VIRGINIA WATER PROTECTION PERMIT PROGRAM REGULATION AND ASSOCIATED VIRGINIA WATER PROTECTION GENERAL PERMIT REGULATIONS

CITIZEN ADVISORY GROUP

DRAFT MEETING NOTES

MEETING THURSDAY, AUGUST 25, 2014
DEQ PIEDMONT REGIONAL OFFICE – TRAINING ROOM

Meeting Attendees

CITIZEN ADVISORY GROUP MEMBERS	*INTERESTED PARTIES*	*SUPPORT STAFF*
Steven E. Begg – Virginia Department of Transportation	John H. Brooks, III – Resource International	Melanie Davenport
Nina Butler – Virginia Manufacturers Association/Mission H2O	Tracey Harmon – Virginia Department of Transportation	Dave Davis
Jason P. Ericson – Dominion Resources Services, Inc.	Sam Hollins – Virginia Transportation Construction Alliance (VTCA)	Mike Murphy
Karen Johnson – The Nature Conservancy (TNC)	Dan Lucey - Virginia Homebuilders Association/Virginia Association for Commercial Real Estate (VACRE)	Bill Norris
Bob Kerr – Kerr Environmental	Scott Ross – Salem Stone Corp.	Ann Regn
Chris Moore – Chesapeake Bay Foundation (CBF) (Alternate for Peggy Sanner)	Dan Savage – Chesapeake Bay Foundation (CBF)	Brenda Winn
Greg Prelewicz – Fairfax Water	Oula Shehab-Dandan – Dominion Resources Services, Inc. (Alternate for Jason P. Ericson)	***OTHER DEQ STAFF***
Mike Rolband – Virginia Homebuilders Association/Virginia Association for Commercial Real Estate (VACRE)	Robert Siegfried – Angler Environmental	Trisha Beasley
Beth Silverman Sprenkle – EEE Consulting, Inc.	Joe Wood – Chesapeake Bay Foundation (CBF)	Steve Hardwick
William T. (Tom) Walker – US Army CORPS of Engineers	Andrea W. Wortzel – Troutman Sanders (Alternate for Nina Butler)	Scott Kudlas
		Sarah Marsala
		Bert Parolari
		Bettina Sullivan

NOTE: Citizen Advisory Group Members NOT in attendance: Katie Frazier – Virginia Agribusiness Council; Margaret L. (Peggy) Sanner – Chesapeake Bay Foundation (CBF); Skip Stiles – Wetlands Watch

1. Welcome & Introductions (Mike Murphy):

Mike Murphy, Director of DEQ's Piedmont Regional Office, welcomed the members of the Citizen's Advisory Group and members of the Interested Parties to the meeting. He told the group that he appreciated the effort and participation by the members of the Advisory Group as well as the "interested parties". This is an important regulation that has a bearing on quite a few things in the Commonwealth. He thanked everyone for being here for today's discussions. He noted that we are on a relatively tight time schedule so we have a lot of ground to cover during this meeting. We plan on

getting into the body of the regulations and some of the staff proposals for revisions during today's meeting and get into the real work of the group which is to look at any potential changes and to recommend moving forward with specific proposal or not and to see if we can reach consensus or not.

He explained the "Procedures" for the meeting in case of an emergency and took care of some housekeeping items.

He asked for introductions of those in attendance. He asked all of those in attendance to make sure that they sign-in on the Sign-In sheet so that we have an official log of who attended the meeting.

2. **Notes from Previous Meeting (August 7, 2014):**

Bill Norris, Regulatory Analyst with DEQ's Office of Regulatory Affairs, asked the group if there were any edits needed for the notes from the previous meeting of the group on August 7, 2014. No additions or changes were noted.

ACTION ITEM: Staff will mark the Meeting Notes from the August 7, 2014 meeting of the VWP Citizens Advisory Group as "Final" and will post them.

3. **Point of Contact (Bill Norris):**

Bill Norris noted that since this is a Public Body that all communications for the group would be handled through a single point of contact. Bill will serve as that point of contact. If any member of the group has any information that they need to share with the group outside of the meetings of the Advisory Group, that information should be forwarded to Bill for distribution to staff and to the Advisory Group distribution list.

4. **Procedure for the Meeting – Process and Schedule (Mike Murphy/Dave Davis):**

Mike Murphy reminded the group that in order to conduct the business of the group efficiently, particularly with the number of "interested parties" attending today's meeting that the conversations and the discussions need to involve only those sitting at the table as members of the Advisory Group. Where needed and when appropriate additional comments from other attendees will be considered, but please try to work through members of the Advisory Group when possible. If needed, please let him or Ann Regn know during a break if you have an item that has bearing on the discussions so that all stakeholders' recommendations can be considered at the appropriate time.

Dave Davis, Director of DEQ's Office of Wetlands & Stream Protection, welcomed folks to the meeting and thanked everyone for coming out to participate in today's meeting. He noted that this is the 2nd of four (4) planned meetings of the group. We currently plan on having this process wrapped up in September. The last meeting is scheduled for September 22nd. We are on a really tight time schedule for the completion of this effort. Part of the discussions of this group today is whether we want to keep moving a "topic" forward or not. There are a few things that we feel that we need to do, there are some other things that we think are appropriate to consider, but may be on the "wish list" and not really a "need". What we are going to be showing you today as we present the "Issue Topics and Summaries" are our rational for discussion which will lead into a decision on whether that topic should move forward or not. He noted that we do have a few more DEQ staff in the room than we had at the first

meeting. They are here to answer any technical questions that the group may have during today's discussions.

5. **Issue Statement Matrix (Brenda Winn):**

Brenda Winn, Senior Program Coordinator for DEQ's Virginia Water Protection (VWP) Permit Program reviewed the "Issue Statement Matrix" that had been compiled based on input from the Advisory Group members related to their ranking of issues that had been identified by staff for possible consideration during this regulatory process. See Below:

TOPICS/RANKINGS	Mike Rolband	Steve Begg	Katie Frazier	Jason Ericson	Bob Kerr	Beth Sprenkle	Greg Prelewicz	Nina Butler				
#1: Movement of surface water withdrawal provisions to a new part (Surface Water Withdrawal – Part I)	B	A	A	A	B	B	C	C				
#2: Functional Assessment requirement	B	A	B	A	A	A		A				
#3: Erosion and sediment control provisions	A	A	B	A	A	A		B				
#4: Wetland delineations revisions	A	A	B	A	A	A		A				
#5: Construction monitoring reporting	B	A	B	A	A	A		A				
#6: Surface Water Withdrawal topics (Surface Water Withdrawal – Part II)	C	B	B	C	C		C	C				
#7: Modifications	A	A	A	A	A	A		B				
#8: Complete application requirements (JPA Complete)	C	B	A	B	B			B				
#9: Temporary impacts	A	A	B	A	A			A				
#10: Compensation, including sequencing	A	B	B	A	A	A		A				
#11: Permitting Exclusions	C		B		C			C				
#12: General Permit Regulation and authorization length-of-terms	C		B		B			A				
KEY: "A" = Topic warrants further DEQ and/or Advisory Group consideration/action/discussion "B" = Not sure about further effort on this topic "C" = Don't pursue further at this time												

She noted that some of these topics will be considered during today's discussion.

6. **Ranking of Issues by Advisory Group – Presentation of Issues and Discussions – Issue #1 – Movement of Surface Water Withdrawal Provisions to a New Part (Scott Kudlas/Sarah Marsala):**

Scott Kudlas, Director of DEQ's Office of Water Supply, provided an overview of the Office of Water

Supply and his roles and responsibilities. He noted that he manages the water resources programs at DEQ - that is code for "water quantity" for the most part – that includes surface water withdrawals; groundwater withdrawals; drought response; some monitoring programs and water supply planning. He noted that since his group has an interest in making some changes structurally to the regulations, he wanted to provide a little bit of background to the group to support these proposals. The proposed reorganization of the water withdrawal portions of the regulations is actually the continuation of a process that was started in 2005. There was an Advisory Group that worked on the Water Supply amendments to the VWP Regulation in 2005 that became effective in 2007. At that time we limited the scope of the proposals, even though it was pretty much the general consensus of the group that it made sense to move in the direction of separating out the water withdrawal components of the regulation so that they were clearer; easier to find and more understandable. This is just a continuation of that process. We had the consensus at the time to separate the requirements and took the first incremental steps at that time to do that. We moved forward some things that resulted from commitments that were made in the Water Supply Planning RAP that predated the convening of the VWP RAP. There were some changes made to the water withdrawal regulations. Some additional language was also included that related to the 404 B1 Guidelines. A number of initial incremental changes were made in an effort to try to focus the water withdrawal requirements and this current process is just a continuation of those initial efforts. Also, one of the things that folks on that earlier RAP anticipated and DEQ staff anticipated was that the next time that the regulation was reopened that we would take that opportunity to make some more changes related to restructuring the regulation.

The changes that are being proposed today are nearly all organizational and structural in nature. There are a couple of clarifications that are being proposed. There are some other "tweaks" to the regulations that will be presented for your consideration that fall into a couple of different categories – most of them are changes that reflect staff experience of the implementation of those changes made in 2007, in addition to that there are some changes that the General Assembly has made in the passage of time since 2007. There a couple of areas where we are proposing changes – they are in the modification section where we want to try to make it clear that there are a number of changes (or categories of changes) to the VWP permit (major and minor) for reservoir projects that can occur. In addition there are proposed changes that are based on new legislation – two in particular that have passed since 2007 are related to "interbasin transfer" that included some additional application requirements that we would like to make sure that those are clearly stated in the application requirements section and carry that forward and there was also a bill that was passed that required "consultation with the water supply planning group" so that water supply planning decisions and plans would be considered in our permitting process so that those plans could be carried out. Finally, over the course of the last 2 1/2 years, DEQ has been working very closely with the Virginia Department of Health (VDH). VDH manages the Virginia Waterworks Operations Permit Regulations and those permits that are issued by VDH deal with all of the public health and distribution things that are related to treatment plants and distribution systems for public water supply systems – for where that public water actually goes. Over the years there have been a number of inconsistencies and discrepancies have been pointed out by mostly members of the regulated community. DEQ has been working with VDH for the last couple of years to identify which parts of which regulations are the proper role and responsibility of which agency as well as to identify some common language that we would like to see in some of the definitions. We are doing this on a dual track with VDH. They have just reopened their "Waterworks Regulation" so that RAP is meeting at the same time as this Advisory Group. The objective is to make common changes to both regulations during this process.

