and student health insurance coverage, in the individual market to be members of a single risk pool.

B. A health insurance issuer shall consider the claims experience of all enrollees in all health plans, other than grandfathered plans, in the small group market to be members of a single risk pool.

C. Each plan year or policy year, as applicable, a health insurance issuer shall establish an index rate based on the total combined claims costs for providing essential health benefits within the single risk pool of the individual or small group market. The index rate may be adjusted on a market-wide basis based on the total expected market-wide payments and charges under the risk adjustment and reinsurance programs in this Commonwealth and the health benefit exchange user fees. The premium rate for all of the health insurance issuer's plans shall use the applicable index rate, as adjusted in accordance with subsection D of this section.

D. A health insurance issuer may vary premium rates for a particular plan from its index rate for a relevant state market based only on the following actuarially justified plan-specific factors:

1. Cost-sharing design of the plan.

2. The plan's provider network, delivery system characteristics, and utilization management practices.

3. The benefits provided under the plan that are in addition to the essential health benefits. These additional benefits shall be pooled with similar benefits within a single risk pool and the claims experience from those benefits shall be utilized to determine rate variations for plans that offer those benefits in addition to essential health benefits.

4. Administrative costs, excluding health benefit exchange user fees.

5. With respect to catastrophic plans, the expected impact of the specific eligibility categories for those plans.

VA.R. Doc. No. R16-4264; Filed October 20, 2015, 3:00 p.m.

# TITLE 17. LIBRARIES AND CULTURAL RESOURCES

## BOARD OF HISTORIC RESOURCES

### Proposed Regulation

Title of Regulation: **17VAC5-20. Regulations Governing Permits for the Archaeological Removal of Human Remains (amending 17VAC5-20-30 through 17VAC5-20-60).**

Statutory Authority: §§ 10.1-2205 and 10.1-2305 of the Code of Virginia.

Public Hearing Information: No public hearings are scheduled.

Public Comment Deadline: January 15, 2016.

Agency Contact: Jennifer Pullen, Executive Assistant, Department of Historic Resources, 2801 Kensington Avenue, Richmond, VA 23221, telephone (804) 482-6085, FAX (804) 367-2391, or email jennifer.pullen@dhr.virginia.gov.

Basis: Section 10.1-2305 of the Code of Virginia authorizes the Department of Historic Resources to issue permits for the archaeological removal of human remains and associated artifacts, whether alone or in concert with a court-approved removal permit. Section 10.1-2305 D of the Code of Virginia calls on the Board of Historic Resources to promulgate regulations to "provide for appropriate public notice prior to issuance of a permit, provide for appropriate treatment of excavated remains, the scientific quality of the research conducted on the remains, and the appropriate disposition of the remains upon completion of the research."

Purpose: Public concerns about local governments and private property owners seeking court orders or other permits for the removal of "abandoned" cemeteries without sufficient public notification resulted in the passage of new statutory requirements for these processes. In order to be consistent with the new court order process, and because of past occurrences where an applicant removed graves and then claimed they did not have the funds to rebury those remains with due respect and consideration, the Board of Historic Resources is proposing to revise its implementing regulations (17VAC5-20) to enhance public notification requirements rendering the application process more transparent and responsive to community interests; to ensure that the applicant has the financial and other resources to complete the proposed work and the respectful disposition of the recovered remains; and to incorporate other technical changes in order to modernize the language of the regulations.

Substance: 17VAC5-20-40 A is revised to specifically require (i) proof of ownership of the archaeological site or property upon which the recovery will take place and (ii) a signed statement confirming adequate resources to complete the research design as well as final disposition of the recovered remains. These revisions are necessary in order to document that the permit holder has the permission of the landowner and is capable, financially and otherwise, of ensuring the respectful disposition of all recovered remains.

17VAC5-20-50 B is revised to require publication of notices of intent using relevant electronic and social media and other public outlets as well as print newspapers, notice posted at the recovery site, direct consultation with local preservation/historical/genealogical organizations, and a public hearing. This section is further revised to require that the notice include a statement regarding the reason for the proposed recovery, additional contact information for the

applicant, the street address of one or more locations where the general public may view a copy or copies of the application, and a statement regarding the proposed disposition of any recovered human remains and associated artifacts. These revisions recognize the prevalence of electronic and social media in modern communication, and the need for greater flexibility in use of signage and other means of passive public notification as well as the importance of thorough and open documentation of intent.

17VAC5-20-50 C is revised to clarify instances in which the public notice may be waived. These revisions are necessary in order to fully inform both applicants and the interested public of this option, which is rarely exercised.

In pursuing these revisions, the department intends to render the permit application and consideration process more transparent to the interested public, to further ensure the respectful treatment of recovered human remains, and to more fully modernize the language of these implementing regulations.

Issues: As development pressure increases the need for land, historically significant cemeteries and unmarked burials will be moved to make way for new construction. While most such removals are conducted by professionals in the funeral/cemetery industry, occasionally the responsible party will engage archaeologists to conduct the work. In these cases (roughly four to six per year) the Department of Historic Resources is charged with ensuring the respectful treatment of both buried human remains and the living community that has an interest in these remains. Recent cases in which interested parties felt they had not been given enough notice or consideration by the property owners has prompted the department to reevaluate existing requirements and revise those requirements to go beyond the traditional public notices in local newspapers, which seldom reach the interested community.

The primary advantages for the general public are greatly increased access to information during the application review process, as well as greater clarity with regard both to project parameters and permit requirements. Permit applicants will be required to provide a considerably greater amount of information as a result of these revisions, which may be perceived by some as a disadvantage. However, the department's proposed regulatory revisions regarding public notification and consultation are entirely in line with those already made to §§ 57-36 and 57-38.1 of the Code of Virginia--the laws governing the court-approved recovery process. The remaining revisions are for documentary and clarification purposes and should pose no disadvantage to permit applicants or the general public.

The department views these proposed revisions as entirely advantageous with regard to its review and management of future archaeological recovery permits. Although review and oversight of the amplified requirements will necessitate a greater investment in time and effort by department staff, encouraging more open and comprehensive public involvement during the review process will assist the department in addressing citizen concerns and render the entire process more transparent.

Department of Planning and Budget's Economic Impact Analysis:

Summary of the Proposed Amendments to Regulation. The Virginia Department of Historic Resources (Department) is responsible for issuing permits for the conduct of archaeological field investigations involving the removal of buried human remains and associated artifacts from unmarked burials, and for archaeological recovery undertaken pursuant to a circuit court-approved removal of a cemetery. Pursuant to Chapter 588 of the 2014 Acts of Assembly, the Virginia Board of Historic Resources (Board) proposes to revise the Regulations Governing Permits for the Archaeological Removal of Human Remains so that permit applications include: 1) proof of ownership of the property of the archaeological site upon which the field investigation will be conducted, 2) a signed statement confirming both financial and other resources for reburial in an appropriate location, and 3) a current email address. The Board also proposes to require the permit applicant to post notice of the planned activity and other information: at the investigation site; to and in consultation with local historical and genealogical commissions/societies; and at a public hearing. Additionally, the Board proposes to require that the notice include "a statement regarding the reason for the proposed relocation," and "the street address of one or more locations in the project vicinity where a copy of the complete application can be viewed by members of the general public during regular business hours."

Result of Analysis. The benefits likely exceed the costs for all proposed changes.

Estimated Economic Impact. Both archaeological and court-ordered processes require public notification and a good faith effort to consult with descendants and interested parties. Recently, public concerns about the inadequacy of existing notification and consultation requirements associated with the court-ordered process resulted in significant revisions to the sections of Virginia Code governing these actions,[1] which revisions were signed into law in 2014 (Chapter 588).

The proposal to require proof of ownership of the property of the archaeological site upon which the field investigation will be conducted is beneficial in that it will help prevent the possibility of inadvertent state approval of the misuse of a property owner's land. The cost of providing a copy of a deed within an application package would be small compared to the benefit of reducing the chance of such misuse of property.

According to the Department there has been at least one instance where after human remains were exhumed the permit holder claimed insufficient resources to properly rebury the remains. Thus the proposed requirement that permit applications include a signed statement confirming both

financial and other resources for reburial in an appropriate location would potentially provide significant benefit. The cost of providing such information would not likely be large for those who do have sufficient resources.

Providing an email address on the permit application is essentially costless and reflects the existence of current technology. The proposal to require this information on the permit application will be beneficial in that it will help enable efficient communication.

The current regulation only requires that upon notice from the Department that the permit application is complete, that the applicant publishes notice of the planned activity and other information in a newspaper of general circulation in the area where the field investigation will occur. The Board proposes to further require that the applicant provide notice posted at the site of the graveyard or burial; notice to any historic preservation or other such commission, as well as area historical and genealogical societies; and notice at least one public hearing. The proposed increased notice will be beneficial in that it will significantly increase the likelihood that individuals or organizations potentially concerned with the specific proposed removal of buried human remains and associated artifacts will become informed of the planned activity.

The proposed increased notice will produce some cost in time and materials for permit applicants. The time and cost of producing and posting a sign at the site of the graveyard or burial would be fairly small. The Department states that it has contact with the various historic preservation commissions and historical and genealogical societies throughout the Commonwealth, and that it would be willing to help find and to notify the relevant entities for the applicant by request. Thus the practical cost of this proposed additional notice would be quite small as well. If desired, holding a public hearing where public comment is received could be done at a fairly small cost. Such a hearing could be done for example in a room at a library and perhaps take an hour or less if interest turns out to be limited.

The proposal to require that the notice include a statement regarding the reason for the proposed relocation would likely have value in that it would help interested parties have greater understanding of the planned project. Including such a brief statement would not likely be time consuming for the applicant. Maintaining a copy of the complete application at one or more locations in the project vicinity where it can be viewed by members of the general public during regular business hours could be somewhat more costly, but not necessarily prohibitively so. According to the Department, libraries are typically willing to keep such items on hand for public convenience.

Businesses and Entities Affected. The proposed amendments affect firms, individuals, organizations, and agencies that own property containing unmarked and/or historic burials and cemeteries that they wish to relocate; individuals with an interest in or objection to this recovery; local and state agencies with a regulatory interest in the process; archaeological firms contracted to perform the recovery; physical anthropologists and their employers; and funeral homes contracted to perform reburials where required by local ordinance. Given current permitting rates, the Department of Historic Resources anticipates that approximately 5 archaeological firms will be affected per year. All would likely be small businesses. Depending on land ownership, permit applicants may also be businesses and may be affected at the same rate.

Localities Particularly Affected. The proposed amendments do not disproportionately affect particular localities.

Projected Impact on Employment. The proposed amendments are unlikely to significantly affect employment.

Effects on the Use and Value of Private Property. The proposed amendments will require that additional efforts are made to inform the public when there are plans to remove human remains from private and public property.

Small Businesses: Costs and Other Effects. Small firms such as property developers may on rare occasions desire to move human remains so as to go forward on a development project. The proposed amendments will require that additional efforts are made to inform the public when there are plans to remove human remains from private and public property. This will produce a relatively small increase in costs for such firms.

Small Businesses: Alternative Method that Minimizes Adverse Impact. There are no clear alternative methods that lower cost while still meeting the policy goal of better informing the public of plans for the removal of buried human remains and associated artifacts from unmarked burials.

Real Estate Development Costs. The proposed amendments will moderately increase real estate development costs in the rare instances where the land to be developed includes human remains.

[1]Specifically §§ 57-36 and § 58-38.1 of the Code of Virginia.

Agency's Response to Economic Impact Analysis: The agency concurs with the economic impact analysis prepared and submitted by the Department of Planning and Budget.

Summary:

*Pursuant to Chapter 588 of the 2014 Acts of Assembly, the proposed amendments revise the regulations so that permit applications include (i) proof of ownership of the property of the archaeological site upon which the field investigation will be conducted, (ii) a signed statement confirming both financial and other resources for reburial in an appropriate location, and (iii) a current email address.*

*The proposed amendments also require the permit applicant to (i) publish notice in a local newspaper, post notice of the planned activity and other information at the*

*investigation site, and provide notice to local historical and genealogical commissions and societies; (ii) provide notice of at least one public hearing; and (iii) include in the notice a statement regarding the reason for the proposed relocation and the street address of one or more locations in the project vicinity where a copy of the complete application can be viewed by members of the general public during regular business hours.*

**17VAC5-20-30. General provisions.**

Any person conducting any field investigation involving the removal of human remains or associated artifacts from any unmarked human burial on an archaeological site shall first obtain a permit from the director.

1. No field investigation involving the removal of human remains or associated artifacts from any unmarked human burial on an archaeological site shall be conducted without a permit.

2. In cases where a field investigation may reasonably be anticipated to involve the excavation and removal of human remains or associated artifacts, the person conducting such investigation may obtain a permit prior to the actual discovery of human burials.

3. In any case where human remains are encountered in a field investigation without having received a permit, all work on the burial or burials shall cease until a permit has been obtained.

4. No field investigation involving the removal of human remains or associated artifacts from any unmarked human burial on an archaeological site shall be performed except under the supervision and control of an archaeologist meeting the qualifications stated in 17VAC5-20-40.

5. Any human remains removed in the course of field investigations shall be examined by a skeletal biologist or other specialist meeting the qualifications stated in 17VAC5-20-40.

6. Any approved field investigation shall include an interim progress report summarizing the field portion of the permitted investigation within 60 days of completion of the removal of all human remains and associated artifacts. Reports indicating progress on analysis and report preparation shall be submitted to the department at 90-day intervals until the final report and disposition are accomplished.

7. The applicant shall make the site and laboratory available to the department for purposes of monitoring progress and compliance with this chapter as requested by the department.

8. A copy of the final report including the analysis of materials removed from the burial shall be delivered to the director according to the timetable described in the application.

9. Documentation of final disposition as required by the permit shall be delivered to the department within 15 days of such disposition.

10. Work conducted under a permit will not be considered complete until all reports and documentation have been submitted to and reviewed by the department to meet all conditions cited in this chapter or specified as part of an approved permit.

11. Failure to complete the conditions of the permit within the permitted time limit may result in revocation of the permit and constitute grounds for denial of future applications.

~~11.~~ 12. The applicant may apply for an extension or change to the conditions of the permit, including changes in research design, principal personnel or disposition, for good cause. Granting such an extension or alteration will be at the discretion of the director, after consultation with interested parties.

**17VAC5-20-40. Permit application.**

A. Application for a permit shall be in such form as required by the director, but shall include the following basic information:

1. Name, address, email address, phone number, and institutional affiliation of the applicant.

2. Location and description of the archaeological site for which field investigation is proposed, including site number if assigned.

3. Proof of ownership of the archaeological site or the property on which the field investigation is to be conducted.

~~3.~~ 4. A written statement of the landowner's permission both to conduct such research and to remove human remains on ~~his~~ the landowner's property, and allowing the director or ~~his~~ the director's designee access to the field investigation site at any reasonable time for the duration of the permit. The landowner's signature ~~should~~ to the written statement shall be notarized.

~~4.~~ 5. Applicant shall provide ~~evidence indicating~~ a signed statement confirming that adequate resources (financial and otherwise) are available to carry out the approved research design including respectful reburial in an appropriate location.

~~5.~~ 6. Applicant shall indicate whether or not this permit is being requested as part of a federal, state, or local government undertaking and, if so, shall provide a brief description of the undertaking.

B. A statement of goals and objectives of the project and proposed research design shall be provided as part of the permit application. The research design shall, at a minimum, address the following:

1. How the research design adheres to professionally accepted methods, standards, and processes used to obtain,

evaluate, and analyze data on mortuary practices in particular and cultural practices in general.

2. Field documentation which shall include, but not be limited to (i) photographs, (ii) maps, (iii) drawings, and (iv) written records. Collected information shall include, but not be limited to (i) considerations of containment devices, (ii) burial shaft or entombment configuration, (iii) burial placement processes, (iv) skeletal positioning and orientation, (v) evidence of ceremonialism or religious practices, and (vi) grave items or artifacts analyses.

To the extent possible, the cultural information shall be examined at the regional level with appropriate archival research. The results of the evaluation, along with the osteological analysis, will be submitted in report form to the director for review, comment, and final acceptance.

3. The planned osteological examination of the human skeletons which shall include determinations of age, sex, racial affiliation, dental structure, and bone inventories for each individual in order to facilitate comparative studies of bone and dental disease. Said inventories shall provide to the extent possible a precise count of all skeletal elements observed, as well as the degree of preservation (complete or partial); separate tabulation of the proximal and distal joint surfaces for the major long bones should be recorded.

The research design should also address at a minimum the following additional analytical techniques and when they will be used: under what circumstances will bone be examined and x-rayed if necessary, to detect lesions or conditions resulting from disease, malnutrition, trauma, or congenital defects; the presence of dental pathological conditions including carious lesions, premortem tooth loss, and alveolar abscessing to be recorded: craniometric and postcraniometric data to be obtained in a systematic format that provides basic information such as stature; and other techniques as appropriate. Although the initial focus concerns description and documentation of a specific sample, the long-term objective is to obtain information that will facilitate future comparative research. The report based on the osteological analysis should identify the research objectives, method of analysis, and results. Specific data (e.g., measurements, discrete trait observations) supplementing those traits comprising the main body of the report may be provided in a separate file including, for example, tables, graphs, and copies of original data collection forms. Unique pathological specimens should be photographed as part of basic documentation.

4. The expected timetable for excavation, analysis and preparation of the final report on the entire investigation.

C. A resume, vitae, or other statement of qualification shall be provided as part of the permit application demonstrating that the persons planning and supervising the field investigation and subsequent analysis meet the minimum qualifications consistent with the federal standards as cited in 36 CFR 61 and 43 CFR 7, as follows:

1. The qualifications of the archaeologist performing or supervising the work shall include a graduate degree in archaeology, anthropology, or closely related field plus:

a. At least one year of full-time professional experience or equivalent specialized training in archaeological research, administration, or management;

b. At least four months of supervised field and analytic experience in general North American archaeology; and

c. Demonstrated ability to carry research to completion.

In addition, a prehistoric archaeologist shall have at least one year of full-time experience at a supervisory level in the study of archaeological resources of the prehistoric period. An historic archaeologist shall have at least one year of full-time experience at a supervisory level in the study of archaeological resources of the historic period.

2. The qualifications of the skeletal biologist needed to undertake the types of analyses outlined in subdivision B 3 of this section should have at least a Masters degree with a specialization in human skeletal biology, bioarchaeology, forensic anthropology, or some other field of physical anthropology, plus two years of laboratory experience in the analysis of human skeletal remains. The individual must be able to develop a research design appropriate to the particular circumstances of the study and to conduct analyses of skeletal samples (including age, sex, race, osteometry, identification of osteological and dental disease, and the like), employing state-of-the-art technology. The individual must have the documented ability to produce a concise written report of the findings and their interpretation.

D. Under extraordinary circumstances, the director shall have the authority to waive the requirements of research design and professional qualifications.

E. The permit application shall also include a statement describing the curation, which shall be respectful, and the proposed disposition of the remains upon completion of the research. When any disposition other than reburial is proposed, then the application shall also include a statement of the reasons for alternative disposition and the benefits to be gained thereby. In the absence of special conditions, including those that may come to light during excavation or analysis, this disposition shall be reburial within a two-year period from the date of removal unless requested otherwise by next of kin or other closely affiliated party.

F. When a waiver of public notice or other requirement based on an emergency situation is requested by the applicant then the permit application must include:

1. A statement describing specific threats facing the human skeletal remains or associated artifacts. This statement must make it clear why the emergency justifies the requested waiver.

2. A statement describing the known or expected location of the burials or the factors that suggest the presence of burials.

3. A statement describing the conservation methods that will be used, especially for skeletal material. Note that conservation treatment of bones should be reversible.

**17VAC5-20-50. Public comment.**

A. Upon receiving notice from the director that the permit application is complete, the applicant shall arrange for public notification as deemed appropriate by the department.

B. In all cases, the applicant shall publish, or cause to be published, ~~a notice in a newspaper of general circulation in the area where the field investigation will occur~~ written notice in the following manners: notice in at least one local newspaper of general circulation in the area where the field investigation will occur; notice posted at the site of the graveyard or burial; notice to any historic preservation or other such commission, as well as area historical and genealogical societies; and notice of at least one public hearing. ~~This~~ Each notice shall include:

1. ~~Name~~ The name and address of applicant~~.~~;

2. ~~Brief~~ A brief description of proposed field investigation~~.~~;

3. A statement regarding the reason for the proposed relocation;

4. A statement informing the ~~public~~ reader that ~~they~~ the reader can request a public meeting~~.~~;

~~4.~~ 5. A contact name, address, email address, and the phone number where ~~they~~ the reader can get more information~~, including a location in the project vicinity where a copy of the complete application can be viewed.~~;

6. The street address of one or more locations in the project vicinity where a copy of the complete application can be viewed by members of the general public during regular business hours;

~~5.~~ 7. A statement that the complete application can also be reviewed and copied at the department~~.~~ or on the department's website;

~~6. When any disposition other than reburial is proposed, this must be stated in the public notice. The notice should contain a~~ 8. A statement ~~of~~ regarding the proposed disposition ~~and~~ of any human remains and associated funerary objects recovered during the permitted recovery process. If any disposition other than reburial is proposed, the notice must specifically request public comment on this aspect of the application~~.~~; and

~~7. Deadline~~ 9. The deadline for receipt of comments.

The notice shall be of a form approved by the director and shall invite interested persons to express their views on all aspects of the proposed field investigation to the director by a date certain prior to the issuance of the permit. Such notice shall be published once each week for four consecutive weeks.

C. ~~Such~~ The public notice requirement may be waived:

~~1. If the applicant can document that the family of the deceased has been contacted directly and is in agreement with the proposed actions.~~

~~2.~~ 1. In cases where the applicant has demonstrated that, due to the rarity of the site or its scientific or monetary value and where security is not possible, ~~there is a likelihood~~ it is likely that looting or other damage to the burial or surrounding site would occur as a result of the public notice.

~~3. If~~ 2. In the case of an emergency and if, in the opinion of the director, the severity of a demonstrated emergency is such that compliance with the above public notice requirements may result in vandalism, looting, or the loss of significant information, or that the publication of such notice may substantially increase the threat of such loss through vandalism, the director, in such cases, may issue a permit prior to completion of the public notice and comment requirements. ~~In such cases the~~ The applicant shall provide for such public notice and comment as determined by the director to be appropriate under the circumstances.

D. In cases of marked burials where a permit is sought pursuant to a court order subject to § 57-38.1 or 57-39 of the Code of Virginia, and in accordance with § 10.1-2305 C of the Code of Virginia, the applicant shall provide evidence of a reasonable effort to identify and notify next of kin.

E. In addition to the notification described in subsection B of this section, in the case of both prehistoric and historic Native American burials, the department shall inform ~~the Virginia Council on Indians and~~ the appropriate ~~tribal~~ leaders of state-recognized and federally recognized tribes.

F. The department shall maintain a list of individuals and organizations who have asked to be notified of permit actions. This list will be updated annually and notices sent to all parties currently listed. In all cases notification shall be sent to the appropriate local jurisdiction.

G. Prior to the issuance of a permit, the director may elect to hold a public meeting on the permit application. The purpose of the public meeting shall be to obtain public comment on the proposed field investigations. The director shall decide whether or not to hold a public meeting on a case-by-case basis, and will include any requests following from the public notice in such considerations.

**17VAC5-20-60. Issuance or denial of permit.**

A. Upon completion of the public comment period, the director shall decide whether to issue the permit within a 30-day review period. In the event the director received no adverse public comment, no further action is required prior to decision.

B. The director shall consider any comment received and evaluate it in the light of the benefits of the proposed investigation, the severity of any emergency, or the amount of scientific information which may be lost in the event no permit is issued. The director may also take such comments into account in establishing any conditions of the permit. In considering such comment, the director shall give priority to comments and recommendations made by individuals and parties most closely connected with the human burials subject to the application.

C. In making ~~his~~ a decision on the permit application, the director shall consider the following:

1. The level of threat facing the human skeletal remains and associated cultural resources.

2. The appropriateness of the goals, objectives, research, design, and qualifications of the applicants to complete the proposed research in a scientific fashion. The director shall consider the United States Secretary of the Interior's Standards and Guidelines for Archaeology and Historic Preservation, set out at 48 FR 44716 (September 29, 1983), in determining the appropriateness of the proposed research and in evaluating the qualifications of the applicants.

3. Comments received from the public.

4. The appropriateness of the proposed disposition of remains upon completion of the research. The director may specify a required disposition as a condition of granting the permit.

5. The performance of the applicant on any prior permitted investigation.

6. The applicability of other federal, state and local laws and regulations.

D. Failure to adequately meet all conditions in a previous permit shall be grounds for denial of any subsequent permit applications.

E. In the event the director proposes to deny a permit application, the director shall conduct an informal conference in accordance with § ~~9-6.14:11~~ 2.2-4019 of the Administrative Process Act.

F. The permit shall contain such conditions which, in the judgment of the director, will protect the excavated human remains or associated artifacts.

G. A permit shall be valid for a period of time to be determined by the director as appropriate under the circumstances.

H. The director may extend or change the period or conditions of the permit or the period of analysis as noted in subdivision ~~11~~ 12 of 17VAC5-20-30. In order to obtain such an extension or change the applicant must submit a written request demonstrating good cause. "Good cause" may include but not be limited to situations in which many more burials were encountered than were expected in the original permit application or where a new analytical technique or question will be applied within an expanded term of the permit. In making any decision to extend a permit, the director will consult with appropriate interested parties as identified in the initial public review.

I. The director may revoke any permit issued under this chapter for good cause shown. Such revocation shall be in accordance with the provisions of the Administrative Process Act.

VA.R. Doc. No. R14-3990; Filed October 26, 2015, 2:36 p.m.

# TITLE 18. PROFESSIONAL AND OCCUPATIONAL LICENSING

## BOARD FOR ARCHITECTS, PROFESSIONAL ENGINEERS, LAND SURVEYORS, CERTIFIED INTERIOR DESIGNERS AND LANDSCAPE ARCHITECTS

### Final Regulation

Title of Regulation: **18VAC10-20. Board for Architects, Professional Engineers, Land Surveyors, Certified Interior Designers and Landscape Architects Regulations (amending 18VAC10-20-10, 18VAC10-20-17 through 18VAC10-20-400, 18VAC10-20-420 through 18VAC10-20-795; adding 18VAC10-20-87, 18VAC10-20-425, 18VAC10-20-495, 18VAC10-20-515, 18VAC10-20-575, 18VAC10-20-627; repealing 18VAC10-20-540, 18VAC10-20-600).**

Statutory Authority: §§ 54.1-201 and 54.1-404 of the Code of Virginia.

Effective Date: January 1, 2016.

Agency Contact: Kathleen R. Nosbisch, Executive Director, Board for Architects, Professional Engineers, Land Surveyors, Certified Interior Designers and Landscape Architects, 9960 Mayland Drive, Suite 400, Richmond, VA 23233, telephone (804) 367-8514, FAX (866) 465-6206, or email apelscidla@dpor.virginia.gov.

Summary:

*The amendments (i) reduce from three years to two years the experience requirement for surveyor-in-training designation applicants who have a board-approved undergraduate degree in a field unrelated to surveying; (ii) withhold renewal, reinstatement, examination, or other services for regulants who fail to pay penalties or other fees owed to the board resulting from a consent or final order; (iii) remove the amount of the duplicate wall certificate fee from the regulations to allow the fee to be updated without having to go through the regulatory process; (iv) require applicants for professional engineer license, land surveyor license, engineer-in-training*

*designation, and surveyor-in-training designation, who do not pass the exam within three years from their approval, to demonstrate proof of educational activities to be eligible for the exam once again; (v) require that the references for architects, engineers, and landscape architects license applicants be someone who has known the applicant within the last five years; (vi) clarify licensure requirements for surveyor photogrammetrists applying via comity by addressing the requirements for those applicants licensed in other states before, during, and after the board's period for grandfathering; and (vii) eliminate duplicative language, clarify existing requirements, update citations, and improve clarity by reorganizing several sections of regulatory text.*

Summary of Public Comments and Agency's Response: A summary of comments made by the public and the agency's response may be obtained from the promulgating agency or viewed at the office of the Registrar of Regulations.

Part I
General

**18VAC10-20-10. Definitions.**

Section 54.1-400 of the Code of Virginia provides definitions of the following terms and phrases as used in this chapter:

Architect

Board

Certified interior designer

Interior design ~~by a certified interior designer~~ (when used in this chapter, interior design shall only be applicable to interior design performed by a certified interior designer).

Land surveyor. When used in this chapter, land surveyor shall include surveyor photogrammetrist unless stated otherwise or the context requires a different meaning.

Landscape architect

Practice of architecture

Practice of engineering

Practice of land surveying

Practice of landscape architecture

Professional engineer

The following words, terms, and phrases when used in this chapter shall have the meanings ascribed to them except where the context clearly indicates or requires different meanings:

"Application" means a completed application with the appropriate fee and any other required documentation~~,~~ including, but not limited to, references, ~~employment~~ experience verification, degree verification, and verification of examination and licensure or certification.

"Certified" means an individual holding a valid certification issued by the board ~~that has not been suspended, revoked, or surrendered, and is currently registered with the board to practice in the Commonwealth in accordance with § 54.1-405 or 54.1-414 of the Code of Virginia~~ and in good standing.

"Comity" means the recognition of licenses or certificates issued by other states~~, the District of Columbia, or any territory or possession~~ or other jurisdictions of the United States as permitted by § 54.1-103 C of the Code of Virginia.

"Department" means the Department of Professional and Occupational Regulation.

~~"Direct control and personal supervision" shall be that degree of supervision by a person overseeing the work of another whereby the supervisor has both control over and detailed professional knowledge of the work prepared under his supervision and words and phrases of similar import mean that the professional shall have control over the decisions on technical matters of policy and design, and exercises his professional judgment in all professional matters that are embodied in the work and the drawings, specifications, or other documents involved in the work; and the professional has exercised critical examination and evaluation of an employee's, consultant's, subcontractor's, or project team members' work product, during and after preparation, for purposes of compliance with applicable laws, codes, ordinances, regulations and usual and customary standards of care pertaining to professional practice. Further, it is that degree of control a professional is required to maintain over decisions made personally or by others over which the professional exercises direct control and personal supervision. "Direct control and personal supervision" also includes the following:~~

~~1. The degree of control necessary for a professional to be in direct control and personal supervision shall be such that the professional:~~

~~a. Personally makes professional decisions or reviews and approves proposed decisions prior to their implementation, including the consideration of alternatives, whenever professional decisions that could affect the health, safety, and welfare of the public are made; and~~

~~b. Determines the validity and applicability of recommendations prior to their incorporation into the work, including the qualifications of those making the recommendations.~~

~~2. Professional decisions that must be made by and are the responsibility of the professional in direct control and personal supervision are those decisions concerning permanent or temporary work that could affect the health, safety, and welfare of the public, and may include, but are not limited to, the following:~~

~~a. The selection of alternatives to be investigated and the comparison of alternatives for designed work; and~~

~~b. The selection or development of design standards and materials to be used.~~

~~3. A professional shall be able to clearly define the scope and degree of direct control and personal supervision and how it was exercised and to demonstrate that the professional was answerable within said scope and degree of direct control and personal supervision necessary for the work for which the professional has signed and sealed; and~~

~~4. No sole proprietorship, partnership, corporation, limited liability company, joint venture, professional corporation, professional limited liability corporation, or other entity shall practice, or offer to practice, any profession regulated under this chapter unless there is a resident professional for that service providing direct control and personal supervision of such service in each separate office in which such service is performed or offered to be performed.~~

"Direct control and personal supervision" means supervision by a professional who oversees and is responsible for the work of another individual.

"Good moral character" may be established if the applicant or regulant:

1. Has not been convicted of a felony or misdemeanor that ~~has a reasonable relationship to the functions of the employment or category for which the license or certification is sought~~ would render the applicant unfit or unsuited to engage in the occupation or profession applied for in accordance with § 54.1-204 of the Code of Virginia;

2. Has not~~, within 10 years of application for licensure, certification, or registration,~~ committed any act involving dishonesty, fraud, misrepresentation, breach of fiduciary duty, negligence, or incompetence reasonably related to ~~the applicant's proposed area of practice;~~:

a. The proposed area of practice within 10 years prior to application for licensure, certification, or registration, or

b. The area of practice related to licensure, certification, or registration by the board while under the authority of the board.

3. Has not engaged in fraud or misrepresentation in connection with the application for licensure, certification, or registration, or related examination;

4. Has not had a license, certification or registration revoked or suspended for cause by this ~~state~~ Commonwealth or by any other jurisdiction, or surrendered a license, certificate, or registration in lieu of disciplinary action; or

5. Has not practiced without the required license, registration, or certification in this ~~state~~ Commonwealth or in another jurisdiction within the five years immediately preceding the filing of the application for licensure, certification, or registration by this Commonwealth~~; or~~.

~~6. Has not, within 10 years of application for licensure, certification, or registration, committed an act that would constitute unprofessional conduct, as set forth in Part XII of this chapter.~~

"Good standing" means a current or active license, certificate, or registration issued by a regulatory body that is not revoked, suspended, or surrendered.

"Licensed" means an individual who holds a valid license issued by the board ~~that has not been suspended, or revoked, or surrendered and who is currently registered with the board to practice in the Commonwealth in accordance with § 54.1-405 of the Code of Virginia~~.

"Place of business" means any location ~~which offers to practice or practices~~ that, through ~~licensed or certified~~ professionals, offers or provides the services of architecture, engineering, land surveying, landscape architecture~~,~~ ~~or~~ certified interior design, or any combination thereof. A temporary field office established and utilized for the duration of a specific project shall not qualify as a place of business under this chapter.

"Profession" means the practice of architecture, engineering, land surveying, landscape architecture, or certified interior design.

"Professional" means an architect, professional engineer, land surveyor, landscape architect~~,~~ or interior designer who ~~is licensed or certified, as appropriate,~~ holds a valid license or certificate issued by the board pursuant to the provisions of this chapter and is in good standing with the board to practice his profession in this Commonwealth.

"Registrant" means a business ~~currently registered with the board~~ holding a valid registration issued by the board, and in good standing, to offer or provide one or more of the professions regulated by the board.

"Regulant" means ~~a licensee, certificate holder or registrant~~ an architect, professional engineer, land surveyor, or landscape architect holding a valid license issued by the board; an interior designer holding a valid certification issued by the board; or a registrant.

"Resident" means physically present ~~in said~~ at the place of business a majority of ~~the~~ its operating hours ~~of the place of business~~.

"Responsible person" means the ~~individual~~ professional named by the ~~entity~~ registrant to be responsible and have control of the registrant's regulated services offered, ~~or~~ rendered, or both~~, by the entity~~. A professional can only be the responsible person for the professions indicated on his license or certification.

"Surveyor photogrammetrist" means a person who by reason of specialized knowledge in the area of photogrammetry has been granted a license by the board to survey land in accordance with Chapter 4 (§ 54.1-400 et seq.) of Title 54.1 of the Code of Virginia for the determination of topography, contours ~~and/or~~, or location of planimetric features using photogrammetric methods or similar remote sensing technology.

**18VAC10-20-17. Replacement of wall certificate.**

Any ~~licensee or certificate holder~~ professional may obtain a replacement for a lost, destroyed, or damaged wall certificate upon submission of a ~~$25~~ department fee accompanied by a written request indicating that the certificate was lost, destroyed, or damaged. Multiple copies may be available at the discretion of the board or its agent.

Part II
General Entry Requirements

**18VAC10-20-20. General application requirements.**

A. ~~All applicants~~ Applicants must be of good moral character.

~~B. 1. Except as otherwise provided in subdivisions 2 and 3 of this subsection, a fully documented application shall be submitted by applicants seeking consideration for licensure, certification or registration to be received in the board's office no later than 130 days prior to the scheduled examination. The date the fully documented application is received in the board's office shall determine if an application has been received by the deadline set by the board. All applications shall be completed in accordance with the instructions contained herein and on the application. Applications will not be considered complete until all required documents are received by the board. All applications, accompanying materials and references become the property of the board upon receipt by the board.~~

~~2. Applicants for the Fundamentals of Engineering examination who are applying pursuant to subdivision 1 of 18VAC10-20-190 may submit applications to be received in the board's office no later than 60 days prior to the scheduled examination.~~

~~3. Applicants for the Fundamentals of Land Surveying examination who are applying pursuant to subdivision 1 of 18VAC10-20-300 may submit applications to be received in the board's office no later than 60 days prior to the scheduled examination.~~

~~4. Applicants for the National Council of Interior Design Qualification (NCIDQ) examination shall apply directly to NCIDQ for the examination.~~

B. Applications shall be completed in accordance with instructions contained in this section and on the application.

C. Applications for licensure requiring an exam shall be received in the board's office by the application deadline established in Part III (18VAC10-20-90 et seq.) of this chapter for each profession's exam. The date the fully documented application is received in the board's office shall determine if the application has been received on time. Applications, accompanying materials, and references become the property of the board upon receipt by the board.

D. Applicants shall meet ~~applicable~~ all entry requirements at the time application is made.

~~D. Applicants who have been found ineligible for any reason may request further consideration by submitting in writing evidence of additional qualifications, training or experience. No additional fee will be required provided the requirements for licensure, certification or registration are met within a period of three years from the date the original application is received by the board. After such period, a new application shall be required.~~

E. Applicants shall provide the board with all required documentation and fees to complete the application for licensure or certification no later than three years from the date of the board's receipt of the initial application fee. Applications that remain incomplete after that time will no longer be processed by the board and the applicant shall submit a new application.

~~E.~~ F. The board may make further inquiries and investigations with respect to ~~the qualifications of an applicant and all~~ an applicant's qualifications and documentation ~~and information~~ to confirm or amplify information supplied. ~~The board may also require a personal interview with an applicant.~~

~~F.~~ G. Failure of an applicant to comply with a written request from the board for additional evidence or information within 60 days of receiving such notice, except in such instances where the board has determined ineligibility for a clearly specified period of time, may be sufficient and just cause for disapproving the application.

~~G. Applicants shall be held to the standards of practice and conduct as set forth in this chapter.~~

H. Applicants who do not meet the requirements of 18VAC10-20-20 or 18VAC10-20-40 may be approved following consideration by the board in accordance with the provisions of the Virginia Administrative Process Act (§ 2.2-4000 et seq. of the Code of Virginia)

**18VAC10-20-25. References.**

In addition to the requirements found in 18VAC10-20-130 ~~and~~, 18VAC10-20-220, and 18VAC10-20-425, as applicable, references that are submitted as part of an application must comply with the following:

1. Written references shall be no more than one year old at the time the application is received ~~by the board~~ in the board's office;

~~2. Individuals who provide references may not also verify experience; and~~

~~3.~~ 2. The individual providing the reference must have known the applicant for at least one year~~.~~;

3. The individual providing the reference must have known the applicant within the last five years from the date of application to the board; and

4. Individuals who provide references shall not also verify experience.

**18VAC10-20-35. Experience.**

All experience or training requirements contained in this chapter ~~are based on the applicant working a minimum of 35 hours per week. All applications will be evaluated against the experience or training requirements~~ will be evaluated ~~by this standard~~ based on the rate of an applicant working a minimum of 35 hours per week. Any experience gained at a rate of less than 35 hours per week may be prorated ~~in~~ at the sole discretion of the board.

**18VAC10-20-40. Good standing of applicants.**

A. ~~An applicant~~ Applicants currently licensed, certified, or registered to practice architecture, engineering, land surveying, landscape architecture, or interior design in another jurisdiction shall be in good standing in every jurisdiction where licensed, certified, or registered~~, and.~~

B. Applicants shall not have had a license, certificate, or registration to practice architecture, engineering, land surveying, landscape architecture, or interior design that was suspended, revoked, or surrendered in connection with a disciplinary action or have been the subject of ~~discipline in another~~ a disciplinary action in any jurisdiction. ~~An applicant who was formerly licensed, certified, or registered to practice architecture, engineering, land surveying, landscape architecture, or interior design in another jurisdiction shall not have had a license, certificate, or registration suspended, revoked, or surrendered in connection with a disciplinary action or have been the subject of discipline in another jurisdiction.~~

~~B. Applicants who do not meet the requirements of subsection A of this section may be approved following consideration by the board in accordance with the provisions of Administrative Process Act of the Code of Virginia.~~

**18VAC10-20-50. Transfer of scores to other boards.**

The board, ~~in~~ at its discretion and upon proper application, may forward the grades achieved by an applicant in the various ~~examinations~~ exams given under the board's jurisdiction to any other duly constituted registration board for use in evaluating ~~such~~ the applicant's eligibility for registration within ~~such~~ another board's jurisdiction or evaluation of ~~such~~ the applicant's national certification. An applicant requesting ~~transfer of~~ that his score be transferred to another registration board shall state his reason for ~~requesting transfer in writing~~ the request in writing.

