



COMMONWEALTH of VIRGINIA

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SUBJECT: Guidance Memorandum No. 11-2004 – Amendments to the Virginia Water Protection Permit Program Regulation 9 VAC 25-210 (Effective July 25, 2007) Regarding Surface Water Withdrawal Permitting

TO: Regional Directors, Regional VWPP/Water Permit Managers, VWPP Staff, Enforcement Staff

FROM : Ellen Gilinsky, Director, Water Division

A handwritten signature in black ink, appearing to read 'Ellen Gilinsky'.

DATE: March 17, 2011

COPIES: Virginia Water Protection Permit Program Managers, David Davis, Director, Office of Wetlands and Water Protection, Scott Kudlas, Director, Office of Surface and Groundwater Supply Planning

Summary:

The purpose of this guidance is to summarize the effects of amendments made to the Virginia Water Protection Permit (VWP) Program Regulation (9VAC25-210 et seq.), effective July 25, 2007, that relate to application review and the issuance, reissuance, or modification of a permit for surface water withdrawal projects. These amendments were the result of concurrent efforts to implement the Local and Regional Water Supply Planning Regulation 9VAC25-780, as well as to develop a more streamlined permitting process for minor surface water withdrawals. Specific procedures to follow for implementing the regulatory changes and permitting surface water withdrawal projects are provided in the VWP Permit Program Permit Manual (10/31/2006, or the most recent revision thereof).

This guidance supersedes DEQ Guidance Memorandum No. 04-2004, *Permit Reviews and Issuance for VWPP Applications Involving Water Withdrawal and Minimum In-Stream Flows* (revoked on March 17, 2011).

Electronic Copy:

An electronic copy of this guidance in PDF format is available for staff internally on DEQNet, and for the general public on DEQ's website at: <http://www.deq.virginia.gov>.

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Disclaimer:

This document is provided as guidance and, as such, sets forth standard operating procedures for the agency. However, it does not mandate any particular method nor does it prohibit any particular method for the analysis of data, or establishment of permit conditions.

I. Introduction:

The revisions to the VWP Permit Program Regulation at 9VAC25-210 clarify the application requirements and permitting provisions for surface water withdrawal activities that may qualify for a VWP individual permit. These revisions followed the implementation of the Local and Regional Supply Planning Regulation at 9VAC25-780 that became effective November 2, 2005, which requires localities to develop water supply plans over a thirty- to fifty-year planning period. The revisions to the VWP Permit Program Regulation also incorporated exclusions from the need to obtain a VWP permit for certain surface water withdrawals, as well as streamlined application and permitting requirements for small surface water withdrawals.

The Office of Surface and Groundwater Supply Planning is developing state-wide models on the watershed level in order to support water supply planners in their review of water supply plans and to support the VWP staff with permitting decisions on surface water withdrawal applications. This effort will provide better consistency and more detailed information to support decision-making by the agency with regard to managing the Commonwealth's surface waters.

II. Background:

This guidance is intended to assist permit writers with interpretation of the VWP Permit Program Regulation at 9VAC25-210 et seq. with respect to surface water withdrawals. Note that detailed procedures for processing VWP projects are found in separate guidance (Guidance Memorandum No. 06-2015, VWP Permit Program Permit Manual, 10/31/2006, or the most recent revision thereof). Additionally, subsequent revisions to the VWP Permit Program Regulation were made regarding impoundments, which are the subject of separate guidance (Guidance Memorandum No. 08-2012, Farm Pond or Impoundment and Stock Pond or Impoundment Exemption from VWP Program Requirements, 10/1/2008).

Prior to the changes made to the State Water Control Law in 1999-2000, a Section 401 Water Quality Certificate (VWP permit) was not issued absent a federal permit action, such as a Section 404 or Section 10 permit.

Beginning in 2005, with the regulatory action noted above for long-term water supply planning, revisions were again needed to the VWP Permit Program Regulation regarding surface water withdrawals. These revisions to the VWP Permit Program Regulation became effective on July 25, 2007 and are detailed further in Section V of this guidance memorandum.