Sarah Marsala, Surface Water Withdrawal Project Manager with DEQ's Office of Water Supply, noted that she would be taking the lead in presenting the proposed reorganization and changes that staff would like to see in the VWP regulation to better organize it for the surface water withdrawal portions of the regulation. Currently the surface water withdrawal requirements are scattered throughout the regulation and it is difficult for not only the regulated community but also DEQ program staff to know exactly what you need to do for a surface water withdrawal permit application. The items that are being presented at this time are strictly reorganization of the language – nothing that effects substance – there are no rewording or re-tweaking of the requirements in what will be presented. This is strictly a "cut-and-paste" exercise. A document "Outline of VWP Regulation 9VAC25-210" was distributed as a guide to the materials that were presented. (It was noted that this document and the materials that were being presented were not a part of the pre-meeting distribution to the Advisory Group.) Sarah noted that the changes that were being proposed at this time were strictly a relocation of language – no wording changes are proposed. Sections of the existing regulation containing surface water withdrawal provisions that are proposed to be moved in whole or in part to a new part specific to surface water withdrawal include the following:

- **Part I. VWP Permit Program Definitions, Exclusions, Prohibitions and Requirements:**
  - **Definitions (9VAC25-210-10):** The proposed edits include moving the definitions related to surface water withdrawal from 9VAC25-210-10 to a new part dealing strictly with Surface Water Withdrawals. Definitions being proposed to be moved include:

    - "Affected stream reach";
    - "Agricultural surface water withdrawal";
    - "Drought";
    - "Emergency Virginia Water Protection Permit";
    - "Intake structure";
    - "Major surface water withdrawal";
    - "Minor surface water withdrawal";
    - "Potomac River Low Flow Allocation Agreement";
    - "Public surface water supply withdrawal";
    - "Public water supply emergency";
    - "Section for Cooperative Water Supply Operations on the Potomac (CO OP)";
    - "Surface water supply project";
    - "Surface water withdrawal";
    - "Water Supply Coordination Agreement"; &
    - "Withdrawal system"

    Discussions by the group included the following:

    - A question was raised as to the term "surface water" and its definition and whether that was being proposed to be relocated. *Staff Response: The definition of "surface water" is not being proposed to be moved.*

- The concept is that the normal VWP Definitions would be upfront as it currently exists with the specific surface water withdrawal definitions moved to the new section. These definitions would be considered as "supplemental" to those definitions.
- Would these changes have any impact on a traditional style VWP project: *Staff Response: No – these are specific to surface water withdrawal projects.*

- **Part I. VWP Permit Program Definitions, Exclusions, Prohibitions and Requirements (Cont.):**
  - Exclusions (9VAC25-210-60): The proposed change for this section is to move the text currently found in 9VAC25-210-60 B and 9VAC25-210-60 C from this section into a new part specific to surface water withdrawals.
- **Part II. VWP Permit Application and Development:**
  - Preapplication procedures for a new or expanded VWP permit for major surface water withdrawals (9VAC25-210-75): The proposal is to move the entire section into the new surface water withdrawal section.
  - Application for a VWP permit (9VAC25-210-80): The proposal is to move the language from 9VAC25-210-80 B 2 - related to applications involving instream flow requirements; 9VAC25-210-80 C – related to applications for new or expanded minor surface water withdrawals; and, 9VAC25-210-80 D – related to applications for an Emergency Virginia Water Protection Permit to address a public water supply emergency into the new surface water withdrawal part.
  - Establishing applicable standards, limitations or other VWP permit conditions (9VAC25-210-110): The proposal is to move the language from 9VAC25-210-110 A – related to conditions applicable to surface water withdrawals into the new surface water withdrawal part.
  - Evaluation of project alternatives (9VAC25-210-115): The proposal is to move the language from 9VAC25-210-115 A and 9VAC25-210-115 B that address project alternatives for a major surface water withdrawal, a public water supply withdrawal or the alteration of instream flow into the new surface water withdrawal part. In addition, the current requirements found in 9VAC25-210-115 C 2 and 9VAC25-210-115 C 3 would also be moved to the new surface water withdrawal part.

Discussions by the group included the following:

- There needs to be something in the new section that states that surface water withdrawals still have to comply with the definitions and requirements for VWP projects found in the balance of the regulation above this section. *Staff Response: That type of language (transition language) will need to be worked out. The actual wording of a*

"transition" link still needs to be developed. This is still living in the chapter for VWP so the current requirements still apply it is just a question of how to make sure that is clearly understood.

- **Part III. Public Involvement:**
    - Public notice of VWP permit applications, permit actions and public comment periods (9VAC25-210-140): The only portion that is being proposed to be moved is 9VAC25-210-40 A which deals with an initial application for surface water supply projects that require both an individual Virginia Water Protection Permit and a Virginia Marine Resources permit.
- **Part IV. VWP Permit Variances; VWP Permit Modification, Revocation and Reissuance, Transfer, Termination and Denial:** The proposal is to change the title of the Part IV to delete reference to "VWP PERMIT VARIANCES" since that language is proposed for relocation to a new part.
    - Variance from VWP permit conditions (9VAC25-210-175): The proposal is to move the language in this section that addresses "variances from VWP permit conditions" from this section to the new section on surface water withdrawals since variances from VWP permit conditions are only related to surface water withdrawal projects – variances are not applicable to traditional VWP projects.
    - Rules for modification, revocation and reissuance, transfer, and termination of VWP permits (9VAC25-210-180): The proposal is to relocate the portion of this section that is relative to surface water withdrawals and minimum instream flow (9VAC25-210-180 D 6) from this section to the new surface water withdrawals section.

Staff noted that all of the proposed changes identified were of a cut and paste/relocate nature. There will need to be some transition language to make sure that the "links aren't broken" between this new part and the existing VWP regulation requirements. Staff is proposing these changes/relocations to try to make the requirements related to surface water withdrawals make more sense and make them easier to find in the regulations. The proposed organization of a new part specific to surface water withdrawals would follow basically the same sequence currently found in the regulation except for the "coordination with VMRC" which is being proposed to be moved higher in the outline as identified below:

NEW PART – SURFACE WATER WITHDRAWALS

- Definitions for Surface Water Withdrawals (from 9VAC25-210-10);
- Exclusions from Permits for Surface Water Withdrawals (from 9VAC25-210-60 B and 9VAC25-210-60 C);
- Pre-Application Procedures for New or Expanded Surface Water Withdrawals (from 9VAC26-210-75);

- Coordinated Review with the Virginia Marine Resource Commission on Applications for Surface Water Withdrawals (from 9VAC25-210-140 A);
- Application Requirements for Surface Water Withdrawals (from 9VAC25-210-80 B 2; 9VAC25-210-80 C and 9VAC25-210-80 D);
- Evaluation of Project Alternatives for Surface Water Withdrawals (from 9VAC25-210-115 B; 9VAC25-210-115 C 2; and 9VAC25-210-115 C 3);
- Conditions Applicable to Surface Water Withdrawal Permits (from 9VAC25-210-110 A);
- Modifications to Surface Water Withdrawal Permits (from 9VAC25-210-180 D 6); &
- Variance from Surface Water Withdrawal Permit Conditions (9VAC25-210-175).

Discussions regarding the proposed relocation of surface water withdrawal related requirements into a new Part for "Surface Water Withdrawals" included the following:

- Will the group be able to work on the "transition language" at a future meeting? *Staff Response" Yes, right now what we need to know is if this is something that the group thinks that we should proceed on and work on making these changes. Is this structure something that the group is willing to consider? Is this something that we should work on further to develop a proposal for review and consideration by the group?*

CONSENSUS: The relocation of language and requirements specific to surface water withdrawals should be pursued by staff and developed into a proposal for review and consideration by the Advisory Group.

ACTION ITEM: A Track-Changes version of the proposed changes will be provided to the Advisory Group for their review and consideration via email following today's meeting.

- The group requested that the "linking language" ("transition" language) be forwarded to the group as soon as it was available.

ACTION ITEM: Staff will develop proposed "transition" language to provide the needed linkage between the new section and the rest of the VWP requirements to the group for their review and consideration as soon as it is available.

7. **Ranking of Issues by Advisory Group – Presentation of Issues and Discussions – Issue #7 – Modifications (Sarah Marsala):**

Sarah Marsala presented a Power Point Presentation to the Group on the issues related to "Modifications" and provided items for consideration by the group. Her presentation included the following:

MODIFICATION SECTION RECOMMENDATIONS:

- **Desired Outcome of Revisions:**
  - Improve functionality of "minor modification"
  - Reduce uncertainty as to activities that qualify for modifications
  - Revise activities to those relevant to VWP
  - Greater transparency on the process and informational requirements
- **Recommended/Proposed Clarifications:**
  - Minor Modification:
    - § Allow changes to compliance deadlines
    - § Additional Impacts:
      - Increase permanent impact thresholds
      - Allow new impacts anywhere within authorized project limits
      - Specify avoidance and minimization and compensation requirements
      - Require prior approval of temporary impacts
    - § Allow change in compensation from permittee-responsible to bank/trust fund
    - § Remove conditions not relevant to VWP
      - 9VAC25-210-180 F 6 and 7 – regarding discharge of pollutants
    - § Clearly identify extension and change of ownership as minor modification actions
    - § Change in ownership:
      - Clarify main interest is transfer of permit responsibility
      - Clearly allow automatic transfer if condition met
    - § Add deadline to submit extension request – currently only in the permit not in the regulation
    - § Propose actions specific to withdrawals (own section)
  - Major Modification:
    - § Propose application requirements and procedures for processing "major" modifications – don't currently identify a process
      - Follow current procedures
      - Refer to other sections, avoid duplication
  - Surface Water Withdrawal:
    - § Major Modification
      - An increase in withdrawal volume or instream flow requirement
      - Significant change to intake location
      - New or modified use for withdrawal
    - § Minor Modification
      - Small changes in intake location
      - Temporary changes to instream flow or operational requirements
      - Changes to operations that do not result in withdrawal increases

        - Changes in monitoring method or location of monitoring sites
    - General Permit (GP) – Notice of Planned Change:
        - Increase thresholds to allow more flexibility
        - Move "change of ownership" to Notice of Plan Change (NOPC) section
        - Allow change in compensation from permittee-responsible to bank/trust fund

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Discussions of the group regarding proposed Modification Section changes included the following:

- When permit "ownership" is transferred is DEQ going to have the original permittee responsible for previous violations and the new "owner" responsible for violations moving forward? Who will DEQ identify as the responsible party? During this process that needs to be clarified. *Staff Response: Did not get to that level of detail yet in this process – but will work to clarify how that situation will be addressed.*
- RE: Major Modification recommendations - Some of the things that are being discussed that are not currently included in the regulation were purposely excluded so that DEQ would have the flexibility of addressing them through guidance and policies. Wouldn't it be easier and more efficient for DEQ to develop a procedure through guidance to address the handling of "major modification" instead of inserting it in the regulations? *Staff Response: VPDES outlines a process that might be applicable for transition into the VWP regulation to address this. We may be able to use the existing VPDES process to shorten the process.* If you include it in the regulation then you can't change it without going through another regulation development process – you only have a couple of meetings left in this current process to get that language developed. *Staff Response: DEQ is between a rock and a hard place on this because some people embrace flexibility and some don't. Some people want to see the process clearly identified in regulatory language – some are okay with that process being identified through guidance and policies.* Does DEQ have a clear process/procedure in mind for addressing "major modifications"? *Staff Response: Yes – to some extent.*
- The concern is that it has taken 13 to 14 years to get to this stage of the process ("to some extent") so if it is included in the regulation how long is the development of that language going to take – we are on a very short time frame for this current process.
- People are worried about clarity – a guidance document could still provide that clarity but would be outside of the regulatory process. Always need to be mindful of "unintended consequences".
- *Staff Note: The balance is that there are different procedural requirements for the major modification (i.e., public notice, etc.) – it would really help us to flesh the process out and to clearly identify what those thresholds are – the process for informational requirements needs to be fleshed out – one of the things that we are trying to do is to take the years of experience we have in working with the program and permitting and articulate clearly the things we know we*

need – we would like that information to be in the regulation so that it is not open to debate as to what is required as each of these applications comes in.