**18VAC10-20-55. Language and comprehension.**

~~Every applicant applying~~ Applicants for licensure or certification shall be able to speak and write English to the satisfaction of the board. Applicants whose primary language ~~is~~ has not always been English, or who have not graduated from a college or university in which English is the language of instruction, ~~including, but not limited to, those born in a non-English speaking country,~~ shall submit to the board a Test of English as a Foreign Language ~~(TOEFL)~~ Internet-based Test (TOEFL iBT) score report ~~to the board, and a Test of Spoken English (TSE) score report to the board~~. Score reports shall not be over two years old at the time of application and~~, to support the application,~~ must reflect a score acceptable to the board.

**18VAC10-20-70. Modifications to examination administration.**

The board and the department support and comply with the provisions of the Americans with Disabilities Act (ADA), 42 USC § 12101 et seq. Contracts between the board, department, and vendors for examinations contain provisions for compliance with the ADA. Requests for accommodations must be in writing and received ~~by the board~~ in the board's office within a reasonable time before the examination. The board may require a report from a medical professional along with supporting data confirming the nature and extent of the disability. ~~It is the responsibility of the applicant to provide~~ The applicant is responsible for providing the required information in a timely manner ~~and~~ including the costs for providing ~~such~~ the information ~~are the responsibility of the applicant~~. The board or its agents will determine, consistent with applicable law, ~~what, if any,~~ any accommodations ~~will~~ to be made.

**18VAC10-20-75. Conduct at examination.**

~~Examinees~~ Applicants approved for an exam will be given specific instructions as to the conduct of each division of the exam at the exam site. ~~Examinees~~ Applicants are required to follow these instructions to assure fair and equal treatment to all ~~examinees~~ applicants during the course of the ~~examination~~ exam. Evidence of misconduct may result in removal from the ~~examination~~ exam site, voided ~~examination~~ exam scores, or both.

**18VAC10-20-85. Examination on regulations.**

~~All applicants for licensure or certification must achieve a passing score on a board supplied examination pertaining to the board's regulations and relevant statutes. The examination will be provided as part of the application.~~ The board shall provide applicants with an exam on its regulations and statutes. All applicants for licensure or certification must achieve a passing score on this exam.

**18VAC10-20-87. Expiration of initial licenses, certificates, and registrations.**

A. Initial licenses, certificates, and registrations shall expire as follows:

1. Individual licenses and certificates shall be valid for two years from the last day of the month in which they are issued.

2. Registrations for professional corporations, professional limited liability companies, and business entities shall expire on December 31 of the odd-numbered year following issuance.

3. Registrations for branch offices shall expire the last day of February of the even-numbered year following issuance.

B. Licenses, certificates, and registrations shall expire in accordance with this section unless renewed pursuant to 18VAC10-20-670 or reinstated pursuant to 18VAC10-20-680.

Part III
Qualifications for Licensing of Architects

**18VAC10-20-90. Fee schedule.**

All fees are nonrefundable and shall not be prorated.

| | |
|---|---|
| Application for Initial Architect License | $75 |
| Application for Architect License by Comity | $75 |
| Renewal | $55 |

**18VAC10-20-110. Education.**

A. ~~All applicants~~ Applicants for original licensure shall hold a professional degree in architecture from a program accredited by the National Architectural Accrediting Board (NAAB) ~~not later than two years after the applicant's graduation from said program.~~ The degree program must have been accredited by NAAB no later than two years after the date of the applicant's graduation from the program.

B. ~~Foreign degrees must be evaluated for equivalency to a NAAB accredited degree~~ Applicants seeking credit for a degree or coursework that is not NAAB-accredited, whether foreign or domestic, shall have that degree or coursework evaluated for equivalency to a NAAB-accredited professional degree in architecture. The board reserves the right to reject, for good cause, any evaluation submitted. Any cost of translation and evaluation shall be borne by the applicant.

**18VAC10-20-120. Experience.**

A. ~~The successful completion of~~ Applicants for original licensure shall successfully complete the National Council of Architectural Registration Boards (NCARB) Intern Development Program (IDP) ~~shall be required of all applicants for original licensure~~. IDP training requirements shall be in accordance with NCARB's ~~Handbook for Interns and Architects, 2008-2009~~ Intern Development Program Guidelines, December 2013 Edition.

B. ~~All applicants~~ Applicants must have a minimum of 36 months experience/training in architecture. Any experience/training of less than eight consecutive weeks will not be considered in satisfying this requirement.

C. ~~All applicants must have a minimum of 12 months experience/training in architecture~~ Of the 36 months of required experience/training in architecture, at least 12 months shall have been obtained as an employee in the office of a licensed architect. An organization will be considered to be an office of a licensed architect if:

1. The architectural practice of the organization in which the applicant works is under the charge of a person practicing as a principal, where a principal is a licensed architect in charge of an organization's architectural practice either alone or with other licensed architects, and the applicant works under the direct supervision of a licensed architect; and

2. The practice of the organization encompasses the comprehensive practice of architecture~~,~~ including the categories set forth in the NCARB IDP requirements.

**18VAC10-20-130. References.**

~~Eligibility for licensure is determined in part by the applicant's demonstrated competence and integrity to engage in the practice of architecture.~~ Applicants shall submit three references with the application, all of ~~whom are~~ which shall be from currently licensed architects in a state or other jurisdiction ~~or territory~~ of the United States or a province of Canada. In addition to the requirements found in 18VAC10-20-25, ~~these professionals shall~~ the applicant shall only submit references from licensed architects who have personal knowledge of the applicant's architectural experience that demonstrates the applicant's competence and integrity.

**18VAC10-20-140. Examination.**

A. ~~All applicants~~ The board is a member board of NCARB and is authorized to make available the NCARB-prepared exam. Applicants for original licensure ~~in Virginia~~ are required to pass ~~an NCARB prepared examination. Provided all other requirements are met, a license as an architect will be issued upon passing the NCARB examination~~ this exam. ~~An applicant shall be admitted to the NCARB prepared examination prior to completing the experience requirements contained in 18VAC10-20-120 if the applicant is otherwise qualified and provided the applicant is enrolled in the NCARB IDP~~.

~~B. The Virginia board is a member board of NCARB and as such is authorized to make available the NCARB prepared examination.~~

B. Applications for original licensure shall be approved by the board before applicants will be allowed to sit for the exam. Applicants who have satisfied the requirements of 18VAC10-20-110 and 18VAC10-20-130 and who are currently enrolled in the NCARB IDP shall be admitted to the exam.

C. Applicants approved by the board to sit for the exam shall register and submit the required exam fee and follow NCARB procedures when taking the exam. Applicants not properly registered will not be allowed to sit for the exam.

D. Applicants approved to sit for the exam shall be eligible for a period of three years from the date of their initial approval. Applicants who do not pass all sections of the exam during their eligibility period are no longer eligible to sit for the exam. To become exam-eligible again, applicants shall reapply to the board as follows:

1. Applicants who have taken at least one section of the exam and who reapply to the board no later than six months after the end of their eligibility may be approved to

sit for the exam for an additional three years. The original application requirements shall apply.

2. Applicants who do not meet the criteria of subdivision 1 of this subsection shall reapply to the board and meet all entry requirements current at the time of reapplication.

E. Applicants will be notified by the board of whether they passed or failed the exam. The exam may not be reviewed by applicants. Exam scores are final and not subject to change.

F. Grading of the ~~examination~~ exam shall be in accordance with the national grading procedure administered by NCARB. The board shall utilize the scoring procedures recommended by NCARB. Grades for each division of the ~~examination~~ exam passed on or after January 1, 2006, shall be valid in accordance with the procedure established by NCARB.

~~D. The NCARB prepared examination will be offered at least once a year at a time designated by the board.~~

~~E.~~ G. The board may approve transfer credits for parts of the ~~NCARB prepared examination~~ exam taken and passed in accordance with national standards.

H. Applicants who have been approved for and subsequently pass the exam and who have satisfied 18VAC10-20-120 shall be issued an architect license.

~~F. Unless otherwise stated, applicants approved to sit for an examination shall register and submit the required examination fee. Applicants not properly registered will not be allowed into the examination site.~~

~~G. Applicants approved to sit for the examination shall follow NCARB procedures.~~

~~H. Examinees will be notified by the board of passing or failing the examination.~~

~~I. Should an applicant fail to pass the NCARB prepared examination within three years after being approved to sit for the examination, the applicant must reapply. If the applicant has not been taking the examination on a continuous basis during the three year eligibility period, or fails to reapply within six months after the end of the three-year eligibility period, or both, then the applicant shall meet the entry requirements current at the time of reapplication.~~

**18VAC10-20-150. Licensure by comity.**

~~A. Any person who is or has been licensed in another state, jurisdiction, possession or territory of the United States, or a province of Canada, may be granted a license provided that:~~

~~1. The applicant meets all the requirements for licensing in Virginia that were in effect at the time of the original licensure or the applicant possesses an NCARB certificate; and~~

~~2. The applicant holds an active valid license in good standing in another state, jurisdiction, possession or territory of the United States, or a province of Canada.~~

~~If the applicant does not possess an NCARB certificate, or does not meet the requirements for licensure in Virginia that were in effect at the time of original licensure, the applicant shall be required to meet the entry requirements current at the time the completed application for comity is received in the board's office.~~

~~B. Applicants licensed in foreign countries other than Canada may be granted a license in Virginia based on an NCARB certificate.~~

A. Applicants who hold a valid active license in another state or other jurisdiction of the United States, a province of Canada, or another foreign country may be granted a license provided that:

1. They possess an NCARB certificate; or

2. They met the requirements for licensure in Virginia that were in effect at the time they were originally licensed.

B. Applicants who do not satisfy the requirements of subsection A of this section shall meet the entry requirements for initial licensure pursuant to this chapter.

Part IV

Qualifications for Licensing of Professional Engineers

**18VAC10-20-160. Definitions.**

The following words, terms, and phrases when used in this part shall have the meanings ascribed to them except where the context clearly indicates or requires different meanings:

"ABET" means the Accreditation Board for Engineering and Technology.

"Approved engineering curriculum" means an undergraduate engineering curriculum of four years or more, or a graduate engineering curriculum, approved by the board. ABET-approved engineering EAC curricula are approved by the board. Curricula that are accredited by ABET not later than two years after an applicant's graduation shall be deemed as ABET-approved.

"Approved engineering technology curriculum" means an undergraduate engineering technology curriculum of four years or more approved by the board. ABET-approved engineering technology TAC curricula of four years or more are approved by the board. Curricula that are accredited by ABET not later than two years after an applicant's graduation shall be deemed as ABET-approved.

"EAC" means Engineering Accreditation Commission.

"Engineer-in-training ~~(EIT)~~" or "EIT" means an applicant who has completed any one of several combinations of education, or education and experience, and has passed the Fundamentals of Engineering ~~examination~~ exam.

"Related science curriculum" includes, but is not limited to, a four-year curriculum in biology, chemistry, geology, geophysics, mathematics, physics, or other curriculum approved by the board. Curriculums must have a minimum of six semester hours of mathematics courses beyond algebra and trigonometry and a minimum of six semester hours of science courses in calculus-based physics in order to be considered a related science curriculum.

"Qualifying engineering experience" means a record of progressive experience on engineering work during which the applicant has made a practical utilization of acquired knowledge and has demonstrated progressive improvement, growth, and development through the utilization of that knowledge as revealed in the complexity and technical detail of the applicant's work product or work record. The applicant must show progressive assumption of greater individual responsibility for the work product over the relevant period. The progressive experience on engineering work shall be of a grade and character that indicates to the board that the applicant is minimally competent to practice engineering. Qualifying engineering experience shall be progressive in complexity and based on a knowledge of engineering mathematics, physical and applied sciences, properties of materials, and fundamental principles of engineering design.

"TAC" means Technology Accreditation Commission.

**18VAC10-20-170. Fee schedule.**

All fees are nonrefundable and shall not be prorated.

| | |
|---|---|
| ~~Fundamentals of Engineering~~ Application for Engineer-in-Training Designation | $30 |
| ~~Principles of Engineering~~ Application for Initial Professional Engineer License | $60 |
| Application for Professional Engineer License by Comity | $60 |
| Renewal | $80 |
| ~~Comity~~ | ~~$60~~ |
| ~~FE/PE out-of-state proctor~~ | ~~$100~~ |

**18VAC10-20-190. Requirements for the Fundamentals of Engineering (FE) exam.**

In order to be approved to sit for the ~~FE examination~~ Fundamentals of Engeering (FE) exam, ~~an applicant~~ applicants must satisfy one of the ~~following~~ subsections (A through E) of this section. Applicants shall:

| EDUCATIONAL REQUIREMENTS | NUMBER OF REQUIRED YEARS OF QUALIFYING ENGINEERING EXPERIENCE |
|---|---|
| ~~1. (i) Enrolled in an ABET-accredited undergraduate curriculum and within 12 months of completion of degree requirements or (ii) enrolled in an ABET-accredited master's or doctorate curriculum, or enrolled in a graduate curriculum that is ABET-accredited at the undergraduate level at the institution at which the graduate degree is being sought, and within six months of completion of graduate degree requirements. In order to be considered pursuant to clause (i) or (ii) of this subdivision, all applications must be accompanied by a certificate of good standing from the dean of the engineering school.~~<br>A. Student applicants.<br>1. Be enrolled in an ABET-accredited undergraduate EAC or TAC curriculum, have 12 months or less remaining before completion of the degree, and provide a certificate of good standing from the dean of the engineering school or his designee;<br>2. Be enrolled in an ABET-accredited graduate or doctorate EAC or TAC curriculum, have six months or less remaining before completion of the degree, and provide a certificate of good standing from the dean of the engineering school or his designee; or<br>3. Be enrolled in a graduate curriculum that is ABET-accredited TAC or EAC at the undergraduate level at the institution at which the graduate degree is being sought, have six months or less remaining before completion of the degree, and provide a certificate of good standing from the dean of the engineering school or his designee. | 0 |
| ~~2. Graduated~~ B. Have graduated from an approved engineering or an approved engineering technology curriculum. | 0 |

| | |
|---|---|
| ~~3. Obtained an undergraduate engineering degree of four years or more from an institution in a curriculum without ABET accreditation and obtained a master's or doctorate engineering degree from an institution in a curriculum that is ABET accredited at the undergraduate level.~~<br>C. Dual degree holders.<br>1. Have graduated from a non-ABET-accredited undergraduate engineering curriculum of four years or more; and<br>2. Have graduated from a graduate or doctorate engineering curriculum that is ABET accredited at the undergraduate level. | 0 |
| ~~4. Graduated~~ D. Have graduated from a nonapproved engineering curriculum or from a related science curriculum of four years or more. | 2 |
| ~~5. Not meeting any of the above requirements, but who, in the judgment of the board, has~~ E. Have obtained, by documented academic coursework, the equivalent of ~~such~~ education ~~by documented academic course work~~ that meets the requirements of ABET accreditation for the baccalaureate engineering technology curricula. Whether an education is considered to be equivalent shall be determined by the judgment of the board. | 6 |

**18VAC10-20-200. Requirements for engineer-in-training (EIT) designation.**

~~An applicant who is qualified to sit for the FE examination under subdivision 1 of 18VAC10-20-190 must provide verification of his degree prior to receiving the EIT designation. All other applicants who qualify to sit for the FE examination under subdivisions 2 through 5 of 18VAC10-20-190 will receive the EIT designation upon achieving a passing examination score as established by the National Council of Examiners for Engineering and Surveying (NCEES).~~ Upon passing the FE exam, an applicant who qualified for the exam under 18VAC10-20-190 A will receive the EIT designation only after he provides verification of his degree to the board. All other applicants will receive the EIT designation upon passing the FE exam. The EIT designation will remain valid indefinitely.

**18VAC10-20-210. Requirements for the Principles and Practice of Engineering (PE) ~~examination~~ exam.**

In order to be approved to sit for the ~~PE examination, an applicant must satisfy one of the following~~ Principles and Practice of Engineering (PE) exam, applicants shall satisfy one of the subsections (A through F) within this section. Applicants shall:

| EDUCATIONAL REQUIREMENTS | EIT REQUIRED? | NUMBER OF REQUIRED YEARS OF QUALIFYING ENGINEERING EXPERIENCE |
|---|---|---|
| ~~1. Graduated~~ A. Have graduated from an approved engineering curriculum. | YES | 4 |
| ~~2. Graduated from an ABET-accredited undergraduate engineering curriculum and awarded a doctorate degree in engineering from an engineering curriculum which is ABET-accredited at the undergraduate level.~~<br>B. Dual degree holders.<br>1. Have graduated from an ABET-accredited undergraduate engineering curriculum; and<br>2. Have graduated from a doctorate engineering curriculum that is ABET accredited at the undergraduate level. | NO | 4 |
| ~~3. Graduated~~ C. Have graduated from a nonapproved engineering curriculum of four years or more, a related science curriculum, or an approved engineering technology curriculum. | YES | 6 |
| ~~4. Graduated~~ D. Have graduated from a nonapproved engineering technology curriculum of four years or more. | YES | 10 |

| | | |
|---|---|---|
| ~~5. Not meeting any of the above requirements, but who, in the judgment of the board, has~~ E. Have obtained, by documented academic coursework, the equivalent of ~~such~~ education ~~by documented academic course work~~ that meets that requirements of ABET accreditation for the baccalaureate engineering technology curricula. Whether an education is considered to be equivalent shall be determined by the judgment of the board. | YES | 10 |
| ~~6. Graduated~~ F. Have graduated from an engineering, engineering technology, or related science curriculum of four years or more. | NO | 20 |

**18VAC10-20-215. Requirements for the PE license.**

~~In order to obtain the Professional Engineer license, an applicant must satisfy the requirements of at least one subsection of 18VAC10-20-210 and pass the PE examination. An applicant will receive his license to practice engineering upon achieving a passing examination score as established by NCEES.~~

An applicant who has satisfied the requirements of this chapter will receive the professional engineer license upon successful completion of the PE exam.

**18VAC10-20-220. References.**

In addition to the requirements found in 18VAC10-20-25, applicants shall satisfy one of the following:

~~1. Applicants for the Fundamentals of Engineering examination only shall provide one reference from a professional engineer, or from the dean of the engineering school or a departmental professor in the school attended by the applicant, or an immediate work supervisor.~~

1. An applicant for the Fundamentals of Engineering exam shall provide one reference that indicates his personal integrity from one of the following:

a. A professional engineer;

b. The dean, or his designee, of the engineering school attended by the applicant; or

c. An immediate work supervisor.

2. ~~Applicants~~ An applicant for the Principles and Practice of Engineering ~~examination must indicate competence and integrity to engage in the engineering profession by submitting~~ exam shall submit three references from professional engineers currently licensed in ~~a~~ another state~~, territory, or possession~~ or other jurisdiction of the United States~~, or the District of Columbia, each having personal knowledge of the applicant's~~. The applicant shall only submit references given by professional engineers who have personal knowledge of the applicant's competence and integrity relative to his engineering experience.

3. ~~Applicants~~ An applicant for licensure by comity ~~must indicate competence and integrity to engage in the engineering profession by submitting~~ shall submit three references from professional engineers currently licensed in ~~a~~ another state~~, territory,~~ or ~~possession~~ other jurisdiction of the United States~~,each having personal knowledge of the applicant's~~. The applicant shall only submit references given by professional engineers who have personal knowledge of the applicant's competence and integrity relative to his engineering experience.

**18VAC10-20-230. Education.**

A. ~~Any~~ An applicant who ~~has earned~~ is seeking credit for a degree that is not ABET accredited TAC or EAC and was earned from an institution outside the United States, shall have the degree authenticated and evaluated by an educational credential evaluation service ~~or by ABET if credit for such education is sought, unless the applicant has also earned an equivalent or higher level engineering degree from a United States institution where the program has been accredited by ABET~~. If the evaluation is rigorous and meets appropriate ABET accreditation standards, the board may consider the degree as an approved engineering curriculum or approved engineering technology curriculum. The board reserves the right to reject, for good cause, any evaluation submitted by the applicant.

B. ~~Except for those degrees~~ Degrees earned ~~from an institution outside~~ within the United States ~~and subject to the provisions of subsection A of this section, all~~ for any nonapproved engineering ~~curriculums~~ curriculum, related science ~~curriculums, and~~ curriculum, or nonapproved engineering technology ~~curriculums~~ curriculum of four years or more shall be from an accredited college or university that is approved or accredited by the Commission on Colleges, a regional or national accreditation association, or by an accrediting agency that is recognized by the U.S. Secretary of Education.

**18VAC10-20-240. Experience.**

~~Applicants shall submit a written narrative or narratives, on the board provided application form,~~ A. Each applicant shall complete the board's Professional Engineer and Engineer-in-Training Experience Verification Form, [ ~~0402 20EXP~~ ] documenting all of ~~the applicant's~~ his engineering experience. ~~Such narrative or narratives shall:~~ The information provided on the form shall clearly describe the engineering work or research that ~~the applicant~~ he personally performed; delineate ~~the role of the applicant~~ his role in any group engineering activity; provide an overall description of the nature and scope of his work; and include a detailed description of the engineering work personally performed by ~~the applicant~~ him.

~~Experience in claims consulting, drafting, estimating, and field surveying are considered nonqualifying.~~

B. In general, the required experience shall be applied as follows:

~~1. Construction experience, in order to be qualifying, must include a demonstrated use of engineering computation and problem-solving skills. The mere execution as a contractor of work designed by others, the supervision of construction, and similar nonengineering tasks will not be considered qualifying experience.~~

~~2. Military experience, in order to be qualifying must have been spent in engineering work and must be of a character substantially equivalent to that required in the civilian sector for like work. Nonengineering military training and supervision will not be considered qualifying experience.~~

~~3. Sales experience, in order to be qualifying, must include a demonstrated use of engineering computational and problem-solving skills. The mere selection of data or equipment from a company catalogue or similar publication or database will not be considered qualifying experience.~~

~~4. Industrial experience, in order to be qualifying, should be directed toward the identification and solution of practice problems in the applicant's area of engineering specialization. This experience should include engineering analysis of existing systems or the design of new ones.~~

~~5. Engineering experience gained by successfully completing a graduate engineering degree or by engineering teaching in an institution approved by the board may be deemed qualifying engineering experience.~~

~~a. Successful completion of a master's or doctorate degree in an engineering curriculum may be accepted as one year of equivalent engineering experience credit.~~

~~b. For teaching experience to be considered by the board, the applicant must have taught in an engineering curriculum approved by the board and must have been employed in the grade of instructor or higher.~~

~~6. Engineering experience gained during a board approved co-op program may be deemed qualifying engineering experience to a maximum of one year of credit.~~

~~7. The board, in its sole discretion, may permit partial credit, not to exceed 1/2 of that required, for approved qualifying engineering experience obtained prior to graduation from an engineering curriculum.~~

| Type of Experience | Qualifying | Nonqualifying |
|---|---|---|
| 1. Construction experience. | A demonstrated use of engineering computation and problem-solving skills. | The mere execution as a contractor of work designed by others, the supervision of construction, and similar nonengineering tasks. |
| 2. Military experience. | Engineering of a character substantially equivalent to that required in the civilian sector for similar work. | Nonengineering military training and supervision. |
| 3. Sales experience. | A demonstrated use of engineering computational and problem-solving skills. | The mere selection of data or equipment from a company catalogue, similar publication, or database. |
| 4. Industrial experience. | Work directed toward the identification and solution of practice problems in the applicant's area of engineering specialization including engineering analysis of existing systems or the design of new ones. | The mere performance of maintenance of existing systems, replacement of parts or components, and other nonengineering tasks. |
| 5. Graduate or doctorate's degree. | The successful completion of a graduate or doctorate degree in an engineering curriculum may be accepted as one year of equivalent engineering experience credit. | Research conducted as part of a graduate or doctorate degree shall not count as additional experience if credit for the degree is granted pursuant to 18VAC10-20-190 or 18VAC10-20-210. |

| | | |
|---|---|---|
| 6. Teaching. | For teaching experience to be considered qualifying by the board, the applicant shall have taught in an engineering curriculum approved by the board and shall have been employed in the grade of instructor or higher. | |
| 7. Co-op program. | Engineering experience gained during a board-approved co-op program may be deemed qualifying engineering experience to a maximum of one year of credit. | |
| 8. General. | | Experience in claims consulting, drafting, estimating, and field surveying. |

C. The board, in its sole discretion, may permit partial credit for approved qualifying engineering experience obtained prior to graduation from an engineering curriculum. Partial credit shall not exceed one-half of that required for any method of initial licensure.

**18VAC10-20-260. Examinations.**

~~A. The Virginia board is a member board of NCEES and as such is authorized to administer the NCEES examinations.~~

~~B. The Fundamentals of Engineering examination consists of an NCEES exam on the fundamentals of engineering.~~

~~C. The Principles and Practice of Engineering examination consists of an NCEES exam on applied engineering.~~

A. Applications for original licensure or EIT designation shall be received by the board in accordance with the following deadlines:

1. Students applying pursuant to 18VAC10-20-190 A shall submit their [ ~~application~~ applications ] to be received in the board's office no later than 60 days prior to the scheduled exam.

2. All other applications shall be received in the board's office no later than 130 days prior to the scheduled exam.

B. The board is a member board of the National Council of Examiners for Engineering and Surveying (NCEES) and is authorized to administer the NCEES exams including the Fundamentals of Engineering exam and the Principles and Practice of Engineering exam.

~~D. Unless otherwise stated, applicants~~ C. Applicants approved by the board to sit for an ~~examination~~ exam shall register and submit the required ~~examination~~ exam fee to be received ~~in the board office, or~~ by the board's designee~~, at a time designated by the board~~ and shall follow NCEES procedures. Applicants not properly registered will not be allowed ~~into the examination site~~ to sit for the exam.

~~E. A candidate~~ D. Applicants eligible for admission to both ~~parts of the examination~~ exams must first successfully complete the ~~fundamentals of engineering examination~~ Fundamentals of Engineering exam before being admitted to the ~~principles and practice of engineering examination~~ Principles and Practice of Engineering exam.

~~F. Should an applicant fail to pass an examination within three years after being approved to sit for an examination the applicant must reapply and meet all current entry requirements at the time of reapplication.~~

~~G. The examination may not be reviewed by the candidates, Examination scores are final and are not subject to change.~~

E. The exam may not be reviewed by applicants. Unless authorized by NCEES rules and procedures, exam scores are final and are not subject to change.

F. Applicants approved to sit for the exam shall be eligible for a period of three years from the date of their initial approval. Applicants who do not pass the exam during their eligibility period are no longer eligible to sit for the exam. To become exam-eligible again, applicants shall reapply to the board and meet all current entry requirements at the time of reapplication. In addition to meeting current entry requirements upon reapplication, applicants shall demonstrate successful completion of 16 hours of educational activities that meet the requirements of 18VAC10-20-683 E and F.

**18VAC10-20-270. Licensure by comity.**

~~A person in good standing and holding a valid license to engage in the practice of engineering in another state, the District of Columbia, or any territory or possession of the United States may be licensed, provided the applicant submits verifiable documentation to the board that the education, experience, and examination requirements by which the applicant was first licensed in the original jurisdiction were substantially equivalent to those existing in Virginia at the time of the applicant's original licensure. No person shall be so licensed, however, who has not passed an examination in another jurisdiction that was substantially equivalent to that approved by the board at the time of the applicant's original licensure. If the applicant does not meet the requirements for licensure in Virginia that were in effect at the time of original licensure, the applicant shall be required to meet the entry~~

~~requirements current at the time the completed application for comity is received in the board's office.~~

A. Applicants holding a valid license to practice engineering in other states or jurisdictions of the United States may be licensed provided they satisfy the provisions of this subsection. Applicants shall:

1. Submit to the board verifiable documentation that the education, experience, and exam requirements by which they were first licensed in the original jurisdiction were substantially equivalent to the requirements in Virginia at the same time;

2. Have passed an exam in another jurisdiction that was substantially equivalent to that approved by the board at the time of their original licensure;

3. Be in good standing in all jurisdictions where they are currently licensed; and

4. Satisfy all other requirements of this chapter.

B. Applicants who do not meet the requirements for licensure in Virginia that were in effect at the time of their original licensure shall be required to meet the entry requirements current at the time [ ~~their~~ the ] completed application for comity is received in the board's office.

Part V
Qualifications for Licensing and Standards of Procedure for Land Surveyors

**18VAC10-20-280. Fee schedule.**

All fees are nonrefundable and shall not be prorated.

| | |
|---|---|
| Application for ~~Fundamentals of Land Surveying~~ Surveyor-in-Training Designation | $60 |
| Application for ~~Principles and Practice of Land Surveying~~ Initial Land Surveyor License | $90 |
| Application for Initial Surveyor Photogrammetrist License | $90 |
| Application for Initial Land Surveyor B License | $90 |
| Application for License by Comity | $90 |
| Renewal | $90 |
| ~~Comity~~ | ~~$90~~ |
| ~~Out-of-state proctor~~ | ~~$100~~ |

**18VAC10-20-295. Definitions.**

"Absolute horizontal positional accuracy" means the value expressed in feet or meters that represents the uncertainty due to systematic and random errors in measurements in the location of any point on a survey relative to the defined datum at the 95% confidence level.

"Approved land surveying experience" means ~~a record of~~ progressive and diversified training and experience under the direct control and personal supervision of a licensed land surveyor~~, or an individual authorized by statute to practice land surveying, on land surveying work during which the applicant has made practical utilization of acquired knowledge and has demonstrated continuous improvement, growth, and development through the utilization of that knowledge as revealed in the complexity and technical detail of the applicant's work product or work record. The applicant must show continuous assumption of greater individual responsibility for the work product over the relevant period. The progressive experience on land surveying work shall be of a grade and character that indicates to the board that the applicant is minimally competent to practice land surveying~~. This experience shall have been acquired in positions requiring the exercise of independent judgment, initiative, and professional skill in the office and field and written verification of such work experience shall be on forms provided by the board. Experience may be gained either prior to or after education is obtained. Notwithstanding the definition of "approved land surveying experience," the requirements set forth in 18VAC10-20-310 shall not be waived.

"Approved photogrammetric surveying or similar remote sensing technology experience" means progressive and diversified training and experience in photogrammetric ~~land~~ surveying or similar remote sensing technology under the ~~supervision and direction~~ direct control and personal supervision of a licensed land surveyor~~,~~ or licensed surveyor photogrammetrist~~, or under the supervision and direction of an individual authorized by statute to practice land surveying or photogrammetry~~. This experience shall have been acquired in positions requiring the exercise of independent judgment, initiative and professional skill in the office and field and written verification of such work experience shall be on forms provided by the board. Experience may be gained either prior to or after education is obtained. Notwithstanding the definition of "approved photogrammetric surveying or similar remote sensing technology experience," the requirements set forth in 18VAC10-20-310 shall not be waived.

"Relative horizontal positional accuracy" means the value expressed in feet or meters that represents the uncertainty due to random errors in measurements in the location of any point on a survey relative to any other point on the same survey at the 95% confidence level.

**18VAC10-20-300. Requirements for surveyor-in-training (SIT) designation.**

A. In order to be approved to sit for the Fundamentals of Land Surveying ~~examination~~ (FLS) exam, ~~an applicant~~ applicants must satisfy one of the following:

1. ~~An applicant who has graduated from, or is~~ Be enrolled in~~,~~ a board-approved or ABET-accredited surveying or surveying technology curriculum ~~of four years or more approved by the board and is within~~, have 12 months ~~of~~ or less remaining before completion of degree requirements

~~shall be admitted to an examination in the Fundamentals of Land Surveying, provided the applicant is otherwise qualified. Upon passing such examination, and providing evidence of graduation, the applicant shall receive the SIT designation, provided the applicant is otherwise qualified. For those applicants who are within 12 months of completion of degree requirements, their application must be accompanied by~~, and provide a certificate of good standing from the dean of the school or his designee;

2. ~~An applicant who has graduated from a curriculum~~ Have earned an undergraduate degree from a board-approved or ABET-accredited surveying or surveying technology curriculum;

3. Have earned a board-approved undergraduate degree related to surveying ~~of four years or more approved by the board~~ and ~~with~~ possess a minimum of one year of approved land surveying experience ~~shall be admitted to an examination in the Fundamentals of Land Surveying, provided the applicant is otherwise qualified. Upon passing such examination, the applicant shall receive the SIT designation, provided the applicant is otherwise qualified~~;

~~3. An applicant who has~~ 4. Have earned ~~at least a four year bachelor's~~ a board-approved undergraduate degree in a field unrelated to surveying ~~approved by the board~~ and ~~with~~ possess a minimum of ~~three~~ two years of approved land surveying experience ~~shall be admitted to an examination in the Fundamentals of Land Surveying, provided the applicant is otherwise qualified. Upon passing such examination, the applicant shall receive the SIT designation, provided the applicant is otherwise qualified~~;

~~4. An applicant who has graduated from a~~ 5. Have earned a board-approved associate's degree related to surveying ~~curriculum of two years or more approved by the board with~~ and possess a minimum of four years of approved land surveying experience ~~shall be admitted to an examination in the Fundamentals of Land Surveying, provided the applicant is otherwise qualified. Upon passing such examination, the applicant shall receive the SIT designation, provided the applicant is otherwise qualified~~;

~~5. An applicant who has~~ 6. Have successfully completed a board-approved survey apprenticeship program ~~approved by the board with~~. The apprenticeship program shall include a minimum of 480 hours of surveying-related classroom instruction with a minimum of six years of approved land surveying experience ~~shall be admitted to an examination in the Fundamentals of Land Surveying, provided the applicant is otherwise qualified. Upon passing such examination, the applicant shall receive the SIT designation, provided the applicant is otherwise qualified~~; or

~~6. An applicant who has~~ 7. Have graduated from high school ~~and who has~~ with evidence of successful completion of courses in algebra, geometry and trigonometry ~~with~~, and possess a minimum of eight years of approved land surveying experience ~~shall be admitted to an examination in the Fundamentals of Land Surveying, provided the applicant is otherwise qualified. Upon passing such examination, the applicant shall receive the SIT designation, provided the applicant is otherwise qualified~~.

~~7. Applicants who have accumulated college credits may apply credit hours approved by the board to help meet the experience requirement. A maximum of one year of experience credit will be given for each 40 semester hours approved college credit.~~

B. Applicants seeking approval to sit for the FLS exam pursuant to subdivisions A 3 through 7 of this section may apply board-approved college credits to help meet the experience requirement. The maximum rate of college credit substitution for experience shall be one year of experience credit for each 40 hours of board-approved college credits completed. College credits applicable toward the completion of any degree used to satisfy a requirement of subsection A of this section shall not be eligible for experience substitution.

C. An applicant who qualified for the FLS exam under subdivision A 1 of this section will be issued the SIT designation upon the board's receipt of the applicant's degree verification. All other applicants shall receive the SIT designation upon passing the FLS exam.

**18VAC10-20-310. Requirements for ~~a licensed land surveyor or surveyor photogrammetrist~~ the land surveyor and surveyor photogrammetrist licenses.**

A. Land surveyor license.

1. An SIT who~~, after meeting~~ has met the requirements of 18VAC10-20-300~~,~~ and has a minimum of four years of approved land surveying experience~~, and has been land surveying under the direct control and personal supervision of a licensed land surveyor,~~ shall be ~~admitted to~~ approved to sit for an ~~examination~~ exam in the Principles and Practice of Land Surveying and the ~~Virginia state specific examination, provided the applicant is otherwise qualified. Upon passing such examination, the applicant shall be granted a license to practice land surveying, provided the applicant is otherwise qualified~~ Virginia-specific land surveying exam.

2. A qualified applicant shall be granted a license to practice land surveying upon passing both exams.

~~B. An SIT who, after meeting the requirements of 18VAC10-20-300, has a specific record of four years of approved photogrammetric surveying or similar remote sensing technology experience of which a minimum of three years experience has been progressive in complexity and has been on photogrammetric surveying or similar remote sensing technology projects under the supervision of a licensed land surveyor or licensed surveyor photogrammetrist shall be admitted to a board approved surveyor photogrammetrist examination and the Virginia state specific examination. Upon passing such examinations, the applicant shall be~~

~~granted a license to practice photogrammetric surveying, provided the applicant is otherwise qualified.~~

B. Surveyor photogrammetrist license.

1. An SIT who has met the requirements of 18VAC10-20-300 and has a minimum of four years of approved photogrammetric surveying or similar remote sensing technology experience shall be approved to sit for the board-approved surveyor photogrammetrist exam and the Virginia-specific photogrammetrist exam.

2. A qualified applicant shall be granted a license to practice photogrammetric surveying upon passing both exams.

~~C. In lieu of the provisions of subsection B of this section, any person presently providing photogrammetric or similar remote sensing technology services with any combination of at least eight years of board-approved education and progressive experience in photogrammetry or similar remote sensing technology, four or more of which shall have been in responsible charge of photogrammetric mapping projects meeting National Map Accuracy Standards or National Standard for Spatial Data Accuracy, or equivalent, may be licensed to practice photogrammetric surveying provided an individual submits an application to the board that provides evidence to the satisfaction of the board of the following:~~

~~1. The applicant submits to the board certified proof of graduation from high school or high school equivalency that is acceptable to the board, both with evidence of successful completion of courses in algebra, geometry and trigonometry either by transcript or examination, or certified proof of a related higher degree of education, or other evidence of progressive related higher education acceptable to the board;~~

~~2. The applicant submits to the board satisfactory proof and evidence of employment as a photogrammetrist or similar remote sensing technology in responsible charge as defined in 18VAC10-20-310 D providing such services within any of the 50 states, the District of Columbia, or any territory or possession of the United States. Evidence of employment shall include verification of the applicant's progressive experience by his supervisor and by the applicant's clients of the applicant's personal involvement in a minimum of five projects;~~

~~3. The applicant must submit three references with the application, all of whom shall be licensed land surveyors in a state or territory of the United States;~~

~~4. The applicant shall certify that they have read and understood Chapter 4 (§ 54.1-400 et seq.) of Title 54.1 and Chapter 17 (§ 55-287 et seq.) of Title 55 of the Code of Virginia, and this chapter; and~~

~~5. The applicant shall apply to the board and submit an application fee for licensure within one year of December 1, 2008 or until such time as the examinations required by 18VAC10-20-310 B are available, whichever is later. After December 1, 2009, or when the examinations required by subsection B of this section become available, whichever is later, no person shall be eligible to apply for licensure as a surveyor photogrammetrist pursuant to this section.~~

~~D. Within the context of subsection C of this section, responsible charge of photogrammetric or similar remote sensing technology mapping projects means technical supervision of:~~

~~1. Assessing the project needs and constraints and accuracies;~~

~~2. Creating the project plan including determining data standards;~~

~~3. Creating overall project specifications;~~

~~4. Determining flight lines and appropriate photogrammetric control required for project accuracies and constraints;~~

~~5. Reviewing and approval of aerotriangulation results, prior to map compilation and certification of the final report of project control;~~

~~6. Determining the appropriate features to be collected, how they are to be collected, annotated, stored;~~

~~7. Editing and reviewing of collected data and features;~~

~~8. Reviewing of equipment, technology, and procedures that meet project requirements;~~

~~9. Determining final data standards and quality control for a project;~~

~~10. Reviewing and approving the final map products, deliverables, files, and spatial data;~~

~~11. Checking and editing final map data for specified completeness and accuracies including project reports, metadata, and any associated databases;~~

~~12. Project management; and~~

~~13. Other duties requiring decision making, control, influence, and accountability of the project.~~

~~E. Any person licensed pursuant to the terms of subsection B or C of this section shall be licensed as a surveyor photogrammetrist.~~

**18VAC10-20-320. Requirements for ~~a licensed~~ the land surveyor B license.**

A. An applicant shall ~~hold a valid license as a land surveyor and present satisfactory evidence of a minimum of two years of land surveying experience that is progressive in complexity in land surveyor B land surveying, as defined in § 54.1-408 of the Code of Virginia, under the direct control and personal supervision of a licensed land surveyor B or professional engineer.~~:

1. Hold a valid license as a land surveyor for two years;

2. Present satisfactory evidence of a minimum of two years of land surveying experience that is progressive in complexity in land surveyor B land surveying, as provided

in § 54.1-408 of the Code of Virginia, under the direct control and personal supervision of a licensed land surveyor B or professional engineer;

3. Present satisfactory evidence of having passed college-level courses in hydrology and hydraulics that are acceptable to the board; and

4. Pass an exam developed by the board.

~~B. An applicant shall also present satisfactory evidence of having passed college level courses in hydraulics acceptable to the board.~~

~~C. An applicant shall pass an examination as developed by the board. Upon passing such examination, the applicant shall be granted a license as a Land Surveyor B, provided the applicant is otherwise qualified.~~

B. A qualified applicant shall be issued a land surveyor B license upon passing the board-developed exam.

**18VAC10-20-330. Education.**

~~Any~~ An applicant who ~~has attended~~ is seeking credit for a degree earned from an institution outside of the United States shall have his degree authenticated and evaluated by an education evaluation service approved by the board ~~if credit for such education is sought~~. The board reserves the right to reject, for good cause, any evaluation submitted by the applicant. Any cost of evaluation shall be borne by the applicant.