III. Authority:

Title 62.1, Chapter 3.1 of the Code of Virginia authorizes DEQ to issue VWP permits for impacts to surface waters, including wetlands, and 9VAC25-210 et seq. of the Virginia Administrative Code is the regulation that implements the VWP Permit Program.

IV. Definitions:

The following definitions in 9VAC25-210-10 are applicable to water withdrawal projects, and are explained below:

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

Staff should use best professional judgment to determine “where effects of the withdrawal are not reasonably expected to adversely affect beneficial uses” by considering such criteria as the size of the withdrawal relative to the size of the stream; the point on the stream where the return flow is introduced; and any accumulation of stream flow in the main channel that originates from tributary streams. This applies to both minor and major withdrawals.

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

This definition distinguishes between agricultural withdrawals and withdrawals for other uses and is used to establish limits that determine whether or not a VWP permit is required (exclusions).

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

This definition is used for establishing the circumstances under which a variance or an Emergency VWP Permit may be issued. A variance temporarily suspends the requirements of one or more VWP permit conditions related to surface water withdrawals until drought conditions improve. Typically, a variance applies to minimum instream flow releases. An emergency VWP permit authorizes a new or increased surface water withdrawal until drought conditions improve. Typically, an emergency permit establishes maximum rates or volumes of water withdrawal, and requires the applicant or permittee to follow up with applying for an individual permit that addresses insufficient water supply.

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

Certain information is required in an application for an emergency permit, as detailed in 9VAC25-210-80.D.

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

The structure could also be a pipe laid in the stream parallel to the stream bank that is allowed to capture water by gravity.

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

Major withdrawals require more information in the application and require an applicant to conduct analyses on purpose and need prior to application submittal.

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

This amount differentiates between minor withdrawals and major withdrawals in order to streamline permitting for minor withdrawals. VWP and OSGWSP staff will coordinate to evaluate the daily use estimates, stream flow characteristics, and total withdrawal amounts to determine the potential environmental impacts of a minor withdrawal; however, extensive modeling analyses may not be warranted.

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

The agreement serves as a water resources management tool for users in the Potomac River watershed. See also *Section for Cooperative Water Supply Operations on the Potomac (CO-OP)* [http://www.potomacriver.org/cms/index.php?option=com_content&view=article&id=87&Itemid=141] and *Water Supply Coordination Agreement*.

The portion of the Potomac River subject to this Agreement is the area located between Little Falls Dam and the farthest upstream limit of the pool of water behind the Chesapeake and Ohio Canal Company rubble dam at Seneca, Maryland. The agreement specifies the allocation to each member user during periods of low flows, as categorized in the agreement.

Certain conditions are applicable to VWP permits issued for surface water withdrawals from the Potomac River that relate to provisions within the agreement. For more information on permitting these withdrawals, refer to the VWP Permit Manual.

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

These withdrawals require a formal evaluation of project alternatives and may qualify for temporary variances from VWP permit conditions to address a public water supply emergency during a drought.

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

The definition clarifies what is considered to be a situation that may warrant the issuance of an emergency permit or a temporary variance from VWP permit conditions.

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

CO-OP staff provides direction to applicable VWP permittees with withdrawals from the Potomac River regarding reduction of withdrawals during certain low flow events. See also *Potomac River Low Flow Allocation Agreement* and *Water Supply Coordination Agreement*.

Surface water supply project means a project that withdraws or diverts water from a surface water body for consumptive or nonconsumptive purposes thereby altering the hydrologic regime of the surface water body. Projects that do not alter the hydrologic regime, or that alter the hydrologic regime but whose sole purpose is flood control or storm water management, are not included in this definition. This term usually applies to municipal projects where water is withdrawn for treatment to create a potable water supply, whether the project qualifies as a minor or major withdrawal for the purposes of the VWP Permit Regulation.

Surface water withdrawal is defined as a removal or diversion of surface water from its natural water course in Virginia or from the Potomac River. Surface water withdrawals can be consumptive or nonconsumptive; can be considered minor or major for purposes of the VWP Permit Regulation; and can be used for a variety of purposes.