- The concern is that we have been waiting for the guidance document for the last 13 to 14 years so is DEQ going to be able to develop regulatory language to address "major modifications" within the next several weeks? Whatever is easier for DEQ – the group will take it either way.
- *Staff Note: We see this process as a two stage process – first we would take what we have related to surface water withdrawals and move that language into a separate section – second stage is whether or not any of the language is moved there may be tweaks/changes that are going to be proposed to clarify and modify the existing language – those changes/edits will be identified and given to the group for their review and consideration prior to moving forward in this process.*
- Are there any existing process identified for major modifications? What changes are being proposed? *Staff Response: The only item that was identified during the presentation was a an item found in the major modification section found in 9VAC25-210-180 B 6 that addresses surface water withdrawals: "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 62.10253 of the Code of Virginia, during the term of the VWP permit."*
- Currently DEQ staff makes the determination of whether a modification is a "major" or a "minor" modification. *Staff Response: Yes, when staff receives a request it is evaluated on a case-by-case basis as to whether the request should be handled as a "major" or a "minor" modification. This is the current process for surface water withdrawals. For wetland projects it is more cut-and-dry – there are more identified procedures that need to be followed in making that determination. Currently having staff make these determinations on a case-by-case basis doesn't appear to be much of an issue for the applicant or permittee as it does for the public – the public has a very hard time understanding, because these are usually very controversial projects – for example, when you build a new reservoir there is always a lot of public opposition in putting it in place. Then 6 months later because of final design you want to make changes to that permit and that becomes public it would be nice to have something to show to the public to explain why it was treated as a "major" modification or a "minor" modification.*
- Are any new definitions going to be proposed as a result of this reorganization effort for surface water withdrawal requirements? *Staff Response" No, but we are proposing to add language to identify certain things that would obviously fall into each category. The list, pretty much by definition won't be exhaustive, there will still be those things that staff has to make a case-by-case decision. But for those things that everyone feels comfortable with that "this ought to be major" and "this ought to be minor" we would like to include them in the regulation.*
- RE: Thresholds: It was suggested that since there are "numbers" quantifying the threshold levels for wetlands that instead of terms such as "small" that there be "numbers" assigned to

thresholds for surface water withdrawal as well. Don't know how you regulate "small" or "significant" – there should be defined "number" limits. The decision making process would be accelerated if there were "numbers" associated thresholds. *Staff Response: In an ideal world that would be great – we had a reg process in the past for a surface water general permit for small withdrawals and that process failed miserable in identifying or determining what a "small withdrawal" was. The group could never come to consensus on that issue. The reality is that given the various agencies involved and the amount of professional judgment dealing with the impacts and changes in flow on different species – it probably can't be done. We would rather just point out some types of changes (i.e., if you propose making a change that falls into this category) that it is either one or the other (major or minor).*

- In the current discussion the terms "small" and "significant" are used in terms of changes in the location of an intake not necessarily the volume of water that you are dealing with. Could we at least get numbers for what a small change is in relation to an intake structure location even though it is not changing the volume? *Staff Response: It becomes very challenging – because if you do a field survey and you find mussels 200 feet downstream from the intake and you ask DGIF, if we move the intake location 200 feet or 300 feet is that okay – it becomes a very subjective decision that is subject to negotiation – don't know that we could come up with a number that everyone would feel comfortable with.*
- Could you quantify a "small" change as something that did not have an impact on endangered species as falling into the category of a "minor modification"? *Staff Response: We are open to any suggestions related to language that the group is willing to put forward.*

The question is whether this concept of changes to the modifications sections, not just related to surface water withdrawals, but the whole concept presented should be carried forward? Is this something that staff should proceed with the development of proposed language and regulation changes for review and consideration by the group? Is this a topic something that the group wants to see proposed language to consider? Some of the topics that will be discussed today have not been looked at by staff in terms of proposed language revisions because staff is undecided as to whether they should be addressed during this process or not – that is why we are bringing them before the group – to help us decide where our efforts should be focused. On some of the topics the question is "Do we even want to pursue this line of thought – this concept – this line of thinking? Once the decision has been made to move forward with a topic then staff will attempt to develop language to specifically address that topic or issue and any proposed language or regulation structure changes needed. We know what makes sense from our point of view as a regulator and permittee, but we don't know if it is as apparent to you all that these things should be changed – because we only have our view on these issues. So that is what we are trying to figure out. We think that it would be helpful for staff to have a better articulation in the regulation as to what constitutes a "major" modification and what constitutes a "minor" modification. But if this group decides that we shouldn't waste our time on that then we will continue to muddle through with the current language and staff interpretations and determinations. On the surface water side there is only one identified thing that qualifies as a major mod there is no guidance at all on what should be considered a minor

mod. One, we get a lot of public interest but there is not a lot of clarity for the public to understand. And, two going into the process there is not any clarity for the regulated community. They don't know what the requirements of a proposed change will be all the time – for a major mod for instance if they come in and want to increase the volume of their withdrawal then they know that there is a public notice requirement – they know what to expect - but if it is a minor mod for a change to intake location or for small changes to operational requirements there is no defined clarity as to what their requirements are – i.e., whether there are public notice requirements or not.

Continued Discussions of the group regarding proposed Modification Section changes included the following:

- Historically has DEQ treated a change in withdrawal volume or a change in use as a minor mod? *Staff Response: That is determined on a case-by-case basis – it depends on the location and the level of public opposition.*
- *Staff Note: The question that needs to be addressed now is whether is a topic/issue that staff should develop proposed regulatory language to address – this is one of the topics that every one of the group who had ranked the items had ranked as an "A". It seemed at least initially like this was a topic that we should move forward with. Our next step is to develop draft language, but is there a topic among these that anyone in the group is very passionate for or against? If there is an item that the group collectively thinks that DEQ is crazy to pursue then we will take it off the table and move on. Should we move ahead with these items presented and discussed above into a track changes document to identify proposed language and structural changes?*
- Don't have any trouble with any of the identified topic areas – the one thing from the first meeting is the issue of "temporary impacts" and some "bad-actors" out there misusing the concept of "temporary impacts" for things that might be considered potential violations. If you want to have a minor mod for increased to permanent impact thresholds does that mean then that there are no additional minor increase in temporary impacts that would need to be authorized under a minor mod? *Staff Response: There are bad actors out there who do things under the guise of "temporary impacts". It makes it difficult for staff to determine what things need to go to enforcement and which things are actually real "temporary impacts". We look at "temporary impacts" being impacts that have been preapproved by the agency. We know about ahead of time and know that the impact is going to occur and that it is "temporary" and that we agree on how the permittee is going to restore it. Then anything else that we do not know about would clearly be handed under a "no permit" situation.*
- Comfortable with most of the language that has been proposed but it was noted that there were some projects where the permittee would not be comfortable with handling temporary impacts in this fashion.
- There should be a way to address changes in construction plans for a project that result in impacts that even though they were not planned for or preapproved that they could be handled

as temporary impacts. This concept should be articulated to allow for these unforeseen instances as temporary impacts.

- What is the time frame for turning around a request for a minor mod? How is notification handled? *Staff Response: There is no designated time frame.*
- There needs to be a time frame for notification. Some of these unplanned impacts can occur in a very short span of time (i.e., an on the fly decision) and others will be evident earlier in the process based on a plan change or a situation on the site.
- *Staff Note: As DEQ increases permit compliance, having the prior notification of temporary impacts becomes important because if you took those temporary impacts 2 days ago and DEQ was not notified and an inspector goes out to the project area then we get back into the situation where this activity/impact appears to be "unpermitted".*
- If you have a notification process by which you can very quickly report the "temporary impact" with an explanation of why the impact occurred then that minimizes any concerns that might arise over whether the activity or impact is "unpermitted" or not. *Staff Response: What is the existing timeline for reporting impacts under other programs such as E&S?*
- On some sites impacts can be reported to the E&S Inspector on site. Minor changes to an E&S Plan can be handled by an E&S Inspector on the site. A major modification requires a review by an administrator. Some are literally handled the same day.
- The normal approach in reporting an unforeseen temporary impact to DEQ is through an email with usually a same day response. *Staff Response: There is generally no specified turn-around time – usually dependent on staff workloads.*
- Again the question was raised – Are we breaking something that currently works?
- *Staff Note: Right now it is hard to be able to say that all "temporary impacts" that are not pre-approved are either "approvable" or "justifiable".*
- You are going to have numbers in this process for wetland impacts – then put some numbers in for surface water withdrawals. Put a number in to identify a "temporary impact" threshold. The numbers are important.

GROUP CONSENSUS: Move forward with the development of language to address the concept of modifications as presented by staff – except for the topic of "temporary impacts" which will be addressed later in today's agenda/discussions. The request has been made that staff attempt to develop specific numbers related to thresholds.

- *Staff Request: If any member of the group has an idea on a specific number please forward that information to Bill for distribution.*
- It was suggested that DEQ propose some numbers with the caveat that this "#" has not caused a problem – staff needs to throw out some numbers based on their experience with the program.

ACTION ITEM: Members of the group were requested to provide any recommendations on threshold numbers to Bill Norris for distribution to the staff for their consideration and incorporation into the proposed regulation revisions/language changes.

- A question was raised over the identification of "automatic transfer" as a proposed change. *Staff Response: This language already exists with that intent but really doesn't specify on "automatic transfer" is handled – this would be an effort to fix something that appears to be broken.*
- A question was raised about the identification of "an extension request" as a minor modification. *Staff Response: This is a "minor modification activity" that currently doesn't live in the "minor modification" section – this is an effort to restructure the regulation to move it into that category for clarity that an extension request is a minor mod.*
- A question was raised over the proposed insertion of a "deadline" in the regulation. *Staff Response: Permits currently contain a requirement for permittees to submit their extension requests at least 180 days prior to the permit being expired. Other programs have that deadline their regulations – maybe that is something that we should include here.* There were members of the group who did not necessarily agree with the inclusion of the deadline date in the regulation. Others noted that they would like to see a deadline relative to the extension request. This would help to ensure that the permit extension authorization is received prior to expiration of the permit in question. It was noted that sometimes VDOT's requests are delayed until right up to the day before the permit expires. If there is a specific deadline then that date/time frame could be included as part of your project schedule.
- *Staff Note: There was some good discussion related to the major modification language with the suggestions that we just use guidance and policies instead of developing new language.*
- Major modifications don't currently have a timeline. It might be nice to have a deadline identified – it shouldn't take longer to get a modification then it takes to get a permit. The process and procedure should be identified. Would be nice to be able to look at proposed language to address this – some might be better addressed or included in guidance and other might be better served if included in the regulation but we will need to be able to see the language.
- In regard to the proposed revisions to the surface water withdrawal requirements: This section has the potential to impact public water supplies. Public water supplies and suppliers are really not represented on this advisory group in terms of localities. The way the NOIRA came out on this action it was difficult to determine what were VWP specific items and which were related to surface water withdrawals. It may be difficult for this group to come up with language that would adequately address concerns that may be out there from the water supply and water suppliers' perspective. There may be other concerns out there that may not be represented in this group.
- In favor of anything that clarifies the process but there seems to be a lot more here than just outlining what constitutes major and minor mods and how they will be handled. There are some complex topics here that may need input from others who are not here at the table. The complexity of these issues makes the proposed timeline for these changes difficult. *Staff Response: It would be beneficial for staff to be able to proceed with some draft language and get the groups' input on the proposals. We have identified some issue and are looking at ways that might be addressed – we need to start somewhere to try to resolve the issues that we have*

identified. What we have presented to the group is a picture of how we do and have done business over the years. These proposed changes are really based on DEQ's experience and on how we have been doing it. This is the way that we have addressed these issues over the years – we are looking to be able to include this process and these things in the regulations as a regulatory agency because it would make it easier for us to make these decisions/distinctions.

- *Staff Note: It was noted that one of the roles of the representatives on the advisory group is to represent sector of the regulated community that you work for and their counterparts throughout the Commonwealth in the development of recommendations for these proposed amendments during this regulatory process. For those who are not part of the regulated community you are expected to represent the other municipalities and other stakeholder organizations across the Commonwealth not just your parent group or organization. The comments of members of this group need to represent all of the affected stakeholders throughout the Commonwealth. Your trepidation is understood but the issues that are being presented are things that have been raised by those who currently hold permits as things that need to be clarified. It is important that the comments of the members of this advisory group represent more than just your own experience.*
- Changes in the grandfathering provisions would raise concerns. *Staff response: There are no changes in the grandfathering provisions being proposed in this action.*
- Are there changes in operations being considered that might have an impact on the process and getting a permit? We need to make sure we really understand what is being considered. *Staff Response: What we are doing is going through and identifying areas that either through our experience have identified as things that were an issue to us or the public or things that have been identified or pointed out to us by the regulated community. That is the genesis of these changes that we have brought before you today and will be addressing through this action. We have identified areas and we are asking you to review and provide feedback to the process. The process is "if we move forward with any of these things we would like to draft language and then provide that language to you for your review and feedback". What we are hearing today is that "It might be okay or it might not be okay but the Devil is in the Details." The question then is can we proceed with the drafting of some language so that you will have an opportunity to look at those details? So you can tell us if it is good or bad?*
- What the group is saying that some of these issues and concepts are complicated and there may be other things on the list of issues, given the short amount of time available for this process where we might be a "better bang for the buck" for the effort expended. The rankings provided by the group identified other items that might be more appropriate to address at this stage of the process.
- No harm at looking at any proposed language to address the topics discussed so far today. The concern is the amount of time that has been set aside for this process and whether we can get through the process and give it adequate attention to address the issues. Do we have enough time to address the complexities of major and minor modifications?
- "Make perfect language it will save time."