**18VAC10-20-340. Experience standards.**

~~An applicant shall submit written verification from each employment engagement~~ In order to demonstrate meeting the experience requirements of 18VAC10-20-300, 18VAC-10-20-310, and 18VAC10-20-320, applicants shall document experience that has been gained under the direct control and personal supervision of a licensed land surveyor~~,~~ or licensed surveyor photogrammetrist ~~or an individual authorized by statute to practice land surveying on forms provided by the board to be considered by the board as approved land surveying experience~~ on the appropriate board-provided forms. Experience shall be verified by a licensed land surveyor or licensed surveyor photogrammetrist and will be evaluated by the board in accordance with 18VAC10-20-35.

**18VAC10-20-350. Examinations.**

~~A. The Fundamentals of Land Surveying examination consists of the National Council of Examiners for Engineering and Surveying (NCEES) examination on the fundamentals of land surveying.~~

~~B. The Principles and Practice of Land Surveying examination consists of an NCEES examination on applied land surveying, or a board approved surveyor photogrammetrist examination, and a Virginia state-specific examination.~~

A. Applications for original licensure shall be received by the board in accordance with the following deadlines:

1. Applications for the SIT designation submitted pursuant to 18VAC10-20-300 A shall be received in the board's office no later than 60 days prior to the scheduled exam.

2. All other applications shall be received in the board's office no later than 130 days prior to the scheduled exam.

B. The board is a member board of the National Council of Examiners for Engineering and Surveying (NCEES) and is authorized to administer the NCEES exams including the Fundamentals of Land Surveying exam and the Principles and Practice of Land Surveying exam. Applicants approved to sit for the exam shall follow NCEES procedures.

C. The ~~examination~~ exam for land ~~surveying under § 54.1-408 of the Code of Virginia (Land Surveyor B)~~ surveyor B shall be given at times designated by the board.

D. Unless otherwise stated, applicants approved to sit for an ~~examination~~ exam must register and submit the required ~~examination~~ exam fee to be received ~~in the board office, or~~ by the board's designee~~,~~ at a time designated by the board. Applicants not properly registered will not be allowed ~~into the examination site~~ to sit for the exam.

E. ~~Applicants shall be notified by the board of passing or failing the examination but shall not be notified of actual scores. Only the board and its staff shall have access to examination papers, scores, and answer sheets. Examinations may not be reviewed~~ The exam shall not be reviewed by applicants. Unless authorized by NCEES rules and procedures, exam scores are final and are not subject to change.

F. ~~Should the applicant fail to pass an examination within~~ Applicants approved to sit for the exam shall be eligible for a period of three years ~~after being authorized to take the examination, the applicant must reapply and meet~~ from the date of their initial approval. Applicants who do not pass the exam during their eligibility period are no longer eligible to sit for the exam. To become exam-eligible again, applicants shall reapply to the board and meet all current entry requirements at the time of reapplication. In addition to meeting the current entry requirements upon reapplication, applicants shall demonstrate successful completion of 16 hours of educational activities that meet the requirements of 18VAC10-20-683 E and F.

**18VAC10-20-360. Licensure by comity.**

~~A. A person in good standing and holding a valid license to engage in the practice of land surveying in another state, the District of Columbia, or any territory or possession of the United States may be licensed, provided the applicant submits verifiable documentation to the board that the education, experience, and examination requirements by which the applicant was first licensed in the original jurisdiction were substantially equivalent to those existing in Virginia at the time of the applicant's original licensure. No person shall be so licensed, however, who has not passed an examination in another jurisdiction that was substantially equivalent to that~~

~~approved by the board at the time of the applicant's original licensure. If the applicant does not meet the requirements for licensure in Virginia that were in effect at the time of original licensure, the applicant shall be required to meet the entry requirements current at the time the completed application for comity is received in the board's office. All applicants shall be required to pass a written Virginia state specific examination. The examination shall include questions on law, procedures and practices pertaining to land surveying in Virginia.~~

~~B. A person holding a current license to engage in the practice of land surveying or photogrammetric surveying issued to the applicant by other states, the District of Columbia or any territory or possession of the United States based on requirements that do not conflict with and are at least as rigorous as the provisions contained in 18VAC10-20-310 C may be licensed as a surveyor photogrammetrist without further examination, except for the Virginia state examination, provided that the applicant was originally licensed prior to the ending date of the provisions contained in 18VAC10-20-310 C.~~

A. Applicants holding a valid license to practice land surveying in another state or other jurisdiction of the United States may be licensed as a land surveyor in Virginia. To become licensed, applicants shall:

1. Submit to the board verifiable documentation that the education, experience, and exam requirements by which they were first licensed in the original jurisdiction were substantially equivalent to the requirements in Virginia at the same time;

2. Have passed an exam in another jurisdiction that was substantially equivalent to that approved by the board at the time of the original licensure;

3. Be in good standing in all jurisdictions where licensed;

4. Pass a Virginia-specific exam; and

5. Satisfy all other requirements of this chapter.

B. Applicants who do not meet the requirements for licensure in Virginia that were in effect at the time of their original licensure shall be required to meet the entry requirements current at the time the completed application for comity is received in the board's office.

C. Applicants holding a current license to practice land surveying or photogrammetric surveying issued by another state or other jurisdiction of the United States may be licensed in Virginia as a surveyor photogrammetrist provided they meet one of the following criteria:

1. Applicants who were originally licensed prior to December 1, 2009, shall meet the requirements of the board's regulations effective December 1, 2008, and pass the Virginia-specific exam; or

2. Applicants who were originally licensed on or after December 1, 2009, shall meet the requirements of the board's regulations effective at the time of original licensure and pass the Virginia-specific exam.

**18VAC10-20-370. Minimum standards and procedures for land boundary surveying practice.**

A. The minimum standards and procedures set forth in this section are to be used for land boundary surveys performed in the Commonwealth of Virginia. The application of the professional's seal, signature and date as required by these regulations shall be evidence that the land boundary survey is correct to the best of the professional's knowledge, information, and belief, and complies with the minimum standards and procedures set forth in this chapter.

B. Research procedure. The professional shall search the land records for the proper description of the land to be surveyed and obtain the description of adjoining land(s) as it pertains to the common boundaries. The professional shall have the additional responsibility to utilize such other available data pertinent to the survey being performed from any other known ~~sources(s)~~ sources. Evidence found, from all known sources, including evidence found in the field, shall be carefully compared in order to aid in the establishment of the correct boundaries of the land being surveyed. The professional shall clearly identify on the plats, maps, and reports inconsistencies found in the research of common boundaries between the land being surveyed and the adjoining land(s). It is not the intent of this regulation to require the professional to research the question of title or encumbrances on the land involved.

C. Minimum field procedures.

1. Angular measurement. Angle measurements made for traverse or land boundary survey lines will be made by using a properly adjusted transit-type instrument which allows a direct reading to a minimum accuracy of 30 seconds of arc or metric equivalent. The number of angles turned at a given station or corner will be the number which, in the judgment of the professional, can be used to substantiate the average true angle considering the condition of the instrument being used and the existing field conditions.

2. Linear measurement. Distance measurement for the lines of traverse or lines of the land boundary survey shall be made with metal tapes which have been checked and are properly calibrated as to incremental distances, or with properly calibrated electronic distance measuring equipment following instructions and procedures established by the manufacturer of such equipment. All linear measurements shall be reduced to the horizontal plane, and other necessary corrections shall be performed before using such linear measurements for computing purposes.

3. Field traverse and land boundary closure and accuracy standards. For a land boundary survey located in a rural area, the maximum permissible error of closure for a field traverse shall be one part in 10,000 (1/10,000). The

attendant angular closure shall be that which will sustain the one part in 10,000 (1/10,000) maximum error of closure. For a land boundary survey located in an urban area, the maximum permissible error of closure for a traverse shall be one part in 20,000 (1/20,000). The attendant angular closure shall be that which will sustain the one part in 20,000 (1/20,000) maximum error of closure.

The maximum permissible positional uncertainty based on the 95% confidence level of any independent boundary corner or independent point located on a boundary that has been established by utilizing global positioning systems shall not exceed the positional tolerance of 0.07 feet (or 20 mm + 50 ppm).

4. Monumentation. As a requisite for completion of the work product, each land boundary survey of a tract or parcel of land shall be monumented with objects made of permanent material at all corners and changes of direction on the land boundary with the exceptions of meanders, such as meanders of streams, tidelands, lakes, swamps and prescriptive rights-of-way, and each such monument, other than a natural monument, shall, when physically feasible, be identified by a temporary witness marker. Where it is not physically feasible to set actual corners, appropriate reference monuments shall be set, preferably on line, and the location of each shall be shown on the plat or map of the land boundary.

All boundaries, both exterior and interior, of the original survey for any division or partition of land shall be monumented in accordance with the provisions of this subdivision, when such monumentation is not otherwise regulated by the provisions of a local subdivision ordinance.

5. For land boundary surveys providing for a division when only the division, in lieu of the entire parcel, is being surveyed, any new corners established along existing property lines shall require that those existing property lines be established through their entire length. This shall include the recovery or reestablishment of the existing corners for each end of the existing property lines.

D. Office procedures.

1. Computations. The computation of field work data shall be accomplished by using the mathematical routines that produce closures and mathematical results that can be compared with descriptions and data of record. Such computations shall be used to determine the final land boundary of the land involved.

2. Plats and maps. The following information shall be shown on all ~~plats or maps, or both,~~ plats and maps used to depict the results of the land boundary survey:

a. The title of the land boundary plat identifying the land surveyed and showing the district, town, and county or city in which the land is located and scale of drawing.

b. The name of the owner of record and ~~deed book reference where the acquisition was recorded~~ recording references.

c. Names of all adjoining owners of record with ~~deed book~~ recording references, or ~~subdivision lot designations~~ with subdivision name and lot designations and recording references.

d. ~~The professional shall clearly note inconsistencies~~ Inconsistencies found in the research of common boundaries between the land being surveyed and the adjoining land(s). The inconsistencies shall be clearly noted by the professional.

e. Names of highways and roads with route number, and widths of right-of-way, or distance to the center of the physical pavement and pavement width, name of railroads, streams adjoining, crossing, or in close proximity to the boundary and other prominent or well-known objects that are informative as to the location of the land boundary.

f. A distance to the nearest road intersection, or prominent or well-known object. In cases of remote areas, a scaled position with the latitude and longitude must be provided.

g. Items crossing any property lines such as, but not limited to, physical encroachments, and evidence of easements such as utilities and other physical features pertinent to the boundary of the property.

h. Bearings of all property lines and meanders to nearest 10 seconds of arc or metric equivalent.

i. Adequate curve data to accomplish mathematical closures.

j. Distances of all property lines and meanders to the nearest one hundredth (.01) of a foot or metric equivalent.

k. Pursuant to subdivision C 5 of this section, the bearing and distances from the new corners to the existing corners on each end of the existing property lines.

l. For property located in rural areas, area to the nearest hundredth (.01) of an acre or metric equivalent.

m. For property located in urban areas, area to the nearest square foot or thousandth (0.001) of an acre or metric equivalent.

n. North arrow and source of meridian used for the survey.

o. For interior surveys, a reference bearing and distance to a property corner of an adjoining owner or other prominent object, including, but not limited to, intersecting streets or roads.

p. Tax map designation or geographic parcel identification number if available.

q. Description of each monument found and each monument set by the professional.

r. A statement that the land boundary survey shown is based on a current field survey or a compilation from deeds, plats, surveys by others, or combination thereof. If the land boundary shown is a compilation from deeds or plats, or a survey by others, the title of the plat shall clearly depict that the plat does not represent a current land boundary survey. ~~The application of the land surveyor's seal, signature and date shall constitute compliance with all the current standards of a land boundary survey as of the date of the application of signature unless otherwise clearly stated in the title of the plat that the plat is to be construed otherwise.~~

s. A statement as to whether ~~or not~~ a current title report has been furnished to the professional.

~~t. If the land boundaries shown on the plat are the result of a compilation from deed or plats, or both, or based on a survey by others, that fact will be clearly stated and the title of the plat shall clearly depict that the plat does not represent a current land boundary survey.~~

~~u.~~ t. A statement as to whether any or all easements are shown on the plat.

~~v.~~ u. Name and address of the land surveyor or the registered business.

~~w.~~ v. The professional's seal, signature and date.

3. Metes and bounds description. The professional shall prepare a metes and bounds description in narrative form, if requested by the client or his agent, for completion of any newly performed land boundary survey. The description shall reflect all metes and bounds, the area of the property described, all pertinent monumentation, names of record owners or other appropriate identification of all adjoiners, and any other data or information deemed as warranted to properly describe the property. Customarily, the metes and bounds shall be recited in a clockwise direction around the property. The professional shall clearly identify in the metes and bounds description any inconsistencies found in the research of common boundaries between land being surveyed and the adjoining [ ~~land(s)~~ land or lands ]. For subdivisions, the professional shall prepare a metes and bounds description in narrative form for only the exterior boundaries of the property.

No metes and bounds description shall be required for the verification or resetting of the corners of a lot or other parcel of land in accordance with a previously performed land boundary survey, such as a lot in a subdivision where it is unnecessary to revise the record boundaries of the lot.

**18VAC10-20-380. Minimum standards and procedures for surveys determining the location of physical improvements; field procedures; office procedures.**

A. The following minimum standards and procedures are to be used for surveys determining the location of physical improvements on any parcel of land or lot containing less than two acres or metric equivalent (sometimes also known as "building location survey," "house location surveys," "physical surveys," and the like) in the Commonwealth of Virginia. The application of the professional's seal, signature and date as required by these regulations shall be evidence that the survey determining the location of physical improvements is correct to the best of the professional's knowledge, information, and belief, and complies with the minimum standards and procedures set forth in this chapter.

B. The professional shall determine the position of the lot or parcel of land in accordance with the intent of the original survey and shall set or verify permanent monumentation at each corner of the property, consistent with the monumentation provisions of subdivision C 4 of 18VAC10-20-370. All such monumentation, other than natural monumentation~~,~~ shall, when physically feasible, be identified by temporary witness markers.

When the professional finds discrepancies of sufficient magnitude to warrant, in his opinion, the performance of a land boundary survey (pursuant to the provisions of 18VAC10-20-370), he shall so inform the client or the client's agent that such land boundary survey is deemed warranted as a requisite to completion of the physical improvements survey.

The location of the following shall be determined in the field:

1. Fences in near proximity to the land boundary lines and other fences which may reflect lines of occupancy or possession.

2. Other physical improvements on the property and all man-made or installed structures, including buildings, stoops, porches, chimneys, visible evidence of underground features (such as manholes, catch basins, telephone pedestals, power transformers, etc.), utility lines and poles.

3. Cemeteries, if known or disclosed in the process of performing the survey; roads or travelways crossing the property which serve other properties; and streams, creeks, and other defined drainage ways.

4. Other visible evidence of physical encroachment on the property.

C. The plat reflecting the work product shall be drawn to scale and shall show the following, unless requested otherwise by the client and so noted on the plat:

1. The bearings and distances for the boundaries and the area of the lot or parcel of land shall be shown in accordance with record data, unless a current, new land boundary survey has been performed in conjunction with the physical improvements survey. If needed to produce a closed polygon, the meander lines necessary to verify locations of streams, tidelands, lakes and swamps shall be shown. All bearings shall be shown in a clockwise direction, unless otherwise indicated.

2. North arrow, in accordance with record data.

3. Fences in the near proximity to the land boundary lines and other fences which may reflect lines of occupancy or possession.

4. Improvements and other pertinent features on the property as located in the field pursuant to subsection B of this section.

5. Physical encroachment, including fences, across a property line shall be identified and dimensioned with respect to the property line.

6. ~~On parcels where compliance with restriction is in question, provide the~~ The closest dimension (to the nearest 0.1 foot or metric equivalent) from the front property line, side property line, and if pertinent, rear property line to the principal walls of each building. Also, all principal building dimensions (to the nearest 0.1 foot or metric equivalent).

7. Building street address numbers, as displayed on the premises, or so noted if no numbers are displayed.

8. Stoops, decks, porches, chimneys, balconies, floor projections, and other similar type features.

9. Street name(s), as posted or currently identified, and as per record data, if different from posted name.

10. Distance to nearest intersection from a property corner, based upon record data. If not available from record data, distance to nearest intersection may be determined from best available data, and so qualified.

11. Building restriction or setback line(s) per restrictive covenants, if shown or noted on the record subdivision plat.

12. The caption or title of the plat shall include the type of survey performed; lot number, block number, section number, and name of subdivision, as appropriate, or if not in a subdivision, the name(s) of the record owner; town or county, or city; date of survey; and scale of drawing.

13. Adjoining property identification.

14. Easements and other encumbrances set forth on the record subdivision plat, and those otherwise known to the professional.

15. A statement as to whether or not a current title report has been furnished to the professional.

16. ~~The professional shall clearly note inconsistencies found in the research of common boundaries between the land being surveyed and the adjoining land(s)~~ Inconsistencies found in the research or field work of common boundaries between the land being surveyed and the adjoining [ ~~land(s)~~ land or lands ] shall be clearly noted.

17. Professional's seal, signature and date.

18. Name and address of the land surveyor or registered business.

~~D. Notwithstanding the monumentation provisions of subsection B of this section or any other provision of these regulations, a professional, in performing a physical improvements survey, shall not be required to set corner monumentation on any property when corner monumentation is otherwise required to be set pursuant to the provisions of a local subdivision ordinance as mandated by § 15.2-2240 of the Code of Virginia, or by subdivision A 7 of § 15.2-2241 of the Code of Virginia, or where the placing of such monumentation is covered by a surety bond, cash escrow, set-aside letter, letter of credit, or other performance guaranty. When monumentation is not required, the surveyor shall clearly note on the plat "no corner markers set" and the reason to include name of guarantors.~~

~~E. Notwithstanding anything to the contrary in this chapter, this chapter shall be construed as to comply in all respects with § 54.1-407 of the Code of Virginia.~~

D. In performing a physical improvements survey, a professional shall not be required to set corner monumentation on any property when:

1. It is otherwise required to be set pursuant to the provisions of a local subdivision ordinance as mandated by § 15.2-2240 of the Code of Virginia or by subdivision A 7 of § 15.2-2241 of the Code of Virginia;

2. Its placement is covered by a surety bond, cash escrow, set-aside letter, letter of credit, or other performance guaranty; or

3. Exempt by § 54.1-407 of the Code of Virginia.

E. A professional performing a physical improvements survey when monumentation is not required as stated in subsection D of this section shall clearly note on the plat "no corner markers set," the reason why it is not required, and the name of guarantors.

**18VAC10-20-382. Minimum standards and procedures for surveys determining topography; field procedures; office procedures.**

A. The minimum standards and procedures set forth in this section are to be used for topographic surveys performed in the Commonwealth of Virginia pursuant to Chapter 4 (§ 54.1-400 et seq.) of Title 54.1 of the Code of Virginia. The application of the professional's seal, signature, and date as required by these regulations shall be evidence that the topographic survey is correct to the best of the professional's knowledge and belief~~,~~ and complies with the minimum standards and procedures.

B. Minimum field and office procedures. The following information shall be shown on, or contained in, all plats, maps, or digital geospatial data including metadata used to depict the results of the topographic survey:

1. Physical improvements on the property, all man-made or installed structures, as well as visible evidence of underground features (such as manholes, catch basins, telephone pedestals, power transformers, etc.), and utility

lines and poles shall be shown or depicted when they are visible based on the methodology and scale. ~~If the methodology or scale prevents the depiction of physical improvements on the property, all man-made or installed structures, as well as visible evidence of underground features (such as manholes, catch basins, telephone pedestals, power transformers, etc.), and utility lines and poles, then such notice shall be clearly stated on or contained in the map, plat, or digital geospatial data including metadata~~ If the methodology or scale prevents depiction of the above, then notice shall be clearly stated on or contained in the map, plat, or digital geospatial data including metadata indicating the improvements that are not depicted.

2. Elevations shall be provided as spot elevations, contours, or digital terrain models.

3. Onsite, or in close proximity, bench mark(s) shall be established with reference to vertical datum, preferably North American Vertical Datum (NAVD), and shown in the correct location.

4. The title of the topographic survey identifying the land surveyed and showing the state, county or city in which property is located.

5. Name of the individual or entity for whom the survey is being performed.

6. Date, graphic scale, numerical scale, and contour interval of plat, map, or digital geospatial data including metadata.

7. ~~Depiction and definition of north~~ North arrow and source of meridian used for the survey.

8. Names of highways, streets and named waterways shall be shown.

9. The horizontal and vertical unit of measurement, coordinate system, and datums, including adjustments if applicable.

~~10. The following minimum positional accuracies shall be met:~~

10. A statement, in the following form, shall be shown on or contained in plats, maps, or digital geospatial data including metadata:

This _____ (provide description of the project) was completed under the direct and responsible charge of _____ (Name of Professional) from an actual □ Ground or □ Airborne (check the one that is applicable) survey made under my supervision [ ~~.~~ : ] that the imagery and/or original data was obtained on _____ (Date); and that this plat, map, or digital geospatial data including metadata meets minimum accuracy standards unless otherwise noted.

C. Minimum positional accuracies shall be met in accordance with the tables in subdivisions 1, 2, and 3 of this subsection. These tables are not intended to be acceptable in all situations, and the professional shall be responsible to perform the work to the appropriate quality and extent that is prudent or warranted under the existing field conditions and circumstances. Metric or other unit of measurements shall meet an equivalent positional accuracy. Map or plat scales, or contour intervals, other than those defined in these tables shall meet an equivalent positional accuracy. The minimum positional accuracy tables are as follows [ : ]

~~a.~~ 1. Scale and contour interval combinations.

| Map or Plat Scale | Contour Interval |
|---|---|
| 1" = 20' | 1 or 2 feet |
| 1" = 30' | 1 or 2 feet |
| 1" = 40' | 1 or 2 feet |
| 1" = 50' | 1 or 2 feet |
| 1" = 100' | 1 or 2 feet |
| 1" = 200' | 2, 4 or 5 feet |
| 1" = 400' | 4, 5 or 10 feet |

~~b.~~ 2. Vertical accuracy standards.

| | Contours - Vertical Positional Accuracy | Spot Elevations - Vertical Positional Accuracy |
|---|---|---|
| Contour line 1' interval | ± 0.60 feet | ± 0.30 feet |
| Contour line 2' interval | ± 1.19 feet | ± 0.60 feet |
| Contour line 4' interval | ± 2.38 feet | ± 1.19 feet |
| Contour line 5' interval | ± 2.98 feet | ± 1.49 feet |
| Contour line 10' interval | ± 5.96 feet | ± 2.98 feet |

Positional Accuracy is given at the 95% confidence level.

~~c.~~ 3. Horizontal accuracy standards.

Well defined ground points - Horizontal (Radial) Positional Accuracy

| Map or Plat Scale | Absolute Horizontal Positional Accuracy | Relative Horizontal Positional Accuracy |
|---|---|---|
| 1" = 20' | ± 0.8 feet | ± 0.20 feet |
| 1" = 30' | ± 1.1 feet | ± 0.30 feet |
| 1" = 40' | ± 1.5 feet | ± 0.40 feet |

| | | |
|---|---|---|
| 1" = 50' | ± 1.9 feet | ± 0.50 feet |
| 1" = 100' | ± 3.8 feet | ± 1.00 feet |
| 1" = 200' | ± 7.6 feet | ± 2.00 feet |
| 1" = 400' | ± 15.2 feet | ± 4.00 feet |

Positional Accuracy is given at the 95% confidence level.

~~The accuracy standards tables as shown are not intended to be acceptable in all situations. The professional shall be responsible to perform the work to the appropriate quality and extent that is prudent or warranted under the existing field conditions and circumstances.~~

~~Metric or other unit of measurements shall meet an equivalent positional accuracy.~~

~~Map or plat scales, or contour intervals, other than those defined in these tables shall meet an equivalent positional accuracy.~~

~~11. A statement, in the following form, shall be shown on or contained in plats, maps, or digital geospatial data including metadata:~~

~~This _____ (provide description of the project) was completed under the direct and responsible charge of, _____ (Name of Surveyor or Surveyor Photogrammetrist) Professional) from an actual □ Ground or □ Airborne (check the one that is applicable) survey made under my supervision; that the imagery and/or original data was obtained on _____ (Date); and that this plat, map, or digital geospatial data including metadata meets minimum accuracy standards unless otherwise noted.~~

**18VAC10-20-390. Geodetic surveys.**

All geodetic surveys~~,~~ including, but not limited to, the determination and publication of horizontal and vertical values utilizing Global Positioning Systems (GPS), which relate to the practice of land surveying as defined in § 54.1-400 of the Code of Virginia, shall be performed under the direct control and personal supervision of a ~~licensed land surveyor~~ professional as defined in Part I (18VAC10-20-10 et seq.) of [ ~~these regulations~~ this chapter ].

**18VAC10-20-395. Standard of care.**

In no event may the requirements contained in ~~18VAC10-20-280~~ 18VAC10-20-370 through 18VAC10-20-392 be interpreted or construed to require the professional to perform work of a lesser quality or quantity than that which is prudent or warranted under the existing field conditions and circumstances.

Part VI
Qualifications for ~~Certification~~ Licensing of Landscape Architects

**18VAC10-20-400. Fee schedule.**

All fees are nonrefundable and shall not be prorated.

| | |
|---|---|
| Application for Initial Landscape Architect License | $125 |
| Application for Landscape Architect License by Comity | $125 |
| Renewal | $110 |
| ~~Out of state proctor~~ | ~~$100~~ |

**18VAC10-20-420. Requirements for ~~certification~~ licensure.**

~~The education or experience, or both, and examination requirements for licensure as a landscape architect are as follows:~~ A. Applicants for licensure as a landscape architect shall satisfy the requirements of subsection B or C of this section.

~~1.~~ B. An applicant who has graduated from ~~an accredited~~ a landscape architecture curriculum ~~approved~~ accredited by the Landscape Architectural Accreditation Board (LAAB) ~~must meet the following requirements for licensure as a landscape architect~~ shall have:

~~a. Passed a CLARB-prepared examination; and~~

~~b.~~ 1. Obtained a minimum of 36 months of ~~experience/training with a minimum of 12 months under the direct control and personal supervision of a landscape architect and the other 24 months under the direct control and personal supervision of a landscape architect, architect, professional engineer, or land surveyor, in accordance with the experience credits portion of the Landscape Architect Equivalency Table. An applicant who has graduated from an accredited landscape architecture curriculum approved by the Landscape Architectural Accreditation Board shall be admitted to a CLARB-prepared examination prior to completing the 36-month experience requirement, if the applicant is otherwise qualified.~~ experience as follows:

a. A minimum of 12 months of experience under the direct control and personal supervision of a licensed or certified landscape architect; and

b. The remaining 24 months of experience under the direct control and personal supervision of a licensed or certified landscape architect or a licensed architect, professional engineer, or land surveyor, in accordance with the LANDSCAPE ARCHITECTS EXPERIENCE CREDIT TABLE; and

2. Passed all sections of the Council of Landscape Architectural Registration Board (CLARB)-prepared exam.

~~2. An applicant who has obtained eight years of combined education and experience, evaluated in accordance with the Landscape Architect Equivalency Table, shall be admitted to a CLARB-prepared examination or equivalent approved by the board. Upon passing such examination, the applicant shall be licensed as a landscape architect, if otherwise qualified.~~

C. Applicants who have not graduated from a LAAB-accredited landscape architecture curriculum shall have obtained a minimum of eight years of combined education and work experience in accordance with this subsection.

1. Only semester and quarter hours with passing grades shall be accepted. Credit shall be calculated as follows:

a. 32 semester credit hours or 48 quarter credit hours shall be worth one year.

b. Fractions greater than or equal to one half-year, but less than one year, will be counted as one-half year.

c. Fractions smaller than one half-year will not be counted.

2. The maximum years indicated in subdivisions a through d of the LANDSCAPE ARCHITECTS EDUCATION CREDIT TABLE shall apply regardless of the length of the degree program.

3. All applicants shall have a minimum of two years of experience under the direct control and personal supervision of a licensed or certified landscape architect.

4. Education and experience shall be evaluated against the LANDSCAPE ARCHITECTS EDUCATION CREDIT TABLE and the LANDSCAPE ARCHITECTS EXPERIENCE CREDIT TABLE to determine if an applicant has met the minimum eight years required in this subsection.

~~LANDSCAPE ARCHITECT EQUIVALENCY TABLE.~~

~~TABLE OF EQUIVALENTS FOR EDUCATION AND EXPERIENCE.~~

| ~~DESCRIPTIONS~~ | ~~Education Credits~~ | | | ~~Experience Credits~~ | |
|---|---|---|---|---|---|
| | ~~First 2 Years~~ | ~~Succeeding Years~~ | ~~Max. Credit Allowed~~ | ~~Credit Allowed~~ | ~~Max. Credit Allowed~~ |
| ~~A 1. Degree from an LAAB accredited landscape architectural curriculum.~~ | ~~100%~~ | ~~100%~~ | ~~5 years~~ | | |
| ~~A 2. Credits toward a degree in landscape architecture from an accredited school of landscape architecture.~~ | ~~100%~~ | ~~100%~~ | ~~4 years~~ | | |
| ~~A 3. Degree in landscape architecture or credits toward that degree from a nonaccredited school of landscape architecture.~~ | ~~100%~~ | ~~100%~~ | ~~4 years~~ | | |
| ~~A 4. Degree or credits toward that degree in an allied professional discipline, i.e., architecture, civil engineering, environmental science, approved by the board.~~ | ~~75%~~ | ~~100%~~ | ~~3 years~~ | | |
| ~~A 5. Any other bachelor degree or credits toward that degree.~~ | ~~50%~~ | ~~75%~~ | ~~2 years~~ | | |
| ~~A 6. Qualifying experience in landscape architecture under the direct supervision of a landscape architect.~~ | | | | ~~100%~~ | ~~no limit~~ |
| ~~A 7. Qualifying experience directly related to landscape architecture when under the direct supervision of an architect, professional engineer, or land surveyor.~~ | | | | ~~50%~~ | ~~4 years~~ |

~~EXPLANATION OF REQUIREMENTS~~

~~B 1. Education Credits. Education credits shall be subject to the following conditions:~~

~~B 1.1. Applicants with a degree specified in A 1 through A 5 will be allowed the credit shown in the Maximum Credit Allowed column, regardless of the length of the degree program.~~

~~B 1.2. With a passing grade, 32 semester credit hours or 48 quarter hours is considered to be one year. Fractions greater than one half year will be counted one half year and smaller fractions will not be counted.~~

~~B 2. Experience Credits. Experience credits shall be subject to the following conditions:~~

~~B 2.1. Every applicant without an LAAB accredited degree must earn at least two years of experience credit under category A 6. Every applicant with an LAAB accredited degree must earn at least one year of experience credit under category A 6.~~

LANDSCAPE ARCHITECTS EDUCATION CREDIT TABLE

| Categories | Values | Examples |
|---|---|---|
| a. Credits completed applicable toward a LAAB-accredited degree.<br><br>b. A degree in landscape architecture, or credits completed applicable toward a degree in landscape architecture, from a non-LAAB-accredited curriculum. | Credit shall be given at the rate of 100% with a maximum of four years allowable. | An applicant has 86 semester hours of credit.<br>Calculation:<br>♦ 86/32 = 2.6875 years<br>♦ 100% credit for a maximum of four years (2.6875 x 100% = 2.6875 years).<br>♦ 0.6875 is ≥ 0.5 years, which is worth 0.5 years.<br>Final result: 86 semester hours equals 2.5 years. |
| c. A degree, or credits completed applicable toward a degree, in an allied professional discipline approved by the board (i.e., architecture, civil engineering, environmental science). | Credit shall be given at the rate of 75% for the first two years and 100% for succeeding years with a maximum of three years allowable. | An applicant has 101 semester hours of credit.<br>Calculation:<br>♦ 101/32 = 3.15625 years<br>♦ 75% credit for the first two years (2 x 75% = 1.5 years).<br>♦ 100% credit for succeeding years (1.15625 x 100% = 1.15625 years).<br>♦ 1.5 + 1.15625 = 2.65625 years.<br>♦ 0.65625 is ≥ 0.5 years, which is worth 0.5 years.<br>Final result: 101 semester hours equals 2.5 years. |
| d. Any other undergraduate degree or credits completed applicable toward that degree. | Credit shall be given at the rate of 50% for the first two years and 75% for succeeding years with a maximum of two years allowable. | An applicant has 95 semester hours of credit.<br>Calculation:<br>♦ 95/32 = 2.96875 years<br>♦ 50% credit for the first two years (2 x 50%= 1 year).<br>♦ 75% credit for succeeding years (.96875 x 75%= .72656 years).<br>♦ 1 + .72656 = 1.72656 years.<br>♦ 0.72656 is ≥ 0.5 years, which is worth 0.5 years.<br>Final result: 95 semester hours equals 1.5 years. |

| LANDSCAPE ARCHITECTS EXPERIENCE CREDIT TABLE | | |
|---|---|---|
| Categories | Values | Examples |
| e. Experience gained under the direct control and personal supervision of a licensed or certified landscape architect. | Credit shall be given at the rate of 100% of work experience gained with no maximum. | An applicant worked under a landscape architect for 3.7 years.<br>Calculation:<br>3.7 years x 100% = 3.7 years (no maximum).<br>Final result: An applicant with 3.7 years of work experience will be credited for the entire 3.7 years. |
| f. Experience gained under the direct control and personal supervision of a licensed architect, professional engineer, or land surveyor. | Credit shall be given at the rate of 50% of work experience gained with a maximum of four years allowable. | An applicant has worked under a land surveyor for eight years or more.<br>Calculation:<br>8 years x 50% = 4 years.<br>Final result: eight years or more of experience is worth only four years based on the maximum allowable. |

**18VAC10-20-425. References.**

In addition to the requirements found in 18VAC10-20-25, applicants shall submit three references with the application, each from a currently licensed landscape architect in another state or other jurisdiction of the United States. An applicant shall only submit references from landscape architects who have personal knowledge of his competence and integrity relative to his landscape architectural experience.

**18VAC10-20-430. Experience standard.**

Qualifying landscape architectural training and experience shall be progressive in complexity and based on ~~a~~ knowledge of natural, physical and mathematical sciences, and the principles and methodology of landscape architecture.

**18VAC10-20-440. Examination.**

~~A. All applicants for original licensure in Virginia are required to pass the CLARB-prepared examination.~~

A. Applicants with a LAAB-accredited degree may be approved to sit for the exam prior to completing the 36-month experience requirement contained in 18VAC10-20-420 [ ~~A~~ B ] 1.

B. The Virginia board is a member of the Council of Landscape Architectural Registration Boards (CLARB) and ~~as such~~ is authorized to administer the CLARB ~~examinations~~ exams. All applicants for original licensure in Virginia are required to pass the CLARB-prepared exam.

~~C. The CLARB-prepared examination will be offered at least once per year at a time designated by the board.~~

C. Applicants approved to sit for the exam shall register and submit the required exam fee to be received in the board office, or by the board's designee. Applicants not properly registered will not be allowed to sit for the exam.

D. Grading of the ~~examination~~ exam shall be in accordance with the national grading procedures established by CLARB. The board shall adopt the scoring procedures recommended by CLARB.

~~E. Unless otherwise stated, applicants approved to sit for an examination shall register and submit the required examination fee to be received in the board office, or by the board's designee, at a time designated by the board. Applicants not properly registered will not be allowed into the examination site.~~

~~F. Examinees will~~ E. Applicants shall be advised only of their passing or failing score and the CLARB minimum passing ~~or failing~~ score.

~~Only the board and its staff shall have access to examination papers, scores, and answer sheets.~~

~~G.~~ F. Upon written request to the board within 30 days of receiving ~~examination~~ exam results, ~~examinees~~ applicants will be permitted to view the performance problems contained within the section that they failed. ~~Examination~~ Exam appeals are permitted in accordance with the CLARB score verification process.

~~H. Should an applicant fail to pass an examination within three years after being approved to sit for an examination, the applicant must reapply and meet all current entry requirements at the time of reapplication. If the applicant has not been taking the examination on a continuous basis during the three-year eligibility period, or fails to reapply within six months after the end of the three-year eligibility period, or both, then the applicant shall meet the entry requirements current at the time of reapplication.~~

G. Applicants approved to sit for the exam shall be eligible for a period of three years from the date of their initial approval. Applicants who do not pass all sections of the exam

during their eligibility period are no longer eligible to sit for the exam. To become exam-eligible again, applicants shall reapply to the board as follows:

1. Applicants who have taken at least one section of the exam and who reapply to the board no later than six months after the end of their eligibility may be approved to sit for the exam for an additional three years. The original application requirements shall apply.

2. Applicants who do not meet the criteria of subdivision 1 of this subsection shall reapply to the board and meet all entry requirements current at the time of reapplication.

**18VAC10-20-450. ~~Certification~~ Licensure by comity.**

~~A person holding a current license to engage in the practice of landscape architecture, issued to the applicant by other states, the District of Columbia, or any territory or possession of the United States based on requirements that do not conflict with and are at least as rigorous as these regulations and supporting statutes of this board that were in effect at the time of original licensure, may be licensed without further examination. No person shall be so licensed, however, who has not passed an examination in another jurisdiction that was substantially equivalent to that approved by the board at that time. If the applicant does not meet the requirements for licensure in Virginia that were in effect at the time of original licensure, the applicant shall be required to meet the entry requirements current at the time the completed application for comity is received in the board's office or shall hold a CLARB certificate.~~

A. Applicants with a valid license in good standing to practice landscape architecture issued by another state or other jurisdiction of the United States may be licensed by the board without further examination provided they:

1. Were issued the original license based on requirements that do not conflict with and that are substantially equivalent to the board's regulations that were in effect at the time of original licensure; and

2. Passed an exam in another jurisdiction that was substantially equivalent to that approved by the board at that time; or

3. Possess a CLARB certificate.

B. Applicants who do not qualify under subsection A of this section shall be required to meet current entry requirements at the time the application for comity is received in the board's office.

Part VII
Qualifications for ~~Certification~~ Certifying of Interior Designers

**18VAC10-20-460. Definitions.**

The following words, terms, and phrases when used in this part shall have the meanings ascribed to them except where the context clearly indicates or requires different meanings.

"CIDA" means the Council for Interior Design Accreditation (CIDA), formerly known as the Foundation of Interior Design Education Research (FIDER).

"Diversified experience" includes the identification, research and creative solution of problems pertaining to the function and quality of the interior environment including, but not limited to, code analysis, fire safety consideration, and barrier free evaluations that relate to the health, safety, and welfare of the public.

"Monitored experience" means diversified experience in interior design under the direct control and personal supervision of a certified or licensed interior designer, an architect, or a professional engineer.

"Professional program approved by the board" means ~~(i) a minimum of a four year degree in an interior design program that has been evaluated and is deemed by the board to be substantially equivalent, at the time of the applicant's graduation, to a four year interior design degree program from an institution accredited by the Council for Interior Design Accreditation (CIDA), formerly known as the Foundation of Interior Design Education Research (FIDER) or (ii) a master's degree in interior design plus a four year degree, the combination of which has been evaluated and is deemed by the board to be substantially equivalent, at the time of the applicant's graduation, to a four year degree program from an institution accredited by CIDA, formerly known as FIDER. Any cost of evaluation shall be borne by the applicant. The board reserves the right to reject, for good cause, any evaluation submitted.~~ an evaluated degree or combination of evaluated degrees as follows:

1. A minimum of an undergraduate degree in an interior design program that is deemed by the board to be substantially equivalent to an undergraduate degree in interior design from a CIDA-accredited institution at the time of the applicant's graduation; or

2. A graduate degree in interior design plus an undergraduate degree that is a combination deemed by the board to be substantially equivalent to an undergraduate degree program from a CIDA-accredited institution at the time of the applicant's graduation.