Diversion of surface waters includes, but is not limited to, the temporary or permanent removal of water from the natural course of the stream or interception of water within the stream, even when the water is then returned to the natural course or is allowed to continue on its natural course after the activity is completed. The most common example of a diversion is the use of stream flow for hydroelectric power generation. Nonconsumptive use of stream flow for power generation is often referred to as “run-of-the-river”. Consumptive use of stream flow for power generation is often referred to as “once-through” in reference to the cycling of water once through the equipment for temperature control. Each of these examples is considered to be a diversion under the State Water Control Law and the VWP Permit Program Regulation.

Water Supply Coordination Agreement means the agreement among the United States of America, the Fairfax County Water Authority, the Washington Suburban Sanitary

Commission, the District of Columbia, and the Interstate Commission on the Potomac River Basin, dated July 22, 1982, that establishes a coordinated manner for each member user to operate its respective water supply systems and that outlines the operating rules and procedures for reducing impacts of severe droughts in the Potomac River Basin.

See also *Potomac River Low Flow Allocation Agreement and Section for Cooperative Water Supply Operations on the Potomac (CO-OP)*.

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

V. Summary of Revisions Made to the VWP Permit Program Regulation Effective July 1, 2007:

- A. *9VAC25-210-10 – Definitions.* Several new definitions were added to clarify terminology related to surface water withdrawals, as listed in Section IV of this guidance memorandum.
- B. *9VAC25-210-50 – Prohibitions and requirements for VWP permits.* This section was revised to specifically include surface water withdrawals as a regulated activity; previously that activity was not mentioned by name but was regulated.
- C. *9VAC25-210-60 – Exclusions.* This section of the regulation was revised to include those regulated surface water withdrawal activities that are not required to be permitted under the VWP Permit Regulation and those activities that are considered to have minor or no impacts to state waters, and therefore, excluded from the requirement to obtain a VWP permit. Please note that while the regulation uses the terminology Section 401 Water Quality Certificate, or Section 401 Certificate, the VWP permit has acted as the Commonwealth's Section 401 Water Quality Certificate since 2000, and thus the two terms are interchangeable in this guidance. Please also note that there may be Section 401 Certificates issued prior to 2000 that do not contain an expiration date; these are valid until such time that the permittee proposes an activity that would trigger the need for a VWP permit under current regulation. Two additional scenarios are possible: 1) hydroelectric generation projects, where the permittee applies for a new license or a license reissuance from the Federal Energy Regulatory Commission (FERC), or a current license holder surrenders its license, which in both cases triggers the need for a new Section 401 application to the state; and 2) one-time dredging projects, where the permit covers a specific event occurring once and the effective date of the 401 Certification is older than 15 years from today's date.

The exclusions added for surface water withdrawals are considered separately from exclusions from VWP permitting for fill, discharges, or excavation in state waters, including wetlands. Thus a particular project may qualify for one or more exclusions for a proposed withdrawal, but not qualify for one or more exclusions for a proposed discharge, and vice versa.

The users who qualify for one or more of the exclusions may or may not be required to report their surface water use under the Water Withdrawal Reporting Regulation 9VAC25-200, depending upon the purpose and rate of surface water withdrawal.

Following are the surface water withdrawal exclusions added to the VWP Permit Program Regulation effective July 25, 2007 that focus primarily on water use rights and those users who were in existence prior to the program regulation changes that occurred in 2000:

1. *Surface water withdrawals established on or before July 1, 1989 (also known as “grandfathered” withdrawals or uses).* Established means operational withdrawals that are actually removing or diverting the water, rather than just completion of the infrastructure to remove or divert the water. Grandfathered uses are included in the overall evaluation that DEQ makes of protecting beneficial uses in the watershed, and balancing the water needs of instream and offstream beneficial uses.

This exemption applies even in cases where there is an interruption in service, a change in ownership, or a change in purpose, *unless* the intake is abandoned. The criteria for meeting the definition of abandoned are detailed in the regulation. Withdrawals qualifying for this exclusion must also submit certain information to DEQ. However, the information is not used to set a limit on grandfathered users, unless a proposal is made which otherwise triggers the need for a VWP permit.