- One of the problems of this group is already one of time – the timelines set out by the Executive Order confine the time available for this process – it was suggested that the group remember that this is just "guidance". If it is going to take more time to do it right then do it right or don't do it. *Staff Response: DEQ treats the Executive Order as a mandated schedule and it would require a really good reason and justification for asking for a delay in the timeline for this effort.*
- It appears that there is reason to do these changes - if there are reasons then take the time to do it right and make the changes.
- Language needs to be developed and put on the table for the group to review and respond to.

CONSENSUS OF THE GROUP: DEQ Staff should proceed with the drafting of language related to "modifications", including those General Permit proposed changes, for review and consideration by the group.

8. **Ranking of Issues by Advisory Group – Presentation of Issues and Discussions – Issue #10 – Compensation (Dave Davis/Steve Hardwick):**

Dave Davis introduced the topic of "Compensation" – he noted that we had started this discussion at the last meeting of the advisory group. He noted that we look at the compensation issue as being two things – one being mitigation rule compliance and all that goes with that and then a couple of things that we think need to be tweaked during this process that may be appropriate.

Steve Hardwick presented a Power Point Presentation to the Group on the issues related to "Compensation" and provided items for consideration by the group. His presentation included the following:

COMPENSATION CONSISTENCY WITH THE 2008 MITIGATION RULE

- **Issues Identified**
    - Currently the general permit regulations indicate that onsite, in-kind compensation shall be deemed the most ecological preferable form of compensation. This conflicts with "Compensatory Mitigation for Losses of Aquatic Resources" (2008 Federal Mitigation Rule) codified at 33 CFR Parts 325 and 332 and 40 CFR Part 230.
    - DEQ's GM 09-2004 indicates that VWPP permit staff will follow the rule's preference unless unique circumstances at the impact site provide an ecologically preferable offset of impacts.
    - The language in the main compensation regulation at 9VAC25-210-116 is outdated and not consistent in some places.
    - 2008 Mitigation Rule requires long-term management of permit-specific compensation sites.

        - Currently permit specific compensation requires use of DEQ and USACE's Restrictive Covenant template and does not require long term management. The restrictive covenant is difficult to enforce after the expiration of the permit.
- **Considerations**
    - Revise the compensation regulation to provide consistency, reduce regulatory burden, and eliminate contradictory and/or duplicative compensation requirements between state and federal wetland regulatory programs.
- **Examples of possible revisions**
    - Revise 9VAC25-210-116, 9VAC25-690-70, and any other corresponding GP sections to state the sequence of preferred compensation is:
        - 1) mitigation bank credits and in-lieu fee released credits
        - 2) in-lieu fee advance credits
        - 3) permittee-responsible mitigation using a watershed approach
        - 4) permittee-responsible mitigation (onsite and in-kind mitigation) with consideration for its compatibility with the proposed project
        - 5) permittee-responsible mitigation (off-site and/or out-of-kind)
    - Revise the application complete section outlining the requirements of conceptual creation, restoration, enhancement, or preservation plans to require a third party easement holder or restrictive covenant with long term management plan, including funding and long term steward [9VAC25-210-80 B 1 k (5)]
    - Revise regulation to require that permittee-responsible compensation be protected by third party easement or restrictive covenant with long term management plan, including long term steward [9VAC25-210-116 B 2]
    - Revise any other language to reflect new sequencing concepts or match other revisions regarding compensation

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Discussions of the group regarding proposed Compensation Section changes included the following:

- *Staff Note: The sequence of preferred mitigation is essentially what DEQ is following in current practice and is found in the federal mitigation rule.*
- If you are already doing this in practice and it is a federal regulation then DEQ needs to move forward with development and incorporation of language in the revised regulations.
- In regard to #4 in the sequence (permittee-responsible mitigation (onsite and in-kind mitigation) with consideration for its compatibility with the proposed project): The term "compatibility with the proposed project" can have different interpretations. There needs to be a provision or a statement included to say "pursuant to the federal mitigation rule" so that there is no confusion about whether DEQ is creating a new criteria for applicability – then you get into differences between DEQ and the Corps.

- You can't repeat the "federal rule" in the DEQ regulations but there is something in the rule that gives the Corps the discretion not to follow this hierarchy under certain circumstances. So if there are ecologically preferable projects then you don't have to go to bank credit or in-lieu fee credits. That phrase giving a level of flexibility as it relates to "ecologically preferable projects" needs to be pulled from the federal mitigation rule and included in the proposed regulation revisions for this section.
- The worst violations in preservation areas are in subdivisions, where the landowner keeps expanding the extent of their "back-yards" into what was originally designated as a "preservation area". *Staff Response: For DEQ, in an enforcement situation, the question becomes who do we approach in an enforcement scenario? Who becomes the responsible party? Is it the individual lot owner who is expanding their backyard or the Homeowners Association? That is the purpose behind creating this third-party easement holder is to have a point of contact and the responsible party for enforcing the easement restrictions.*
- RE: Long-term stewardship: What is missing is any guidance as to what value should be provided? If you have long term stewardship what kind of financial guarantees/assurance is going to be required? What kind of funding is going to be required? There needs to be guidance on this. *Staff Response: This is going to have to be handled on a case-by-case basis.*
- The problem is that the statute doesn't currently allow requiring financial assurance.
- Maybe the way to approach this is that the third party would have some financial responsibility. There has to be some financial mechanism provided for a third party to be able to manage the easement.
- RE: Transportation and long-term management: Under the 2008 mitigation rule there is an exclusion for government agencies and VDOT is currently working with the Corps right now to go back and forth on the development of their own plan to implement VDOT's own long-term management plan. Essential what is being done is to avoid, as a fellow government agency, holding tax payer money for a long period of time. VDOT has the ability to put money aside for their mitigation sites – there is an annual line item in the budget to be able to manage their long-term sites. Want to make sure that any changes that wind up in writing here go back and reference that exemption/flexibility. It was noted that this is a "flexibility to make a decision" not a "blanket exemption". This is handled on a case-by-case basis and looks at the extent of long term management that is necessary.
- Annual inspections of long-term management areas is needed.
- *Staff Note: We can come up with some "flexibility" language that will address "other governmental agency" needs. The point is to be consistent with the Federal Mitigation Rule and the requirements of DEQ's SPGPs.*
- Some concern with the "restrictive covenant" language as it relates to transportation projects because of right-of-ways was noted.
- "Flexibility" needs to consider the track record of the permittee.

- What is a third party – long-term steward? *Staff Response: Is there a need to define this in the regulations?* It was suggested that this would be better addressed in guidance rather than in the regulation.

CONSENSUS OF GROUP: Move forward with the concepts outlined for Compensation and develop regulatory language for review and consideration by the Advisory Group.

9. **BREAK FOR LUNCH – 11:30 A.M. – 12:30 P.M.**

10. **Review of Topics from 08/07/2014 Meeting – Wetland Delineations Revisions (Issue #4) (Dave Davis and Brenda Winn):**

Dave Davis reminded the group that this was an issue topic that had been discussed at the August 7, 2014 meeting of the advisory group and the material that is going to be presented is staff's proposed language to address the issues identified at that meeting. Brenda Winn presented an overview of the proposed regulatory language changes related to revisions related to "wetland delineations". She noted that the group should have received copies of two track-change documents that included the revisions. Her presentation included the following:

9VAC25-210-45. Wetland delineation.

Each wetland delineation shall be conducted in accordance with the USACE "Wetland Delineation Manual, Technical Report Y-87-1, January 1987, Final Report" (Federal Manual) and any regional wetland supplements approved for use by the Corps. ~~The~~ These Federal ~~Manual~~ Manuals shall be interpreted in a manner consistent with USACE guidance and the requirements of this regulation, and any delineation guidance adopted by the board as necessary to ensure consistency with the USACE implementation of delineation practices. USACE regulatory guidance letters may be used to supplement preparation of delineations.

Discussions of the group regarding changes to 9VAC25-210-45 included the following:

- No issue or problem with the proposed language – but there was a question regarding the "high water mark" identification for surface waters – surface streams - ponds. Is there any place in the regulation where this term is defined? *Staff Response: "Ordinary High Water" is not defined in the Individual Permit definitions. "Surface waters" is defined.*
- There are instances, working with the Baltimore Office of the Corps where the "ordinary high water mark" has not been identified, additional surveying is required to identify the "ordinary high water mark" in order to get a permit from DEQ. Should we be defining "ordinary high water mark" in our state regulations? *Staff Response: We will need to go back through the regulation to see where "ordinary high water mark" is referenced. It is referenced and included in the definitions for the General Permit – need to move it into the main regulation definition section.*

- Shouldn't this be called "delineation of wetlands and waters", instead of just "delineation of wetlands"? What is being done is a "delineation of waters". *Staff Response: The "all surface waters" requirement is a DEQ concept – the Corps does not have the jurisdiction or the knowledge to provide that jurisdictional determination to DEQ when the "water" is outside the realm of a wetland.*
- It would be nice to have one place where the regulation said that "the Corps does all delineations of all wetlands that are not isolated and all other waters are to be identified on the map" or some variation of that concept. *Staff Response: What we are trying to say is that regardless of what the Corps takes jurisdiction over that DEQ regulates all surface waters, unless they are excluded, and we want one map that has all of the surface water features identified, where some features will have a Corps Confirmation using the 87 manual, which DEQ will use, and other of those features, which the Corps is not interested in, DEQ would in one form or another would confirm for our use.*
- This distinction should be in a delineation section because what is unclear is "who at DEQ makes the determination/decision?" What is the procedure that needs to be followed? When is it done? Why are we focusing on delineation of wetlands, shouldn't we be focusing on knowing where all of the jurisdictional waters are in the Commonwealth?
- Surface waters need to be defined in this section.
- It was suggested that the title of the section should be changed to "Surface Water Delineation".
- There is already a wetland delineation section – staff was going to go into another section of the regulation dealing with surface waters and attempt to incorporate that definition into this section. The idea is that there are streams and open waters, mudflats, etc., all of those other things that are regulated by the Corps that are surface waters that need to be defined and mapped. *Staff Response: Maybe we can title this section "Surface Water Delineation".*
- It was suggested that the section be titled "Delineation of Waters" with a sub-section for "Wetland Delineations" and one for "Other Waters Delineations".

ACTION ITEM: Staff will include the definition of "ordinary high water mark" that is currently found in the definition section of the regulations for General Permits in the definition section of the main regulation.

CONSENSUS OF GROUP: Proceed with the development of language as proposed for 9VAC25-210-45 for review and consideration by the Advisory Group.

Brenda Winn presented the following information about proposed revisions to 9VAC25-210-80 (the complete application section) that address "wetland delineation":

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

B. Informational requirements for a VWP Permit Application…

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

k. The latitude and longitude…and surface water withdrawal projects (if applicable), ~~wetland delineation information,~~ state- and federally-listed threatened…

(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 a RPA.~~ A copy of the U.S. Army Corps of Engineers (USACE), U.S. Department of Agriculture Natural Resources Conservation Service (NRCS), or DEQ delineation confirmation, or other correspondence from the USACE, NRCS, or DEQ indicating approval of the wetland boundary, including the wetlands data sheets, and the latitude and longitude (to the nearest second) of the center of the project site. A delineation map must also be provided that depicts the geographic area(s) of all delineated wetlands, in accordance with 9VAC25-210-45, and all streams and open waters on the site. Wetland types shall be noted according to their Cowardin classification or similar terminology. This requirement may be waived by DEQ, on a case-by-case basis, where the proposed activities are clearly limited to open water areas.