For the purposes of this definition, a degree program that met CIDA accreditation requirements not later than two years after the date of the applicant's graduation shall be determined to be CIDA accredited.

**18VAC10-20-470. Fee schedule.**

All fees are nonrefundable and shall not be prorated.

| | |
|---|---|
| Application for Initial Interior Designer Certification | $45 |
| Application for Interior Designer Certification by Comity | $45 |
| Renewal | $45 |

**18VAC10-20-490. Requirements for certification.**

~~The education, experience and examination requirements for certification as an interior designer are as follows:~~

A. Applicants shall meet one of the following education requirements:

~~1. The applicant shall be a graduate of a four-year professional degree program accredited by CIDA, formerly known as FIDER, not later than one year after the applicant's graduation from said program, or an equivalent accrediting organization, or a professional program approved by the board; have a minimum of two years of monitored experience;~~ and have passed the board-approved examination for certification as an interior designer.

~~2. Monitored experience gained under the direct control and personal supervision of a professional engineer shall be reduced by 50%. The total experience credit for such experience shall not exceed six months.~~

1. Have graduated from a program accredited by CIDA;

2. Have graduated from a program accredited by an organization equivalent to CIDA; or

3. Have graduated from a professional degree program approved by the board.

B. Applicants shall possess a minimum of two years of monitored experience. Any monitored experience gained under the direct control and personal supervision of a professional engineer shall be reduced by 50% and shall not account for more than six months of the two years required by this subsection.

C. Applicants shall have passed the board-approved exam and provide documentation acceptable to the board verifying that the exam has been passed.

D. Any cost of evaluation of degrees shall be borne by the applicant. The board reserves the right to reject, for good cause, any evaluation submitted.

**18VAC10-20-495. Examination.**

A. The National Council of Interior Design Qualification (NCIDQ) exam is approved by the board.

B. Applicants shall apply directly to NCIDQ for the exam.

**18VAC10-20-505. Certification by comity.**

~~A person in good standing and holding a valid license or certificate to engage in the practice of interior design in another state, the District of Columbia, or any territory or possession of the United States may be certified provided the applicant submits verifiable documentation to the board that the education, experience, and examination requirements by which the applicant was first licensed or certified in the original jurisdiction were equal to those existing in Virginia at the time of the applicant's original licensure or certification. No person shall be so certified, however, who has not passed an examination in another jurisdiction that was equivalent to that approved by the board at the time of the applicant's original licensure or certification. If the applicant does not meet the requirements for certification in this state that were in effect at the time of original licensure or certification, the applicant shall be required to meet the entry requirements current at the time the completed application for comity is received in the board's office. Upon receipt of such satisfactory evidence and provided all other requirements of this chapter are complied with, a certificate shall be issued to the applicant.~~

An applicant with a valid license or certificate in another state or country or the District of Columbia may be issued a certificate if he provides satisfactory evidence to the board that:

1. The license or certificate was issued based on qualifications equal to those required by this chapter as of the date the application is received by the board; and

2. The license or certificate is in good standing.

Part VIII

Qualifications for Registration as a Professional Corporation

**18VAC10-20-510. Definitions.**

Section 13.1-543 of the Code of Virginia provides the definition of the following term:

Professional Corporation ("P.C.")

The following words, terms, and phrases when used in this part shall have the meanings ascribed to them except where the context clearly indicates or requires different meanings:

"Employee" of a corporation, for purposes of stock ownership, is a person regularly employed by the corporation who devotes 60% or more of his gainfully employed time to that of the corporation.

"Registration" means a certificate of authority issued by the board to transact business in Virginia pursuant to § 13.1-549 of the Code of Virginia.

**18VAC10-20-515. Registration required.**

Any professional corporation offering or rendering professional services in the Commonwealth of Virginia shall register with the board. Professional services shall include architecture, engineering, land surveying, landscape architecture, or interior design.

**18VAC10-20-520. Fee schedule.**

All fees are nonrefundable and shall not be prorated.

| | |
|---|---|
| Application for professional corporation registration | $30 |
| ~~Designation~~ Application for professional corporation branch office registration | $30 |
| Renewal of professional corporation registration | $25 |
| Renewal of professional corporation branch office registration | $25 |
| ~~Reinstatement of branch office~~ | ~~$30~~ |

~~Part VIII~~

~~Qualifications for Registration as a Professional Corporation~~

**18VAC10-20-530. Application requirements.**

A. All applicants shall ~~have been~~ be incorporated in the Commonwealth of Virginia or, if a foreign professional corporation, shall have ~~obtained~~ a certificate of authority to conduct business in Virginia from the State Corporation Commission in accordance with § 13.1-544.2 of the Code of Virginia. The corporation shall be in good standing with the State Corporation Commission at the time of application to the board office and at all times when the board registration is in effect.

~~B. Each application shall include certified true copies of the certificate of incorporation issued by the state of incorporation (in Virginia, such certificate issued by the State Corporation Commission), articles of incorporation, bylaws and charter, and, if a foreign professional corporation, the certificate of authority issued by the State Corporation Commission.~~

B. Each application shall include:

1. For applicants incorporated in Virginia, the applicant shall provide a copy of its articles of incorporation, bylaws, or charter, and the certificate of incorporation issued by the Virginia State Corporation Commission.

2. For applicants incorporated in a state other than Virginia, the applicant shall provide a copy of its articles of incorporation, bylaws, or charter, the certificate of incorporation issued by the foreign state of incorporation, and the certificate of authority issued by the Virginia State Corporation Commission.

C. Articles of incorporation ~~and~~ or bylaws. ~~The following statements are required:~~

1. The articles of incorporation or bylaws shall specifically state that cumulative voting is prohibited.

~~2. Pursuant to § 13.1-549 of the Code of Virginia, the bylaws of a corporation rendering the services of architects, professional engineers, land surveyors, or landscape architects or using the title of certified interior designers, or any combination thereof, shall provide that not less than two-thirds of its capital stock shall be issued to individuals duly licensed to render the services of architect, professional engineer, land surveyor, or landscape architect or to individuals legally authorized to use the title of certified interior designer. Similarly, for those corporations using the title of certified interior designers and providing the services of architects, professional engineers or land surveyors, or any combination thereof, the bylaws shall provide that not less than two-thirds of the capital stock of the corporation shall be held by individuals who are duly licensed. The bylaws shall further provide that the remainder of said stock may be issued only to and held by individuals who are employees of the corporation whether or not such employees are licensed to render professional services or authorized to use a title. Notwithstanding the above limitations, the bylaws may provide that the corporation may issue its stock to a partnership each of the partners of which is duly licensed or otherwise legally authorized to render the same professional services as those for which the corporation was incorporated.~~

2. The bylaws shall affirmatively state that the professional corporation meets the requirements of § 13.1-549 of the Code of Virginia.

3. The bylaws shall state that nonlicensed or noncertified individuals will not have a voice or standing in any matter affecting the practice of the corporation requiring professional expertise, ~~or~~ in any matter constituting professional practice, or both.

~~D. Board of directors. A corporation may elect to its board of directors not more than one-third of its members who are employees of the corporation and are not authorized to render professional services.~~

~~At least two-thirds of the board of directors shall be licensed to render the services of an architect, professional engineer, land surveyor, or landscape architect or be duly certified to use the title of certified interior designer, or any combination thereof.~~

~~At least one director currently licensed or certified in each profession offered or practiced shall be resident at the business to provide effective supervision and control of the final professional product.~~ D. The board of directors shall meet the following requirements:

1. A corporation may not elect to its board of directors more than one-third of its members who are employees of the corporation and are not authorized to render professional services;

2. At least two-thirds of the board of directors shall be licensed to render the services of an architect, professional engineer, land surveyor, or landscape architect or be duly certified to use the title of certified interior designer, or any combination thereof; and

3. At least one director, currently licensed or certified in each profession offered or practiced, shall be resident at the business to provide effective supervision and control of the final professional product.

E. Joint ownership of stock. Any type of joint ownership of the stock of the corporation is prohibited. Ownership of stock by nonlicensed or noncertified employees shall not entitle those employees to vote in any matter affecting the practice of the professions herein regulated.

F. The name of the business and any assumed, fictitious, trading as, or doing business as names of the firm shall be disclosed on the application.

G. ~~Branch offices. If professional services are offered or rendered in a branch office, a separate branch office designation form shall be completed for each branch office.~~

~~Responsible persons shall be designated in accordance with this chapter. At least one currently licensed or certified responsible person in each profession offered or practiced at each branch office shall be resident at each branch office to provide effective supervision and control of the final professional product~~ Any branch office offering or rendering professional services shall complete a branch office registration application from the board. Each branch office shall have a responsible person resident at the branch office for each profession offered or rendered.

**18VAC10-20-540. ~~Certificates of authority.~~ (Repealed.)**

~~Certificates of authority shall be issued by the board. The certificate of authority will permit a corporation to practice only the professions shown on its certificate of authority.~~

**18VAC10-20-550. Foreign corporations.**

A. The bylaws shall state that the foreign corporation's activities in Virginia shall be limited to rendering the services of architects, professional engineers, land surveyors, landscape architects ~~and~~, certified interior designers, or any combination thereof. ~~A foreign corporation must meet every requirement of this chapter except the requirement that two-thirds of its stockholders be licensed or certified to perform the professional service in Virginia.~~

B. Foreign corporations shall not be required to have two-thirds of its stockholders be licensed or certified to perform professional services in Virginia but must meet all other requirements of this chapter.

~~The corporation~~ C. Foreign corporations shall provide the name, address, and Virginia license or certificate number of each stockholder or employee of the corporation who will be offering or providing the professional ~~service(s)~~ services in Virginia.

**18VAC10-20-560. Amendments and changes.**

A. Amendments to charter, articles of incorporation or bylaws. A corporation holding a ~~certificate of authority~~ registration to practice in one or in any combination of the professions covered in these regulations shall file with the board, within 30 days of its adoption, a ~~certified true~~ copy of any amendment to the articles of incorporation, bylaws or charter.

B. Change in directors or shareholders. ~~In the event there is a change in corporate directors or shareholders, whether the change is temporary or permanent and whether it may be caused by death, resignation or otherwise, the certificate of authority shall be limited to that professional practice permitted by those pertinent licenses or certificates held by the remaining directors and shareholders of the corporation unless an employee of the firm holds the appropriate license or certificate and is competent to render such professional services. In the event that such change results in noncompliance with the requirements of this chapter and applicable statutes relating to ownership of capital stock or composition of the board of directors, the certificate of authority shall be suspended until such time as the corporation comes into compliance with this chapter. The corporation shall notify the board within 30 days of any such change.~~ The following shall apply to the board-issued registration upon the event of any change in directors or shareholders whether the change is temporary or permanent, caused by death, resignation, or otherwise:

1. The professional corporation shall notify the board within 30 days of any change in its directors or shareholders;

2. In the event of a change in the corporate directors or shareholders, the board-issued registration shall be limited to the professional practices permitted by those pertinent licenses or certificates held by the remaining directors and shareholders of the corporation unless an employee of the firm holds the appropriate license or certificate and is competent to render such professional services; and

3. In the event that a change results in the professional corporation's noncompliance with the requirements of this chapter and applicable statutes relating to ownership of capital stock or composition of the board of directors, the board-issued registration shall be automatically suspended until such time as the corporation comes into compliance with this chapter.

C. Change of name, address and place of business. ~~Any change of name (including assumed names), address, place of business in Virginia, or responsible person(s) of the profession(s) practiced or offered at each place of business shall be reported to the board by the registered entity within 30 days of such an occurrence. In addition, any licensed or certified employee responsible for such practice shall notify the board in writing of any changes of his employment status within 30 days of such change.~~ The professional corporation shall notify the board, in writing, within 30 days of any of the following changes at each place of business:

1. Any change of name (including assumed names), address, place of business in Virginia, or responsible person of the profession offered or practiced; and

2. Any change in the employment status of a licensed or certified employee responsible for professional practice.

Part IX
Qualifications for Registration as a Professional Limited Liability Company

**18VAC10-20-570. Definitions.**

[ A. ] Section 13.1-1102 of the Code of Virginia provides the definition of the following term:

Professional Limited Liability Company ("P.L.C.," "PLC," "P.L.L.C.," or "PLLC")

[ B. ] The following words, terms, and phrases when used in this part shall have the meanings ascribed to them except where the context clearly indicates or requires different meanings:

"Manager" is a person or persons designated by the members of a limited liability company to manage the professional limited liability company as provided in the articles of organization or an operating agreement, and who is duly licensed or otherwise legally authorized to render one or more of the professional services of architects, professional engineers, land surveyors, landscape architects, or certified interior designers in the Commonwealth of Virginia.

"Member" means an individual or professional business entity that owns an interest in a professional limited liability company.

"Registration" means a certificate of authority issued by the board to transact business in Virginia pursuant to § 13.1-1111 of the Code of Virginia.

**18VAC10-20-575. Registration required.**

Any professional limited liability company offering or rendering professional services in the Commonwealth of Virginia shall register with the board. Professional services shall include architecture, engineering, land surveying, landscape architecture, and interior design.

**18VAC10-20-580. Fee schedule.**

All fees are nonrefundable and shall not be prorated.

| | |
|---|---|
| Application for professional limited liability company registration | $100 |
| ~~Designation~~ Application for professional limited liability company branch office registration | $50 |
| Renewal of professional limited liability company registration | $50 |
| Renewal of professional limited liability company branch office registration | $50 |
| ~~Reinstatement of branch office~~ | ~~$30~~ |

**18VAC10-20-590. Application requirements.**

A. All applicants shall have ~~obtained~~ a certificate of organization in the Commonwealth of Virginia or, if a foreign professional limited liability company, shall have ~~obtained~~ a certificate of ~~registration~~ authority to conduct business in Virginia from the State Corporation Commission, in accordance with § 13.1-1105 of the Code of Virginia. The company shall be in good standing with the State Corporation Commission at the time of application to the board ~~office~~ and at all times when the board registration is in effect.

B. Each application shall include ~~a certified true copy of the certificate of organization or, if a foreign professional limited liability company, a certificate of registration issued by the State Corporation Commission. Each application must also include certified true copies~~ a copy of the articles of organization~~,~~ or operating agreement~~, or both~~. Applications shall also include additional information as follows:

1. Applicants organized as a professional limited liability company in Virginia shall provide a copy of the certificate of organization.

2. Applicants organized as a professional limited liability company in a state other than Virginia shall provide a copy of the certificate of authority issued by the Virginia State Corporation Commission.

C. ~~Each application shall include a written affirmative affidavit that attests to the following inclusions to the articles~~ Articles of organization or operating agreement.

1. The articles of organization or operating agreement shall state the specific purpose of the professional limited liability company.

~~2. Pursuant to § 13.1 1111 of the Code of Virginia, the articles of organization or operating agreement shall provide that not less than two-thirds of the membership interests of a PLLC rendering the services of architects, professional engineers, land surveyors, or landscape architects or using the title of certified interior designers, or any combination thereof, shall be held by individuals duly licensed or professional business entities legally authorized to render the services of architects, professional engineers, land surveyors, or landscape architects or by individuals or professional business entities legally authorized to use the title of certified interior designers. Similarly, for those PLLCs using the title of certified interior designers and providing the services of architects, professional engineers, or land surveyors, or any combination thereof, the articles of organization or operating agreement shall provide that not less than two-thirds of the membership interests of the company shall be held by individuals who are duly licensed. The articles of organization or operating agreement shall further provide that the remainder of the membership interests of the PLLC may be held only by individuals who are employees of the PLLC whether or not those employees are licensed to render professional services or authorized to use a title~~

2. The articles of organization or operating agreement shall affirmatively state that the professional limited liability company meets the requirements of § 13.1-1111 of the Code of Virginia.

3. The articles of organization or operating agreement shall attest that all members, managers, employees and agents who render professional services of architects, professional engineers, land surveyors, or landscape architects, or use the title of certified interior designers, are duly licensed or certified to provide those services.

4. The person executing the affidavit shall sign it and state beneath his signature his name and the capacity in which he signs. If the person signing the affidavit is not a manager of the PLLC, the affidavit shall also state that the individual has been authorized by the members of the PLLC to execute the affidavit for the benefit of the company.

D. Management of the PLLC.

1. Pursuant to § 13.1-1118 of the Code of Virginia, unless the articles of organization or operating agreement provides for management of the PLLC by a manager or managers, management ~~of the PLLC~~ shall be vested in its members.

~~If the articles of organization or an operating agreement provides for management of the PLLC by a manager or managers, the manager or managers~~ 2. Any manager or member must be ~~an individual or individuals duly~~ licensed ~~or otherwise legally authorized~~ to render the same professional services within the Commonwealth for which the company was formed. These members or managers shall be the only members or managers authorized to supervise and direct the provision of professional services within the Commonwealth.

~~Only members or managers duly licensed or otherwise legally authorized to render the same professional services within this Commonwealth shall supervise and direct the provision of professional services within this Commonwealth.~~

3. At least one member or manager currently licensed or certified in each profession offered or practiced shall be resident at the business to provide effective supervision and control of the final professional product.

E. The name of the business and any assumed, fictitious, trading as, or doing business as names of the firm shall be disclosed on the application.

F. ~~If professional services are offered or rendered in a branch office, a separate branch office designation form shall be completed for each branch office. Responsible persons shall be designated in accordance with this chapter. At least one currently licensed or certified responsible person in each profession offered or practiced at each branch office shall be resident at each branch office to provide effective supervision and control of the final professional product.~~ Any branch office offering or rendering professional services shall complete a branch office registration application from the board. Each branch office shall have a resident responsible person at the branch office for each profession offered or rendered.

**18VAC10-20-600. ~~Certificates of authority.~~ (Repealed.)**

~~A certificate of authority shall be issued by the board. The certificate of authority will permit a PLLC to practice only the professions shown on its certificate of authority.~~

**18VAC10-20-610. Foreign professional limited liability companies.**

A. The articles of organization or operating agreement shall state that the PLLC's activities in Virginia shall be limited to rendering the professional services of architects, professional engineers, land surveyors, landscape architects, ~~and~~ certified interior designers, or any combination thereof.

B. The foreign ~~company must~~ PLLC shall meet every requirement of ~~this chapter~~ § 13.1-1111 of the Code of Virginia except for the requirement that two-thirds of its members and managers be licensed or certified to perform the professional service in this Commonwealth.

C. The PLLC shall provide the name, address, and Virginia license or certificate number of each manager or member who will be providing the professional service(s) in Virginia.

**18VAC10-20-620. Amendments ~~to articles of organization, operating agreements or certificate of organization; change in managers or members; change in name, address and place of business~~ and changes.**

A. A PLLC holding a ~~certificate of authority~~ registration to practice ~~in one or~~ in any combination of the professions covered in these regulations shall file with the board~~, within 30 days of its adoption,~~ a ~~certified true~~ copy of any amendment to the articles of organization, operating agreement, or certificate of organization within 30 days of its adoption.

~~B. In the event there is a change of managers or members of the PLLC, whether the change is temporary or permanent and whether it may be caused by death, resignation, or otherwise, the certificate of authority shall be automatically modified to be limited to that professional practice permitted by those pertinent licenses or certificates held by the remaining managers or members of the PLLC unless an employee of the PLLC holds the appropriate license or certificate and is competent to render such professional services. Unless otherwise provided, in the event that such change results in noncompliance with the requirements of this chapter and applicable statutes relating to ownership of the membership interests, the certificate of authority shall be automatically suspended until such time as the PLLC comes into compliance with these regulations. The PLLC shall notify the board within 30 days of any such change.~~

~~No member of the PLLC may transfer or sell its membership interest in the company, except to the company, or unless at least two-thirds of the remaining membership interest is held by individuals or professional business entities duly licensed or otherwise authorized to render the professional services of the company.~~

B. Change of managers or members of the PLLC. The following shall apply to the board-issued registration upon the event of any change in members or managers whether the change is temporary or permanent, caused by death, resignation, or otherwise:

1. The PLLC shall notify the board within 30 days of any change in its members or managers.

2. In the event of a change in the members or managers, the board-issued registration shall be limited to the professional practices consistent with the licenses or certificates held by the remaining members or managers of the PLLC unless an employee of the firm holds the appropriate license or certificate and is competent to render such professional services; and

3. In the event that a change results in the PLLC's noncompliance with the requirements of this chapter and applicable statutes relating to ownership of the membership interests, the board-issued registration shall be automatically suspended until such time as the PLLC comes into compliance with this chapter.

~~C. Any change of name (including assumed names), address, place of business in Virginia, registered agent, or responsible person(s) of the profession(s) practiced or offered shall be reported by the registered entity to the board within 30 days of such an occurrence. In addition, any licensed or certified employee responsible for such practice shall notify the board in writing of any changes of his employment status within 30 days of such change~~.

C. Change of name, address, or place of business. The PLLC shall notify the board, in writing, within 30 days of any of the following changes at each place of business:

1. Any change of name (including assumed names), address, place of business in Virginia, or responsible person of the profession offered or practiced; and

2. Any change in the employment status of a licensed or certified employee responsible for professional practice.

Part X

Qualifications for Registration as a Business Entity Other Than a Professional Corporation and Professional Limited Liability Company

**18VAC10-20-627. Registration required.**

Any business entity, which is not a professional corporation or professional limited liability company but is offering or practicing architectural, engineering, surveying, landscape architectural, or interior design services in the Commonwealth of Virginia, shall register with the board.

**18VAC10-20-630. Fee schedule.**

All fees are nonrefundable and shall not be prorated.

| | |
|---|---|
| Application for business entity registration | $100 |
| ~~Designation~~ Application for business entity branch office registration | $50 |
| Renewal of business entity registration | $50 |
| Renewal of business entity branch office registration | $50 |
| ~~Reinstatement of branch office~~ | ~~$30~~ |

~~Part X~~

~~Qualifications for Registration as a Business Entity Other Than a Professional Corporation and Professional Limited Liability Company~~

**18VAC10-20-640. Application requirements.**

A. In accordance with § 54.1-411 of the Code of Virginia, any entity that is not a PC, PLLC, or sole proprietorship that does not employ other individuals for which licensing is required shall register with the board. This includes, but is not limited to, any corporation, partnership, limited liability company, ~~or other entity, including but not limited to~~ joint ventures, ~~shall register with the board on a form approved by the board~~ or [ ~~nonprofits~~ nonprofit ].

B. ~~If a partnership or limited partnership, a~~ Partnerships. Applications [ for ] registration as a partnership shall include a copy of the partnership agreement ~~shall be included with the application. The partnership agreement~~, which shall state that all professional services of the partnership shall be under the direct control and personal supervision of a licensed or certified professional.

~~The limited partnership application shall also include a~~ C. Limited partnerships. Applications for registration as a limited partnership shall include:

1. A copy of the partnership agreement that shall state that all professional services of the limited partnership shall be under the direct control and personal supervision of duly licensed or certified professionals; and

2. A copy of the certificate of limited partnership issued by the Virginia State Corporation Commission~~. If a foreign limited partnership~~ for applicants organized in Virginia or, if organized as a foreign limited partnership, a certification of registration ~~of the foreign limited partnership~~ issued by the Virginia State Corporation Commission ~~shall be required in lieu of the certificate of limited partnership~~.

~~C. If a corporation, the application shall include copies~~ D. Corporations. Applications for registration as a corporation shall include:

1. A copy of the ~~certificate of incorporation issued by the Virginia State Corporation Commission~~ articles of incorporation, bylaws ~~and~~, or charter~~.~~; and

~~If a foreign corporation, a~~ 2. A copy of the certificate of incorporation issued by the Virginia State Corporation Commission if organized in Virginia or, if organized as a foreign corporation, a copy of the certificate of authority issued by the Virginia State Corporation Commission ~~shall be required in lieu of the certification of incorporation~~.

~~D. If a limited liability company, the application~~ E. Limited liability companies. Applications for registration as a limited liability company shall include a copy of the certificate of organization issued by the State Corporation Commission if organized in Virginia or, ~~and,~~ if organized as a foreign limited liability company, a ~~certified true~~ copy of the certificate of authority issued by the Virginia State Corporation Commission.

~~E.~~ F. If ~~professional~~ architectural, engineering, surveying, landscape architectural, or interior design services are offered or rendered in a branch office, a separate branch office designation form shall be completed for each branch office. ~~Responsible persons resident~~ Resident responsible persons shall be designated for each branch office in accordance with this chapter.

~~F.~~ G. The name of the business and any assumed, fictitious, trading as, or doing business as names of the firm shall be disclosed on the application.

**18VAC10-20-660. Change of status.**

A. Any changes of status~~,~~ including, but not limited to, change in entity, name (including assumed names), address, place of business or responsible persons at each place of business~~,~~ shall be reported to the board by the registered entity within 30 days of ~~such an~~ the occurrence. In addition, any licensed or certified employee responsible for such practice shall notify the board in writing of any changes of his employment status within 30 days of ~~such~~ the change.

B. In the event there is a change in the responsible person, whether the change is temporary or permanent and whether it may be caused by death, resignation or otherwise, the registration shall be automatically modified to be limited to that professional practice permitted by the remaining licensed or certified employees, or shall be automatically suspended until such time as the entity comes into compliance with these regulations.

Part XI
Renewal and Reinstatement

**18VAC10-20-670. ~~Expiration and renewal~~ Renewal.**

~~A. Prior to the expiration date shown on the license, certificate or registration, licenses, certificates or registrations shall be renewed for a two-year period upon completion of a renewal application and payment of a fee established by the board. Registrations for professional corporations, professional limited liability companies and business entities shall expire on December 31 of each odd-numbered year. Branch office registrations expire the last day of February of each even-numbered year. If the renewal fee for a branch office is not received by the board within 30 days following the expiration date noted on the registration, a reinstatement fee of $25 will be required in addition to the renewal fee. Branch offices may not renew until the main office registration is properly renewed.~~

~~B. Failure to receive a renewal notice and application shall not relieve the regulant of the responsibility to renew. If the regulant fails to receive the renewal notice, a copy of the license, certificate or registration may be submitted with the required fee as an application for renewal.~~

~~C. By submitting the renewal fee, an applicant for renewal is certifying continued compliance with the Standards of Practice and Conduct as established by the board. In addition, by submitting the renewal fee, applicants to renew a license are certifying that they comply with the continuing education requirements as contained in this chapter.~~

~~D. Board discretion to deny renewal. The board may deny renewal of a license, certificate or registration for the same reasons as it may refuse initial licensure, certification or registration or discipline a regulant or for noncompliance with the continuing education requirements as contained in this chapter.~~

~~E. If the renewal fee is not received by the board within 30 days following the expiration date noted on the license, certificate or registration, a late renewal fee equal to the regular fee plus $25 shall be required, unless a reinstatement fee is otherwise noted.~~

A. Individuals and organizations shall not practice with an expired license, certificate, or registration. The following [ ~~time frames~~ timeframes ] shall determine the required fees for renewal based on the date the fee is received in the board's office:

1. If the renewal fee is received by the board by the expiration date of the license, certificate, or registration, no additional fee shall be required to renew.

2. If the renewal fee is not received by the board within 30 days following the expiration date of the branch office registration, the registration shall be subject to the requirements of 18VAC10-20-680.

3. If the renewal fee is not received by the board within 30 days following the expiration date of the license, certificate, or nonbranch office registration, a $25 late fee shall be required in addition to the renewal fee.

4. If the renewal fee and applicable late fee are not received by the board within six months following the expiration date of the license, certificate, or nonbranch office registration, the reinstatement fee shall be required pursuant to 18VAC10-20-680.

B. Upon receipt of the required fee, licenses, certificates, and registrations not currently sanctioned by the board shall be renewed for a two-year period from their previous expiration date.

C. Branch offices shall not renew or reinstate until the main office registration is properly renewed or reinstated.

D. The board may deny renewal of a license, certificate, or registration for the same reasons as it may refuse initial licensure, certification, or registration or for the same reasons that it may discipline a regulant for noncompliance with the standards of practice and conduct as well as the continuing education requirements contained in this chapter. The regulant has the right to request further review of any such action by the board under the Administrative Process Act (§ 2.2-4000 et seq. of the Code of Virginia).

E. By submitting the renewal fee, the regulant is certifying continued compliance with the standards of practice and conduct as established by the board. In addition, by submitting the renewal fee, licensees are certifying their compliance with the continuing education requirements as contained in this chapter.

F. Failure to receive a renewal notice shall not relieve the regulant of the responsibility to renew. In the absence of a renewal notice, the regulant may submit a copy of the license, certificate, or registration with the required fee for renewal.

G. A license, certificate, or registration that is renewed shall be regarded as having been current without interruption and under the authority of the board.

H. Failure to pay any monetary penalty, reimbursement of cost, or other fee assessed by consent order or final order shall result in a delay or withholding of services provided by the department such as, but not limited to, renewal, reinstatement, processing a new application, or exam administration.

**18VAC10-20-680. Reinstatement.**

~~A. If the license, certificate or registration has expired for six months or more, but less than five years, the regulant shall be required to submit a reinstatement application, which shall be evaluated by the board to determine if the applicant meets the renewal requirements. In addition, a reinstatement fee equal to the regular renewal fee plus $100 shall be required. In addition, individual license holders applying for reinstatement are required to provide evidence of compliance with the continuing education requirements as contained in this chapter.~~

~~B. If the license, certificate or registration has expired for five years or more, an application for reinstatement shall be required, which shall be evaluated by the board to determine if the applicant remains qualified to be a regulant of the board, and a reinstatement fee equal to the regular renewal fee plus $250 shall be submitted. In addition, the board may require an individual applicant to submit to an examination. In addition, individual license holders applying for reinstatement are required to provide evidence of compliance with the continuing education requirements as contained in this chapter.~~

~~C. Board discretion to deny reinstatement. The board may deny reinstatement of a license, certificate or registration for the same reasons as it may refuse initial licensure, certification or registration or discipline a regulant or for noncompliance with the continuing education requirements as contained in this chapter.~~

~~D. The date the renewal application and fee are received in the office of the board shall determine whether a license, certificate or registration shall be renewed without late renewal or reinstatement, or shall be subject to reinstatement application procedures.~~

~~E. A license, certificate or registration that is reinstated shall be regarded as having been continuously licensed, certified or registered without interruption. Therefore, the license, certificate or registration holder who is not subject to the licensure for life provisions of § 54.1-405 of the Code of Virginia shall remain under the disciplinary authority of the board during the entire period and shall be accountable for his activities during the period. A license, certificate or registration that is not reinstated and is not subject to the licensure for life provisions of § 54.1-405 of the Code of Virginia shall be regarded as unlicensed, uncertified or unregistered from the expiration date forward. Nothing in this chapter shall divest the board of its authority to discipline a license, certificate or registration holder for a violation of the law or regulation during the period of time for which the regulant was licensed, certified or registered.~~

A. Applicants whose license, certificate, or nonbranch office registration has expired for more than six months, and applicants whose branch office registration has expired for more than 30 days, shall be required to submit a reinstatement application, which shall be evaluated by the board to determine if the applicant remains qualified to be a regulant of the board.

B. The board may deny reinstatement of a license, certificate, or registration for the same reasons as it may refuse initial licensure, certification, or registration or for the same reasons that it may discipline a regulant for noncompliance with the standards of practice and conduct, as well as the continuing education requirements, contained in this chapter. The applicant has the right to request further review of any such action by the board under the Administrative Process Act (§ 2.2-4000 et seq. of the Code of Virginia).

C. The date the reinstatement fee is received in the board's office shall determine the amount to be paid pursuant to the following requirements:

1. Branch office registrations that have expired for more than 30 days shall require a reinstatement fee that shall equal the renewal fee plus $30.

2. Licenses, certificates, and nonbranch office registrations that have expired for more than six months, but less than five years, shall require a reinstatement fee that shall equal the renewal fee plus $100.

3. Licenses, certificates, and nonbranch office registrations that have expired for more than five years shall require a reinstatement fee that shall equal the renewal fee plus $250.

D. Architects, professional engineers, land surveyors, surveyor photogrammetrists, and landscape architects applying for reinstatement shall provide evidence of compliance with the continuing education requirements of this chapter.

E. The board may require an exam for architects, professional engineers, land surveyors, surveyor photogrammetrists, landscape architects, and interior designers whose license or certificate has expired for more than five years.

F. Licensees shall remain under the disciplinary authority of the board at all times, regardless of whether the license is reinstated, pursuant to § 54.1-405 of the Code of Virginia.

G. A certificate or registration holder who reinstates shall be regarded as having been current and without interruption and under the authority of the board.

H. Failure to pay any monetary penalty, reimbursement of cost, or other fee assessed by consent order or final order

shall result in a delay or withholding of services provided by the department such as, but not limited to, renewal, reinstatement, processing a new application, or exam administration.

**18VAC10-20-683. Continuing education requirements for renewal or reinstatement.**

~~A. Individuals whose licenses expire or who apply to reinstate after March 31, 2010, shall be required to comply with the continuing education provisions of this chapter.~~

~~B. Individuals are required to complete at least 16 continuing education credit hours of approved continuing education activities for any license renewal or reinstatement.~~

~~C. Continuing education activities shall be deemed to be approved provided the following criteria are met:~~

~~1. Content and subject matter. Continuing education activities must be related to practice of the profession of the license being renewed, have a clear purpose and objective that will maintain, improve, or expand the skills and knowledge relevant to the licensee's area of practice as defined in Chapter 4 (§ 54.1-400 et seq.) of Title 54.1 of the Code of Virginia. The required continuing education credit hours may be in areas related to business practices, including project management, risk management, and ethics, which have demonstrated relevance to the licensee's area of practice as defined in Chapter 4 of Title 54.1 of the Code of Virginia.~~

~~2. Curriculum. The curriculum of the continuing education activity must be consistent with the purpose and objective of the continuing education activity.~~

~~3. Sponsors and instructors. Sponsors of continuing education activities must have sufficient resources to provide the continuing education activity and documentation of completion of the continuing education activity to those individuals who successfully complete the continuing education activity. Course instructors must be competent in the subject being taught, either by education or experience.~~

~~4. Methods of instruction for continuing education courses. The method of instruction must be consistent with the purpose and objective of the continuing education activity.~~

~~5. Computation of credit.~~

~~a. Fifty contact minutes shall equal one continuing education credit hour. For a continuing education course or activity in which individual segments are less than 50 minutes, the sum of the segments shall be totaled for computation of continuing education credit hours for that continuing education course or activity.~~

~~b. The sponsor of the continuing education activity must have predetermined the number of continuing education credit hours that an activity shall take to complete. A licensee cannot claim credit for more than the predetermined number of continuing education credit hours if the licensee took more than the predetermined number of hours to complete the continuing education activity.~~

~~c. One semester credit hour of approved college credit shall equal 15 continuing education credit hours and one quarter credit hour of approved college credit shall equal 10 continuing education credit hours.~~

~~d. For self-directed continuing education activity, there must be an assessment by the sponsor at the conclusion of the activity to verify that the individual has achieved the purpose and objective of the continuing education activity; credit will not be awarded if the individual has not successfully achieved the purpose and objective of the continuing education activity based upon the results of the assessment.~~

~~e. A licensee may be granted credit for the initial development or substantial updating of a continuing education activity or his initial teaching of a course that otherwise meets the requirements of this chapter at twice the amount of credit that students of the course or activity would receive. Additional credit for subsequent offerings of the course or activity with the same content will not be permitted.~~

~~f. A licensee will not receive credit for completing the same continuing education activity with the same content more than once during the license period immediately prior to the expiration date of the license for renewal or during the two years immediately prior to the date of receipt of a complete reinstatement application.~~

~~D. 1. Only continuing education activities completed during the license period immediately prior to the expiration date of the license shall be acceptable in order to renew the license. Continuing education activities utilized to satisfy the continuing education requirements to renew a license shall be valid only for that renewal and shall not be accepted for any subsequent renewal cycles or reinstatement of that license.~~

~~2. Individuals shall maintain records of completion of continuing education activities that comply with the requirements of this chapter for three years from the date of expiration of the license for which the continuing education activities are being used to renew the license. Individuals shall provide such records to the board or its duly authorized agents upon request.~~

~~E. Notwithstanding the provisions of subsection D of this section, continuing education activities completed during a licensing renewal cycle to satisfy the continuing education requirements of the preceding licensing renewal cycle shall be valid only for that preceding license renewal cycle and shall not be accepted for any subsequent renewal cycles or reinstatement.~~

~~F. 1. Each individual license holder applying for reinstatement shall provide, as part of his reinstatement application, evidence of compliance with the continuing education requirements of this chapter. The completion date~~

~~of continuing education activities submitted in support of a reinstatement application shall not be more than two years old as of the date a complete reinstatement application is received by the board.~~

~~2. Continuing education activities utilized to satisfy the continuing education requirements in order to reinstate a license shall be valid only for that reinstatement and shall not be accepted for any subsequent renewal cycles or reinstatement.~~

~~G. Periodically, the board may conduct a random audit of its licensees who have applied for renewal to determine compliance. Licensees who are selected for audit shall provide all documentation of all continuing education activities utilized to renew their license within 21 calendar days of receiving notification of audit.~~

A. Licensees are required to complete 16 hours of continuing education (CE) pursuant to the provisions of this section for any renewal or reinstatement.

B. CE for renewal shall be completed during the two-year license period immediately prior to the expiration date of the license and shall be valid for that renewal only; additional hours over 16 hours shall not be valid for subsequent renewal.

C. CE for reinstatement shall be completed during the two years immediately prior to the date of the board's receipt of a reinstatement application and shall be valid for that reinstatement only; additional hours over 16 hours shall not be valid for subsequent reinstatement.

D. Licensees shall maintain records of completion of CE used to renew a license for three years from the date of expiration of the license. Licensees shall provide those records to the board or its authorized agents upon request.

E. CE activities completed by licensees may be accepted by the board provided the activity:

1. Consists of content and subject matter related to the practice of the profession;

2. Has a clear purpose and objective that will maintain, improve, or expand the skills and knowledge relevant to the licensee's area of practice and may be in areas related to business practices, including project management, risk management, and ethics, that have demonstrated relevance to the licensee's area of practice as defined in § 54.1-400 of the Code of Virginia;

3. Is taught by instructors who are competent in the subject matter, either by education or experience, for those activities involving an interaction with an instructor;

4. If self-directed, contains an assessment by the sponsor at the conclusion of the activity that verifies that the licensee has successfully achieved the purpose and objective of the activity; and

5. Results in documentation that verifies the licensee's successful completion of the activity.

F. Computation of credit.

1. Fifty contact minutes shall equal one hour of CE. For activities that consist of segments that are less than 50 minutes, those segments shall be totaled for computation of CE for that activity.

2. One semester hour of college credit shall equal 15 hours of CE and one-quarter hour of college credit shall equal 10 hours of CE.

3. The number of hours required to successfully complete any CE activity must have been predetermined by the sponsor. A licensee shall not claim more credit for any CE activity than the number of hours that was predetermined by the sponsor at the time the activity was completed.

4. CE may be granted for the initial development, substantial updating, or the initial teaching of a CE activity that meets the requirements of this chapter at twice the amount of credit that participants receive. CE claimed pursuant to this subdivision shall not be claimed for subsequent offerings of the same activity.

5. A licensee applying for renewal shall not receive credit for completing a CE activity with the same content more than once during the two years prior to license expiration.

6. A licensee applying for reinstatement shall not receive credit more than once for completing a CE activity with the same content during the two years immediately prior to the date of the board's receipt of his reinstatement application.

G. The board may periodically conduct a random audit of its licensees who have applied for renewal to determine compliance. Licensees who are selected for audit shall provide all documentation of all CE activities utilized to renew their license within 21 calendar days of the date of the board's notification of audit.

H. If the board determines that CE was not obtained properly to renew or reinstate a license, the licensee shall be required to make up the deficiency to satisfy the 16-hour CE requirement for that license renewal or reinstatement. Any CE activity [ ~~use~~ used ] to satisfy the deficiency shall not be applied to his current license CE requirement or any subsequent renewal or reinstatement.

**18VAC10-20-687. Exemptions and waivers.**

Pursuant to § 54.1-404.2 of the Code of Virginia, the board may grant exemptions ~~or~~ to, waive, or reduce the number of continuing education activities required in cases of certified illness or undue hardship. However, such exemptions, waivers, or reductions shall not relieve the individual of ~~their~~ his obligation to comply with any other requirements of this chapter including, but not limited to, the provisions of 18VAC10-20-670~~,~~ or 18VAC10-20-680~~, or 18VAC10-20-683~~.

Part XII
Standards of Practice and Conduct

**18VAC10-20-690. Responsibility to the public.**

The primary obligation of the ~~professional~~ regulant is to the public. The ~~professional~~ regulant shall recognize that the health, safety, and welfare of the general public are dependent upon professional judgments, decisions, and practices. If the ~~professional~~ judgment of the ~~professional~~ regulant is overruled ~~under~~ resulting in circumstances when the health, safety, ~~and~~ or welfare~~, or any combination thereof,~~ of the public ~~are~~ is endangered, the ~~professional~~ regulant shall inform the employer ~~or~~, client, and appropriate authorities in writing of the possible consequences ~~and notify appropriate authorities~~.

**18VAC10-20-700. Public statements.**

A. The ~~professional~~ regulant shall be truthful in all professional matters~~. The professional~~ and shall include all relevant ~~and pertinent~~ information in professional reports, statements, or testimony, which shall include the date indicating when such information was current.

B. When serving as an expert or technical witness, the ~~professional~~ regulant shall express an opinion only when it is based on an adequate knowledge of the facts in the issue~~, on~~ and a background of competence in the subject matter~~, and upon honest conviction~~.

C. Except when appearing as an expert witness in court or in an administrative proceeding when the parties are represented by counsel, the ~~professional~~ regulant shall issue no statements, reports, criticisms, or arguments on matters relating to professional practice ~~which~~ that are inspired by or paid for by ~~an~~ interested ~~party or parties~~ persons, unless the regulant has prefaced the comment by disclosing any self-interest and the identities of [ ~~the~~ ] ~~party or parties~~ all persons on whose behalf the ~~professional~~ regulant is speaking~~, and by revealing any self-interest~~.

~~C.~~ D. A ~~professional~~ regulant shall not knowingly make a materially false statement or ~~fail~~ deliberately ~~to disclose~~ withhold a material fact requested in connection with his application for licensure, certification, registration, renewal, or reinstatement.

~~D. A professional shall not knowingly make a materially false statement or fail to deliberately disclose a material fact requested in connection with an application submitted to the board by any individual or business entity for licensure, certification, registration, renewal or reinstatement.~~

**18VAC10-20-710. Conflicts of interest.**

A. The regulant shall promptly and fully inform an employer or client of any business association, interest, or circumstance which may influence the ~~professional's~~ regulant's judgment or the quality of service.

B. The regulant shall not accept compensation, financial or otherwise, from more than one [ party ~~person~~ ] for services on or pertaining to the same project~~,~~ unless the circumstances are fully disclosed ~~to,~~ and agreed to in writing by~~,~~ all interested [ parties ~~persons~~ ] ~~in writing~~.

C. The regulant shall ~~neither~~ not solicit ~~nor~~ or accept financial or other valuable consideration from material or equipment suppliers for specifying their products or services.

D. The regulant shall not solicit or accept gratuities, directly or indirectly, from contractors, their agents, or other [ parties ~~persons~~ ] dealing with a client or employer in connection with work for which the regulant is responsible.

**18VAC10-20-720. Solicitation of work or employment.**

A. In the course of soliciting work from, or employment by, a public authority the regulant shall not directly or indirectly:

1. ~~The regulant shall not give~~ Give, solicit, or receive~~, either directly or indirectly,~~ any gratuity, contribution, or ~~unlawful~~ consideration to unlawfully influence the award of a contract ~~by a public authority, or that may reasonably be construed as having the effect of intending to influence the awarding of such a contract. The regulant shall not offer or provide any gift or other valuable consideration in order to secure work. The regulant shall not pay a commission, percentage, or brokerage fee in order to secure work, except to a full-time employee or established commercial or marketing agency retained by them.~~;

2. Give, solicit, or receive any gratuity, contribution, or consideration that may reasonably be construed as an intention to influence the awarding of a contract; or

3. Offer or provide any gift or other valuable consideration in order to secure work.

B. The regulant shall not pay, directly or indirectly, a commission, percentage, or brokerage fee to a potential or existing client in order to secure work.

~~2.~~ C. The regulant shall not falsify or ~~permit~~ knowingly allow misrepresentation of his or an associate's ~~academic or professional qualifications or work, nor shall the regulant misrepresent the degree of responsibility for prior assignments. Materials used in the solicitation of employment shall not misrepresent facts concerning employers, employees, associates, joint ventures or past accomplishments of any kind.~~:

1. Academic or professional qualifications or work; or

2. Degree of responsibility for prior assignments.

D. Materials used in the solicitation of employment shall not misrepresent facts concerning employers, employees, associates, joint ventures, or past accomplishments of any kind.

**18VAC10-20-730. Competency for assignments.**

EDITOR'S NOTE: The proposed amendments to this section were not adopted in the final regulations; therefore, no changes are made to this section.

A. The [ professional ~~regulant~~ ] shall undertake to perform professional assignments only when qualified by education

[ or, ] experience, or both, and licensed or certified in the profession involved. [ Licensed professionals ~~Regulants~~ ] may perform assignments related to interior design provided they do not hold themselves out as certified in this profession unless they are so certified by this board. The [ professional ~~regulant~~ ] may accept an assignment requiring education or experience outside of the field of the [ professional's ~~regulant's~~ ] competence, but only to the extent that services are restricted to those phases of the project in which the [ professional ~~regulant~~ ] is qualified. All other phases of such project shall be the responsibility of licensed or certified associates, consultants or employees.

B. A [ professional ~~regulant~~ ] shall not misrepresent to a prospective or existing client or employer his qualifications and the scope of his responsibility in connection with work for which he is claiming credit.

C. The [ professional ~~regulant~~ ] shall adhere to the minimum standards and requirements pertaining to the practice of his own profession, as well as other professions if incidental work is performed.

**18VAC10-20-740. Professional responsibility.**

A. Unless exempt by statute, all architectural, engineering, land surveying, landscape architectural, and interior design work must be completed by a professional or a person performing the work who is under the direct control and personal supervision of a professional.

B. A professional shall be able to clearly define his scope and degree of direct control and personal supervision, clearly define how it was exercised, and demonstrate that he was responsible within that capacity for the work that he has sealed, signed, and dated. For the work prepared under his supervision, a professional shall:

1. Have detailed professional knowledge of the work;

2. Exercise the degree of direct control over work that includes:

a. Having control over decisions on technical matters of policy and design;

b. Personally making professional decisions or the review and approval of proposed decisions prior to implementation, including the consideration of alternatives to be investigated and compared for designed work, whenever professional decisions are made that could affect the health, safety, and welfare of the public involving permanent or temporary work;

c. The selection or development of design standards and materials to be used; and

d. Determining the validity and applicability of recommendations prior to incorporation into the work, including the qualifications of those making the recommendations.

3. Have exercised his professional judgment in all professional matters that are embodied in the work and the drawings, specifications, or other documents involved in the work; and

4. Have exercised critical examination and evaluation of an employee's, consultant's, subcontractor's, or project team member's work product, during and after preparation, for purposes of compliance with applicable laws, codes, ordinances, regulations, and usual and customary standards of care pertaining to professional practice.

~~A.~~ C. The regulant shall not knowingly associate in a business venture with, or permit the use of ~~the regulant's~~ his name, by any person or firm when there is reason to believe that person or firm is engaging in activity of a fraudulent or dishonest nature or is violating statutes or any of these regulations.

~~B.~~ D. A regulant who has direct knowledge or reason to believe that any individual~~,~~ or firm may have violated or may currently be violating any of these provisions, or the provisions of Chapters 7 (§ 13.1-542.1 et seq.) and 13 (§ 13.1-1100 et seq.) of Title 13.1 or Chapters 1 (§ 54.1-100 et seq.) through 4 (§ 54.1-400 et seq.) of Title 54.1 ~~or Chapters 7 and 13 of Title 13.1~~ of the Code of Virginia, shall immediately inform the board in writing and shall cooperate in furnishing any further information or assistance that may be required by the board or any of its agents.

~~C. The~~ E. Upon request by the board or any of its agents, the regulant shall~~, upon request or demand,~~ produce ~~to the board, or any of its agents, any plan, document, book, record or copy thereof in his or its possession~~ any plan, plat, document, sketch, book, record, or copy thereof concerning a transaction covered by this chapter~~,~~ and shall cooperate in the investigation of a complaint filed with the board against a regulant.

~~D. A~~ F. Except as authorized by 18VAC10-20-760 A 2, a regulant shall not utilize the design, drawings, specifications, or work of another regulant to complete ~~the design, drawings, specifications, or work,~~ or to replicate ~~like design, drawings, specifications, or~~ any work without the ~~knowledge and~~ written consent of the person or organization that owns the design, drawings, specifications, or work.

~~E. A professional who has received permission to modify or otherwise utilize the designs, drawings, specifications, or work of another professional pursuant to subsection D of this section may seal that work only after a thorough review of the design, drawings, specifications, or work to the extent that full responsibility shall be assumed for all design, drawings, specifications, or work.~~

~~F. The information contained in recorded plats or surveys may be utilized by another professional without permission. If modifications are made to the plats or surveys, the professional must conduct a thorough review and verification of the work to the extent that full responsibility shall be assumed for any changes or modifications to the plats or surveys.~~

G. Utilization and modification of work.

1. A regulant who utilizes the designs, drawings, specifications, or work of another regulant pursuant to [ ~~18VAC10-20-740~~ subsection ] F [ of this section ] or 18VAC10-20-760 A 2, or who modifies any plats or surveys, shall conduct a thorough review of the work to verify that it has been accomplished to the same extent that would have been done under the direct control and personal supervision of the regulant affixing the professional seal, signature, and date. The regulant shall assume full responsibility for [ ~~any changes or modifications to the work~~ the utilization of any unsealed work or any changes or modifications to previously sealed work ].

2. The information contained in recorded plats or surveys may be utilized by another regulant without permission.

**18VAC10-20-750. Good standing ~~in other jurisdictions~~.**

A. A regulant licensed, certified, or registered to practice architecture, engineering, land surveying, landscape architecture, or interior design in ~~other jurisdictions~~ any jurisdiction shall be in good standing in every jurisdiction where licensed, certified, or registered.

B. A regulant who has received a reprimand, civil penalty, or monetary penalty, or whose license, certificate or registration is revoked, suspended, denied, or surrendered as a result of a disciplinary action by ~~another~~ any jurisdiction, shall ~~be subject to discipline by the board if the regulant's action constitutes a violation of the provisions of Chapters 1 (§ 54.1-100 et seq.) through 4 (§ 54.1-400 et seq.) of Title 54.1, or Chapters 7 (§ 13.1-542 et seq.) and 13 (§ 13.1-1100 et seq.) of Title 13.1 of the Code of Virginia, or the regulations adopted by the board~~ notify the board of such action within 30 days.

~~C. A regulant who has received a reprimand, civil penalty, or monetary penalty, or whose license, certificate or registration is revoked, suspended, denied, or surrendered as a result of a disciplinary action by another jurisdiction, must notify the board of such action within 30 days.~~

**18VAC10-20-760. Use of seal.**

A. [ ~~The application~~ Affixing ] of a professional seal, signature, and date shall indicate that the professional has exercised direct control and personal supervision over the work to which it is affixed. ~~Therefore, no professional shall affix a name, seal or certification to a plat, design, specification or other work constituting the practice of the professions regulated which has been prepared by an unlicensed or uncertified person unless such work was performed under the direct control and personal supervision of the professional while said unlicensed or uncertified person was an employee of the same firm as the professional or was under written contract to the same firm that employs the professional. If the original professional of record is no longer employed by the regulant or is otherwise unable to seal completed professional work, such work may be sealed by another professional, but only after a thorough review of the work by the professional affixing the professional seal to verify that the work has been accomplished to the same extent that would have been exercised if the work had been done under the direct control and personal supervision of the professional affixing the professional seal~~ [ ~~The application~~ Affixing ] of the seal, signature, and date also indicates the professional's acceptance of responsibility for the work shown thereon.

1. No professional shall affix a seal, signature, and date or certification to a plan, plat, document, sketch, or other work constituting the practice of the professions regulated that has been prepared by an unlicensed or uncertified person unless such work was performed under the direct control and personal supervision of the professional while the unlicensed or uncertified person was an employee of the same firm as the professional or was under written contract to the same firm that employs the professional.

2. If the original professional of record is no longer able to seal, sign, and date completed professional work, such work may be sealed, signed, and dated by another qualified professional pursuant to the standards established in 18VAC10-20-740 G 1.

~~B. An appropriately licensed or certified professional shall apply a seal to final and complete original cover sheets of plans, drawings, plats, technical reports and specifications and to each original sheet of plans, drawings or plats, prepared by the professional or someone under his direct control and personal supervision.~~

B. Documents to be sealed.

~~1. All seal imprints on the cover or first sheet of final documents shall bear an original signature and date. "Final Documents" are completed documents or copies submitted on a client's behalf for approval by authorities or recordation. In such cases, the cover sheet of the documents or copies shall contain a list of drawings or plats included in the set on which a seal, original signature and date shall be affixed for all regulated disciplines. Every page of the submission, other than the cover, may be reproduced from originals which contain the seal, original signature and date by each discipline responsible for the work.~~

1. All final documents, including original cover sheet of plans, plats, documents, sketches, technical reports, and specifications, and each original sheet of plans, plats, or drawings prepared by the professional, or someone under his direct control and personal supervision, shall be sealed, signed, and dated by the professional. All final documents shall also bear the professional's name or firm name, address, and project name. Final documents are completed documents or copies submitted on a client's behalf for approval by authorities, for construction, or for recordation.

2. For projects involving multiple sets of plans from multiple professionals involved in the same project, each professional shall seal, sign, and date the final documents for the work component that he completed or that was completed under his direct control and personal supervision. [ ~~Any~~ The ] professional responsible for the [ ~~entire~~ compilation of the ] project shall seal, sign, and date the cover sheet of the aggregate collection of final documents for the project.

~~a.~~ C. An electronic seal, signature, and date are permitted to be used in lieu of an original seal, signature, and date when the following criteria, and all other requirements of this section, are met:

~~(1)~~ 1. It is a unique identification of the professional;

~~(2)~~ 2. It is verifiable; and

~~(3)~~ 3. It is under the professional's direct control.

~~b. A professional should not seal original documents made of mylar, linen, sepia, or other materials, or that are transmitted electronically, which can be changed by the person or entity with whom the documents are filed, unless the professional accompanies such documents with a signed and sealed letter making the recipient of such documents aware that copies of the original documents as designed by the professional have been retained by the professional and that the professional cannot assume responsibility for any subsequent changes to the reproducible original documents that are not made by the professional or those working under his direct control and personal supervision.~~

~~2.~~ D. Incomplete plans, plats, documents, and sketches, whether advance or preliminary copies, shall be so identified on the plan, plat, document, or sketch and need not be sealed, signed or dated. Advance or preliminary copies of incomplete plans, plats, documents, and sketches must be clearly identified as not complete but need not be sealed, signed, or dated.

~~3. All plans, drawings or plats prepared by the professional shall bear the professional's name or firm name, address and project name.~~

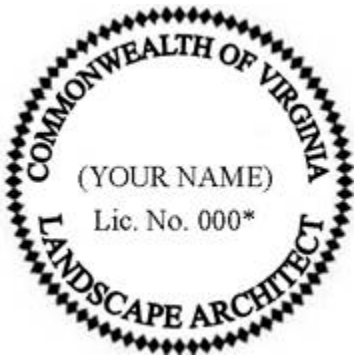
~~4. The seal of each professional responsible for each profession shall be used and shall be on each document that was prepared under the professional's direction and for which that professional is responsible. If one of the exemptions found in § 54.1-402 of the Code of Virginia is applicable, a professional licensed or certified by this board shall nevertheless apply his seal to the exempt work.~~

~~5. Application of the seal and signature indicates acceptance of responsibility for work shown thereon.~~

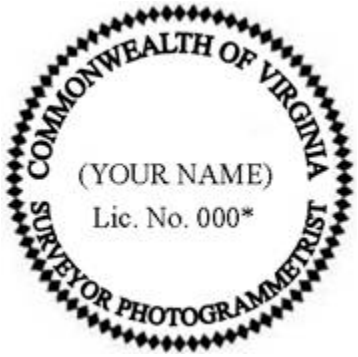
E. All work performed by a professional who is licensed or certified by this board, including work that is exempt from licensure pursuant to § 54.1-402 of the Code of Virginia, shall be sealed, signed, and dated pursuant to subsection B of this section.

~~6.~~ F. The original seal shall conform in detail and size to the design illustrated below and shall be two inches in diameter. The designs below may not be shown to scale:








*The number referred to is the last six-digit number as shown on the license or certificate. The number is permanent. Leading zeros contained in the six-digit number may be omitted from the seal.

**18VAC10-20-770. Organization and styling of practice.**

A. A firm shall offer or practice only the professions shown on its board-issued registration.

B. Nothing shall be contained in the name, letterhead or other styling of a professional practice implying a relationship, ability or condition which does not exist. Professional services that the firm is not properly registered to provide ~~may~~ shall not be included in the name.

C. An assumed, fictitious or corporate name shall not be misleading as to the identity, responsibility or status of those practicing ~~thereunder~~ professionals employed or contracted by the registrant. ~~Advertisements, signs, letterheads, business cards, directories~~ Any advertisement, sign, letterhead, business card, directory, or any other form of representation shall avoid ~~any~~ reference to any service that cannot be provided for under a resident responsible person.

**18VAC10-20-780. Professional required at each place of business.**

A. Any ~~legal entity or professional~~ regulant maintaining a place of business ~~from which the entity or professional~~ that offers or ~~provides~~ practices architectural, engineering, land surveying, landscape architectural, or certified interior design services in Virginia, shall name at least one responsible person for each profession offered or practiced at each place of business ~~a resident, responsible person. The named resident, responsible person must hold a current valid Virginia license or certificate in the profession being offered or practiced~~.

~~Each named professional~~ B. [ ~~A~~ Each ] resident responsible person designated by the firm shall exercise direct control and personal supervision of the work being offered or practiced at ~~the~~ each place of business ~~for which he is named~~. ~~Each named professional shall be responsible for only one location at a time. A named professional~~ [ ~~A~~ Each ] resident responsible person may be responsible for more than one location provided that he is resident at ~~the~~ each place of business during a majority of ~~the~~ its operating hours ~~of operation at each location~~.

**18VAC10-20-790. Sanctions.**

~~A. No~~ A license, certificate, or registration shall not be ~~suspended or revoked, nor shall any regulant be fined~~ sanctioned unless a majority of the eligible voting members of the entire board ~~who are eligible to vote,~~ vote for the action. The board may discipline or sanction~~, or both,~~ any ~~license holder, certificate holder, or the holder of a certificate of authority or registration~~ regulant if the board finds that:

1. The regulant failed to maintain good moral character pursuant to the definition in 18VAC10-20-10.

2. The license, certification, or registration was obtained or renewed through fraud or misrepresentation;

~~2.~~ 3. The regulant has been found guilty by the board, or by a court of [ competent ~~legal~~ ] jurisdiction, of any material misrepresentation in the course of professional practice, or has been convicted, pleaded guilty or has been found guilty, regardless of adjudication or deferred adjudication, of any felony or misdemeanor ~~which~~ that, in the judgment of the board, adversely affects the regulant's ability to perform satisfactorily within the regulated discipline. Any plea of nolo contendere shall be considered a conviction for the purposes of this chapter. The board shall review the conviction pursuant to the provisions of § 54.1-204 of the Code of Virginia;

~~3.~~ 4. The regulant is guilty of professional incompetence, negligence, or gross negligence;

~~4.~~ 5. The regulant has abused drugs or alcohol to the extent that professional competence is adversely affected;

~~5.~~ 6. The ~~licensee~~ regulant fails to comply, or misrepresents any information pertaining to their compliance, with any of the continuing education requirements as contained in this chapter;

~~6.~~ 7. The regulant violates any standard of practice and conduct~~,~~ as defined in this chapter; or

~~7.~~ 8. The regulant violates or induces others to violate any provision of Chapters 7 (§ 13.1-542.1 et seq.) and 13 (§ 13.1-1100 et seq.) of Title 13.1 or Chapters 1 (§ 54.1-100 et seq.) through 4 (§ 54.1-400 et seq.) of Title 54.1 ~~or Chapters 7 and 13 of Title 13.1~~ of the Code of Virginia, or any other statute applicable to the practice of the professions ~~herein~~ regulated~~, or any provision of~~ by this chapter.

~~B. If evidence is furnished to the board which creates doubt as to the competency of a regulant to perform professional assignments, the board may require the regulant to prove competence by interview, presentation or examination. Failure to appear before the board, pass an examination, or otherwise demonstrate competency to the board shall be grounds for revocation or suspension of the license, certification or registration.~~

**18VAC10-20-795. Change of address.**

All regulants shall notify the board in writing of any change of address~~, in writing,~~ within 30 days of making the change. When submitting a change of address, ~~any regulant~~ regulants holding more than one license, certificate, or registration shall inform the board of ~~all licenses, certificates or registrations~~ each affected by the change. ~~A physical address is required.~~ A post office box will not be accepted in lieu of a physical address.

NOTICE: The following forms used in administering the regulation were filed by the agency. The forms are not being published; however, online users of this issue of the Virginia Register of Regulations may click on the name of a form with a hyperlink to access it. The forms are also available from the agency contact or may be viewed at the Office of the Registrar of Regulations, General Assembly Building, 2nd Floor, Richmond, Virginia 23219.

[ FORMS (18VAC10-20)

~~Architect License Application (Architect Information Sheet), 0401LIC (rev. 6/30/09).~~

~~Verification of Architect Examination and Licensure Form, 0401EXVER (rev. 9/5/08).~~

~~Architect Experience Verification Form, 0401EXP (rev. 12/4/08).~~

~~Architect Client Experience Verification Form, 0401CEXP (rev. 12/4/08).~~

~~Architect Degree Verification Form, 0401DEG (rev. 12/4/08).~~

~~Architect Reference Form, 0401REF (rev. 12/4/08).~~

~~Architect License Reinstatement Application, 0401REI (rev. 4/1/09).~~

~~Architect License Renewal Form, 0401REN (rev. 4/1/09).~~

~~Professional Engineer License Application (Professional Engineer Information Sheet), 0402LIC (rev. 12/2/08).~~

~~Professional Engineer Reference Form, 0402REF (rev. 12/2/08).~~

~~Professional Engineer License Reinstatement Application, 0402REI (rev. 4/1/09).~~

~~Professional Engineer and Engineer in Training Degree Verification Form, 0402_20DEG (rev. 12/2/08).~~

~~Professional Engineer and Engineer in Training Experience Verification Form, 0402_20EXP (rev. 4/23/09).~~

~~Engineer Verification of Examination and Licensure Form, 0402 20ELV (rev. 12/2/08).~~

~~Engineer in Training Designation Application, (Engineer in Training Information Sheet) 0420DES (rev. 12/2/08).~~

~~Engineer in Training Reference Form, 0420REF (rev. 12/2/08).~~

~~Course Requirements for Engineering Technology Program, 0402_20CREQ (eff. 12/2/08).~~

~~Professional Engineer License Renewal Form, 0402REN (rev. 4/1/09).~~

~~Land Surveyor License Application (Land Surveyor Information Sheet), 0403LIC (rev. 5/21/09).~~

~~Land Surveyor License Reinstatement Application, 0403REI (rev. 4/1/09).~~

~~Land Surveyor B License Application (Land Surveyor B Information Sheet), 0404LIC (rev. 12/5/08).~~

~~Land Surveyor B License Reinstatement Application, 0404REI (rev. 4/1/09).~~

~~Land Surveyor License Renewal Form, 0403_04REN (rev. 4/1/09).~~

~~Land Surveyor and Surveyor in Training Degree Verification Form, 0403_30DEG (rev. 12/5/08).~~

~~Land Surveyor Verification of Examination and Licensure Form, 0403_30ELV (rev. 12/5/08).~~

~~Land Surveyor & Surveyor in Training Experience Verification Form, 0403_30EXP (rev. 12/5/08).~~

~~Surveyor Photogrammetrist License Application (Surveyor Photogrammetrist Information Sheet), 0408LIC (rev. 3/16/09).~~

~~Surveyor Photogrammetrist License Renewal Form, 0408REN (rev. 4/1/09).~~

~~"Grandfather" Surveyor Photogrammetrist Reference Form, 0408GREF (rev. 12/8/08).~~

~~Surveyor Photogrammetrist Experience Verification Form, 0408EXP (rev. 12/8/08).~~

~~"Grandfather" Surveyor Photogrammetrist Experience Verification Form, 0408GEXP (rev. 12/8/08).~~

~~Surveyor Photogrammetrist License Reinstatement Application, 0408REI (rev. 4/1/09).~~

~~Surveyor Photogrammetrist Degree Verification Form, 0408DEG (rev. 12/8/08).~~

~~Surveyor Photogrammetrist Verification of Examination and Licensure Form, 0408ELV (eff. 12/8/08).~~

~~Surveyor In Training Designation Application (Surveyor in Training Information Sheet), 0430DES (rev. 12/5/08).~~

~~Landscape Architect License Application (Landscape Architect Information Sheet), 0406LIC (rev. 7/1/10).~~

~~Verification of Landscape Architect Examination and Licensure Form, 0406ELV (rev. 6/23/09).~~

~~Landscape Architect Experience Verification Form for Examination and Comity Applicants, 0406EXP (rev. 12/8/08).~~

~~Landscape Architect Degree Verification Form, 0406DEG (rev. 12/8/08).~~

~~Landscape Architect License Reinstatement Application, 0406REI (rev. 7/1/10).~~

~~Landscape Architect License Renewal Form, 0406REN (rev. 7/1/10).~~

~~Interior Designer Certificate Application, (Interior Designer Information Sheet) 0412CERT (rev. 9/17/08).~~

~~Verification of Interior Designer Examination and Certification Form, 0412ELV (rev. 9/17/08).~~

~~Interior Designer Degree Verification Form, 0412DEG (rev. 9/17/08).~~

~~Interior Designer Experience Verification Form, 0412EXP (rev. 9/17/08).~~

~~Interior Designer Certificate Reinstatement Application, 0412REI (rev. 9/17/08).~~

~~Interior Designer Certificate Renewal Form, 0412REN (rev. 4/1/09).~~

~~Professional Corporation Registration Application (Professional Corporation Information Sheet), 04PCREG (rev. 9/25/08).~~

~~Professional Corporation Branch Office Registration Application, 04BRPCREG (eff. 9/25/08).~~

~~Business Entity Registration Application (Business Entity Information Sheet) 04BUSREG, (rev. 9/25/08).~~

~~Business Entity Branch Office Registration Application, 04BRBUSREG (rev. 9/25/08).~~

~~Professional Limited Liability Company Registration Application (Professional Limited Liability Company Information Sheet) 04PLCREG (rev. 9/25/08).~~

~~Professional Limited Liability Company Branch Office Registration Application, 04BRPLCREG (rev. 9/25/08).~~

License/Certificate Renewal Form (Architect, Professional Engineer, Land Surveyor, Surveyor Photogrammetrist, Landscape Architect, Interior Designer), A415-04REN-v1 (eff. 10/2011)

Architect License Application (Architect Information Sheet), 0401LIC (rev. 4/2012)

Verification of Architect Examination & Licensure Form, 0401ELV (rev. 4/2012)

Architect Experience Verification Form, 0401EXP (rev. 4/2012)

Architect Client Experience Verification Form, 0401CEXP (rev. 4/2012)

Architect Degree Verification Form, 0401DEG (rev. 4/2012)

Architect Reference Form, A416-0401REF-v1 (eff. 1/2016)

Architect License Reinstatement Application, 0401REI (rev. 4/2012)

Professional Engineer License Application (Professional Engineer Information Sheet), 0402LIC (rev. 4/2012)

Professional Engineer Reference Form, A416-0402REF-v1 (eff. 1/2016)

Professional Engineer License Reinstatement Application, 0402REI (rev. 4/2012)

Professional Engineer & Engineer-in-Training Degree Verification Form, 0402_20DEG (rev. 4/2012)

Professional Engineer & Engineer-in-Training Experience Verification Form, A416-0402_20EXP-v1 (eff. 11/2013)

Engineer Verification of Examination and Licensure Form, 0402_20ELV (rev. 4/2012)

Engineer-in-Training Designation Application, (Engineer-in-Training Information Sheet) A416-0420DES-v2 (rev. 12/2013)

Engineer-In-Training Reference Form, A416-0420REF-v1 (eff. 1/2016)

Course Requirements for Engineering Technology Program, 0402CREQ (rev. 4/2012)

Land Surveyor License Application (Land Surveyor Information Sheet), 0403LIC (rev. 4/2012)

Land Surveyor License Reinstatement Application, 0403REI (rev. 4/2012)

Land Surveyor B License Application (Land Surveyor B Information Sheet), 0404LIC (rev. 4/2012)

Land Surveyor B License Reinstatement Application, 0404REI (rev. 4/2012)

Land Surveyor & Surveyor-in-Training Degree Verification Form, 0403_30DEG (rev. 4/2012)

Land Surveyor Verification of Examination and Licensure Form, 0403_30ELV (rev. 4/2012)

Land Surveyor & Surveyor-in-Training Experience Verification Form, 0403_30EXP (rev. 4/2012)

Surveyor Photogrammetrist License Application (Surveyor Photogrammetrist Information Sheet), 0408LIC (rev. 4/2012)

Surveyor Photogrammetrist Reference Form, 0408REF (rev. 9/2014)

Surveyor Photogrammetrist Experience Verification Form, 0408EXP (rev. 4/2012)

Surveyor Photogrammetrist License Reinstatement Application, 0408REI (rev. 4/2012)

Surveyor Photogrammetrist Degree Verification Form, 0408DEG (rev. 4/2012)

Surveyor Photogrammetrist Verification of Examination and Licensure Form, 0408elvf (eff. 4/2012)

Surveyor-In-Training Designation Application (Surveyor-in-Training Information Sheet), A416-0430DES-v3 (rev. 12/2013)

Landscape Architect License Application (Landscape Architect Information Sheet), 0406LIC (rev. 9/2014)

Landscape Architect Reference Form, A416-0406REF-v1 (eff. 1/2016)

Verification of Landscape Architect Examination and Licensure Form, 0406ELV (rev. 4/2012)

Landscape Architect Experience Verification Form for Examination and Comity Applicants, 0406EXP (rev. 4/2012)

Landscape Architect Degree Verification Form, 0406DEG (rev. 4/2012)

Landscape Architect License Reinstatement Application, 0406REI (rev. 4/2012)

Interior Designer Certificate Application, (Interior Designer Information Sheet) 0412CERT (rev. 4/2012)

Verification of Interior Designer Examination and Certification Form, 0412ELV (rev. 4/2012)

Interior Designer Degree Verification Form, 0412DEG (rev. 4/2012)

Interior Designer Experience Verification Form, 0412EXP (rev. 4/2012)

Interior Designer Certificate Reinstatement Application, 0412REI (rev. 4/2012)

Professional Corporation Registration Application (Professional Corporation Information Sheet), 04PCREG (rev. 4/2012)

Professional Corporation Branch Office Registration Application, 04BRPCREG (rev. 4/2012)

Business Entity Registration Application (Business Entity Information Sheet) 04BUSREG, (rev. 4/2012)

Business Entity Branch Office Registration Application, 04BRBUSREG (rev. 4/2012)

Professional Limited Liability Company Registration Application (Professional Limited Liability Company Information Sheet) 04PLCREG (rev. 4/2012)

Professional Limited Liability Company Branch Office Registration Application, 04BRPLCREG (rev. 4/2012)

Criminal Conviction Reporting Form, A406-01CCR-v1 (eff. 5/2015)

Disciplinary Action Reporting Form, A406-01DAR-v1 (eff. 5/2015)

Criminal Conviction - Supplemental Form, Requesting an Informal Fact Finding (IFF) Conference, A713-01IFF-v1 (eff. 1/2016) ]

DOCUMENTS INCORPORATED BY REFERENCE (18VAC10-20)

~~Handbook for Interns and Architects, 2008-2009 Edition, National Council of Architectural Registration Boards, 1801 K Street, NW, Suite 1100 K, Washington, DC 20006, www.ncarb.org.~~

Intern Development Program Guidelines, December 2013, National Council of Architectural Registration Boards, 1801 K Street NW, Suite 700 K, Washington, DC 20006 (http://www.ncarb.org)

VA.R. Doc. No. R11-2357; Filed October 27, 2015, 11:31 a.m.

## BOARD OF AUDIOLOGY AND SPEECH-LANGUAGE PATHOLOGY

### Emergency Regulation

Title of Regulation: **18VAC30-20. Regulations Governing the Practice of Audiology and Speech-Language Pathology (amending 18VAC30-20-10; adding 18VAC30-20-241).**

Statutory Authority: § 54.1-2400 of the Code of Virginia.

Effective Dates: October 23, 2015, through June 28, 2016.

Agency Contact: Leslie L. Knachel, Executive Director, Board of Audiology and Speech-Language Pathology, 9960 Mayland Drive, Suite 300, Richmond, VA 23233-1463, telephone (804) 367-4630, FAX (804) 527-4413, or email leslie.knachel@dhp.virginia.gov.

Preamble:

*Section 2.2-4011 of the Code of Virginia states that agencies may adopt emergency regulations in situations in which Virginia statutory law requires that a regulation be effective in 280 days or less from its enactment. Chapter 327 of the 2014 Acts of the Assembly included such an enactment clause.*

*The goal of this emergency regulation is to provide a framework for safe practice in an advanced procedure that, before 2014, was not recognized in Virginia as being within the scope of practice of an audiologist. By the change in law and regulation, the practice is expanded to include limited cerumen management, but the qualifications for such practice and the limitations of practice by an audiologist are essential to protect patients.*

*Since cerumen management is a more advanced skill in the practice of audiology, requiring additional knowledge and training, the emergency regulations specify the education and specific training necessary to perform it on patients. Additionally, audiologists must know the contraindications for performance by an audiologist and the conditions that require referral to a medical doctor.*

*After publication of the emergency regulations, comments on the Notice of Intended Regulatory Action for the replacement regulation indicated that the contraindications for cerumen management by an audiologist were too restrictive and would limit current practice in certain settings. In response, the board amended the emergency regulations and on October 23, 2015, the Governor approved the amendment of the previous emergency action, which was published in 31:11 VA.R. 958-960 January 26, 2015, also to be promulgated as an emergency action.*

Part I
General Provisions

**18VAC30-20-10. Definitions.**

A. The words and terms "audiologist," "board," "practice of audiology," "practice of speech-language pathology," "speech-language disorders," and "speech-language pathologist" when used in this chapter shall have the meanings ascribed to them in § 54.1-2600 of the Code of Virginia.

B. The following words when used in this chapter shall have the following meanings unless the context clearly indicates otherwise:

"Contact hour" means 60 minutes of time spent in continuing learning activities.

"Limited cerumen management" means the identification and removal of cerumen from the cartilaginous outer one-third portion of the external auditory canal in accordance with minimum standards and procedures set forth in this chapter.

"School speech-language pathologist" means a person licensed pursuant to § 54.1-2603 of the Code of Virginia to provide speech-language pathology services solely in public school divisions.

"Supervision" means that the audiologist or speech-language pathologist is responsible for the entire service being rendered or activity being performed, is available for consultation, and is providing regular monitoring and documentation of clinical activities and competencies of the person being supervised.

"Type 1" means continuing learning activities that must be offered by an accredited sponsor or organization as specified in 18VAC30-20-300.

"Type 2" means continuing learning activities that may or may not be approved by an accredited sponsor or organization but shall be activities considered by the learner to be beneficial to practice or to continuing learning. In Type 2 activities, licensees document their own participation on the Continued Competency Activity and Assessment Form and are considered self-learning activities.

**18VAC30-20-241. Limited cerumen management.**

A. In order for an audiologist to perform limited cerumen management, he shall:

1. Be a graduate of a doctoral program in audiology that is accredited by the Council on Academic Accreditation of the American Speech-Language-Hearing Association [ or other accrediting body recognized by the board ] and that included didactic education and supervised clinical experience in cerumen management as specified in subsection B of this section; or

2. Complete a course or workshop in cerumen management that provides training as specified in subsection B of this section and that is approved by the American Speech-Language Hearing Association or the American Academy of Audiology.

B. An audiologist shall maintain documentation evidencing satisfactory completion of training in cerumen management to include the following:

1. Recognizing the presence of preexisting contraindications that necessitate referral to a physician;

2. Recognizing patient distress and appropriate action to take if complications are encountered;

3. Use of infection control precautions;

4. Procedures for removal of cerumen, including cerumen loop, gentle water irrigation, suction, and the use of material for softening;

5. Observation of each type of cerumen management procedure performed by a qualified audiologist or physician; and

6. Successful performance, under direct supervision by an audiologist qualified to perform cerumen management or a physician, of each type of cerumen management procedure.

C. An audiologist shall not perform cerumen management on a patient who [ ~~is younger than 12 years of age or on a patient who~~ ] has any of the following preexisting contraindications:

1. [ ~~Hearing in only one ear;~~

~~2.~~ ] A perforated tympanic membrane;

[ ~~3.~~ 2. ] Inflammation, tenderness, [ drainage, ] or open wounds or traces of blood in the external ear canal;

[ ~~4. Drainage from the external ear canal or middle ear;~~

~~5. Current tympanostomy tubes;~~

~~6.~~ 3. ] History of ear surgery [ ~~, excluding past tympanostomy tubes or simple tympanoplasty~~ that results in distortion of the external ear canal ];

[ ~~7. Diabetes mellitus,~~ 4. ] HIV infection [ ~~,~~ ] or bleeding disorders;

[ ~~8.~~ 5. ] Actual or suspected foreign body in the ear [ , excluding hearing aid components that are located in the lateral one-third portion of the ear canal ];

[ ~~9.~~ 6. ] Stenosis or bony exostosis of the ear canal; [ or

~~10.~~ 7. ] Cerumen impaction that totally occludes the [ ~~ear canal; or~~

~~11. Inability to see at least 25% of the tympanic membrane~~ visualization of the tympanic membrane ].

D. An audiologist performing cerumen management shall:

1. Obtain informed written consent of the patient or legally responsible adult and maintain documentation of such consent and the procedure performed in the patient record.

2. Refer patients to a physician if they exhibit contraindications or experience any complication, such as dizziness, during the procedure.

VA.R. Doc. No. R15-4115; Filed October 23, 2015, 4:29 p.m.

## Proposed Regulation

Titles of Regulations: **18VAC30-20. Regulations Governing the Practice of Audiology and Speech-Language Pathology (repealing 18VAC30-20-10 through 18VAC30-20-320).**

**18VAC30-21. Regulations Governing Audiology and Speech-Language Pathology (adding 18VAC30-21-10 through 18VAC30-21-170).**

Statutory Authority: § 54.1-2400 of the Code of Virginia.

Public Hearing Information:

December 11, 2015 - 8:30 a.m. - Department of Health Professions, Perimeter Center, 9960 Mayland Drive, Conference Center, 2nd Floor, Richmond, VA 23233

Public Comment Deadline: January 15, 2016.

Agency Contact: Leslie L. Knachel, Executive Director, Board of Audiology and Speech-Language Pathology, 9960 Mayland Drive, Suite 300, Richmond, VA 23233-1463, telephone (804) 367-4630, FAX (804) 527-4413, or email leslie.knachel@dhp.virginia.gov.

Basis: Regulations Governing the Practice of Audiology and Speech-Language Pathology (18VAC30-20) are promulgated under the general authority of the following: (i) subdivision 6 of § 54.1-2400 of the Code of Virginia, which states: "The general powers and duties of health regulatory boards shall be: To promulgate regulations in accordance with the Administrative Process Act (§ 9-6.14:1 et seq.) which are reasonable and necessary to administer effectively the regulatory system. Such regulations shall not conflict with the purposes and intent of this chapter or of Chapter 1 (§ 54.1-100 et seq.) and Chapter 25 (§ 54.1-2500 et seq.) of this title..." and (ii) §§ 54.1-2603 and 54.1-2604 of the Code of Virginia, which provide authority for the board and for licensure of professions under the board.