Discussions of the group regarding changes to 9VAC25-210-80 included the following:

- RE: "or DEQ delineation confirmation": Shouldn't the text refer to either a "preliminary" or a "final" delineation confirmation, because the Corps issues mostly preliminary confirmations now?
- "DEQ preliminary or final delineation confirmation" should actually read "DEQ preliminary or final jurisdictional confirmation".
- RE: "all streams and open waters on the site": That is where you have a problem with "ordinary high water mark", because you are in the section on wetland delineation and you do not talk about other surface water features – something needs to be added. The current proposed language addresses 9VAC25-210-45 which is wetland delineation and then it refers to other surface waters. Need to consider adding another section or section reference to refer to things other than wetlands. The question is how do you define and delineate those things that are not wetlands?
- On the map being referred to in this section, everything needs to be covered/included that Virginia is going to permit.
- *Staff Note: One of the issues that staff was trying to address with this proposed language change was the concerns raised by the regulated public where they are required by the Corps to*

make a delineation map but a lot of Corps reps only want it to contains those things that they regulate (those things that a jurisdictional determination identifies). What DEQ wants to see that jurisdictional determination map as well as a map with all of those features on the site that are not included in the Corps Jurisdictional determination but are required by DEQ in order to issue a permit (i.e., all surface waters – all waters regulated by the VWP Permit Program).

- It was noted that in most instances that a map with all of the features required by both the Corps and DEQ – with the non-jurisdictional determination items shaded has been acceptable to the Corps. The map has a key identifying what is regulated by the Corps and what is not.
- A question related to "manmade ditches on a project site" that are not being regulated by the Corps was raised. These are non-jurisdictional features that are not identified as "surface waters" on the map – they are called "ditches".
- The concern over a requirement for having two separate maps to identify those things that are regulated by the Corps and those that are regulated by DEQ was raised. Anytime two separate documents addressing the same site are required there is an opportunity for errors.
- A single map should be required that contains "all surface water features" on a site that are regulated by the state.
- Hopefully the applicant knows what is being regulated prior to applying for a permit. The whole idea is to get a Jurisdictional Determination (JD) so you can figure out what is being regulated prior to applying for a permit.
- When multiple maps are being created for the same project site, the opportunity for errors and game-playing increases. As soon as there are two maps there will be mistakes made. There should just be one map. *Staff Response: There have been instances where a Corps rep. will not consider a map that includes non-jurisdictional features on the map. The Corps suggested that we can figure out/work out a solution to this issue. What makes the Corps uneasy is anything that makes it appear that they are approving anything that is non-jurisdictional. If an agreement can be reached that is consistent and designates specifically that say "the shaded areas are not the jurisdiction of the Corps" or "no approval of non-jurisdictional features are implied by the Corps approval", etc.*
- *Staff Note/Question: Does everyone do a preliminary determination or is it only the Corps?* NRCS also does a "preliminary".
- The wording should be "a copy of a preliminary or final jurisdictional determination", because you cannot always get a "final".
- *Staff Note: Structurally the wording should be" "A copy of the preliminary or final jurisdictional determination from the U.S. Army Corps of Engineers (USACE), U.S. Department of Agriculture Natural…" instead of as originally proposed by the group.*
- *Staff Note: The wording in this section that refers to "indicating approval of wetland boundary" should be changed to read "indicating approval of the boundaries of jurisdictional waters".*
- There should only be one map.

- Should the text of the last sentence of this section that starts out with "wetland types shall…" be changed to read "wetland areas (acres) by type shall…"? Yes.
- What about the inclusion/identification of submerged aquatic vegetation (SAV)? Normally there is a requirement to map SAVs in open water areas. *Staff Response" Staff will look into this.* The Corps requires this information and designates them as "special aquatic sites". VMRC also requires this information.
- RE: VDOT: VDOT has existing agreements with DEQ where in most cases they do not provide these documents/information. It is currently handled informally through interagency meetings. The language that currently reads "may be waived by DEQ, on a case-by-case basis" should also refer to "or through existing agreements". *Staff Response: The intent is not to change things that we are already doing that are working. There are some existing language in the current regulations that need to be considered. Staff will need to review the existing regulation language for consideration before making any changes.*

CONSENSUS OF GROUP: Proceed with the development of language as proposed and discussed and potential modified by today's discussions for 9VAC25-210-80 as it relates to "wetland delineation" and "surface water delineation" for review and consideration by the Advisory Group.

11. Review of Topics from 08/07/2014 Meeting – Functional Assessments - Revisions (Issue #2) (Dave Davis and Brenda Winn):

Brenda Winn noted that this was another topic that had been introduced during the August 7, 2014 meeting of the Advisory Group. She provided a summary of the changes that had been proposed by staff to address this topic area. Her presentation included the following:

9VAC25-210-80. Application for a VWP permit.
B. Informational requirements for a VWP Permit Application…
1. A complete VWP permit application, at a minimum, consists of the following information:
k. The latitude and longitude…and surface water withdrawal projects (if applicable), ~~wetland delineation information,~~ state- and federally-listed threatened…
(1) For VWP Individual permits where wetland impacts are greater than ~~one acre (1.0 acre or 43, 560 square feet)~~ two acres, the assessment of functional values of the affected surface waters must include information on:…This information will be used to determine the type of compensatory mitigation required under a VWP individual permit to ensure no net loss of wetland functions.

Discussions of the group regarding changes to 9VAC25-210-80 related to "functional assessments" included the following:

- The term "functional value assessment" should be "functions and values assessments". This may be one of those terms that is now widely accepted even though it is wrong. *Staff Response:*

Don't like the term – value implies some kind of economic or societal value. Really we are talking about an assessment of the function.

- The suggestion was made to just delete the whole paragraph at 9VAC25-210-80 B 1 k (1). *Staff Response: That had been considered.* Historically, the information required by this section has been submitted but no one ever comments on it – it is not serving any purpose. It was suggested that it is just a waste of time and money to write up and submit this information. It was suggested that this could maybe be identified as a required at the "discretion of DEQ" and not identified as a "permit requirement".
- It was noted that while the last sentence of this section says that "this information will be used to determine the type of compensatory mitigation required…" it has never been used for that – mitigation ratios are normally used.
- *Staff Note: For those who don't feel comfortable with the complete deletion of this language, we could develop language to indicate that this information could be required at the discretion of DEQ for VWP individual permits or we could just delete the whole thing.*
- Why is this information not being used? *Staff Response: Because we are not adjusting the type of compensatory mitigation required or our mitigation ratios for the type of compensation, we are using straight mitigation ratios for compensation. The compensation is still 2 to 1 for forested wetlands.*
- It was noted that there is a memorandum that established that you would achieve no net loss in function and value in a forested wetland by using a 2 to 1 mitigation ratio. For stream you actually do a functional assessment using the USM methodology that is more a physical function but does have some ecological attributes. So they do those two things – but what is normally done is the development of verbal analysis that you submit and get your permit. It really isn't used.
- *Staff Note: The other technical issue related to wetland functional assessment or functions and value assessment is that there are 40 or 50 different methods out there- while this number can be narrowed down to 5 or 6 methods for most projects – there is going to some project that you are going to want a different assessment method used or a different method is needed – we either need to eliminate this or put some bookends on it or we get into the situation where a consultant does an assessment using one method and we don't agree with the method used.*
- For forested wetlands, one functional method that is commonly accepted is the WET Method. That puts the most value on "open marsh". If you use HGM you end up on the opposite end with "forested wetlands" having more value.
- At the end of the process – no matter the method used – you still end up with a 2 to 1 mitigation ratio. Even if two different assessment methodologies are used on the same site – the mitigation ratio is still 2 to 1.
- The new federal mitigation rule encourages the Corps to move towards the use of functional assessments as a way to determine mitigation ratios. There is some value to leaving some mention of this in the regulations.

- *Staff Note: State law says permits contain requirements for compensating impacts – such compensation sufficient to achieve no-net loss of wetland acreage and functions. What we are hearing everyone say is that functional examination has been standardized over time with wetland ratios. It sounds like the options that we have are that we could specify or have some language in there about when we could ask for an assessment and bracket what that assessment could or couldn't include or methodologies – because if the Corps is really moving in that direction we don't want to preclude it through this but we also don't want time or effort expended on something that is not utilized.*
- Even if the information has not been used in the past the hope is that this is something that we would become better at in the future matching up functions and not just using a straight ratio. *Staff Response: DEQ has another initiative that is going to dove-tail with this effort which could allow some changes in the ratios under certain circumstances – we could possible maintain this 2 to 1 ratio but have a tool that is flexible to discuss on a project-by-project basis – a lower ratio or possible even a higher ratio. That is not quite ready for "prime time" yet.*
- It was suggested that we need to keep the distinction for IPs and possibly eliminate the assessment requirement for GPs. Maybe this is only applicable for Individual Permits but it might still be discretionary. You might need to do a functional assessment in every case. *Staff Response: There is a discretionary kick-out where there is a concern over a project that may have impacts on the aquatic environment. The idea for the kick-out for an IP where there may not lead to a functional assessment – that may not be the best idea either – you may be in an IP for several reasons – there may not be wetland impacts – it may be 2,000 feet of impacts to intermittent streams that are the concern in a ten acre wetland – so we may want to consider an acreage trigger – because the current language only addresses a wetland assessment.*
- *Staff Note: So are we back to looking at language that says: "At DEQ's discretion with an Individual Permit that is 2 acres or more"? Two (2) acres is the current break between IPs and GPs. Staff will need to go back through the language and try to clean it up and reword the section so that we can send it back out for the groups review and consideration and comments.*
- It was noted that there was some that were uncomfortable with changes it to 2 acres for a functional assessment – suggest keeping it at one (1) acre. There may be a reason to keep it at 1 acre instead of going to 2. Should this be kept as "discretionary"? *Staff Response: In only rare cases would a one (1) acre impact not be covered by a GP.*
- A suggestion was made to add a GP kick-out for "histols".

ACTION ITEM: Staff will develop some draft language based on the groups discussions related to the handling of "functional assessments" in the "applications" section of the regulations.

ACTION ITEM: The group was asked to provide Bill with any ideas or suggestions or specific examples related to the acreage cutoff (1 or 2 acres) as soon as possible so that staff could incorporate that information into their development of any revised language.

12. Review of Topics from 08/07/2014 Meeting – Impact Site Construction Monitoring - Revisions (Issue #5) (Dave Davis and Brenda Winn):

Brenda Winn reviewed the August 21, 2014 version of the proposed revisions to 9VAC25-690-100 the Virginia Water Protection General Permit for Impacts from development and certain mining activities. This is the regulation for WP4 – 9VAC25-690-100. This is the language that is in the authorization that you get handed when you get the permit. The GP Regulation is the permit. When the change was made last year it was made to the IP, because a change in the IP did not require a regulatory change, because it is a permit condition. To use that same rational in the GP, it requires a regulatory change. The materials presented included the following:

9VAC25-690-100. VWP general permit.

Part II. Construction and Compensation Requirements, Monitoring, and Reporting.

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. Construction monitoring shall consist of ~~one of the following options: a. Photographs…b. An ortho rectified photograph…c. In lieu of photographs…~~site inspections to be conducted once every calendar month and recorded on the Monthly VWP Permit Inspection Checklist [the DEQ-provided form], in accordance with 9VAC25-690-100 Part II E 1 through 5.

~~2. As part of construction monitoring…following completion of construction at the site.~~

~~3. Each photograph shall be labeled…and photograph subject description.~~

~~4.~~ 2. Monitoring of water quality parameters…c. Temperature…at each station.

E. Reporting.

Impact Site:

1. ~~Written communications required…prior to implementing the changes.~~

~~2. DEQ shall be notified…at each permitted impact area.~~ The permittee shall submit written notification no more than 30 days prior to or 30 days after initiation of land disturbance or construction activities in permitted areas. The notification shall include a projected schedule for initiating and completing work at each permitted impact area.

~~3.~~ 2. ~~Construction monitoring reports…f. Labeled site map depicting all impact areas and photo stations.~~ The permittee or the permittee's qualified designee shall conduct site inspections once every calendar month during active construction within authorized surface water impact areas and record the observations on a form provided by DEQ. 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 all on-site areas designated for permanent preservation. The form shall be completed in its entirety for each monthly inspection and shall be kept on-site and made available for review by DEQ staff upon request during normal business hours.

~~4.~~ 3. ~~DEQ shall be notified in writing…authorized under this permit.~~ A construction status update form, provided by DEQ, shall be completed in June and December of every year for the duration of the permit. The construction status update form shall include reference to the VWP permit authorization number and one of the following statements for each authorized surface water impact location:

a. Construction activities not yet started:
b. Construction activities started;
c. Construction activities started but are currently inactive, or;
d. Construction activities complete.

4. The construction status update form shall be submitted electronically or mailed to the appropriate DEQ Regional Office and must be received by DEQ no later than January 10 and July 10 of every year.
5. The permittee shall notify DEQ within 24 hours of discovering impacts to surface waters including wetlands, stream channels, and open water that are not authorized by the permit. The notification shall include photographs, estimated acreage and/or linear footage of impacts, and a description of the impacts.
6. The permittee shall submit written notification of completion within 30 calendar days after the completion of all activities in all permitted impact areas authorized under this permit.

Compensation Site:

~~5.~~ 8. DEQ shall be notified in writing at least 10 days prior…construction completion.
~~6.~~ 9. All compensation monitoring reports shall be submitted annually…
~~7.~~ 10. The permittee shall notify DEQ in writing…
~~8.~~ 11. The permittee shall report fish kills…
~~9.~~ 12. Violations of state water quality standards shall be reported within 24 hours to the appropriate DEQ office.
~~10.~~ 13. Submittals required by this VWP general permit shall contain the following signed certification statement…

Discussions of the group regarding changes to 9VAC25-690-100 related to "impact site construction monitoring" included the following:

- So currently when we get a GP, we get a Construction Authorization notice. The first issue noted was that the proposed language is not consistent with the Construction Authorization Notice. The Construction Authorization Notice does not require the documentation of "pre-existing conditions". That condition is not currently deleted in the text being reviewed by the group. *Staff Response: The requirement for documenting "preexisting conditions" should have been deleted.*
- It was suggested that it makes sense to require documentation of preexisting conditions. It is important to have a record to document preexisting conditions.

CONSENSUS OF GROUP: It is important to document "preexisting conditions". Staff needs to check the language in the IP to clarify that this requirement is kept in the regulations.

- *Staff Note: The option in this section related to requiring the use of a specific form is to name it or not – either identify it with a name (The Monthly VWP Permit Inspection Checklist) or designate it as "the DEQ-provided form".* It was suggested that whether the form was changed

in the future or not that DEQ should just keep the same name – could change the content of the form but retain the name. You can revise the form but keep the same name.

CONSENSUS OF GROUP: Keep the name of the form (the Monthly VWP Permit Inspection Checklist) in the regulation and just revise the content as needed.

- There was a lot of discussion regarding the taking of photographs (specifically referenced in the text that is being proposed for deletion) and their usefulness. It was suggested that it would be worthwhile trying to revamp the program (use of photos as part of the documentation requirements for monitoring) rather than completely deleting the requirement. Need to determine what would be useful to DEQ – to retain some of the qualities of the photographic work that has been done in the past. Need to figure out a way to make it more useable – more user-friendly rather than completely deleting the requirement. *Staff Response: The issue is that in the stacks of photo-monitoring reports that are submitted that there may be an issue that is overlooked by staff and when it is discovered on the site during the site visit – the permittee says that they reported it on the photographs. What we are trying to do is have an more efficient and effective system where DEQ would receive a notification of construction – report twice a year with an idea of where construction is at that point in time that way DEQ could make more efficient use of their resources to schedule site inspections and site visits to coincide with specific phases of construction on the site and any specific/possible impacts.*
- It was suggested that even if DEQ went to requiring less reporting (less frequent) that photographs could still be a part of that reporting cycle. There is some value to having the photographs versus just the written report. *Staff Response: The photographs that we are currently getting of impacts that are currently authorized on the site and not necessarily impacts adjacent to those authorized that have not been authorized. Conceptually, the reports should be looking at the "bad stuff" what we get is photos of what we have already know – of what we have already approved – a photo can be useful but not as useful as staff being on the site - we need to try to gear the reports to have a certainty of when and where the work is being done which we don't have now so that we can get "boots-on-the-ground".*
- The phrase "under penalty of law" that is contained in the certification that has to be signed was discussed.
- There is a need for more enforcement.
- What you normally get is photos of the impact, what you really need are photos of the edge of the impact area.
- It was suggested that DEQ may want to consider deleting 9VAC25-690-100 – Part II B 1 a but retaining Part II B 1 b since this addresses an annual photograph of the site. This photo would clearly show the delineated surface waters and authorized impact areas.
- The potential and opportunity to utilize the stormwater management inspections and inspectors since the program has recently been shifted to DEQ to be out on sites more frequently. *Staff Response: This was raised at the first meeting and DEQ hopes to be able to use some synergy between the programs to help with inspections and the number and frequency of "boots-on-the-*

ground". There will be an effort to cross-train with the stormwater inspectors to be able to improve the inspection effort. The stormwater folks are integrated into the VWP wetlands programs because they have the same regional managers.

- The concept of required monthly inspections was discussed. There could be projects that could sit and not be active for months at a time. Some of the language that is being proposed for deletion (Narratives are not required during periods of no activity within the impact area.) would have addressed that concern. It was suggested that this proposed deletion not be made. If nothing is happening on the site during a period of time – it might not be useful to have required reports. *Staff Response: It would be nice to know that there is a certain period of time (a month) where no activity is taking place on a site instead of "there is a month with no reports – no check list".*
- Does the check list stay on site or does it get sent to DEQ? *Staff Response: The 2-Year Notification comes to DEQ – the actual checklist – monthly reports stay on site.*
- It was suggested that an inactive site could be addressed through an "inactive site" letter, similar to what is done with the Corps, to identify a time when nothing is happening on the site and no inspections are being done as opposed to having a specific checklist.
- *Staff Note: We don't want to have inspections or require inspections of dormant or inactive sites. We need to make this clearer. As long as DEQ knows not to expect something because of inactivity on the site/project – that is fine. We just need to know what is happening on a site/project – we need to know what you are doing.*
- Now that these forms are going to be held on site – can they be tied to or included in the SWPP? If so is the SWPP publicly viewable? The issue that came up during the discussions related to the SWPP program was that a lot of people felt that they should be able to access the SWPP on site - It was determined that the SWPP was a component of regulatory compliance not part of a public right to know issue. The question is if the checklist is going to maintained on site does that mean that that information is available to the public. *Staff Response: We will need to check with our legal analyst. If these things – this information is submitted to DEQ, obviously they are part of the file and are available to the public. So SWPPs are to be kept on site, some components of the SWPP that are submitted to DEQ for approval only if DEQ is the VSMP authority.*
- The checklist is supposed to be maintained on site. So it is up to the permittee to put them where they want to on-site. They don't have to be included in the SWPP mailbox. They don't have to be in a mailbox. They can be in a construction trailer, or on the seat of inspector's car/truck. They just need to be available on-site. The preference is that they not be tied to the SWPP. *Staff Response: Our idea would be that they would be in a file cabinet in the construction trailer or on the front seat of the grading contractor's truck, etc. but if DEQ comes on-site to inspect the site that if we ask to see the last 3 months of inspections that those records will be there and readily available for review.*
- It was noted that will the deletion of the other materials that DEQ has received in the past that this piece of information, this checklist might be the one piece of information that DEQ would

like to receive on a monthly basis. *Staff Response: What we want to see – what is most important to us is what is happening on the site – are you working or not and whether anything bad happened on the site. So if there are unpermitted impacts, you are required to submit this form within 24 hours along with pictures of those impacts. If the site is in compliance then seeing the form doesn't mean that much. But if there are unpermitted impacts then DEQ needs that information.*

- It was suggested that the checklist just be included in or with the SWPP since every site has a designated SWPP location. *Staff Response: In application what is being suggested makes sense, but we don't have the authority to require that the checklist be maintained in a specific location. Practically it is a cool idea but in reality it has to be handled under different statutes and different regulatory requirements. But that being said – if the permittee decides to keep the information – the checklist – with the SWPP that would not be a problem. All we need to know is when we come on-site for an inspection is where is the information and that it is available and accessible on-site. The biggest concern is "notification". We are trying to streamline the tools that we need to get better on the compliance side of the equation. So we are going through a process of "this is what we think we need" and "this is what we really don't have" and "whether something adds anything to our valuation of compliance".*
- It was noted that there is a public comment period open on the "enforcement components" – right now they penalize people who self-report – currently if someone reports themselves for a violation, DEQ penalizes them for a violation for doing that – if they don't report themselves then nothing usually happens. So in essence we are teaching people to cheat. So language should be included to indicate that "if you self-report" then you won't get a penalty. If you don't report and an unpermitted impact is discovered then you get penalized.
- With a stream-lined inspection process, you may be able to catch more violators.
- It was suggested that the reporting requirements be broken into 2 sections – one is the reports that we have to report to DEQ (starting construction notice; ceasing construction or temporarily ceasing construction; halting; starting backup and terminating and then there will be a separate section on "monthly you will need to" items. These sections should indicate what items needed to be submitted to DEQ and what items need to stay and be available for inspection on-site.
- Has the checklist that has been discussed been distributed to the group? *Staff Response: No – but a copy was distributed to the group.*
- A question was raised as to whether we had decided about the things that needed to be maintained on-site with the report that clearly have to be available to DEQ, whether they had to be made available to the public? *Staff Response: No – that wasn't decided.* The materials that have to be submitted to DEQ clearly have to be subject to FOIA. The ones being maintained on-site are currently not available to the public.
- A question regarding the distributed checklist and the proposed text for 9VAC25-690-100 Item E2 regarding the requirement to clearly mark non-impacted wetlands and streams and preservation areas within 50 feet of construction to prevent unpermitted impacts. With most transportation projects 50 feet is sometimes well beyond their right-of-way. That would also be

the case with power-line and pipe-line projects. Should that requirement be left in here given these specific project limitations, because this is the only item in the checklist that has a number associated with it? It was noted that the permittee has been allowed to not do that if it went beyond the property line. So does this need to be clarified? *Staff Response: This should be within 50 feet of the construction but still within the project area – within the property boundary. The General Permit does specify within the project right-of-way.*

ACTION ITEM: Staff will make the clarification regarding reporting and marking of non-impacted wetlands; streams; and preservation areas is to be within 50 feet of the construction but within the project area and/or property boundary. Staff will make the language consistent with what is contained in the General Permit.

- It was suggested that on the checklist that there be a checkbox that says "There was no activity for this period". *Staff Response: That's perfect.*
- The group agreed to strike the language at 9VAC25-690-100 E 1 as proposed by staff in the 8/21/2014 version.
- It was noted that the one sentence of the proposed deletion that is of concern is the sentence that reads: "Construction shall be performed in accordance with the final construction plans submitted to DEQ, which shall be in compliance with the permit." How often are those changed? That would seem to provide that everyone would know what is happening at the site. *Staff Response: Those plans should not be changing without a "modification".* The problem is that "final construction plans" are 100's of sheets, whereas the permit plans that DEQ approves is just a single 8 1/2 X 11 sheet of paper showing the impact area. The concern is the permitted impacts and any unpermitted impacts not the general overall construction plan details. The key is compliance with the permit. As long as the permittee does not impact anything that is not allowed by the permit that is all that is required. *Staff Response: The construction plans provide way more information than DEQ actually needs.*
- A concern was still noted regarding this language related to "final construction plans" and the wording – a request was made to allow time to consider possible language edits for this section.

ACTION ITEM: The group will send any language suggestions and edits to 9VAC25-690-100 E 1 to Bill Norris for distribution to staff and the group for their consideration.