Purpose: In order to arrange the regulations governing the practice of audiology and speech-language pathology in a more understandable, logical manner, the board voted to repeal the current chapter and promulgated a replacement chapter.

Substantively, the qualifications for licensure in audiology will not change, but applicants for licensure in speech-language pathology will be required to demonstrate clinical competency by professional credentialing through American Speech-Language-Hearing Association (ASHA). This regulatory action is consistent with changes proposed through a fast-track rulemaking action relating to provisional licensure submitted for executive branch review on July 29, 2013. Requirements for reactivation and reinstatement of licensure are less burdensome to encourage practitioners to re-enter the workforce. Continuing education requirements are modified to reflect annual renewals and to eliminate the Type 1 and Type 2 categories. Rather than 30 hours every two years, the board proposes a requirement of 10 hours every year with the ability to transfer or credit excess hours to the next renewal year.

Additionally, the grounds for unprofessional conduct are expanded to include problematic conduct for which the board currently has no grounds for disciplinary action. Consistent with the board's responsibility to protect the health and safety of the public, it proposes additional grounds for disciplinary action for causes such as revocation, suspension, or restriction by another regulatory board; failure to comply with laws on patient confidentiality and provision of records; and actions that would constitute a professional boundary violation.

Substance: 18VAC30-20 will be repealed to allow a clearer, more logical organization of regulations. In the major parts of regulations, the following changes have been adopted:

General provisions:

- New definitions for words and terms used in the revised regulations will be added, such as "active practice" and "ASHA"; terms no longer used will be eliminated, such as "Type 1" and "Type 2." For consistency, the term "client" rather than "patient" will be used throughout the regulations and included in the definitions.
- The requirement for posting a license will be amended to allow licensees to carry copies of their licenses to accommodate those who travel between facilities.
- A requirement for furnishing legal proof to the board evidencing a name change will be added for consistency with board policy.
- There are no changes proposed in the application or renewal fees.

Requirements for licensure:

- General application requirements for all professions will be set out in one section. The board decided to require an attestation of having read the statutes and regulations rather than initiating a jurisprudence examination.
- Qualifications for initial licensure are simplified into one section; both audiologists and speech-language pathologists will be required to obtain a professional credential certifying graduation from an accredited educational program, passage of the examination, and completion of supervised clinical experience.
- All requirements relating to provisional licensure, whether issued to obtain clinical experience for initial

licensure or to practice for a period under supervision in order to qualify for licensure by endorsement, reactivation, or reinstatement, are placed in one section rather than scattered throughout the chapter. Amendments to provisional licensure include speech-language pathologists as authorized by Chapter 436 of the 2013 Acts of Assembly. Two barriers to provisional licensure are eliminated.

• Requirements for licensure by endorsement are modified to require less continuing education, allow a license in another state to be lapsed but eligible for reinstatement, and have one of the past three years of active practice. Currently, an applicant can qualify by documentation of a current license and active practice for three of the past five years.

Renewal and continuing competency (CE):

• Proposal for a reduction in the number of required CE hours from 30 hours every two years to 10 hours per year; the 10 hours would have to be verifiable by a recognizable sponsor, educational institution or organization.

• Elimination of Type 1 and Type 2 designated CE.

• Addition of ability to carryover up to 10 hours of CE to the next renewal period.

Reactivation and reinstatement:

• Reactivation of an inactive license is less burdensome because the number of CE hours that may be required is capped at 30 or an applicant may submit current ASHA certification. If an inactive licensee has not reactivated his license within five years, he would be able to show active practice in another jurisdiction for one of the past three years or practice under supervision with a provisional license.

• Reinstatement of a lapsed license is also less burdensome with requirements similar to those for reactivation.

Standards of practice:

• The board has added language on supervisory responsibilities that the practitioner is not prohibited from delegating to an unlicensed assistant such activities or functions as are nondiscretionary and do not require the exercise of professional judgment for their performance.

The board has added language to address patient confidentiality, records retention, professional boundaries, advertising, and disciplinary action taken by another professional regulatory agency.

Issues: The primary advantage to the public is clearer, more explicit rules for client confidentiality and records, professional boundaries, and delegation of tasks to unlicensed assistants. In addition, greater clarity in licensure and renewal requirements will encourage compliance with regulations to the benefit of licensees and the clients they serve. There are less burdensome requirements for persons who may want to re-enter the workforce through reinstatement or reactivation and for applicants for licensure by endorsement to encourage more practitioners who can provide professional services to clients. There are no disadvantages.

There are no advantages or disadvantages to the agency or the Commonwealth, except the logical order of the revised regulation and more clarity in the rules may reduce the number of questions to staff and problems with noncompliance.

Department of Planning and Budget's Economic Impact Analysis:

Summary of the Proposed Amendments to Regulation. The Board of Audiology and Speech-Language Pathology (Board) proposes to repeal Chapter 20 and promulgate Chapter 21 to reorganize sections and provisions more logically and with more clarity. The regulations will still be called Regulations of the Board of Audiology and Speech-Language Pathology. Additionally, the Board proposes the following for the regulations: 1) a change in continuing competency requirements from 30 hours within two years to 10 hours annually, offered by an approved sponsor or provider; 2) less burdensome rules for re-entry into practice, 3) elimination of barriers to provisional licensure, and 4) additional clarity through more explicit rules for patient confidentiality, maintenance of records and violations of professional boundaries.

Result of Analysis. The benefits likely exceed the costs for all proposed changes.

Estimated Economic Impact.

Continuing competence requirements: Under Chapter 20, in order for licensees to renew their licenses, they must complete at least 30 hours of continuing learning activities within the two years immediately preceding renewal. At least 15 of those hours must be Type 1. Type 1 activities are continuing learning activities that are offered by an accredited sponsor or organization. The remaining hours may be Type 2, which are defined as "continuing learning activities that may or may not be approved by an accredited sponsor or organization but shall be activities considered by the learner to be beneficial to practice or to continuing learning."

In Chapter 21 the Board proposes to eliminate Type 2 and instead require that licensees complete at least 10 contact hours of continuing learning activities in the year immediately preceding renewal. Continuing learning activities must be activities, programs or courses related to speech-language pathology or audiology, depending on the license held, and offered or approved by an accredited sponsor or organization. "Continuing learning hours in excess of the number required for renewal may be transferred or credited to the next renewal year for a total of not more than 10 hours." So the number of required hours per year is reduced from 15 to 10; and also since hours can be carried

over across years, licensees can arrange their schedules to account for outside events. This is clearly beneficial for licensees.

Reactivating an inactive license: Under Chapter 20, when a practitioner wishes to reactivate an inactive license, the practitioner must file a reinstatement application, pay the difference between the inactive and active renewal fees for the current year, and provide documentation of having completed continued competency hours equal to the requirement for the number of years, not to exceed four years, in which the license has been inactive. Under Chapter 21, the requirements are the same except for continued competency hours. The licensee must provide documentation of having completed continued competency hours equal to the requirement for the number of years, not to exceed three years or current American Speech-Language-Hearing Association certification. The proposed continuing education requirement is less burdensome while not reducing assurance of competency. Thus, it should provide a net benefit.

Provisional licensure: Under Chapter 20, for an applicant for provisional licensure to qualify for initial licensure, the practitioner must have passed the qualifying examination within the past 3 years and currently be enrolled in a doctoral program. For Chapter 21, the Board proposes to still require that the applicant have passed the qualifying exam, but no longer require that it have been within the last three years. Also, the Board proposes to eliminate the requirement that the applicant be currently enrolled in a doctoral program. Eliminating these two requirements, while maintaining the other provisional licensure requirements, will enable some additional individuals who have demonstrated their competence via examination to qualify for provisional licensure. Thus, it should provide a net benefit.

Businesses and Entities Affected. The proposed amendments potentially affect the 3354 speech-language pathologists, 491 audiologists and 122 school speech pathologists licensed in the Commonwealth.

Localities Particularly Affected. The proposed amendments do not disproportionately affect particular localities.

Projected Impact on Employment. The proposed less burdensome rules for re-entry into practice and provisional licensure may moderately add to the supply of working audiologists and speech-language pathologists.

Effects on the Use and Value of Private Property. The proposed reduction in required continuing competency hours per year from 15 to 10 will enable audiologists and speech-language pathologists to use more of their time as they choose. The proposed less burdensome rules for re-entry into practice and provisional licensure may moderately reduce costs for firms which employ them.

Small Businesses: Costs and Other Effects. The proposed less burdensome rules for re-entry into practice and provisional licensure may moderately reduce costs for small firms which employ them.

Small Businesses: Alternative Method that Minimizes Adverse Impact. The proposed amendments do not adversely affect small businesses.

Real Estate Development Costs. The proposed amendments are unlikely to affect real estate development costs.

Agency's Response to Economic Impact Analysis: The Board of Audiology and Speech-Language Pathology concurs with the analysis of the Department of Planning and Budget.

Summary:

*The proposed action repeals 18VAC30-20 and adopts new regulations in 18VAC30-21 to organize sections and provisions more logically and with more clarity. Provisions of the proposed regulation include (i) a change in continuing competency requirements from 30 hours within two years to 10 hours annually, offered by an approved sponsor or provider; (ii) less burdensome rules for licensure and reentry into practice; (iii) elimination of barriers to provisional licensure, including requirements pursuant to Chapter 436 of the 2013 Acts of Assembly; and (iv) more explicit rules for patient confidentiality and maintenance of records and regarding violations of professional boundaries.*

## CHAPTER 21
## REGULATIONS GOVERNING AUDIOLOGY AND SPEECH-LANGUAGE PATHOLOGY

### Part I
### General Provisions

**18VAC30-21-10. Definitions.**

A. The words and terms "audiologist," "board," "practice of audiology," "practice of speech-language pathology," "speech-language disorders," and "speech-language pathologist" when used in this chapter shall have the meanings ascribed to them in § 54.1-2600 of the Code of Virginia.

B. The following words and terms when used in this chapter shall have the following meanings unless the context clearly indicates otherwise:

"Active practice" means a minimum of 160 hours of professional practice as an audiologist or speech-language pathologist for each 12-month period immediately preceding application for licensure. Active practice may include supervisory, administrative, educational, research, or consultative activities or responsibilities for the delivery of such services.

"ASHA" means the American Speech-Language-Hearing Association.

"Client" means a patient or person receiving services in audiology or speech-language pathology.

"Contact hour" means 60 minutes of time spent in continuing learning activities.

"School speech-language pathologist" means a person licensed pursuant to § 54.1-2603 of the Code of Virginia to

provide speech-language pathology services solely in public school divisions.

"Supervision" means that the audiologist or speech-language pathologist is responsible for the entire service being rendered or activity being performed, is available for consultation, and is providing regular monitoring and documentation of clinical activities and competencies of the person being supervised.

**18VAC30-21-20. Required licenses; posting of licenses.**

A. There shall be separate licenses for the practices of audiology and speech-language pathology. It is prohibited for any person to practice as an audiologist or a speech-language pathologist unless the person has been issued the appropriate license.

B. A licensee shall post his license in a place conspicuous to the public in each facility in which the licensee is employed and holds himself out to practice. If it is not practical to post the license, the licensee shall provide a copy of his license upon request.

**18VAC30-21-30. Records; accuracy of information.**

A. All changes of name, address of record, or public address, if different from the address of record, shall be furnished to the board within 30 days after the change occurs.

B. A licensee who has changed his name shall submit as legal proof to the board a copy of the marriage certificate, a certificate of naturalization, or a court order evidencing the change. A duplicate license with the changed name shall be issued by the board upon receipt of such evidence and the required fee.

C. All notices required by law and by this chapter to be mailed by the board to any registrant or licensee shall be validly served when mailed to the latest address of record on file with the board.

**18VAC30-21-40. Fees required.**

A. The following fees shall be paid as applicable for licensure:

| | |
|---|---|
| 1. Application for audiology or speech-language pathology license | $135 |
| 2. Application for school speech-language pathology license | $70 |
| 3. Verification of licensure requests from other states | $20 |
| 4. Annual renewal of audiology or speech-language pathology license | $75 |
| 5. Late renewal of audiology or speech-language pathology license | $25 |
| 6. Annual renewal of school speech-language pathology license | $40 |
| 7. Late renewal of school speech-language pathology license | $15 |
| 8. Reinstatement of audiology or speech-language pathology license | $135 |
| 9. Reinstatement of school speech-language pathology license | $70 |
| 10. Duplicate wall certificate | $25 |
| 11. Duplicate license | $5 |
| 12. Returned check | $35 |
| 13. Inactive license renewal for audiology or speech-language pathology | $40 |
| 14. Inactive license renewal for school speech-language pathology | $20 |
| 15. Application for provisional license | $50 |
| 16. Renewal of provisional license | $25 |

B. Fees shall be made payable to the Treasurer of Virginia and shall not be refunded once submitted.

Part II
Requirements for Licensure

**18VAC30-21-50. Application requirements.**

A. A person seeking a provisional license or licensure as an audiologist, a speech-language pathologist, or a school speech-language pathologist shall submit:

1. A completed and signed application;

2. The applicable fee prescribed in 18VAC30-21-40;

3. Documentation as required by the board to determine if the applicant has met the qualifications for licensure;

4. An attestation that the applicant has read, understands, and will comply with the statutes and regulations governing the practice of audiology or speech-language pathology; and

5. If licensed or certified in another United States jurisdiction, verification of the status of the license or certification from each jurisdiction in which licensure or certification is held.

B. An incomplete application package shall be retained by the board for a period of one year from the date the application is received by the board. If an application is not completed within the year, an applicant shall reapply and pay a new application fee.

**18VAC30-21-60. Qualifications for initial licensure.**

A. The board may grant an initial license to an applicant for licensure in audiology or speech-language pathology who:

1. Holds a current and unrestricted Certificate of Clinical Competence issued by ASHA or certification issued by the American Board of Audiology or any other accrediting body recognized by the board. Verification of currency shall be in the form of a certified letter from a recognized

accrediting body issued within six months prior to filing an application for licensure; and

2. Has passed the qualifying examination from an accrediting body recognized by the board.

B. The board may grant a license to an applicant as a school speech-language pathologist who:

1. Holds a master's degree in speech-language-pathology; and

2. Holds a current endorsement in speech-language pathology from the Virginia Department of Education.

**18VAC30-21-70. Provisional licensure.**

A. Provisional license to qualify for initial licensure. An applicant may be issued a provisional license in order to obtain clinical experience required for certification by ASHA, the American Board of Audiology, or any other accrediting body recognized by the board. To obtain a provisional license in order to qualify for initial licensure, the applicant shall submit documentation that he has:

1. Passed the qualifying examination from an accrediting body recognized by the board; and

2. Either:

a. For provisional licensure in audiology, successfully completed all the didactic coursework required for the doctoral degree as documented by a college or university whose audiology program is accredited by the Council on Academic Accreditation of ASHA or an equivalent accrediting body; or

b. For provisional licensure in speech-language pathology, successfully completed all the didactic coursework required for a graduate program in speech-language pathology as documented by a college or university whose program is accredited by the Council on Academic Accreditation of the American Speech-Language-Hearing Association or an equivalent accrediting body.

B. Provisional license to qualify for endorsement or reentry into practice. An applicant may be issued a provisional license in order to qualify for licensure by endorsement pursuant to 18VAC30-21-80, reactivation of an inactive license pursuant to subsection C of 18VAC30-21-110, or reinstatement of a lapsed license pursuant to subsection B of 18VAC30-21-120.

C. All provisional licenses shall expire 18 months from the date of issuance and may be renewed for an additional six months by submission of a renewal form and payment of a renewal fee. Renewal of a provisional license beyond 24 months shall be for good cause shown as determined by a committee of the board.

D. The holder of a provisional license in audiology shall only practice under the supervision of a licensed audiologist, and the holder of a provisional license in speech-language pathology shall only practice under the supervision of a licensed speech-language pathologist. The provisional licensee shall be responsible and accountable for the safe performance of those direct client care tasks to which he has been assigned.

E. Licensed audiologists or speech-language pathologists providing supervision shall:

1. Notify the board electronically or in writing of the intent to provide supervision for a provisional licensee;

2. Have an active, current license and at least three years of active practice as an audiologist or speech-language pathologist prior to providing supervision;

3. Document the frequency and nature of the supervision of provisional licensees;

4. Be responsible and accountable for the assignment of clients and tasks based on their assessment and evaluation of the provisional licensee's knowledge and skills; and

5. Monitor clinical performance and intervene if necessary for the safety and protection of the clients.

F. The identity of a provisional licensee shall be disclosed to the client prior to treatment and shall be made a part of the client's file.

**18VAC30-21-80. Qualifications for licensure by endorsement.**

An applicant for licensure in audiology or speech-language pathology who has been licensed in another United States jurisdiction may apply for licensure in Virginia in accordance with application requirements in 18VAC30-20-50 and submission of documentation of:

1. Ten continuing education hours for each year in which he has been licensed in the other jurisdiction, not to exceed 30 hours, or a current and unrestricted Certificate of Clinical Competence in the area in which he seeks licensure issued by ASHA or certification issued by the American Board of Audiology or any other accrediting body recognized by the board. Verification of currency shall be in the form of a certified letter from a recognized accrediting body issued within six months prior to filing an application for licensure;

2. Passage of the qualifying examination from an accrediting body recognized by the board;

3. Current status of licensure in another United States jurisdiction showing that no disciplinary action is pending or unresolved. The board may deny a request for licensure to any applicant who has been determined to have committed an act in violation of 18VAC30-21-160; and

4. Evidence of active practice in another United States jurisdiction for at least one of the past three years or practice for six months with a provisional license in accordance with 18VAC30-21-70 and by providing evidence of a recommendation for licensure by his supervisor.

Part III
Renewal and Continuing Education

**18VAC30-21-90. Renewal requirements.**

A. A person who desires to renew his license shall, not later than December 31 of each year, submit the renewal notice and applicable renewal fee. A licensee who fails to renew his license by the expiration date shall have a lapsed license, and practice with a lapsed license may constitute grounds for disciplinary action by the board.

B. A person who fails to renew his license by the expiration date may renew at any time within one year of expiration by submission of a renewal notice, the renewal fee and late fee, and statement of compliance with continuing education requirements.

**18VAC30-21-100. Continuing education requirements for renewal of an active license.**

A. In order to renew an active license, a licensee shall complete at least 10 contact hours of continuing education prior to December 31 of each year. Up to 10 contact hours of continuing education in excess of the number required for renewal may be transferred or credited to the next renewal year.

B. Continuing education shall be activities, programs, or courses related to audiology or speech-language pathology, depending on the license held, and offered or approved by one of the following accredited sponsors or organizations sanctioned by the profession:

1. The Speech-Language-Hearing Association of Virginia or a similar state speech-language-hearing association of another state;

2. The American Academy of Audiology;

3. The American Speech-Language-Hearing Association;

4. The Accreditation Council on Continuing Medical Education of the American Medical Association offering Category I continuing medical education;

5. Local, state, or federal government agencies;

6. Colleges and universities;

7. International Association of Continuing Education and Training; or

8. Health care organizations accredited by the Joint Commission on Accreditation of Healthcare Organizations.

C. If the licensee is dually licensed by this board as an audiologist and speech-language pathologist, a total of no more than 15 hours of continuing education are required for renewal of both licenses with a minimum of 7.5 contact hours in each profession.

D. A licensee shall be exempt from the continuing education requirements for the first renewal following the date of initial licensure in Virginia under 18VAC30-20-60.

E. The licensee shall retain all continuing education documentation for a period of three years following the renewal of an active license. Documentation from the sponsor or organization shall include the title of the course, the name of the sponsoring organization, the date of the course, and the number of hours credited.

F. The board may grant an extension of the deadline for continuing education requirements, for up to one year, for good cause shown upon a written request from the licensee prior to the renewal date of December 31st.

G. The board may grant an exemption for all or part of the requirements for circumstances beyond the control of the licensee, such as temporary disability, mandatory military service, or officially declared disasters.

H. The board shall periodically conduct an audit for compliance with continuing education requirements. Licensees selected for an audit conducted by the board shall complete the Continuing Education Activity and Assessment Form and provide all supporting documentation within 30 days of receiving notification of the audit.

I. Failure to comply with these requirements may subject the licensee to disciplinary action by the board.

Part IV
Reactivation and Reinstatement

**18VAC30-21-110. Inactive licensure; reactivation for audiologists and speech-language pathologists.**

A. An audiologist or speech-language pathologist who holds a current, unrestricted license in Virginia may, upon a request on the renewal application and submission of the required fee, be issued an inactive license. The holder of an inactive license shall not be required to maintain continuing education requirements and shall not be entitled to perform any act requiring a license to practice audiology or speech-language pathology in Virginia.

B. A licensee whose license has been inactive and who requests reactivation of an active license shall file an application, pay the difference between the inactive and active renewal fees for the current year, and provide documentation of current ASHA certification or of having completed 10 continuing education hours equal to the requirement for the number of years in which the license has been inactive, not to exceed 30 contact hours.

C. A licensee who does not reactivate within five years shall meet the requirements of subsection B of this section and shall either:

1. Meet the requirements for initial licensure as prescribed by 18VAC30-21-60; or

2. Provide documentation of a current license in another jurisdiction in the United States and evidence of active practice for at least one of the past three years or practice in accordance with 18VAC30-21-70 with a provisional license for six months and submit a recommendation for licensure from his supervisor.

D. If the licensee holds licensure in any other state or jurisdiction, he shall provide evidence that no disciplinary action is pending or unresolved. The board may deny a request for reactivation to any licensee who has been determined to have committed an act in violation of 18VAC30-21-160.

**18VAC30-21-120. Reinstatement of a lapsed license for audiologists or speech-language pathologists.**

A. When a license has not been renewed within one year of the expiration date, a person may apply to reinstate his license by submission of a reinstatement application, payment of the reinstatement fee, and submission of documentation of current ASHA certification or at least 10 continuing education hours for each year the license has been lapsed, not to exceed 30 contact hours, obtained during the time the license in Virginia was lapsed.

B. A licensee who does not reinstate within five years shall meet the requirements of subsection A of this section and shall either:

1. Reinstate by meeting the requirements for initial licensure as prescribed by 18VAC30-21-60; or

2. Provide documentation of a current license in another United States jurisdiction and evidence of active practice for at least one of the past three years or practice in accordance with 18VAC30-21-70 with a provisional license for six months and submit a recommendation for licensure from his supervisor.

C. If the licensee holds licensure in any other state or jurisdiction, he shall provide evidence that no disciplinary action is pending or unresolved. The board may deny a request for reinstatement to any licensee who has been determined to have committed an act in violation of 18VAC30-21-160.

**18VAC30-21-130. Reactivation or reinstatement of a school speech-language pathologist.**

A. A school speech-language pathologist whose license has been inactive and who requests reactivation of an active license shall file an application and pay the difference between the inactive and active renewal fees for the current year. A school speech-language pathologist whose license has lapsed and who requests reinstatement shall file an application and pay the reinstatement fee as set forth in 18VAC30-20-40.

B. The board may reactivate or reinstate licensure as a school speech-language pathologist to an applicant who:

1. Holds a master's degree in speech-language-pathology; and

2. Holds a current endorsement in speech-language pathology from the Virginia Department of Education.

C. The board may deny a request for reactivation or reinstatement to any licensee who has been determined to have committed an act in violation of 18VAC30-21-160.

Part V
Standards of Practice

**18VAC30-21-140. Supervision of unlicensed assistants.**

A. If a licensed audiologist or speech-language pathologist has unlicensed assistants, he shall document supervision of them, shall be held fully responsible for their performance and activities, and shall ensure that they perform only those activities which do not constitute the practice of audiology or speech-language pathology and which are commensurate with their level of training.

B. A licensee may delegate to an unlicensed assistant such activities or functions that are nondiscretionary and do not require the exercise of professional judgment for their performance.

C. The identity of the unlicensed assistant shall be disclosed to the client prior to treatment and shall be made a part of the client's file.

**18VAC30-21-150. Prohibited conduct.**

A. No person, unless otherwise licensed to do so, shall prepare, order, dispense, alter, or repair hearing aids or parts of or attachments to hearing aids for consideration. However, audiologists licensed under this chapter may make earmold impressions and prepare and alter earmolds for clinical use and research.

B. No person licensed as a school speech-language pathologist shall conduct the practice of speech-language pathology outside of the public school setting.

**18VAC30-21-160. Unprofessional conduct.**

The board may refuse to issue a license to any applicant, suspend a license for a stated period of time or indefinitely, reprimand a licensee or place his license on probation with such terms and conditions and for such time as it may designate, impose a monetary penalty, or revoke a license for any of the following:

1. Guarantee of the results of any speech, voice, language, or hearing consultative or therapeutic procedure or exploitation of clients by accepting them for treatment when benefit cannot reasonably be expected to occur or by continuing treatment unnecessarily;

2. Diagnosis or treatment of speech, voice, language, and hearing disorders solely by written correspondence, provided this shall not preclude:

a. Follow-up by written correspondence or electronic communication concerning individuals previously seen; or

b. Providing clients with general information of an educational nature;

3. Failure to comply with provisions of § 32.1-127.1:03 of the Code of Virginia related to the confidentiality and disclosure of client records or related to provision of client records to another practitioner or to the client or his personal representative;

4. Failure to properly manage and keep timely, accurate, legible, and complete client records, to include the following:

a. For licensees who are employed by a health care institution, school system, or other entity, in which the individual practitioner does not own or maintain his own records, failure to maintain client records in accordance with the policies and procedures of the employing entity; or

b. For licensees who are self-employed or employed by an entity in which the individual practitioner does own and is responsible for client records, failure to maintain a client record for a minimum of six years following the last client encounter with the following exceptions:

(1) For records of a minor child, the minimum time is six years from the last client encounter or until the child reaches the age of 18 or becomes emancipated, whichever is longer; or

(2) Records that have previously been transferred to another practitioner or health care provider or provided to the client or his personal representative as documented in a record or database maintained for a minimum of six years;

5. Engaging or attempting to engage in a relationship with a client that constitutes a professional boundary violation in which the practitioner uses his professional position to take advantage of the vulnerability of a client or a client's family, including but not limited to sexual misconduct with a client or a member of the client's family or other conduct that results or could result in personal gain at the expense of the client;

6. Incompetence or negligence in the practice of the profession;

7. Failure to comply with applicable state and federal statutes or regulations specifying the consultations and examinations required prior to the fitting of a new or replacement prosthetic aid for any communicatively impaired person;

8. Failure to refer a client to an appropriate health care practitioner when there is evidence of an impairment for which assessment, evaluation, care, or treatment might be necessary;

9. Failure to supervise persons who assist in the practice of audiology or speech-language pathology as well as failure to disclose the use and identity of unlicensed assistants;

10. Conviction of a felony or a misdemeanor involving moral turpitude;

11. Violating or cooperating with others in violating any of the provisions of Chapters 1 (§ 54.1-100 et seq.), 24 (§ 54.1-2400 et seq.), or 26 (§ 54.1-2600 et seq.) of Title 54 of the Code of Virginia or the regulations of the board;

12. Publishing or causing to be published in any manner an advertisement relating to his professional practice that is false, deceptive, or misleading;

13. Inability to practice with skill and safety;

14. Fraud, deceit, or misrepresentation in provision of documentation or information to the board or in the practice of audiology or speech-language pathology;

15. Aiding and abetting unlicensed activity; or

16. Revocation, suspension, restriction, or any other discipline of a license or certificate to practice or surrender of license or certificate while an investigation or administrative proceedings are pending in another regulatory agency in Virginia or another jurisdiction.

**18VAC30-21-170. Criteria for delegation to an agency subordinate.**

A. Decision to delegate. In accordance with subdivision 10 of § 54.1-2400 of the Code of Virginia, the board may delegate an informal fact-finding proceeding to an agency subordinate upon determination that probable cause exists that a practitioner may be subject to a disciplinary action.

B. Criteria for delegation. Cases that may not be delegated to an agency subordinate are those that involve:

1. Intentional or negligent conduct that causes or is likely to cause injury to a patient;

2. Mandatory suspension resulting from action by another jurisdiction or a felony conviction;

3. Impairment with an inability to practice with skill and safety;

4. Sexual misconduct;

5. Unauthorized practice.

C. Criteria for an agency subordinate.

1. An agency subordinate authorized by the board to conduct an informal fact-finding proceeding may include board members and professional staff or other persons deemed knowledgeable by virtue of their training and experience in administrative proceedings involving the regulation and discipline of health professionals.

2. The executive director shall maintain a list of appropriately qualified persons to whom an informal fact-finding proceeding may be delegated.

3. The board may delegate to the executive director the selection of the agency subordinate who is deemed appropriately qualified to conduct a proceeding based on the qualifications of the subordinate and the type of case being heard.

NOTICE: The following forms used in administering the regulation were filed by the agency. The forms are not being published; however, online users of this issue of the Virginia Register of Regulations may click on the name of a form with a hyperlink to access it. The forms are also available from the agency contact or may be viewed at the Office of the

Registrar of Regulations, General Assembly Building, 2nd Floor, Richmond, Virginia 23219.

FORMS (18VAC30-21)

Board of Audiology and Speech-Language Pathology Continuing Education Affidavit Form (rev. 3/2015)

VA.R. Doc. No. R11-2759; Filed October 26, 2015, 10:51 a.m.

## BOARD OF FUNERAL DIRECTORS AND EMBALMERS

### Final Regulation

Title of Regulation: **18VAC65-20. Regulations of the Board of Funeral Directors and Embalmers (amending 18VAC65-20-436).**

Statutory Authority: § 54.1-2400 of the Code of Virginia.

Effective Date: December 16, 2015.

Agency Contact: Lisa Russell Hahn, Executive Director, Board of Funeral Directors and Embalmers, 9960 Mayland Drive, Suite 300, Richmond, VA 23233-1463, telephone (804) 367-4424, FAX (804) 527-4637, or email lisa.hahn@dhp.virginia.gov.

Summary:

*The amendments (i) specify that a decedent may be identified by viewing unique identifiers or markings on the remains and (ii) clarify that crematories must consult with law enforcement, a medical examiner, or medical personnel before identifying a body when visual identification is not possible.*

Summary of Public Comments and Agency's Response: No public comments were received by the promulgating agency.

**18VAC65-20-436. Standards for registered crematories or funeral establishments relating to cremation.**

A. Authorization to cremate.

1. A crematory shall require a cremation authorization form executed in person or electronically in a manner that provides a copy of an original signature in accordance with § 54.1-2818.1 of the Code of Virginia.

2. The cremation authorization form shall include an attestation of visual identification of the deceased from a viewing of the remains or a photograph signed by the person making the identification. Visual identification may be made by viewing unique identifiers or markings on the remains. The identification attestation shall either be given on the cremation authorization form or on an identification form attached to the cremation authorization form.

3. In the event visual identification is not feasible, a crematory may use other positive identification of the deceased in consultation with law enforcement, a medical examiner, or medical personnel as a prerequisite for cremation pursuant to § 54.1-2818.1 of the Code of Virginia.

B. Standards for cremation. The following standards shall be required for every crematory:

1. Every crematory shall provide evidence at the time of an inspection of a permit to operate issued by the Department of Environmental Quality (DEQ).

2. A crematory shall not knowingly cremate a body with a pacemaker, defibrillator or other potentially hazardous implant in place.

3. A crematory shall not cremate the human remains of more than one person simultaneously in the same retort, unless the crematory has received specific written authorization to do so from the person signing the cremation authorization form.

4. A crematory shall not cremate nonhuman remains in a retort permitted by DEQ for cremation of human remains.

5. Whenever a crematory is unable to cremate the remains within 24 hours upon taking custody thereof, the crematory shall maintain the remains in refrigeration at approximately 40° Fahrenheit or less, unless the remains have been embalmed.

C. Handling of human remains.

1. Human remains shall be transported to a crematory in a cremation container and shall not be removed from the container unless the crematory has been provided with written instructions to the contrary by the person who signed the authorization form. A cremation container shall substantially meet all the following standards:

a. Be composed of readily combustible materials suitable for cremation;

b. Be able to be closed in order to provide complete covering for the human remains;

c. Be resistant to leakage or spillage; and

d. Be rigid enough for handling with ease.

2. No crematory shall require that human remains be placed in a casket before cremation nor shall it require that the cremains be placed in a cremation urn, cremation vault or receptacle designed to permanently encase the cremains after cremation. Cremated remains shall be placed in a plastic bag inside a rigid container provided by the crematory or by the next-of-kin for return to the funeral establishment or to the next-of-kin. If cremated remains are placed in a biodegradable container, a biodegradable bag shall be used. If placed in a container designed for scattering, the cremated remains may be placed directly into the container if the next-of-kin so authorized in writing.

3. The identification of the decedent shall be physically attached to the remains and appropriate identification placed on the exterior of the cremation container. The crematory operator shall verify the identification on the remains with the identification attached to the cremation container and with the identification attached to the

cremation authorization. The crematory operator shall also verify the identification of the cremains and place evidence of such verification in the cremation record.

D. Recordkeeping. A crematory shall maintain the records of cremation for a period of three years from the date of the cremation that indicate the name of the decedent, the date and time of the receipt of the body, and the date and time of the cremation and shall include:

1. The cremation authorization form signed by the person authorized by law to dispose of the remains and the form on which the next-of-kin or the person authorized by § 54.1-2818.1 of the Code of Virginia to make the identification has made a visual identification of the deceased or evidence of positive identification if visual identification is not feasible;

2. The permission form from the medical examiner;

3. The DEQ permit number of the retort used for the cremation and the name of the retort operator; and

4. The form verifying the release of the cremains, including date and time of release, the name of the person and the entity to whom the cremains were released and the name of the decedent.

VA.R. Doc. No. R13-2543; Filed October 23, 2015, 2:23 p.m.

## Fast-Track Regulation

Title of Regulation: **18VAC65-20. Regulations of the Board of Funeral Directors and Embalmers (amending 18VAC65-20-436).**

Statutory Authority: § 54.1-2400 of the Code of Virginia.

Public Hearing Information: No public hearings are scheduled.

Public Comment Deadline: December 16, 2015.

Effective Date: January 15, 2016.

Agency Contact: Lisa Russell Hahn, Executive Director, Board of Funeral Directors and Embalmers, 9960 Mayland Drive, Suite 300, Richmond, VA 23233-1463, telephone (804) 367-4424, FAX (804) 527-4637, or email lisa.hahn@dhp.virginia.gov.

Basis: Section 54.1-2400 of the Code of Virginia establishes the general powers and duties of health regulatory boards including the responsibility of the Board of Funeral Directors and Embalmers to promulgate regulations and to administer a registration program. Section 54.1-2814.1 of the Code of Virginia authorizes the board to prescribe procedures for registration as a cremator.

Purpose: The goal of the proposal is to allow use of a more efficient and cost-effective retort or unit that emits fewer air particulates and uses less fuel. Those aspects of the unit contribute to efforts to protect the environment and the health and safety of the public.

Rationale for Using Fast-Track Process: This amendment updates the current regulation for consistency with newer technology but maintains the policy of not allowing the commingling of cremains by a crematory. The amendment will facilitate but not mandate usage of the newer type of retort or unit; it is not controversial and was unanimously supported by board members.

Substance: Currently, regulations do not allow a crematory to cremate the human remains of more than one person simultaneously in the same retort or cremation unit. This amendment will allow cremation of more than one person provided the remains are separated into different chambers within the same retort or unit.

Issues: The primary advantage to the public is the fuel efficiency and the emission of fewer air particulates; it will facilitate usage of a more efficient cremation unit by crematories. There are no disadvantages because the policy of separating cremains is not amended.

There are no advantages and disadvantages to the agency or the Commonwealth.

Department of Planning and Budget's Economic Impact Analysis:

Summary of the Proposed Amendments to Regulation. The Board of Funeral Directors and Embalmers (Board) proposes to allow crematories to use a newer and more fuel efficient cremation technology.

Result of Analysis. The benefits likely exceed the costs for all proposed changes.

Estimated Economic Impact. These regulations establish standards for crematories. Currently, crematories are not allowed to cremate human remains of more than one person simultaneously in the same retort or cremation unit. However, according to Department of Health Professions (DHP), there are new retort units with multiple incineration chambers available in the cremation industry which make it possible to cremate the remains of more than one person simultaneously without comingling the cremains.

The Board proposes to allow the use of the newer cremation technology provided the remains are separated into different chambers within the same retort or unit. According to DHP, the units with multiple chambers are more fuel efficient. They also take up less space than two single units. Thus, crematories that utilize such technology are likely to realize some savings in their fuel and space costs and emit fewer air particulates.

Businesses and Entities Affected. The proposed regulations will affect crematories that choose to use the newer type of cremation units. While the Board has no data on the type of cremation units used by crematories, there are currently a total of 106 licensed crematories in Virginia.

Localities Particularly Affected. The proposed regulations apply throughout the Commonwealth.

Projected Impact on Employment. The proposed changes are unlikely to significantly affect employment.

Effects on the Use and Value of Private Property. The proposed changes will allow the use of more fuel efficient technology and make it possible for crematories to realize some savings if they invest in newer technology. Thus, a small positive impact on their profitability and value may be expected if they choose to implement the new technology.

Small Businesses: Costs and Other Effects. The proposed changes do not impose any costs on small businesses. All crematories are considered small businesses. Thus, other effects on small businesses are the same as discussed above.

Small Businesses: Alternative Method that Minimizes Adverse Impact. The proposed changes do not have an adverse impact on small businesses.

Real Estate Development Costs. No impact on real estate development costs is expected.

Agency's Response to Economic Impact Analysis: The Board of Funeral Directors and Embalmers concurs with the analysis of the Department of Planning and Budget for amendments to 18VAC65-20.

Summary:

*The amendments allow a crematory to cremate human remains of more than one person in the same unit provided the remains and ashes are kept in separate chambers.*

**18VAC65-20-436. Standards for registered crematories or funeral establishments relating to cremation.**

A. Authorization to cremate.

1. A crematory shall require a cremation authorization form executed in person or electronically in a manner that provides a copy of an original signature in accordance with § 54.1-2818.1 of the Code of Virginia.

2. The cremation authorization form shall include an attestation of visual identification of the deceased from a viewing of the remains or a photograph signed by the person making the identification. The identification attestation shall either be given on the cremation authorization form or on an identification form attached to the cremation authorization form.

3. In the event visual identification is not feasible, a crematory may use other positive identification of the deceased as a prerequisite for cremation pursuant to § 54.1-2818.1 of the Code of Virginia.

B. Standards for cremation. The following standards shall be required for every crematory:

1. Every crematory shall provide evidence at the time of an inspection of a permit to operate issued by the Department of Environmental Quality (DEQ).

2. A crematory shall not knowingly cremate a body with a pacemaker, defibrillator or other potentially hazardous implant in place.

3. A crematory shall not cremate the human remains of more than one person simultaneously in the same ~~retort~~ chamber of the retort or cremation unit, unless the crematory has received specific written authorization to do so from the person signing the cremation authorization form.

4. A crematory shall not cremate nonhuman remains in a retort permitted by DEQ for cremation of human remains.

5. Whenever a crematory is unable to cremate the remains within 24 hours upon taking custody thereof, the crematory shall maintain the remains in refrigeration at approximately 40° Fahrenheit or less, unless the remains have been embalmed.

C. Handling of human remains.

1. Human remains shall be transported to a crematory in a cremation container and shall not be removed from the container unless the crematory has been provided with written instructions to the contrary by the person who signed the authorization form. A cremation container shall substantially meet all the following standards:

a. Be composed of readily combustible materials suitable for cremation;

b. Be able to be closed in order to provide complete covering for the human remains;

c. Be resistant to leakage or spillage; and

d. Be rigid enough for handling with ease.

2. No crematory shall require that human remains be placed in a casket before cremation nor shall it require that the cremains be placed in a cremation urn, cremation vault or receptacle designed to permanently encase the cremains after cremation. Cremated remains shall be placed in a plastic bag inside a rigid container provided by the crematory or by the next-of-kin for return to the funeral establishment or to the next-of-kin. If cremated remains are placed in a biodegradable container, a biodegradable bag shall be used. If placed in a container designed for scattering, the cremated remains may be placed directly into the container if the next-of-kin so authorized in writing.

3. The identification of the decedent shall be physically attached to the remains, and appropriate identification placed on the exterior of the cremation container. The crematory operator shall verify the identification on the remains with the identification attached to the cremation container and with the identification attached to the cremation authorization. The crematory operator shall also verify the identification of the cremains and place evidence of such verification in the cremation record.