- *Staff Note: The proposed deletion is not something that is required in the General Permit now – this is language that staff had proposed for inclusion in these proposed edits but has reconsidered and is now proposing not to put these requirements in the regulation.*
- It was suggested that the language just should clearly note that "construction shall be in compliance with the permit".
- If you are going to have the "preconstruction condition assessment" then you don't need the written notification requirement identified in 9VAC25-690-100 E 1 (old E 2). Don't see the benefit of that requirement. In addition, the last sentence being proposed for that section regarding submittal of a "construction schedule" for "initiating and completing work at each

permitted impact area" does not provide useful or relevant information because no one knows what the actual construction schedule will be on most of these projects – it is dependent on any number of things that it is hard to identify specific timetables and start dates in advance. Don't see any benefit and the information that would be provided wouldn't be accurate. *Staff Response: The theory and rational behind this proposed language is if twice a year you are submitting something that says "We are working" or "We are not working" then you are going out every month filling out a check list, only if the site is under construction. What we are trying to get at is prioritizing our compliance. We don't need to see someone out to a site when you are not working in state waters. Right now we know twice a year when you are under construction for some projects.*

- Are we supposed to submit a form to say that "we are not working – we are not under construction – construction is going to cease" or is that something that is being proposed? *Staff Response: Initially and the regulations say that there needs to be a 10 day notification letter – some permittees don't provide this notification.*
- Having someone say that they are not under construction and just having that information in their files on site is not doing DEQ any good in tacking what activities are actually going on and there are a lot of permittees who are not submitting something that says that nothing is going on. What is the benefit of knowing whether a permittee is doing anything or not on a site in a month? Does it matter? Do we really need to know? *Staff Response: We have limited staff and we are trying to prioritize the use of that staff. If we know in July that these projects are under construction then we can prioritize getting out to some or all of the sites. We don't want to send an inspector out to a site that has been siting dormant.*
- It was suggested that we try to delete at least the last sentence in the proposed additions to 9VAC25-690-100 E 1 (old E 2). Delete the request for a "projected schedule". *Staff Response: Most sites are going to also have coverage under the Construction GP. They are going to have obligations as the permittee under that to do regular stormwater inspections.* But there is no requirement for notification for a schedule by site under that program. *Staff Response: The bottom line is that there is a need for some form of better communication for when there are impacts or when there is someone on site moving dirt. The key information that is needed by DEQ is when work starts on a site. Once a site is under construction, even if on a specific day they are not doing anything, it doesn't hurt to go out to a site to identify any problems. Just because someone is not currently working on a site doesn't mean that there aren't problems.*
- It was again suggested that a solution would be to delete the last sentence that is being proposed for this section [9VAC25-690-100 E 1 (old E 2)].
- The important thing to know is when construction begins on a site.
- The suggestion was made to revise the proposed language "The permittee shall submit written notification no more than 30 days prior to or 30 days after initiation or land disturbance or construction activities in permitted areas" to read "The permittee shall submit written notification no more than 10 days after initiation or land disturbance or construction activities in permitted areas." Is this business days or calendar days? *Staff Response: Business Days.*

- How does DEQ deal with people who are not reporting? What do you do with the folks who are not notifying DEQ? *Staff Response: DEQ maintains a list of "who should be reporting" and "who did not" so that letters could be sent to those "who had not submitted reports". There are a lot of letters that are sent out – if no response is received then they are placed on the list of sites that needed to be inspected.*
- DEQ may be really limiting their planning ability if you only require an "after initiation of construction" deadline for notification.
- It was noted that there are other programs that have a "10-day prior notice" requirement.
- It was also noted that the suggested "10-day after" notification requirement seemed workable. *Staff Response: What we are trying to articulate is what is the most useful bit of information for us that is the least burdensome as possible – not sure that we have arrived at that point yet.*

ACTION ITEM: Staff will review the language for this section and propose a time-frame and send out a clarification to the group for their review and consideration.

- RE: Page 5 of the proposed language revisions for 9VAC25-690-100 E 2: Match the language related to the "50 feet of any land disturbing activity" to that contained in the GP.

ACTION ITEM: Staff will match the requirements identified in 9VAC25-690-100 E 2 to those contained in the General Permit regarding the "within 50 feet" language.

- RE: Page 5 of the proposed language revisions for 9VAC25-690-100 E 3: For the construction status updates is it clear that the update can be completed anytime during the months of June and December? Any time during that entire month or does it need to say "during the months of June and December"? *Staff Response" You can do the report/update anytime during June and December but the deadline for receipt of the report/update is no later than January 10 and July 10 of each year.*
- The suggestion was made to include the language proposed for 9VAC25-690-100 E 4 as duplicative language in 9VAC25-690-100 E 3.
- You need both the construction status update completion deadlines as well as the submittal deadlines identified. Some wordsmithing is needed to clarify these requirements. *Staff Response: We need to be able to have the most current information twice a year.*

ACTION ITEM: Staff will do some wordsmithing of the proposed text found on pages 5 and 6 of the handout for proposed language for 9VAC25-690-100 E 3 and E 4so that it is consistent with the requirements found in other DEQ regulatory programs and to clarify the requirements and will provide that language for the group's review and consideration.

- RE: Page 6 – 9VAC25-690-100 E 5 (old E 6): Can the requirement for notification to DEQ within 24 hours be changed to 2 Business Days? Or at least 1 Business Day? Because if something happens on a Friday – do you want us to call the emergency number? *Staff Response: No –we don't want that.* Is an email an acceptable method of notification? How about

the use of "next business day". *Staff Response: Fine with "next business day" or "by close of the next business day".*

- RE: Page 6 – 9VAC25-690-100 E 5 (old E 6): The term "preservation area" also needs to be included as an area of concern for impacts that are not authorized under this permit. The text should read: "…of discovering impacts to surface waters, including wetlands, stream channels, and open water, and preservation areas that are not authorized by this permit."
- It was noted that the same issue related to the use of the time limit of "24 hours" is also found on page 9 at 9VAC25-690-100 E12 (old E9).

ACTION ITEM: Staff will do some wordsmithing of the proposed text found on pages 6 and 9 of the handout for proposed language for 9VAC25-690-100 E 5 and E 12 related to the use of the time limit of 24 hours and the proposed revision to a change to "the next business day" or "by the close of the next business day" to clarify the requirements and will provide that language for the group's review and consideration. Requirements under the Water Control Law will be considered in any proposed revisions related to references to violations of water quality standards.

- RE: Page 6 – Item 9VAC25-690-100 E 8 (old E 5): This language needs to be consistent with the changes proposed in this section related to notification requirements.

ACTION ITEM: Staff will review the proposed changes for consistency and provide the revised language to the group for their review and consideration.

- RE: Page 9 and 10 – 9VAC25-690-100 E 13 (old E 10) – Should this certification requirement/language also apply to documents kept on-site? *Staff Response: It does – this is just a shortened version of the certification statement. It is different in as much as different individuals are required/authorized to sign each certification statement.*
- A question was raised about the "delegation of authority" for those that can sign certification statements.

ACTION ITEM: Staff will revise the proposed language of the certification statement and provide revisions to the group for their review and consideration.

13. Review of Topics from 08/07/2014 Meeting – Erosion and Sediment Control Provisions - Revisions (Issue #3) (Dave Davis and Brenda Winn):

Brenda Winn noted that the proposed revisions were found in one of the last sections of 9VAC25-210 – the Documents Incorporated by Reference section. She noted that this was one obvious place to delete any references to E&S that staff felt were not necessary. The proposed revisions included the following:

DOCUMENTS INCORPORATED BY REFERENCE (9VAC25-210)

~~Virginia Stormwater Management Handbook, First Edition, 1999, Volume 1, Chapter 3, Department of Conservation and Recreation.~~

Corps of Engineers Wetlands Delineation Manual, Technical Report Y-87-1, January 1987, Final Report and any regional wetland supplements approved for use by the Corps.

Forestry Best Management Practices for Water Quality in Virginia Technical Guide, Fourth Edition, 2002, Department of Forestry.

Virginia Agricultural Best Management Practices (BMP) Manual, Revised June 2000, Department of Conservation and Recreation.

~~Virginia Erosion and Sediment Control Handbook, Third Edition, 1992, Department of Conservation and Recreation.~~

Guideline for Specification of Disposal Sites…

Potomac River Low Flow Allocation Agreement…

Water Supply Coordination Agreement…

Discussions of the group regarding changes related to references to E&S included the following:

- What about references to Forestry and Virginia BMPs? The suggestion was made to also delete these references. These references are currently included in the "exemptions" section. These references need to be retained since they are used in another part of the regulation.
- *Staff Note: There is also a reference to E&S in the "complete application for a final comp plan" – an information requirement for a comp plan – this reference will also need to be addressed.*
- The references to the inclusion and use of the Corps "regulatory guidance letters" or "regional wetland supplements" was discussed. Regional supplements to some mean "manuals". It was noted that you really don't want to include "guidance letters" as part of the regulation.

9VAC25-210-45. Wetland delineation.

Each wetland delineation shall be conducted in accordance with the USACE "Wetland Delineation Manual, Technical Report Y-87-1, January 1987, Final Report" (Federal Manual) and any regional wetland supplements approved for use by the Corps. ~~The~~ These Federal ~~Manual~~ Manuals shall be interpreted in a manner consistent with USACE guidance and the requirements of this regulation,

and any delineation guidance adopted by the board as necessary to ensure consistency with the USACE implementation of delineation practices. USACE regulatory guidance letters may be used to supplement preparation of delineations.

- It was suggested that if these Corps guidance letters are going to be included in the regulation then they also need to be included in the "reference section".
- *Staff Note: The bottom line is whatever the Corps uses for implementation of delineation practices is what needs to be used.*

ACTION ITEM: Staff will confirm whether things that have been included as references in the regulation need to be included in the "Documents"/"Reference" section of the regulation.

Brenda noted that there was one additional change made due to items that had been deleted and that was in section "9VAC25-210-10 - Definitions." The proposed change was to the definition of "Permanent flooding or impounding".

"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 Environmental Quality (DEQ) standards for such facilities are not considered to be permanent flooding and impounding.

Continued discussions of the group regarding changes related to references to E&S included the following:

- It was noted that the GPs have a number of references to the E&S manual. *Staff Response: The intention is if there are changes made to language in the IP that is included in the GPs that corresponding changes will also be made.*
- The concern is that the handbook is not just referenced, but there are instances where the statement is included that certain practices "will be designed in accordance with the E&S Handbook" so that the deletion of the reference may not be an option.

ACTION ITEM: Staff will review the concept of deletion of the E&S references and look at other uses of the reference throughout the regulations and make a decision as to whether to pursue this option of not.

14. BREAK (2:50 – 3:00)

15. Continued Ranking of Issues by Advisory Group – Presentation of Issues and Discussions – Issue #8 – Application Complete Section (Sarah Marsala):

Sarah Marsala presented a Power Point Presentation regarding the proposed revisions for the Application Complete Revisions. The main focus of these changes is on the Individual Permit Regulation with some items at the end of the regulation dealing with the GP. Her presentation included the following:

- **Desired Outcome of Revisions:**
  - Reflect information required by JPA
  - Increase usability/clarity through reorganization/grouping similar informational requirements
  - Reduce staff time spent interpreting/explaining regulation
  - Address statutory changes
- **Proposed Clarifications:**
  - Applicant/agent contact information
    - Revise "name" to "Legal name"
    - Add email address (if applicable)
  - Project location information
    - Specific location identification (parcel number, street address)
    - Riparian/adjacent landowner information (to conduct notifications)
    - GIS compatible shapefile(s) – project sites and compensation sites
    - Written disclosure of any preservation areas onsite (copy from GPs)
    - Acknowledge similar information needed for compensation site (avoid repeating)
  - Impact information
    - Group related info together
    - Pre-con photos (with discretion) to support CMR changes
    - Update impact map requirements
      - Identify all surface waters – currently it does say that
      - Require proposed structures and contours be identified
    - T&E discussion – consider removal of requirement to provide agency correspondence (DEQ coordinates)
    - Wetland delineation
      - Approval required as part of complete JPA
      - Identify other agencies that may approve boundaries
  - Avoidance and minimization
    - Clearly state information needed in section
    - Consider removal of reference to Section 404 (b) (1) guidelines) and replace with list of requirements for analysis

- Functions and values assessment
    - Inclusion of secondarily impacted surface waters in assessment
    - Reconsider when assessment is required
- Compensation
    - Update to reflect Mitigation rule
- Water withdrawal
    - Update application requirements to reflect JPA/address statutory changes
        - Interbasin transfer information
        - Water supply plan relevant information
        - Impoundment information (dimensions, stage-storage info)
        - Intake screens and velocities
    - Consolidate informational requirements into one section

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Discussions of the group regarding changes related to the Application Complete Section included the following:

- Re: Request for Shapefiles – Does this refer to the site boundaries? *Staff Response: This would be for the project site as well as any compensation site.* There are projects where the wetland boundaries also have to be submitted in a GIS format. Doesn't DEQ want to know where the wetlands and streams are? *Staff Response: Yes.* If that is the case then DEQ needs to identify/spell out exactly what they need in the regulation.
- RE: Preservation site information – wouldn't DEQ want that in GIS format as well. If so then it needs to be spelled out. *Staff Response: Yes, that information is needed in GIS format as well.*
- RE: "Written disclosure of any preservation areas onsite" – Shouldn't this be a map or a survey not just a written disclosure? *Staff Response: That would be good to have. Some of these items some entities don't have.*
- *Staff Note: This information would be needed for both the project site as well as any compensation site.*
- DEQ needs to spell out exactly what they want and in what format. The permittee is not going to do these things or provide this information unless DEQ requires it. *Staff Response: We want as much information as possible electronically.*
- Need to know whether there is a compensation area on the site. Need to know if there are any preservation areas on the site.
- *Staff Note: At minimum information related to the project site should be provided in shapefiles for incorporation into a larger resource tracking database. Information on the compensation and/or preservation areas would also be useful in an electronic format if available.*
- Everyone is submitting information to DEQ and the Corps – it would be great if DEQ would take the responsibility to collect it all into a useable database.
- You just need to spell out exactly what you want. *Staff Response: We will try to spell it out in the proposed language.*

- RE: Requirement for identification of proposed structures and contours: There are a number of smaller highway projects out there where that information may not be readily available. These are projects that go through the current interagency agreement mechanism.
- RE: Pre-con photos: Can this be an air photo instead of a ground photo? *Staff Response: Aerial Photos are good. That can be specified in the regulation. The photo "could" be aerial. The concept of having the pre-con photos is to document the nature of the stream channel or wetland downstream of the impact area so that if right now it is pristine and in 6 months it is filled with sediment that we would have a before and after photo of the area.* So in this instance an aerial photograph is not appropriate.
- *Staff Note: Pre-Construction photos are part of the requirements for Construction Monitoring after the permit is issued.*
- So this is part of the application – this would be a new requirement – you want to see pre-construction photos as part of the application process. The issue with this is if is done pre-construction how are you going to be able to confirm where you are on the site relative to the planned construction activities? This is normally tied to the E&S practice stage of the project after permit issuance.
- It was suggested that the concept of moving this requirement to application section is not appropriate and the proposed changes should be struck.

ACTION ITEM: The proposed changes to the regulations that would have moved the requirements for pre-construction photos to the application section will be deleted and the requirements retained in the after permit-issuance section.

- RE: Removal of T&E requirement for agency correspondence: The group discussed the proposed deletion and suggested that the requirement be retained. The permittee and consultants get a lot of information out of this requirement – it is useful to retain the requirement.

ACTION ITEM: The proposed removal of the requirement for T&E information regarding agency correspondence will be deleted. The requirement will be retained.

- In a previous meeting it was noted that about 50% of all applications that were submitted were incomplete in one way or another and that was causing a lot of extra work by DEQ staff what are those issues? *Staff Response: In the original TAC the statement was made that "I don't care what you want just tell us what it is and we will get it to you". That is why in the original regulation that we specified exactly what we wanted/needed but people do not provide the information that is currently being requested. Staff ends up sending out a large number of "Add Information" letters because basic information that is required in the regulation is not being provided. We are just trying to stop asking for information that we are not getting anyway. So the idea is to provide some clarity and specificity as to what we need, maybe we will start getting it.*

- The suggestion was made to not remove the reference because of the amount of regulatory history but just add more specific and examples to clarify what is needed. *Staff Response: Should we be referencing something that we don't have any control over?*

ACTION ITEM: Staff will develop language without the reference and retaining the reference for review and consideration by the advisory group.

- The reorganization of the water withdrawal requirements into its own section or part was discussed.
- RE: Intake screens: Needs to recognize the 316 B rule.
- RE: Major and Minor Modifications – Is this information supposed to be relevant to the nature of the request? This information may or not be required based on whether it is a major or minor impact. *Staff Response: The language that has been presented is for applications that are getting a new withdrawal – it is not a modification of an existing permit. If the information is applicable then it would need to be submitted.*
- If information is not applicable – an applicant can designate the information item as not applicable.
- RE: Interbasin transfer – What is currently required in the JPA? *Staff Response: A lot of it corresponds to existing information needs but it is not explicit. This addresses interbasin transfer that affects a neighboring state. The information requirements include: the efforts that were taken to notify affected parties; information on the affected stream reach in the other basin; the lat/long of where that transfer is; information on both the withdrawal and the discharge points and the effected stream reach of both sites.*

CONSENSUS OF GROUP: Move forward the specific proposed language changes except for those noted during the discussion as items not to follow through with for the application complete sections of the regulations.

16. **Continued Ranking of Issues by Advisory Group – Presentation of Issues and Discussions – Issue #11 – Temporary Impacts Section (Dave Davis/Brenda Winn):**

Dave Davis that we had touched on this topic earlier and that during the last meeting there was a lot of discussion. Brenda Winn noted that the last time we asked the group for their thoughts on changing the threshold for temporary impacts if we keep it on the list of "minor mods". Brenda provided a brief overview of the proposal for revisions to the regulation related to "temporary impacts". Her presentation included the following:

- **Temporary Impacts:**
    - Need for staff to know what temporary impacts are earlier in the application process and should be approved by DEQ in advance if being taken
    - Additional and unauthorized impacts are being identified as "temporary"

- New definition for "conversion" to clarify difference between a temporary and a permanent impact to wetlands
- Clarify existing definitions for "Impacts" and "Temporary Impacts"
- Clarify that all types of impacts to surface waters must be identified in the application to the maximum extent possible
- Consider adding timeline to what is considered temporary
- Clarify existing language to require notification in advance of taking additional temporary impacts
- Allow minor modification for additional temporary impacts if minimal ecological impact (i.e., mowing of emergent wetlands)

Discussions of the group regarding changes related to the Temporary Impacts included the following:

- A question was raised on whether we had already addressed the "conversion" definition issue. Wasn't there a 20 foot easement stipulation for conversion from one type to another specified in Nationwide 12? *Staff Response: There is a 20 foot maintenance corridor in WP 2 that only applies to GPs, but that gets into whether you compensate for it or not. We have started to see some large conversions – it is not so much a concern when it is conversion from "forested" to "shrub" as when it is going to go from "forested" to "emergent" and be permanently maintained. These are usually associated with big utility projects. Our other biggest issue with temporary impacts is the notion that people are skirting around an unpermitted impact enforcement situation by saying oops you caught be but that is a "temporary impact" and I'll fix it. We can probably fix that issue by changing the definition to say that a "temporary impact" is something that we have permitted in advance. If we didn't know in advance then it wasn't a temporary impacts it was an unpermitted impact.*
- Would DEQ consider a request or notification of an additional temporary impact as falling into the category of a "temporary impact"? *Staff Response: Yes – Advance notification would be considered. The issue is that the regulations require notification but does not indicate a need for prior notification. Staff needs to have prior notification of temporary impacts – they need to be preapproved/permitted. "Temporary impacts" are impacts that are going to be restored by their very nature.*
- It was noted that DEQ needed to be careful of the choice of wording so that there are no unintended consequences. *Staff Response: The idea is to unmask the "bad doers" who hid behind the "unpermitted impact" argument. We need to be clear as to what we mean as a temporary impact.*
- A question was raised regarding the example of "mowing of emergent wetlands" as a minor modification – a temporary impact. *Staff Response: Staff has wrestled with this practice being considered a "temporary impact".* That is also an item of dispute between VMRC and the local wetland boards.

- What type of temporary impact would mowing be for? *Staff Response: Bulkhead repair – flood plain maintenance.*
- It would be nice to have clarification on whether cutting vegetation above the ground requires a permit from DEQ – it doesn't require one from the Corps.
- If it is actually a "temporary impact" then is has to be discussed in the narrative for the project (i.e., we are going to mow the bulkhead and go in and repair it). As long it is described you have the ability to review it.
- There are a lot of mowing projects where the intention is to have temporary impacts but the damage done is much larger – there can be extensive damage to a wetland because of a mowing operation.
- It was suggested that DEQ could delete the parenthetical reference to "mowing" and address it in guidance instead of in the regulation.
- Need to clarify that there is a notification in advance requirement for taking additional temporary impacts. *Staff response: Notification is a default automatic issuance of a minor mod.*
- RE: Conversion – is the proposed language change – the change in definition – a change in how this is handled currently? *Staff Response: This is just a clarification of what we are currently doing in the program – clarifying what our current practice is – memorializing what our practice has been.*

CONSENSUS OF GROUP: Move forward with the development of language to address Temporary Impacts

ACTION ITEM: Staff will prepare a track changes document of the changes related to "Temporary Impacts" for review and consideration by the group.

17. Public Comment (Bill Norris):

Bill Norris asked for public comment. No Public comments were offered.

18. Next Meeting (Bill Norris)

The next meeting of the VWP Citizen Advisory Group is scheduled for Tuesday, September 9, 2014 at the DEQ Central Office – 2nd Floor – Meeting Rooms B&C – Sing-in starts at 9:15 and the meeting starts at 9:30 A.M.

19. Wrap-Up (Mike Murphy/Melanie Davenport):

Mike Murphy provided a wrap-up for the meeting. He thanked everyone helping us on this effort. He asked the group to provide their recommendations on any proposed language for any of the issues that we had covered today to Bill Norris so that they can be taken into consideration by staff as they develop additional language for review and consideration by the group.

Melanie Davenport thanked everyone for their participation in this effort. She noted that it feels that the work that the agency does under the VWP program for surface water withdrawals is very specialized.

She asked the group whether there was a need or desire on the part of the group to have a separate meeting for discussion of the specific changes being proposed for the surface water withdrawal section of the regulation. We will need to see if we can fit an additional meeting into the mandated schedule that we are following to be able to bring these changes before the State Water Control in December. Folks that are on the Advisory Group who are really not interested in the topic wouldn't have to attend if they didn't want to. It feels like we have two very distinct areas of interest and issues.

- The group noted that this would probably be a good idea.

ACTION ITEM: DEQ staff will explore the possibility of holding a special one-time meeting related to the proposed changes to the VWP Regulations related to surface water withdrawals.

It was noted that this additional meeting would need to be advertised.

Bill Norris requested suggestions from the members of the Advisory Group as to who they thought might be interested in participating and would be valuable to the process if this special "surface water withdrawal" meeting is organized.

ACTION ITEM: Members of the Advisory Group are requested to provide names for possible participants for a special surface water withdrawal meeting and to provide that information to Bill Norris as soon as possible.

- It was suggested that DEQ might want to consider having the optional meeting that scheduled for Wednesday, October 15, 2014 as the last meeting of the group and hold the "Surface Water Withdrawal" specific discussion on the previous meeting (Monday, September 22, 2014).

20. Meeting Adjournment:

The meeting was adjourned at approximately 4:00 P.M.