D. Recordkeeping. A crematory shall maintain the records of cremation for a period of three years from the date of the cremation that indicate the name of the decedent, the date and time of the receipt of the body, and the date and time of the cremation and shall include:

1. The cremation authorization form signed by the person authorized by law to dispose of the remains and the form

on which the next-of-kin or the person authorized by § 54.1-2818.1 of the Code of Virginia to make the identification has made a visual identification of the deceased or evidence of positive identification if visual identification is not feasible;

2. The permission form from the medical examiner;

3. The DEQ permit number of the retort used for the cremation and the name of the retort operator; and

4. The form verifying the release of the cremains, including date and time of release, the name of the person and the entity to whom the cremains were released and the name of the decedent.

VA.R. Doc. No. R16-4279; Filed October 23, 2015, 4:09 p.m.

## BOARD OF MEDICINE

### Fast-Track Regulation

Title of Regulation: **18VAC85-140. Regulations Governing the Practice of Polysomnographic Technologists (amending 18VAC85-140-60, 18VAC85-140-70, 18VAC85-140-90).**

Statutory Authority: § 54.1-2400 of the Code of Virginia.

Public Hearing Information: No public hearings are scheduled.

Public Comment Deadline: December 16, 2015.

Effective Date: January 15, 2016.

Agency Contact: William L. Harp, M.D., Executive Director, Board of Medicine, 9960 Mayland Drive, Suite 300, Richmond, VA 23233, telephone (804) 367-4558, FAX (804) 527-4429, or email william.harp@dhp.virginia.gov.

Basis: Section 54.1-2400 of the Code of Virginia provides the Board of Medicine the general authority to promulgate regulations to administer the regulatory system. Section 54.1-2957.15 of the Code of Virginia requires an individual practicing as a polysomnograhpic technologist to be licensed by the board.

Purpose: The purpose of the amendments is to (i) correct the reference to the body that accredits professional organizations and (ii) clarify that the CPR course required for licensure and renewal of licensure is a hands-on course for health care providers. The amendment to specify that the course required is Basic Life Support for Health Care Providers is essential to ensure that these practitioners are actually able to perform rescue techniques if a client experiences respiratory or cardiac arrest. Polysomnographic technologists are often the only health care providers available when a sleep study is being conducted; their knowledge and skill in resuscitation techniques are necessary to protect public health and safety.

Rationale for Using Fast-Track Process: There is no controversy in the adoption of these amendments; they are strongly recommended by the Advisory Board on Polysomnographic Technology and by the staff of the Board of Medicine.

Substance: The amended regulations (i) correct the name of the national organization that accredited certifying or credentialing bodies from the National Organization for Competency Assurance to its new name, the Institute for Credentialing Excellence, and (ii) specify the required course is the Basic Life Support (BLS) for Health Care Providers with a hands-on practice training evaluation segment.

Issues: The primary advantage to the public is assurance that polysomnographic technologists conducting sleep studies are appropriately trained in BLS for Health Care Providers. There are no disadvantages.

There are no advantages or disadvantages to the agency or the Commonwealth.

Department of Planning and Budget's Economic Impact Analysis:

Summary of the Proposed Amendments to Regulation. The Board of Medicine (Board) proposes to: 1) within this regulation update the name of the national organization that accredits certifying or credentialing bodies, and 2) clarify which cardiopulmonary resuscitation course is required for polysomnographic technologist licensure.

Result of Analysis. The benefits likely exceed the costs for all proposed changes.

Estimated Economic Impact. Polysomnographic technologists work with licensed physicians to monitor, test, and treat individuals who suffer from sleep disorders. Chapter 838 of the 2010 Acts of Assembly directed the Board to begin licensing this profession and to develop the associated regulatory requirements. The initial regulations establishing licensure for this profession became effective on December 31, 2014.

One of the requirements for polysomnographic technologist licensure is documentation of a relevant certification or credential. One of the three choices for demonstrating a relevant certification or credential is described as follows: "A professional certification or credential approved by the board from an organization or entity that is a member of the National Organization for Competency Assurance." The entity formerly known as the National Organization for Competency Assurance is now called the Institute for Credentialing Excellence. The Board proposes to amend the regulation to reflect the current name of this entity. This proposed change may produce a moderate benefit in that it may save some individuals some wasted time searching for organizations that are members of an entity name that no longer applies.

The regulation text specifies that current certification in Basic Cardiac Life Support with a hands-on practice training evaluation segment is required for both initial licensure and license renewal. There has been some confusion among potential licensees as toward which existing courses would satisfy this requirement. The Board proposes to change "Basic Cardiac Life Support" to "Basic Life Support for

Health Care Providers," the actual name of the course they must take. This proposed change may also provide some moderate benefit in that it will likely reduce confusion and perhaps save time for potential polysomnographic technologist licensees.

Businesses and Entities Affected. The proposed amendments affect polysomnographic technologists applying for licensure or renewal of licensure. The initial regulations establishing licensure for this profession became effective on December 31, 2014. Thus far 28 individuals have become licensed as polysomnographic technologists.[1]

Localities Particularly Affected. The proposed amendments do not disproportionately affect particular localities.

Projected Impact on Employment. The proposed amendments are unlikely to significantly affect employment.

Effects on the Use and Value of Private Property. The proposed amendments are unlikely to significantly affect the use and value of private property.

Small Businesses: Costs and Other Effects. The proposed amendments will not increase costs for small businesses.

Small Businesses: Alternative Method that Minimizes Adverse Impact. The proposed amendments do not adversely affect small businesses.

Real Estate Development Costs. The proposed amendments do not significantly affect real estate development costs.

[1]Date source: Department of Health Professions

Agency's Response to Economic Impact Analysis: The Board of Medicine concurs with the economic impact analysis.

Summary:

*The amendments (i) correct the name of the national organization that accredits certifying or credentialing bodies from the National Organization for Competency Assurance to its new name, the Institute for Credentialing Excellence, and (ii) specify that the required cardiopulmonary resuscitation course for polysomnographic technologist licensure is the Basic Life Support for Health Care Providers with a hands-on practice training evaluation segment.*

**18VAC85-140-60. Licensure requirements.**

A. An applicant for a license to practice as a polysomnographic technologist shall provide documentation of one of the following:

1. Current certification as a Registered Polysomnographic Technologist (RPSGT) by the Board of Registered Polysomnographic Technologists;

2. Documentation of the Sleep Disorders Specialist credential from the National Board of Respiratory Care (NBRC-SDS); or

3. A professional certification or credential approved by the board from an organization or entity that ~~is a member of the National Organization for Competency Assurance~~ meets the accreditation standards of the Institute for Credentialing Excellence.

B. An applicant for licensure shall provide documentation of current certification in Basic ~~Cardiac~~ Life Support for Health Care Providers with a hands-on practice training evaluation segment.

Part III
Renewal and Reinstatement

**18VAC85-140-70. Renewal of license.**

A. Every licensed polysomnographic technologist who intends to maintain an active license shall biennially renew his license each odd-numbered year during his birth month and shall:

1. Submit the prescribed renewal fee;

2. Attest to having current certification in Basic ~~Cardiac~~ Life Support ~~(BCLS)~~ for Health Care Providers with a hands-on practice training evaluation segment; and

3. Attest to having met the continuing education requirements of 18VAC85-140-100.

B. The license of a polysomnographic technologist is lapsed if the license has not been renewed by the first day of the month following the month in which renewal is required. Practice with a lapsed license may be grounds for disciplinary action. A license that is lapsed for two years or less may be renewed by payment of the renewal fee and a late fee as prescribed in 18VAC85-140-40 and attestation of compliance with continuing education requirements and current ~~BCLS~~ Basic Life Support for Health Care Providers with a hands-on practice training evaluation segment certification.

**18VAC85-140-90. Reactivation or reinstatement.**

A. To reactivate an inactive license or to reinstate a license that has been lapsed for more than two years, a polysomnographic technologist shall submit an attestation of current certification in Basic ~~Cardiac~~ Life Support ~~(BCLS)~~ for Health Care Providers with a hands-on practice training evaluation segment and evidence of competency to return to active practice to include one of the following:

1. Information on continued active practice in another jurisdiction during the period in which the license has been inactive or lapsed;

2. Attestation of at least 10 hours of continuing education for each year in which the license has been inactive or lapsed, not to exceed three years; or

3. Recertification by passage of an examination for the Registered Polysomnographic Technologist (RPSGT), the Sleep Disorders Specialist credential from the National Board of Respiratory Care (NBRC-SDS), or other credential approved by the board for initial licensure.

B. To reactivate an inactive license, a polysomnographic technologist shall pay a fee equal to the difference between

the current renewal fee for inactive licensure and the renewal fee for active licensure.

C. To reinstate a license that has been lapsed for more than two years, a polysomnographic technologist shall file an application for reinstatement and pay the fee for reinstatement of his licensure as prescribed in 18VAC85-140-40. The board may specify additional requirements for reinstatement of a license so lapsed to include education, experience, or reexamination.

D. A polysomnographic technologist whose licensure has been revoked by the board and who wishes to be reinstated shall make a new application to the board, fulfill additional requirements as specified in the order from the board, and make payment of the fee for reinstatement of his licensure as prescribed in 18VAC85-140-40 pursuant to § 54.1-2408.2 of the Code of Virginia.

E. The board reserves the right to deny a request for reactivation or reinstatement to any licensee who has been determined to have committed an act in violation of § 54.1-2915 of the Code of Virginia or any provisions of this chapter.

VA.R. Doc. No. R16-4275; Filed October 23, 2015, 4:09 p.m.

## BOARD OF PSYCHOLOGY

### Fast-Track Regulation

Title of Regulation: **18VAC125-30. Regulations Governing the Certification of Sex Offender Treatment Providers (amending 18VAC125-30-20 through 18VAC125-30-50, 18VAC125-30-70, 18VAC125-30-80, 18VAC125-30-100).**

Statutory Authority: §§ 54.1-2400 and 54.1-3605 of the Code of Virginia.

Public Hearing Information: No public hearings are scheduled.

Public Comment Deadline: December 16, 2015.

Effective Date: January 15, 2016.

Agency Contact: Jaime Hoyle, Executive Director, Board of Psychology, 9960 Mayland Drive, Suite 300, Richmond, VA 23233, telephone (804) 367-4406, FAX (804) 327-4435, or email jaime.hoyle@dhp.virginia.gov.

Basis: Section 54.1-2400 of the Code of Virginia establishes the general powers and duties of health regulatory boards including the responsibility to promulgate regulations. Section 54.1-3605 of the Code of Virginia authorizes the Board of Psychology to promulgate regulations for certification of sex offender treatment providers.

Purpose: The purpose of the amendments is clarification of qualifications for certification and for those who supervise the experience of trainees preparing for certification. Further clarification and specificity may improve the quality and competency of applicants. Likewise, amendments to the standards of practice will provide clear authority for the board to refuse to issue a certificate to an applicant who is found in violation of one of the specified standards. Adherence to the standards of practice in the profession assures that a certificate holder will not face disciplinary action and is able to protect the health, safety, and welfare of his clients. The cliental of this profession can present significant risk of harm to the public, so the board has a unique responsibility for assuring that providers are competent and compliant with accepted standards of practice.

Rationale for Using Fast-Track Process: The board did not adopt any recommended changes that were more restrictive or burdensome, therefore, the board does not expect any of the changes to be controversial or consequential.

Substance: Amendments will: 1) delete a "comparable degree" as an acceptable educational credential to eliminate language that may be confusing to applicants; 2) clarify the types of licenses one must hold to qualify as a supervisor for clinical experience; 3) allow acceptance of continuing education hours offered by one of the state chapters of the Association for the Treatment of Sexual Abusers; 4) specify that the standards of practice apply to applicants as well as certificate holders; and 5) add romantic relationships with clients or trainees as grounds for unprofessional conduct.

Issues: The primary advantage of the amendments is clarification of current rules and practices. There are no disadvantages to the public. There are no advantages or disadvantages to the Commonwealth.

Department of Planning and Budget's Economic Impact Analysis:

Summary of the Proposed Amendments to Regulation. The Board of Psychology (Board) proposes to amend its Regulations Governing the Certification of Sex Offender Treatment Providers to 1) make several clarifying changes to regulatory text, 2) specify that an applicant providing services under supervision must also abide by the regulation's standards of practice and 3) add romantic relationships with clients or trainees as unprofessional conduct.

Result of Analysis. Benefits likely outweigh costs for these proposed regulatory changes.

Estimated Economic Impact. The Board proposes several clarifying changes to this regulation's text that will not change any entity's rights or responsibilities but should make the regulation easier to understand. The Board proposes, for instance, to specify what licensure (doctor of medicine licensure, clinical nurse specialist licensure, etc.) would be needed to serve as a supervisor for a sex offender treatment provider trainee, rather than just stating that supervisors shall provide supervision only for sex offender treatment services that they are qualified to render. No entity is likely to incur costs on account of proposed changes that are meant solely to clarify licensure rules. To the extent that these changes may reduce confusion about these rules, interested individuals will benefit.

The current regulation specifies that the regulation's standards of practice apply to "persons certified by the Board." Code of Virginia § 54.1-2400(7), however, gives the Board the authority to refuse to issue a certificate for "causes enumerated in applicable law and regulations"… including this regulation's standards of practice. The Board now proposes to add applicants under supervision to those subject to the standards of practice so that they know they are expected to follow them and may be denied certification if they do not. Trainees are likely to benefit from this change as they are more likely to know to what standards they will be held.

This regulation currently prohibits that certificate holders from engaging in sexual intimacy with clients or with trainees under their supervision. The Board proposes to also prohibit certificate holders from having romantic relationships with these same entities, presumably even if there is no sexual component to the relationship. This change will benefit clients and trainees as it will prohibit relationships where there is an inherent power imbalance.

Businesses and Entities Affected. Board staff reports that the Board currently certifies 408 sex offender treatment providers. All of these entities, as well as any future trainees and certificate holders, will be affected by these proposed regulatory changes.

Localities Particularly Affected. No locality will be particularly affected by this proposed regulatory action.

Projected Impact on Employment. This regulatory action is unlikely to have an effect on employment in the Commonwealth.

Effects on the Use and Value of Private Property. This regulatory action is unlikely to affect the use or value of any private property.

Small Businesses: Costs and Other Effects. No small businesses will incur costs on account of this regulatory action.

Small Businesses: Alternative Method that Minimizes Adverse Impact. No small businesses will incur costs on account of this regulatory action.

Real Estate Development Costs. This regulatory action will likely have no effect on real estate development costs in the Commonwealth.

Agency's Response to Economic Impact Analysis: The Board of Psychology concurs with the analysis of the Department of Planning and Budget on proposed amendments pursuant to a periodic review of regulations.

Summary:

*The amendments (i) delete "comparable degree" as an acceptable educational credential; (ii) clarify the types of licenses that must be held to qualify as a supervisor for clinical experience; (iii) allow acceptance of continuing education hours offered by one of the state chapters of the Association for the Treatment of Sexual Abusers; (iv) specify that the standards of practice apply to applicants as well as certificate holders; and (v) add romantic relationships with clients or trainees as grounds for unprofessional conduct.*

**18VAC125-30-20. Fees required by the board.**

A. The board has established the following fees applicable to the certification of sex offender treatment providers:

| | |
|---|---|
| Registration of supervision | $50 |
| Add or change supervisor | $25 |
| Application processing and initial certification fee | $90 |
| Certification renewal | $75 |
| Duplicate certificate | $5 |
| Late renewal | $25 |
| Reinstatement of an expired certificate | $125 |
| Replacement of or additional wall certificate | $15 |
| Returned check | $35 |
| Reinstatement following revocation or suspension | $500 |
| One-time reduction in fee for renewal on June 30, 2014 | $52 |

B. Fees shall be ~~paid by check or money order~~ made payable to the Treasurer of Virginia ~~and forwarded to the Board of Psychology~~. All fees are nonrefundable.

Part II
Requirements for Certification

**18VAC125-30-30. Prerequisites to certification.**

A. Every applicant for certification by the board shall:

1. Meet the educational requirements prescribed in 18VAC125-30-40;

2. Meet the experience requirements prescribed in 18VAC125-30-50;

3. Submit to the ~~executive director of the~~ board:

a. A completed application form;

b. Documented evidence of having fulfilled the education, experience, and supervision set forth in 18VAC125-30-40 and 18VAC125-30-50; and

c. Reference letters from three licensed health care professionals familiar with and attesting to the applicant's skills and experience.

B. The board may certify by endorsement an individual who can document current certification as a sex offender treatment provider in good standing obtained by standards substantially

equivalent to those outlined in this chapter as verified by an out-of-state certifying agency on a board-approved form.

**18VAC125-30-40. Educational requirements.**

An applicant for certification as a sex offender treatment provider shall:

1. Document completion of one of the following degrees:

a. A master's or doctoral degree in social work, psychology, counseling, or nursing from a regionally accredited university; or

b. The degree of Doctor of Medicine or Doctor of Osteopathic Medicine from an institution that is approved by an accrediting agency recognized by the Virginia Board of Medicine~~; or~~

~~c. A comparable degree acceptable to the board~~.

Graduates of institutions that are not accredited by an acceptable accrediting agency shall establish the equivalency of their education to the educational requirements of the Virginia Board of Social Work, Psychology, Counseling, Nursing or Medicine.

2. Provide documentation of 50 clock hours of training acceptable to the board in the following areas, with 15 clock hours in each area identified in subdivisions 2 a and b of this section, 10 clock hours in each area identified in subdivision 2 c of this section, and five clock hours in each area identified in subdivisions 2 d and e of this section:

a. Sex offender assessment;

b. Sex offender treatment interventions;

c. Etiology/developmental issues of sex offense behavior;

d. Criminal justice and legal issues related to sexual offending; and

e. Program evaluation, treatment efficacy, and issues related to recidivism of sex offenders.

**18VAC125-30-50. Experience requirements; supervision.**

A. Registration of supervision.

1. In order to register supervision with the board, individuals shall submit:

a. A completed supervisory contract;

b. The registration fee prescribed in 18VAC125-30-20; and

c. Official graduate transcript.

2. The board may waive the registration requirement for individuals who have obtained at least five years documented work experience in sex offender treatment in another jurisdiction.

B. An applicant for certification as a sex offender treatment provider shall provide documentation of having 2,000 hours of postdegree clinical experience in the delivery of clinical assessment/treatment services. At least 200 hours of this experience must be face-to-face treatment and assessment with sex offender clients.

1. The experience shall include a minimum of 100 hours of face-to-face supervision within the 2,000 hours experience with a minimum of six hours per month. A minimum of 50 hours shall be in individual face-to-face supervision. Face-to-face supervision obtained in a group setting shall include no more than six trainees in a group.

2. If the applicant has obtained the required postdegree clinical experience for a mental health license within the past 10 years, he can receive credit for those hours that were in the delivery of clinical assessment/treatment services with sex offender clients provided:

a. The applicant can document that the hours were in the treatment and assessment with sex offender clients; and

b. The supervisor for those hours can attest that he ~~is~~ was licensed and qualified to render services to sex offender clients at the time of the supervision.

~~B.~~ C. Supervised experience obtained in Virginia without prior written board approval shall not be accepted toward certification. Candidates shall not begin the experience until after completion of the required degree as set forth in 18VAC125-30-40. An individual who proposes to obtain supervised postdegree experience in Virginia shall, prior to the onset of such supervision, submit a supervisory contract along with the application package and pay the registration of supervision fee set forth in 18VAC125-30-20.

~~C.~~ D. The supervisor.

1. The supervisor shall assume responsibility for the professional activities of the applicant.

2. The supervisor shall not provide supervision for activities for which the prospective applicant has not had appropriate education.

3. The supervisor shall hold a current and unrestricted license as a clinical nurse specialist, doctor of medicine or osteopathic medicine, professional counselor, clinical social worker, or clinical psychologist and shall provide supervision only for those sex offender treatment services which he is qualified to render.

4. At the time of formal application for certification, the board approved supervisor shall document for the board the applicant's total hours of supervision, length of work experience, competence in sex offender treatment, and ~~any~~ needs for additional supervision or training.

~~D. Registration of supervision.~~

~~1. In order to register supervision with the board, individuals shall submit in one package:~~

~~a. A completed supervisory contract;~~

~~b. The registration fee prescribed in 18VAC125-30-20; and~~

~~c. Official graduate transcript.~~

~~2. The board may waive the registration requirement for individuals who have obtained at least five years~~

~~documented work experience in sex offender treatment in another jurisdiction.~~

~~E. Supervised experience obtained prior to April 10, 2002, may be acceptable if they met the board's requirements that were in effect at the time the supervision was rendered.~~

**18VAC125-30-70. Supervision of unlicensed persons.**

Those persons providing ancillary services as part of an identified sex offender treatment program in an exempt practice situation and not meeting the educational and experience requirements to become an applicant shall ~~practice~~ provide such services under the supervision of a certified sex offender treatment provider.

Part III
Renewal and Reinstatement

**18VAC125-30-80. Annual renewal of certificate.**

A. Every certificate issued by the board shall expire on June 30 of each year.

B. Along with the renewal application, the certified sex offender treatment provider shall:

1. Submit the renewal fee prescribed in 18VAC125-30-20; and

2. Attest to having obtained six hours of continuing education in topics related to the provision of sex offender treatment within the renewal period. Continuing education shall be offered by a sponsor or provider approved by the Virginia Board of Social Work, Psychology, Counseling, Nursing, or Medicine or by the Association for the Treatment of Sexual Abusers or one of its state chapters. Hours of continuing education used to satisfy the renewal requirements for another license may be used to satisfy the six-hour requirement for sex offender treatment provider certification, provided it was related to the provision of sex offender treatment.

C. Certificate holders shall notify the board in writing of a change of address of record or of the public address, if different from the address of record, within 60 days. Failure to receive a renewal notice and application ~~form(s)~~ form or forms shall not excuse the certified sex offender treatment provider from the renewal requirement.

Part IV
Standards of Practice; Disciplinary Action; Reinstatement

**18VAC125-30-100. Standards of practice.**

A. The protection of the public health, safety, and welfare and the best interest of the public shall be the primary guide in determining the appropriate professional conduct of all certified practitioners who provide services to sex offenders.

B. Persons certified by the board and applicants under supervision shall:

1. Practice in a manner that ensures community protection and safety.

2. Treat all sex offender clients with dignity and respect, regardless of the nature of their crimes or offenses.

3. Provide only services and use only techniques for which they are qualified by training and experience.

~~4. Disclose to sex offender clients all experimental methods of treatment and inform clients of the risks and benefits of any such treatment.~~

~~5.~~ 4. Inform sex offender clients of (i) the purposes of an interview, testing, or evaluation session ~~and~~; (ii) the ways in which information obtained in such sessions will be used before asking the sex offender client to reveal personal information or allowing such information to be divulged; (iii) the methods of interventions, including any experimental methods of treatment; and (iv) the risks and benefits of any treatment.

~~6.~~ 5. Inform sex offender clients of the limits of confidentiality and any circumstances which may allow an exception to the agreed upon confidentiality, including (i) as obligated under dual-client situations, especially in criminal justice or related settings; (ii) when the client is a danger to self or others; (iii) when under court order to disclose information; (iv) in cases of suspected child abuse; and (v) as otherwise required by law.

~~7.~~ 6. Not require or seek waivers of privacy or confidentiality beyond the requirements of treatment, training, or community safety.

~~8.~~ 7. Explain to juvenile sex offender clients the rights of their parents or legal guardians, or both, to obtain information relating to the sex offender client.

~~9.~~ 8. Maintain sex offender client records securely, inform all employees of the rules applicable to the appropriate level of confidentiality, and provide for the destruction of records which are no longer useful.

~~10.~~ 9. Retain sex offender client records for a minimum of five years from the date of termination of services.

~~11.~~ 10. Stay abreast of new developments, concepts, and practices which are important to providing appropriate professional services.

~~12.~~ 11. Never engage in dual relationships with sex offender clients or former clients, or current trainees that could impair professional judgment or compromise the sex offender client's or trainee's well-being, impair the trainee's judgment, or increase the risk of sex offender client or trainee exploitation. Engaging in sexual intimacies or romantic relationships with sex offender clients or former clients, or with current trainees is strictly prohibited.

~~13.~~ 12. Report to the board known or suspected violations of the laws and regulations governing the practice of sex offender treatment providers, as well as any information that a sex offender treatment provider is unable to practice with reasonable skill and safety because of illness or substance abuse or otherwise poses a danger to himself, the public, or clients.

~~14.~~ 13. Provide clients with accurate information concerning tests, reports, billing, ~~acceptable means of~~ payment responsibilities, therapeutic regime, and schedules before rendering services.

~~15.~~ 14. Maintain cooperative and collaborative relationships with corrections/probation/parole officers or any responsible agency for purposes of the effective supervision and monitoring of a sex offender client's behavior in order to assure public safety.

~~16.~~ 15. Consider the validity, reliability, and appropriateness of assessments selected for use with sex offender clients. Where questions exist about the appropriateness of utilizing a particular assessment with a sex offender client, expert guidance from a knowledgeable, certified sex offender treatment provider shall be sought.

~~17.~~ 16. Recognize the sensitivity of sexual arousal assessment testing and treatment materials, safeguard the use of such materials in compliance with § 18.2-374.1:1 of the Code of Virginia, and use them only for the purpose for which they are intended in a controlled penile plethysmographic laboratory assessment.

~~18.~~ 17. Be aware of the limitations of plethysmograph and that plethysmographic data is only meaningful within the context of a comprehensive evaluation or treatment process or both.

~~19.~~ 18. Be knowledgeable of the limitations of the polygraph and take into account its appropriateness with each individual client and special client population.

~~20.~~ 19. Comply with all laws of the Code of Virginia applicable to the practice of sex offender treatment providers.

VA.R. Doc. No. R16-3956; Filed October 23, 2015, 4:10 p.m.

## BOARD FOR WASTE MANAGEMENT FACILITY OPERATORS

### Proposed Regulation

Title of Regulation: **18VAC155-20. Waste Management Facility Operators Regulations (amending 18VAC155-20-10, 18VAC155-20-110).**

Statutory Authority: §§ 54.1-201 and 54.1-2211 of the Code of Virginia.

Public Hearing Information:

December 17, 2015 - 10 a.m. - Department of Professional and Occupational Regulation, Perimeter Center, Second Floor Training Room 1, 9960 Mayland Drive, Richmond, VA 23233

Public Comment Deadline: January 15, 2016.

Agency Contact: Eric L. Olson, Executive Director, Board for Waste Management Facility Operators, 9960 Mayland Drive, Suite 400, Richmond, VA 23233, telephone (804) 367-8511, FAX (866) 430-1033, or email wastemgt@dpor.virginia.gov.

Basis: Subsection A of § 54.1-2211 of the Code of Virginia states, "The Board shall promulgate regulations and standards for the training and licensing of waste management facility operators."

Purpose: The proposed amendments will consolidate all composting requirements from being separated between Class I and Class II licenses into only the Class I license. Currently a Class II license is for composting municipal solid waste as well as all types of landfills. The Class I license is for composting yard waste in addition to transfer stations. The board has determined that it would be less burdensome to regulants for all composting to be put together under the Class I license. These amendments will ensure that operators of those types of facilities are adequately trained and meet the minimum competency requirements, ultimately producing updated regulations that will effectively protect the health, safety, and welfare of the public.

Substance: 18VAC155-20-10 is amended to clarify definitions of the Class I and II license types.

18VAC155-20-110 is amended to clarify license classifications for Class I and Class II licensees.

Issues: The proposed amendments are to consolidate composting requirements into one license type. The changes would be advantageous to public and to the waste management facilities as they would not need to know the differences between composting types to determine which class of license is required. In amending the regulations, the Board for Waste Management Facility Operators is continuing to provide necessary public protection tasked to them through existing statutes.

Department of Planning and Budget's Economic Impact Analysis: Summary of the Proposed Amendments to Regulation. The proposed change will consolidate all composting requirements that exist in Class I and II licenses into only the Class I license.

Result of Analysis. There is insufficient data to accurately compare the magnitude of the benefits versus the costs. Detailed analysis of the benefits and costs can be found in the next section.

Estimated Economic Impact. The proposed change will consolidate all composting requirements that exist in Class I and II licenses into only the Class I license. Currently, a Class I license is for composting yard waste in addition to transfer stations. A Class II license is for composting municipal solid waste as well as all types of landfills. A Class I licensee is required to obtain a Class II license to be able to compost municipal waste. With the proposed change, a Class I licensee will be allowed to compost municipal waste. The Board plans to pull out all composting questions currently in the Class II exam and put them in the Class I exam to ensure competency of the operators.

Under the proposed change, Class I licensees will not be required to obtain a Class II license to compost municipal

waste. These individuals will save the $75 application fee, $225 exam fee, and time and travel costs associated with taking the Class II exam. Municipalities generally pay for the application fee and exam fee for their operators. There may also be a small expense from the examination vendor to make adjustments to the examinations for Class I and Class II licenses. The Board staff estimates that there are approximately 10 individual applicants per year performing composting. However, there is no accurate data to estimate the number of individuals who only have a Class I license and who would perform municipal waste composting.

Since the Board will test for municipal composting competency in the Class I license, no adverse environmental risks are expected from future applicants due to this change. However, since all current Class I licenses will be allowed to perform municipal waste composting and will not be tested for their competency, there exists a slight possibility that an incompetent operator may perform municipal waste composting. The Board staff points out that the current Class I license exam covers the basics of all types of composting; the industry is self regulating to avoid citations; and continuing education is required. Thus, the Board staff believes that any adverse environmental risk that may be posed by this change is negligible and that the proposed regulation will effectively protect the health, safety, and welfare of the public.

Businesses and Entities Affected. The Board staff estimates that there are 162 individuals who currently hold only a Class I license and approximately 10 individual applicants per year performing composting. However, there is no accurate data to estimate the number of individuals who only have Class I license and who would perform municipal waste composting. In addition, there are only 3 landfills composting municipal waste in the Commonwealth.

Localities Particularly Affected. The proposed regulation applies throughout the Commonwealth.

Projected Impact on Employment. The proposed change is unlikely to significantly affect employment.

Effects on the Use and Value of Private Property. The proposed change is unlikely to significantly affect the use and value of private property.

Small Businesses: Costs and Other Effects. Facilities composting waste are either large businesses or governmental entities. Thus, the proposed amendment is unlikely to affect small businesses.

Small Businesses: Alternative Method that Minimizes Adverse Impact. The proposed amendment is unlikely to adversely affect small businesses.

Real Estate Development Costs. The proposed amendment is unlikely to affect real estate development costs.

Agency's Response to Economic Impact Analysis: The agency concurs with the analysis of the Department of Planning and Budget.

Summary:

*The proposed amendments consolidate all composting requirements of Class I and Class II licenses into the Class I license.*

Part I
General

**18VAC155-20-10. Definitions.**

The following words and terms when used in this chapter shall have the following meanings unless the context clearly indicates otherwise:

~~*~~"Board" means the Board for Waste Management Facility Operators.

"Board-approved training course" means a course that has been approved by the board to provide appropriate training to an applicant in accordance with this chapter.

"Class I license" means the authorization from the board to act as a waste management facility operator of a transfer station, a material recovery facility receiving mixed waste, an experimental facility, or a composting facility ~~receiving yard waste~~.

"Class II license" means the authorization from the board to act as a waste management facility operator of ~~a facility that composts municipal solid waste,~~ a sanitary landfill, an industrial landfill, a construction landfill, or a debris landfill.

"Class III license" means the authorization from the board to act as a waste management facility operator of an infectious waste incinerator or autoclave.

"Class IV license" means the authorization from the board to act as a waste management facility operator of a municipal waste combustor.

"Closed facility" means a solid waste management facility that has been properly secured in accordance with an approved facility closure plan.

"Closure" means an act of securing a solid waste management facility pursuant to the requirements established by the Virginia Department of Environmental Quality or appropriate regulatory authority.

"Contact hour" means 50 minutes of participation in a group program or 60 minutes of completion time for a project.

"Continuing professional education/training ~~(CPE/T)~~" or "CPE/T" means an integral part of the lifelong learning process that enables a licensed solid waste management facility operator to maintain and increase the competence required to assure the public's protection, which shall be pursued through an organized program or project in compliance with this chapter.

"Department" means the Department of Professional and Occupational Regulation.

"Full-time employment" means 1,760 hours per year or 220 work days per year.

"In charge" means the designation of any person by the owner to have duty and authority to operate or modify the operation of a waste management facility.

"License" means an authorization issued by the board to an individual to practice as a waste management facility operator who meets the provisions of this chapter.

"Municipal solid waste ~~(MSW)~~" means that waste that is defined as "municipal solid waste" in ~~9VAC20-80-10~~ 9VAC20-81-10.

"Municipal waste combustor" means a mass burn or a refuse derived fuel incinerator or facility designed or modified for the purpose of noninfectious solid waste combustion.

"Operation" means any waste management facility that is under construction, treating, processing, storing, or disposing of solid waste, or in the act of securing a facility for closure.

"Organized program" means a formal learning process designed to permit a participant to learn a given subject or subjects through interaction with an instructor in a formal course, seminar, or conference.

"Owner" means the person who owns a solid waste management facility or part of a solid waste management facility.

~~*~~"Person" means an individual, corporation, partnership, association, governmental body, municipal corporation, or any other legal entity, as defined in § 54.1-2209 of the Code of Virginia.

"Project" means a learning process designed to permit a participant to perform work assigned by the owner, operator, or manager of a waste management facility under the supervision of a knowledgeable person that results in a specific, predetermined end result and that increases the participant's competence to practice as a waste management facility operator.

"Site" means within the vicinity of all land and structures, other appurtenances, and improvements thereon used for treating, storing, and disposing of solid waste. This term includes adjacent land within the property boundary used for the utility systems such as repair, storage, shipping, or processing areas, or other areas incident to the management of solid waste.

"Solid waste" means any of those materials defined as nonhazardous solid waste in regulations promulgated by the Virginia Department of Environmental Quality.

"Storage" means housing a solid waste as consistent with the regulations of the Virginia Waste Management Board.

"Substantial change" means a deviation from a specific course that decreases the approved time of the course by more than 30 minutes or modifies the topics of the approved course to below the target levels of knowledge, as stated in the course application.

~~*~~"Waste management facility" means a site used for planned treatment, storage, or disposal of nonhazardous solid waste, as defined in § 54.1-2209 of the Code of Virginia.

~~*~~"Waste management facility operator" means any person, including an owner, who is in charge of the actual, on-site operation of a waste management facility during any period of operation, as defined in § 54.1-2209 of the Code of Virginia.

~~*As defined by Chapter 22.1 (§ 54.1-2209 et seq.) of Title 54.1 of the Code of Virginia.~~

**18VAC155-20-110. License classification.**

A. The applicant shall apply for at least one classification of license as outlined below:

1. An individual operating a facility that is defined by the Department of Environmental Quality as a transfer station, a material recovery facility receiving mixed waste, an experimental facility, or a composting facility ~~receiving yard waste~~ shall hold a Class I license. An individual who has obtained a Class II, III or IV license may also operate a facility listed under Class I, if the individual has completed the board-approved basic training course.

2. An individual operating a facility that ~~composts municipal solid waste, or~~ is defined by the Department of Environmental Quality as a sanitary, industrial, construction, or debris landfill, shall hold a Class II license.

3. An individual operating a facility defined by the Department of Environmental Quality as an infectious waste incinerator or an autoclave shall hold a Class III license.

4. An individual operating a facility defined by the Department of Environmental Quality as a municipal waste combustor shall hold a Class IV license.

B. A licensee may not operate a facility outside of his classification other than that defined by subdivision A 1 of this section.

C. An individual operating a solid waste management facility that has been issued a permit by the Department of Environmental Quality but for which the board has not established training and licensure requirements shall hold a Class I license until the board establishes the training and licensing requirements by regulation.

VA.R. Doc. No. R14-3909; Filed October 27, 2015, 1:42 p.m.

# TITLE 22. SOCIAL SERVICES

## STATE BOARD OF SOCIAL SERVICES

### Fast-Track Regulation

Title of Regulation: **22VAC40-41. Neighborhood Assistance Tax Credit Program (amending 22VAC40-41-10, 22VAC40-41-20, 22VAC40-41-50, 22VAC40-41-55).**

Statutory Authority: §§ 58.1-439.20 and 63.2-217 of the Code of Virginia.

Public Hearing Information: No public hearings are scheduled.

Public Comment Deadline: December 16, 2015.

Effective Date: December 31, 2015.

Agency Contact: Wanda Stevenson, Neighborhood Assistance Program Technician, Department of Social Services, 801 East Main Street, Richmond, VA 23219, telephone (804) 726-7924, or email wanda.stevenson@dss.virginia.gov.

Basis: Chapters 56 and 153 of the 2015 Acts of Assembly and Chapter 851 of the 2009 Acts of Assembly require the State Board of Social Services to adopt regulations for the administration of the Neighborhood Assistance Program (NAP) in accordance with § 58.1-439.20 of the Code of Virginia.

Purpose: The proposed changes are necessary to conform to legislation passed by the General Assembly. The changes allow NAP organizations more flexibility to attract donations to improve and protect the health and well-being of the Commonwealth's most vulnerable citizens. The changes will allow NAP organizations to fully utilize assigned tax credits, which have not always been fully used in the past. The changes expand the opportunities to attract and maximize the use of physician specialists for medically fragile patients. The changes also help to clarify NAP definitions to provide more consistent program interpretation for staff and the public.

Rationale for Using Fast-Track Process: There is no indication that any of the proposed changes will be controversial. Proposed changes will provide increased flexibility for NAP organizations. NAP organizations will be able to provide NAP credits to physician specialists who need to meet off site with fragile patients. NAP organizations will have the ability to develop individualized donor valuation agreements with individuals and businesses. Additional definitions will help assist with the administration of the Neighborhood Assistance Program.

Substance: The proposed changes (i) allow physician specialists to be eligible for tax credits when donating specialty medical services to patients who are referred from an approved organization; (ii) provide that an individual or business making a qualified donation may accept a tax credit of less than 65% of the donated value from an approved neighborhood organization; (iii) establish actions of the Department of Social Services relating to the review of the neighborhood organization proposals and provide that the allocation of tax credits will be exempt from the provisions of the Administrative Process Act and that decisions of the Department of Social Services will be final and not subject to review or appeal; and (iv) add definitions for "affiliate" and "poverty guidelines."

Issues: These changes pose no disadvantages to the public, the Commonwealth or government officials, or the regulated community. Advantages include (i) increased flexibility for NAP organizations; (ii) ability to have physician specialists meet off site with fragile patients; (iii) development of individualized donor valuation agreements by NAP organizations; and (iv) clearer definitions, which will assist with the administration of the Neighborhood Assistance Program.

Department of Planning and Budget's Economic Impact Analysis:

Summary of the Proposed Amendments to Regulation. The State Board of Social Services proposes to amend its neighborhood assistance tax credit program (NAP) regulation to harmonize it with legislative changes that were passed in 2009 (Chapter 851 of the 2009 Act of the Assembly) and 2015 (Chapters 56 and 153 of the 2015 Acts of the Assembly). Specifically, the Board proposes to 1) update definitions, 2) allow physician specialists to be eligible for tax credits for donated specialty medical services, 3) remove the list of information needed on a certification form and instead cite the Code of Virginia sections where the list of necessary information can be found and 4) remove language that allowed NAP applicants to appeal adverse decisions to the Commissioner of the Department of Social Services.

Result of Analysis. Since all proposed changes to this regulation are already the law in Virginia, the benefits of harmonizing this regulation with the Code of Virginia likely exceed the costs of doing so.

Estimated Economic Impact. In 1981, the General Assembly passed legislation that authorized the Board's neighborhood assistance program (NAP) to, "…encourage businesses, trusts and individuals to make donations to approved 501(c) (3) organizations for the benefit of low-income persons. In return for their contributions, businesses, trusts and individuals may receive tax credits equal to 65 percent of the donation that may be applied against their state income tax liability."[1] The Board now proposes to amend its regulation for this program to account for legislative changes that occurred in 2009 and 2015.

The Board proposes to add two definitions, for "affiliate" and "poverty guidelines," as well as substitute Code of Virginia (COV) references for finding information required on certification forms in the code for an obsolete list of required information that is currently in the regulation. These changes likely have no costs attached but will provide the benefit of clarity for readers of the regulation.

The Board also proposes to harmonize this regulation with the COV by allowing physician specialists to get NAP credits for donating specialty medical services. This change to the COV that is mirrored in this regulation may increase the hours of specialty medical services donated as the donating physicians will likely be able to deduct a large portion of the value of those services from their state taxes. No entities are

likely to incur net costs on account of this change. Physicians who donate their services, the non-profits that they donate them to and the patients who will receive those services will all likely benefit from this change.

Currently, this regulation has provision for any affected non-profit that disagrees with any decision on an application for NAP credits to appeal that decision to the Commissioner of the Department of Social Services. Legislation in 2009, however, made all decisions on the disposition of such applications final and non-appealable. To eliminate confusion over the rules for all affected parties, the Board now proposes to eliminate the regulatory language that deals with appeals. Since COV language has precedence and no appeals have been allowable since 2009, no entity will be adversely affected by removing the appeal process from this regulation. Interested parties will benefit from confusing language that contradicts the prevailing rules in the COV being removed from the regulation.

Businesses and Entities Affected. These proposed changes mirror legislative changes in 2009 and 2015 which affected all individuals, businesses and trusts that donate to the non-profit organizations that participate in the NAP as well as the 257 non-profits that receive those donations.

Localities Particularly Affected. This proposed change will not particularly affect any locality in the Commonwealth.

Projected Impact on Employment. This proposed change will likely not affect employment in the Commonwealth.

Effects on the Use and Value of Private Property. Allowing medical specialists to receive credits for donating their time and medical services to qualifying non-profits may increase the number of hours spent providing donated medical care which may slightly decrease the number of hours spent providing medical services for revenue for any affected medical professional.

Real Estate Development Costs. This proposed change will likely not affect real estate development costs.

Small Businesses:

Definition. Pursuant to § 2.2-4007.04 of the Code of Virginia, small business is defined as "a business entity, including its affiliates, that (i) is independently owned and operated and (ii) employs fewer than 500 full-time employees or has gross annual sales of less than $6 million."

Costs and Other Effects. No small businesses will incur costs on account of this regulatory change.

Alternative Method that Minimizes Adverse Impact. No small businesses will incur costs on account of this regulatory change.

Adverse Impacts:

Businesses: This proposed change is unlikely to adversely impact any business in the Commonwealth.

Localities: This proposed change is unlikely to adversely impact localities.

Other Entities: This proposed change is unlikely to adversely impact any other entities in the Commonwealth.

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[1]Description taken from the Department of Social Services' NAP website at http://www.dss.virginia.gov/community/nap.cgi.

Agency's Response to Economic Impact Analysis: The Department of Social Services reviewed the economic impact analysis prepared by the Department of Planning and Budget and concurs.

Summary:

*The amendments (i) allow physician specialists to be eligible for tax credits when donating specialty medical services to patients who are referred from an approved organization; (ii) provide that an individual or business making a qualified donation may accept a tax credit of less than the 65% of the donated value; (iii) establish that actions of the Department of Social Services shall be exempt from the provisions of the Administrative Process Act; and (iv) add definitions for "affiliate" and "poverty guidelines."*

**22VAC40-41-10. Definitions.**

The following words and terms when used in this chapter shall have the following meanings unless the context clearly indicates otherwise:

"Affiliate" means with respect to any person, any other person directly or indirectly controlling, controlled by, or under common control with such person. For purposes of this definition, "control" (including controlled by and under common control with) means the power, directly or indirectly, to direct or cause the direction of the management and policies of such person whether through ownership or voting securities or by contract or otherwise.

"Approved organization" means a neighborhood organization that has been found eligible to participate in the Neighborhood Assistance Program.

"Audit" means any audit required under the federal Office of Management and Budget's Circular A-133, or, if a neighborhood organization is not required to file an audit under Circular A-133, a detailed financial statement prepared by an outside independent certified public accountant.

"Business firm" means any corporation, partnership, electing small business (Subchapter S) corporation, limited liability company, or sole proprietorship authorized to do business in this Commonwealth subject to tax imposed by Articles 2 (§ 58.1-320 et seq.) and 10 (§ 58.1-400 et seq.) of Chapter 3, Chapter 12 (§ 58.1-1200 et seq.), Article 1 (§ 58.1-2500 et seq.) of Chapter 25, or Article 2 (§ 58.1-2620 et seq.) of Chapter 26 of Title 58.1 of the Code of Virginia. "Business firm" also means any trust or fiduciary for a trust subject to tax imposed by Article 6 (§ 58.1-360 et seq.) of Chapter 3 of Title 58.1 of the Code of Virginia.

"Commissioner" means the Commissioner of the Department of Social Services, his designee or authorized representative.

"Community services" means any type of counseling and advice, emergency assistance, medical care, provision of basic necessities, or services designed to minimize the effects of poverty, furnished primarily to low-income persons.

"Contracting services" means the provision, by a business firm licensed by the Commonwealth of Virginia as a contractor under Chapter 11 (§ 54.1-1100 et seq.) of Title 54.1 of the Code of Virginia, of labor or technical advice to aid in the development, construction, renovation, or repair of (i) homes of low-income persons or (ii) buildings used by neighborhood organizations.

"Education" means any type of scholastic instruction or scholastic assistance to a low-income person or eligible student with a disability.

"Eligible student with a disability" means a student (i) for whom an individualized educational program has been written and finalized in accordance with the federal Individuals with Disabilities Education Act (IDEA), regulations promulgated pursuant to IDEA, and regulations of the Board of Education and (ii) whose family's annual household income is not in excess of 400% of the current poverty guidelines.

"Housing assistance" means furnishing financial assistance, labor, material, or technical advice to aid the physical improvement of the homes of low-income persons.

"Job training" means any type of instruction to an individual who is a low-income person that enables him to acquire vocational skills so that he can become employable or able to seek a higher grade of employment.

"Low-income person" means an individual whose family's annual household income is not in excess of 300% of the current poverty guidelines.

"Neighborhood assistance" means providing community services, education, housing assistance, or job training.

"Neighborhood organization" means any local, regional or statewide organization whose primary function is providing neighborhood assistance and holding a ruling from the Internal Revenue Service of the ~~United States~~ U.S. Department of the Treasury that the organization is exempt from income taxation under the provisions of § 501(c)(3) or § 501(c)(4) of the Internal Revenue Code of 1986, as amended from time to time, or any organization defined as a community action agency in the Economic Opportunity Act of 1964 (42 USC § 2701 et seq.), or any housing authority as defined in § 36-3 of the Code of Virginia.

"Poverty guidelines" means the poverty guidelines for the 48 contiguous states and the District of Columbia updated annually in the Federal Register by the U.S. Department of Health and Human Services under the authority of § 673(2) of the Omnibus Budget Reconciliation Act of 1981.

"Professional services" means any type of personal service to the public which requires as a condition precedent to the rendering of such service the obtaining of a license or other legal authorization and shall include, but not be limited to, the personal services rendered by medical doctors, dentists, architects, professional engineers, certified public accountants, attorneys-at-law, and veterinarians.

"Scholastic assistance" means (i) counseling or supportive services to elementary school, middle school, secondary school, or postsecondary school students or their parents in developing a postsecondary academic or vocational education plan, including college financial options for such students or their parents, or (ii) scholarships.

**22VAC40-41-20. Purpose; procedure for becoming an approved organization; eligibility criteria; termination of approved organization; appeal procedure.**

A. The purpose of the Neighborhood Assistance Program is to encourage business firms and individuals to make donations to neighborhood organizations for the benefit of low-income persons.

B. Neighborhood organizations that do not provide education services and that wish to become an approved organization must submit an application to the commissioner. Neighborhood organizations that provide education services must submit an application to the Superintendent of Public Instruction. The application submitted to the Superintendent of Public Instruction must comply with regulations or guidelines adopted by the Board of Education. The application submitted to the commissioner must contain the following information:

1. A description of eligibility as a neighborhood organization, the programs being conducted, the low-income persons assisted, the estimated amount that will be donated to the programs, and plans for implementing the programs.

2. Proof of the neighborhood organization's current exemption from income taxation under the provisions of § 501(c)(3) or § 501(c)(4) of the Internal Revenue Code, or the organization's eligibility as a community action agency as defined in the Economic Opportunity Act of 1964 (42 USC § 2701 et seq.) or housing authority as defined in § 36-3 of the Code of Virginia.

3. For neighborhood organizations with total revenues (including the value of all donations) (i) in excess of $100,000 for the organization's most recent year ended, an audit or review for such year performed by an independent certified public accountant or (ii) of $100,000 or less for the organization's most recent year ended, a compilation for such year performed by an independent certified public accountant; a copy of the organization's current federal form 990; a current brochure describing the organization's programs; and a copy of the annual report filed with the Department of Agriculture and Consumer Services' Division of Consumer Protection.

4. A statement of objective and measurable outcomes that are expected to occur and the method the organization will use to evaluate the program's effectiveness.

C. To be eligible for participation in the Neighborhood Assistance Program, the applicant and any of its affiliates must meet the following criteria:

1. Applicants must have been in operation as a viable entity, providing neighborhood assistance for low-income people, for at least 12 months.

2. Applicants must be able to demonstrate that at least 50% of the total people served and at least 50% of the total expenditures were for low-income persons or eligible students with disabilities.

3. Applicant's audit must not contain any significant findings or areas of concern for the ongoing operation of the neighborhood organization.

4. Applicants must demonstrate that at least 75% of total revenue received is expended to support their ongoing programs each year.

D. The application period will start no later than March 15 of each year. All applications must be received by the Department of Social Services no later than the first business day of May. An application filed without the required audit, review, or compilation will be considered timely filed provided that the audit, review, or compilation is filed within 30 days immediately following the deadline.

E. Those applicants submitting all required information and reports and meeting the eligibility criteria described in this section will be determined an approved organization. The program year will run from July 1 through June 30 of the following year.

F. The commissioner may terminate an approved organization's eligibility based on a finding of program abuse involving illegal activities or fraudulent reporting on contributions.

~~G. Any neighborhood organization that disagrees with the disposition of its application, or its termination as an approved organization, may appeal to the commissioner in writing for a reconsideration. Such requests must be made within 30 days of the denial or termination. The commissioner will act on the request and render a final decision within 30 days of the request for reconsideration.~~

**22VAC40-41-50. Donations by businesses and health care professionals.**

A. As provided by § 58.1-439.21 of the Code of Virginia, a business firm shall be eligible for a tax credit based on the value of the money, property, professional services, and contracting services donated by the business firm during its taxable year to an approved organization.

B. No tax credit shall be granted to any business firm for donations to an approved organization providing job training or education for individuals employed by the business firm.

C. Health care professionals that meet certain conditions, as specified in § 58.1-439.22 C of the Code of Virginia, shall be eligible for a tax credit based on the time spent in providing health care services for such clinic.

D. Mediators that meet certain conditions, as specified in § 58.1-439.22 C of the Code of Virginia, shall be eligible for a tax credit based on the time spent in providing mediation services at the direction of an approved organization regardless of where the service is delivered.

E. Physician specialists shall be eligible for tax credits when donating specialty medical services to patients referred from an approved organization, as specified in § 58.1-439.22 D of the Code of Virginia.

~~E.~~ F. All donations must be made directly to the approved organization without any conditions or expectation of monetary benefit. Discounted donations and bargain sales are not allowable donations for the Neighborhood Assistance Program.

~~F.~~ G. Granting of tax credits shall conform to the minimum and maximum amounts prescribed in § 58.1-439.21 of the Code of Virginia.

~~G.~~ H. Credits granted to a partnership, electing small business (Subchapter S) corporation, or limited liability company shall be allocated to their individual partners, shareholders, or members, respectively, in proportion to their ownership or interest in such business entities.

~~H.~~ I. The approved organization and donor shall complete a certification on a form prescribed by the Department of Social Services, as specified in § 58.1-439.21 C of the Code of Virginia. ~~The certification shall identify the date, type, and value of the donation.~~

~~I.~~ J. All certifications must be submitted to the Department of Social Services within four years of the date of donation.

~~J.~~ K. Upon receipt and approval of the certification, the commissioner shall issue a tax credit certificate to the business.

**22VAC40-41-55. Donations by individuals.**

A. As provided in § 58.1-439.24 of the Code of Virginia, an individual shall be eligible for a tax credit for a cash donation or a donation of marketable securities to an approved organization.

B. Such donations are subject to the minimum and maximum amounts and other provisions set forth in § 58.1-439.24 of the Code of Virginia.

C. The approved organization and the individual shall complete a certification on a form prescribed by the Department of Social Services, as specified in § 58.1-439.24 E of the Code of Virginia. ~~The certification shall identify the date and amount of the donation.~~

D. All certifications must be submitted to the Department of Social Services within four years of the date of donation.

E. Upon receipt and approval of the certification, the commissioner shall issue a tax credit certificate to the individual.

VA.R. Doc. No. R16-4350; Filed October 26, 2015, 11:05 a.m.

### Fast-Track Regulation

Title of Regulation: **22VAC40-185. Standards for Licensed Child Day Centers (amending 22VAC40-185-40).**

Statutory Authority: §§ 63.2-217 and 63.2-1734 of the Code of Virginia.

Public Hearing Information: No public hearings are scheduled.

Public Comment Deadline: December 16, 2015.

Effective Date: July 1, 2017.

Agency Contact: Sharon Lindsay, Department of Social Services, 801 East Main Street, Richmond, VA 23219, telephone (804) 726-7167, FAX (804) 726-7132, or email sharon.lindsay@dss.virginia.gov.

Basis: Section 63.2-217 of the Code of Virginia provides the general authority for the State Board of Social Services to adopt regulations as may be necessary to carry out the purpose of Title 63.2 of the Code of Virginia. Section 63.2-1734 of the Code of Virginia authorizes the board to adopt regulations and requirements for licensed child day centers and mandates promulgation of regulations for the activities, services, and facilities to be employed by persons and agencies required to be licensed, which shall be designed to ensure that such activities, services, and facilities are conducive to the welfare of the children under the custody or control of such persons or agencies.

Purpose: The proposed amendment to 22VAC40-185 updates a reference to a section of the Code of Virginia. There is no impact on public health, safety, or welfare, as the amendment merely updates a Code of Virginia reference.

Rationale for Using Fast-Track Process: Executive Order 17 for the development and review of state agency regulations allows state agencies to use a fast-track rulemaking process to expedite regulatory changes that are expected to be noncontroversial. The Office of the Attorney General advised the use of the fast-track process to make a minor amendment to a Code of Virginia reference. This action is not controversial.

Substance: The amendment updates a Code of Virginia reference related to background check requirements for licensed child day centers. The Code of Virginia reference is replaced with another section of the Code of Virginia effective July 1, 2017.

Issues: The primary advantage of this regulatory action for the public and for the Commonwealth is that it will provide an accurate Code of Virginia reference so that providers and the public will have the correct citation. There are no disadvantages to the public or the Commonwealth.

Department of Planning and Budget's Economic Impact Analysis:

Summary of the Proposed Amendments to Regulation. The proposed change updates the reference to the applicable Code of Virginia background check requirements.

Result of Analysis. The benefits likely exceed the costs for all proposed changes.

Estimated Economic Impact. The 2015 General Assembly enacted House Bill 1570/Senate Bill 1168 that added Section 63.2-1721.1 to the Code of Virginia. This section establishes the requirements licensed child day centers must follow in conducting background checks effective July 1, 2017.

The proposed change merely updates the current reference in the regulation to the applicable statutory background check requirements that will be effective July 1, 2017. The proposed regulation is beneficial in the sense that it will update the reference to the correct applicable statutory requirements. No other significant economic effect is expected.

Businesses and Entities Affected. The proposed regulation applies to 2,498 licensed child day centers.

Localities Particularly Affected. No locality is particularly affected.

Projected Impact on Employment. No impact on employment is expected.

Effects on the Use and Value of Private Property. No impact on the use and value of private property is expected.

Real Estate Development Costs. No impact on real estate development costs is expected.

Small Businesses:

Definition. Pursuant to § 2.2-4007.04 of the Code of Virginia, small business is defined as "a business entity, including its affiliates, that (i) is independently owned and operated and (ii) employs fewer than 500 full-time employees or has gross annual sales of less than $6 million."

Costs and Other Effects. The proposed amendment does not impose costs or other effects on small businesses.

Alternative Method that Minimizes Adverse Impact. No adverse impact on small businesses is expected.

Adverse Impacts:

Businesses: The proposed amendment does not adversely affect non-small businesses.

Localities: The proposed amendment does not adversely affect localities.

Other Entities: The proposed amendment does not adversely affect other entities.

Agency's Response to Economic Impact Analysis: The Department of Social Services reviewed the economic impact analysis prepared by the Department of Planning and Budget and concurs.

Summary:

*Pursuant to Chapters 758 and 770 of the 2015 Acts of Assembly, the amendment updates a Code of Virginia section reference related to background check requirements for licensed child day centers by replacing "§ 63.2-1721" with "§ 63.2-1721.1" effective July 1, 2017.*

**22VAC40-185-40. Operational responsibilities.**

A. Applications for licensure shall conform with Chapters 17 (§ 63.2-1700 et seq.) and 18 (§ 63.2-1800 et seq.) of Title 63.2 of the Code of Virginia and the regulation entitled General Procedures and Information for Licensure, 22VAC40-80.

B. Pursuant to §§ 63.2-1719 and ~~63.2-1721~~ 63.2-1721.1 and the regulation entitled Background Checks for Child Welfare Agencies, 22VAC40-191, the applicant and any agent at the time of application who is or will be involved in the day-to-day operations of the center or who is or will be alone with, in control of, or supervising one or more of the children, shall be of good character and reputation and shall not be guilty of an offense. Offenses are barrier crimes, conviction of any other felony not included in the definition of barrier crime unless five years have elapsed since conviction, and a founded complaint of child abuse or neglect.

C. The sponsor shall afford the commissioner or his agents the right at all reasonable times to inspect facilities and to interview his agents, employees, and any child or other person within his custody or control, provided that no private interviews may be conducted with any child without prior notice to the parent of such child.

D. The license shall be posted in a place conspicuous to the public (§ 63.2-1701 of the Code of Virginia).

E. The operational responsibilities of the licensee shall include, but not be limited to, ensuring that the center's activities, services, and facilities are maintained in compliance with these standards, the center's own policies and procedures that are required by these standards, and the terms of the current license issued by the department.

F. Every center shall ensure that any advertising is not misleading or deceptive as required by § 63.2-1713 of the Code of Virginia.

G. The center shall meet the proof of child identity and age requirements as stated in § 63.2-1809 of the Code of Virginia.

H. The sponsor shall maintain public liability insurance for bodily injury for each center site with a minimum limit of at least $500,000 each occurrence and with a minimum limit of $500,000 aggregate.

1. A public sponsor may have equivalent self-insurance that is in compliance with the Code of Virginia.

2. Evidence of insurance coverage shall be made available to the department's representative upon request.

I. The center shall develop written procedures for injury prevention.

J. Injury prevention procedures shall be updated at least annually based on documentation of injuries and a review of the activities and services.

K. The center shall develop written playground safety procedures which shall include:

1. Provision for active supervision by staff to include positioning of staff in strategic locations, scanning play activities, and circulating among children; and

2. Method of maintaining resilient surface.

L. Hospital-operated centers may temporarily exceed their licensed capacity during a natural disaster or other catastrophe or emergency situation and shall develop a written plan for emergency operations, for submission to and approval by the Department of Social Services.

M. When children 13 years or older are enrolled in the program and receive supervision in the licensed program, they shall be counted in the number of children receiving care and the center shall comply with the standards for these children.

VA.R. Doc. No. R16-4510; Filed October 26, 2015, 10:51 a.m.

## BOARD FOR BRANCH PILOTS

### Notice of Periodic Review and Small Business Impact Review

Pursuant to Executive Order 17 (2014) and §§ 2.2-4007.1 and 2.2-4017 of the Code of Virginia, the Board for Branch Pilots is currently reviewing each of the regulations listed below to determine whether the regulation should be repealed, amended, or retained in its current form. The review of each regulation will be guided by the principles in Executive Order 17 (2014). Public comment is sought on the review of any issue relating to each regulation, including whether the regulation (i) is necessary for the protection of public health, safety, and welfare or for the economical performance of important governmental functions; (ii) minimizes the economic impact on small businesses in a manner consistent with the stated objectives of applicable law; and (iii) is clearly written and easily understandable.

**18VAC45-11, Public Participation Guidelines**

**18VAC45-20, Board for Branch Pilots Regulations**

The comment period begins November 16, 2015, and ends December 7, 2015.

Comments must include the commenter's name and address (physical or email) information in order to receive a response to the comment from the agency. Following the close of the public comment period, a report of both reviews will be posted on the Town Hall, and a report of the small business impact review will be published in the Virginia Register of Regulations.

Contact Information: Kathleen R. Nosbisch, Executive Director, Department of Professional and Occupational Regulation, 9960 Mayland Drive, Suite 400, Richmond, VA 23233, telephone (804) 367-8514, FAX (866) 465-6206, or email branchpilots@dpor.virginia.gov.

## CEMETERY BOARD

### Small Business Impact Review - Report of Findings

Pursuant to § 2.2-4007.1 of the Code of Virginia, the Cemetery Board conducted a small business impact review of **18VAC47-11, Public Participation Guidelines** and determined that this regulation should be retained in its current form. The Cemetery Board is publishing its report of findings dated October 21, 2015, to support this decision in accordance with § 2.2-4007.1 F of the Code of Virginia.

Code of Virginia § 2.2-4007.02 mandates the agency to solicit the input of interested parties in the formation and development of its regulations. Therefore, the continued need for the regulation is established in statute. The regulation is necessary to protect public health, safety, and welfare by establishing Public Participation Guidelines that promote public involvement in the development, amendment, or repeal of an agency's regulation. By soliciting the input of interested parties, the agency is better equipped to effectively regulate the occupation or profession. Since no complaints or comments were received during the public comment period, there does not appear to be a reason to amend or repeal the regulation. The regulation is clearly written and easily understandable. The regulation does not overlap, duplicate, or contravene federal or state law or regulation. The most recent periodic review of the regulation occurred in 2012. On October 21, 2015, the board discussed the regulation and, for the reasons stated in this section, determined that the regulation should not be amended or repealed, but should be retained in its current form.

Contact Information: Christine Martine, Executive Director, Department of Professional and Occupational Regulation, 9960 Mayland Drive, Suite 400, Richmond, VA 23233, telephone (804) 367-8552, FAX (866) 826-8863, or email cemetery@dpor.virginia.gov.

### Small Business Impact Review - Report of Findings

Pursuant to § 2.2-4007.1 of the Code of Virginia, the Cemetery Board conducted a small business impact review of **18VAC47-20, Cemetery Board Rules and Regulations** and determined that this regulation should be retained in its current form. The Cemetery Board is publishing its report of findings dated October 21, 2015, to support this decision in accordance with § 2.2-4007.1 F of the Code of Virginia.

Section 54.1-201.5 of the Code of Virginia mandates the Cemetery Board to promulgate regulations. The continued need for the regulation is established in statute. Repeal of the regulation would remove the current public protections provided by the regulation. The Cemetery Board provides protection to the safety and welfare of the citizens of the Commonwealth by ensuring that only those individuals who meet specific criteria set forth in the statutes and regulations are eligible to receive a cemetery company license and sales personnel registration. The board is also tasked with ensuring that its regulants meet standards of practice that are set forth in the regulations. No comments or complaints were received during the public comment period. The regulation is clearly written, easily understandable, and does not overlap, duplicate, or conflict with federal or state law or regulation. The most recent evaluation occurred in 2012. The board discussed the regulation and, for the reasons stated in this section, determined that the regulation should not be amended or repealed, but should be retained in its current form.

Contact Information: Christine Martine, Executive Director, Department of Professional and Occupational Regulation, 9960 Mayland Drive, Suite 400, Richmond, VA 23233, telephone (804) 367-8552, FAX (866) 826-8863, or email cemetery@dpor.virginia.gov.

## BOARD OF CORRECTIONS

### Notice of Periodic Review and Small Business Impact Review

Pursuant to Executive Order 17 (2014) and §§ 2.2-4007.1 and 2.2-4017 of the Code of Virginia, the Board of Corrections is currently reviewing each of the regulations listed below to determine whether the regulation should be repealed, amended, or retained in its current form. The review of each regulation will be guided by the principles in Executive Order 17 (2014). Public comment is sought on the review of any issue relating to each regulation, including whether the regulation (i) is necessary for the protection of public health, safety, and welfare or for the economical performance of important governmental functions; (ii) minimizes the economic impact on small businesses in a manner consistent with the stated objectives of applicable law; and (iii) is clearly written and easily understandable.

**6VAC15-20, Regulations Governing Certification and Inspection**

**6VAC15-28, Regulations for Public/Private Joint Venture Work Programs Operated in a State Correctional Facility**

**6VAC15-45, Regulations for Private Management and Operation of Prison Facilities**

The comment period begins November 30, 2015, and ends December 30, 2015.

Comments must include the commenter's name and address (physical or email) information in order to receive a response to the comment from the agency. Following the close of the public comment period, a report of both reviews will be posted on the Town Hall, and a report of the small business impact review will be published in the Virginia Register of Regulations.

Contact Information: Jim Bruce, Agency Regulatory Coordinator, Department of Corrections, P.O. Box 26963, Richmond, VA 23261-6963, telephone (804) 887-8215, or email james.bruce@vadoc.virginia.gov.

## DEPARTMENT OF ENVIRONMENTAL QUALITY

### Opportunity for Public Comment - Draft Coastal Enhancement Strategies

The Virginia Coastal Zone Management (CZM) Program has prepared Draft Virginia Coastal Zone Management Program Coastal Enhancement Strategies. The strategies were developed using National Oceanic and Atmospheric Administration's Section 309 Guidance issued in January 2013.

The Virginia CZM Program began its 2016-2020 Coastal Zone Enhancement Process in fall of 2014 by distributing to its partners a Virginia Coastal Needs Assessment and Prioritization Survey. The results of this survey were shared at the December 2014 Virginia Coastal Partners Workshop, which included attendees from regional, local, and state agencies; academic institutions; nongovernmental organizations; marine-related businesses; and individuals who help manage and protect Virginia's coastal resources. During the course of the workshop, attendees heard presentations on critical or evolving coastal resource management issues and helped prioritize which areas should be considered the highest priorities for the Virginia CZM Program and the focus of Coastal Enhancement (Section 309) strategies for the coming 2016-2020 cycle.

Virginia CZM Program staff then presented recommendations to the Virginia Coastal Policy Team (CPT) in February 2015. The CPT approved staff recommendations to develop strategies in the following three "High Priority" areas:

- Ocean management
- Coastal hazards
- Cumulative and seconday impacts of coastal development

The department is now seeking comment on the draft strategies. The draft strategies can be reviewed in the Section 309 Coastal Needs Assessment & Strategy document on the department's website at http://www.deq.virginia.gov/Portals/0/DEQ/CoastalZoneManagement/FundsInitiativesProjects/section309VACZM2016-2020needsassessandstrategies.pdf.

Contact Information: Laura McKay, Department of Environmental Quality, 629 East Main Street, P.O. Box 1105, Richmond, VA 23218, telephone (804) 698-4320, or email laura.mckay@deq.virginia.gov.

## VIRGINIA LOTTERY

### Director's Orders

The following Director's Orders of the Virginia Lottery were filed with the Virginia Registrar of Regulations on October 27, 2015. The orders may be viewed at the Virginia Lottery, 900 East Main Street, Richmond, VA, or at the office of the Registrar of Regulations, 201 North 9th Street, 2nd Floor, Richmond, VA.

Director's Order Number One Hundred Forty-Seven (15)

Virginia's Computer-Generated Lottery Game "Pick 4" Final Rules for Game Operation (This Director's Order becomes effective on October 10, 2015, fully replaces any and all prior Virginia Lottery "Pick 4" game rules, and shall remain in full force and effect unless amended or rescinded by further Director's Order)

Director's Order Number One Hundred Forty-Nine (15)

Virginia's Computer-Generated Lottery Game "Cash 5" Final Rules for Game Operation (This Director's Order becomes effective on October 10, 2015, fully replaces any and all prior Virginia Lottery "Cash 5" game rules, and shall remain in full

force and effect unless amended or rescinded by further Director's Order)

Director's Order Number One Hundred Fifty (15)

Virginia's Computer-Generated Lottery Game "Pick 3" Final Rules for Game Operation (This Director's Order becomes effective on October 10, 2015, fully replaces any and all prior Virginia Lottery "Pick 3" game rules, and shall remain in full force and effect unless amended or rescinded by further Director's Order)

Director's Order Number One Hundred Fifty-Three (15)

Virginia's Computer-Generated Lottery Game "Bank A Million" Final Rules for Game Operation (This Director's Order becomes effective on October 10, 2015, fully replaces any and all prior Virginia Lottery "Bank A Million" game rules, and shall remain in full force and effect unless amended or rescinded by further Director's Order)

Director's Order Number One Hundred Fifty-Five (15)

Virginia's Lottery's All That Glitters Promotion Final Rules for Operation (effective December 1, 2015)

Director's Order Number One Hundred Fifty-Six (15)

Virginia's Computer-Generated Game Lottery "New Year" Millionaire Raffle" Final Rules for Game Operation (effective November 3, 2015)

Director's Order Number One Hundred Fifty-Seven (15)

Certain Virginia Instant Game Lotteries; End of Games.

In accordance with the authority granted by §§ 2.2-4002 B 15 and 58.1-4006 A of the Code of Virginia, I hereby give notice that the following Virginia Lottery instant games will officially end at midnight on Friday, October 16, 2015:

| | |
|---|---|
| Game 1567 | Summer Jam |
| Game 1565 | $4,000 Payday |
| Game 1562 | High Cards |
| Game 1560 | Ca$h Payout |
| Game 1553 | Triple Cash Crossword |
| Game 1548 | Hit $155,000 |
| Game 1547 | Hit $55,000 |
| Game 1546 | Hit $25,000 |
| Game 1543 | $100,000 Home Changer |
| Game 1539 | Spicy Hot Cash |
| Game 1527 | Throwback To The 70's |
| Game 1525 | 5X The Money |
| Game 1524 | Joker's Jackpot |
| Game 1522 | 2 For The Money |
| Game 1507 | High Roller |
| Game 1506 | Hot Shot |
| Game 1493 | 7-Eleven |
| Game 1488 | 7X The Money |
| Game 1475 | On A Roll |
| Game 1369 | Money, Money, Money |
| Game 1290 | Casino Royal |
| Game 1202 | $1,000,000 Cash Blast |

The last day for lottery retailers to return for credit unsold tickets from any of these games will be Friday, December 4, 2015. The last day to redeem winning tickets for any of these games will be Wednesday, April 13, 2016, 180 days from the declared official end of the game. Claims for winning tickets from any of these games will not be accepted after that date. Claims that are mailed and received in an envelope bearing a postmark of the United States Postal Service or another sovereign nation of Wednesday, April 13, 2016, or earlier, will be deemed to have been received on time. This notice amplifies and conforms to the duly adopted State Lottery Board regulations for the conduct of lottery games.

This order is available for inspection and copying during normal business hours at the Virginia Lottery headquarters, 900 East Main Street, Richmond, Virginia, and at any Virginia Lottery regional office. A copy may be requested by mail by writing to Director's Office, Virginia Lottery, 900 East Main Street, Richmond, Virginia 23219.

This Director's Order becomes effective on the date of its signing and shall remain in full force and effect unless amended or rescinded by further Director's Order.

/s/ Paula I. Otto
Executive Director
October 10, 2015

Director's Order Number One Hundred Fifty-Eight (15)

Virginia's Computer-Generated Game Lottery "Lucky Bucks" Final Rules for Game Operation (effective November 2, 2015)

Director's Order Number One Hundred Fifty-Nine (15)

Certain Virginia FastPlay Game; End of Game - Virginia Lottery's FastPlay Hallo-win (126 15) (effective November 1, 2015)

## STATE BOARD OF SOCIAL SERVICES

### Small Business Impact Review - Report of Findings

Pursuant to § 2.2-4007.1 of the Code of Virginia, the State Board of Social Services conducted a small business impact

review of **22VAC40-191, Background Checks for Child Welfare Agencies** and determined that this regulation should be retained in its current form. The State Board of Social Services is publishing its report of findings dated June 21, 2012, to support this decision in accordance with § 2.2-4007.1 F of the Code of Virginia.

This regulation is necessary to comply with § 63.2-1723 of the Code of Virginia that mandates the adoption of regulations to implement the provisions of the section. This section pertains to waivers of disqualification of individuals seeking to operate, volunteer, or work at a child welfare agency or of adults residing in a family day home. The regulation also is necessary to provide guidance and clarification on implementation of the background check requirements of §§ 63.2-901.1, 63.2-1704, 63.2-1720, 63.2-1721, 63.2-1722, and 63.2-1723 of the Code of Virginia. No complaints or comments on the regulation have been received. The regulation was last reviewed in October 2008. There is no economic impact on small businesses caused by this regulation, so no amendments are necessary.

Contact Information: Karen Cullen, Program Consultant, Department of Social Services, 801 East Main Street, Richmond, VA 23219, telephone (804) 726-7152, FAX (804) 726-7132, or email karen.cullen@dss.virginia.gov.

### Notice of Periodic Review and Small Business Impact Review

Pursuant to Executive Order 17 (2014) and §§ 2.2-4007.1 and 2.2-4017 of the Code of Virginia, the State Board of Social Services is currently reviewing each of the regulations listed below to determine whether the regulation should be repealed, amended, or retained in its current form. The review of each regulation will be guided by the principles in Executive Order 17 (2014). Public comment is sought on the review of any issue relating to each regulation, including whether the regulation (i) is necessary for the protection of public health, safety, and welfare or for the economical performance of important governmental functions; (ii) minimizes the economic impact on small businesses in a manner consistent with the stated objectives of applicable law; and (iii) is clearly written and easily understandable.

**22VAC40-293, Locality Groupings**

Contact Information: Mark Golden, Program Manager, Department of Social Services, 801 East Main Street, Richmond, VA 23219, telephone (804) 726-7385, FAX (804) 726-7357, or email mark.golden@dss.virginia.gov.

**22VAC40-685, Virginia Energy Assistance Program - Home Energy Assistance Program**

Contact Information: Denise Surber, Program Consultant, Department of Social Services, 801 East Main Street, Richmond, VA 23219, telephone (804) 726-7386, FAX (804) 726-7358, or email denise.t.surber@dss.virginia.gov.

**22VAC40-910, General Provisions for Maintaining and Disclosing Confidential Information of Public Assistance, Child Support Enforcement, and Social Services Records**

Contact Information: Karin Clark, Regulatory Coordinator, Department of Social Services, 801 East Main Street, Richmond, VA 23219, telephone (804) 726-7017, FAX (804) 726-7015, or email karin.clark@dss.virginia.gov.

The comment period begins November 16, 2015, and ends December 7, 2015.

Comments must include the commenter's name and address (physical or email) information in order to receive a response to the comment from the agency. Following the close of the public comment period, a report of both reviews will be posted on the Town Hall, and a report of the small business impact review will be published in the Virginia Register of Regulations.

## STATE WATER CONTROL BOARD

### Proposed Enforcement Action for Greif Packaging LLC

An enforcement action has been proposed for Greif Packaging LLC, regarding a wastewater treatment plant operated by Greif in Riverville, Virginia for violations of State Water Control Law and regulations. The proposed enforcement action includes a civil charge. A description of the proposed action is available at the Department of Environmental Quality office named below or online at www.deq.virginia.gov. Robert Steele will accept comments by email at robert.steele@deq.virginia.gov, FAX at (540) 562-6725, or postal mail at Department of Environmental Quality, 3019 Peters Creek Road, Roanoke, VA 24019, from November 16, 2015, through December 16, 2015.

### Total Maximum Daily Loads for Walker Creek, Town Creek, East Wilderness Creek, Nobusiness Creek, Kimberling Creek, and Little Walker Creek

The Department of Environmental Quality (DEQ) seeks written and oral comments from interested persons on the development of total maximum daily loads (TMDLs) for Walker Creek, Town Creek, East Wilderness Creek, Nobusiness Creek, Kimberling Creek, and Little Walker Creek in Bland and Giles Counties. These streams are listed on the 2012 § 303(d) TMDL Priority List and Report as impaired due to violations of the state's water quality standards for bacteria. Section 303(d) of the Clean Water Act and § 62.1-44.19:7 C of the State Water Control Law requires DEQ to develop TMDLs for pollutants responsible for each impaired water contained in Virginia's § 303(d) Priority List and Report.

The impaired segments include: 33.53 miles of Walker Creek from the Route 52 crossing to the confluence with Kimberling Creek; 4.40 miles of Town Creek from the

headwaters downstream to the confluence with Crab Orchard Creek; 3.35 miles of East Wilderness Creek from the confluence with Wolf Pen Branch upstream 3.2 miles; 4.88 miles of Kimberling Creek from the Hiram Thompson Branch confluence upstream to Hazel Branch; 6.72 miles of Nobusiness Creek from the confluence with Kimberling Creek upstream 6.4 miles.

The final public meeting on the development of the TMDL to address the bacteria impairments for these segments will be held on November 19, 2015, from 6 p.m. to 7:30 p.m. at the Bland County Public Library located at 697 Main Street, Bland, VA 24315.

The public comment period will begin November 19, 2015, and end December 21, 2015.

A component of a TMDL is the wasteload allocations (WLAs); therefore, this notice is provided pursuant to § 2.2-4006 A 14 of the Administrative Process Act for any future adoption of the TMDLs associated WLAs. Information on the development of the TMDLs for these impairments is available upon request.

Questions or information requests should be addressed to Martha Chapman, Department of Environmental Quality, Southwest Regional Office, 355-A Deadmore Street, Abingdon, VA 24210, telephone (276) 676-4800, or email martha.chapman@deq.virginia.gov.

Please note, all written comments should include name, address, and telephone number of the person submitting the comments and should be sent to the DEQ contact listed.

## VIRGINIA CODE COMMISSION

### Notice to State Agencies

**Contact Information:** *Mailing Address:* Virginia Code Commission, General Assembly Building, 201 North 9th Street, 2nd Floor, Richmond, VA 23219; *Telephone:* Voice (804) 786-3591; *Email:* varegs@dls.virginia.gov.

**Meeting Notices:** Section 2.2-3707 C of the Code of Virginia requires state agencies to post meeting notices on their websites and on the Commonwealth Calendar at http://www.virginia.gov/connect/commonwealth-calendar.

**Cumulative Table of Virginia Administrative Code Sections Adopted, Amended, or Repealed:** A table listing regulation sections that have been amended, added, or repealed in the *Virginia Register of Regulations* since the regulations were originally published or last supplemented in the print version of the Virginia Administrative Code is available at http://register.dls.virginia.gov/documents/cumultab.pdf.

**Filing Material for Publication in the *Virginia Register of Regulations*:** Agencies use the Regulation Information System (RIS) to file regulations and related items for publication in the *Virginia Register of Regulations*. The Registrar's office works closely with the Department of Planning and Budget (DPB) to coordinate the system with the Virginia Regulatory Town Hall. RIS and Town Hall complement and enhance one another by sharing pertinent regulatory information.

# ERRATA

## STATE BOARD OF HEALTH AND MEDICAL ASSISTANCE SERVICES

Title of General Notice: **Notice of Request for Certificate of Public Need Applications for Development of Additional Nursing Home Beds Planning Target Year 2017.**

Publication: 32:5 VA.R. 236-238 September 7, 2015.

Correction to General Notice:

Page 238, column 1, Schedule of Review, after "specified review cycle" replace lines 8, 9, and 10 with the following:

"Letter of intent must be received by December 31, 2015.

Application must be received by February 1, 2016.

Review cycle will begin on March 10, 2016."

VA.R. Doc. No. C16-02; Filed October 26, 2015, 1:47 p.m.

## BOARD OF DENTISTRY

Title of Regulation: **18VAC60-21. Regulations Governing the Practice of Dentistry.**

Publication: 32:5 VA.R. 706-742 November 2, 2015.

Correction to Final Regulation:

Page 710, 18VAC60-21-50 A, line 4, delete "§ 54.1-2710" and insert "§ 54.1-2700"

VA.R. Doc. No. R10-2362; Filed November 3, 2015, 6:41 p.m.

## REAL ESTATE APPRAISER BOARD

Title of Regulation: **Real Estate Appraiser Board Rules and Regulations.**

Publication: 32:4 VA.R. 573-576 October 19, 2015.

Correction to Table of Contents:

Under "Regulations," after "18VAC130-20. Real Estate Appraiser Board Rules and Regulations," change "(Proposed)" to "(Final)"

VA.R. Doc. No. R16-4512; Filed November 6, 2015, 12:55 p.m.