No VWP permit (Section 401 Water Quality Certificate) is required for the surface water withdrawal until such time that the user proposes to increase the withdrawal, and that proposal somehow triggers the need for a Section 401 certificate (VWP permit), or the grandfathered withdrawal is abandoned. Examples of activities that would increase a withdrawal and then require a Section 401 Certificate include, but are not limited to, moving an intake to deeper water, usually to better utilize low flows; replacing a dam or weir due to severe leakage; elevating a dam spillway to increase storage capacity in the impounded pool; constructing a larger intake to replace an existing smaller intake; and constructing a new intake to supplement withdrawals at an existing intake. Municipal water supply, agricultural, and commercial intakes and impoundments are examples of users that often meet this exclusion until water supply demands increase. Cases have occurred where a larger intake structure is desired for anticipated future demand, although the user does not intend to increase the withdrawal between now and then. Here, it may be necessary for the user to provide documentation that there has not been an increase in withdrawal during the years following construction of the larger intake, perhaps through required use reporting under 9VAC25-200, through a provision of the ‘No Permit Required’ decision, or through compliance inspections by DEQ staff.

In many instances, a VWP permit may be required because a fill, discharge, or excavation in surface waters is associated with the withdrawal activity, rather than because of the withdrawal itself. VWP staff will need to consider whether the fill,

discharge, or excavation is also excluded from VWP permitting before making a decision on whether the withdrawal activity requires a permit.

While some surface water withdrawal activities may incur a federal permit from the U.S. Army Corps of Engineers (Corps), DEQ has not certified those federal permits where water withdrawal activities occur, and DEQ can act independently of the federal permit action. In cases where exclusion under 9VAC25-210-60.B.1 does not apply and a VWP permit is required, a new permit application should be submitted and processed according to the VWP Permit Regulation.

Being excluded from VWP permitting requirements does not mean the surface water withdrawal is exempt from complying with other state laws and regulations, such as the Water Withdrawal Reporting Regulation 9VAC25-200. While this regulation became effective on December 5, 1990, use and withdrawal records are likely available prior to that from most municipal water supply and industrial owners. By law, mandatory agricultural water use reporting did not begin until July 1989. Therefore, documentation that the withdrawal began before the deadline may not be available, and VWP staff will have to determine applicability to the exclusion on a case-by-case basis. Compliance with this regulation is one tool that DEQ uses to determine historical water use. Recently, historical water use has also been submitted to DEQ through the requirements of the Water Supply Planning Regulation. 9VAC25-780.

2. *Surface water withdrawals that were established after July 1, 1989 but where the user received a Section 401 Certificate (VWP permit) prior to January 1, 1989 authorizing the installation of the withdrawal infrastructure, i.e. intake, etc. (also known as “grandfathered” withdrawals).* In other words, the user received a certificate to build the intake, for example, but did not actually start withdrawing the surface water until after the July date. As long as the user complies with the limits in the certificate received, the withdrawal does not require a VWP permit just because circumstances prevented the actual withdrawal from occurring before July 1, 1989.

The only known user to date that meets this exclusion is the City of Virginia Beach. The City obtained a Section 401 Certificate to withdraw 60 million gallons per day (mgd) from Pea Hill Creek on Lake Gaston in 1983, but the withdrawal did not start until sometime after 1990 due to legal challenges made against the Corps’ permit.

Users that qualify for this exclusion become subject to VWP permitting requirements if the withdrawal limits in their existing VWP permit are exceeded, or if some other project modification is proposed that triggers the need for a VWP permit.

Again, exclusion from VWP permitting does not mean exemption from other state laws and regulations.

3. *Surface water withdrawals that exist today and were established between July 1, 1989 and July 25, 2007 (regulation effective date) that have complied with state law but have not obtained a VWP permit, as a permit was not required until the revisions to the VWP Permit Program Regulation became effective in 2007.* This exclusion is based on the maximum amount of water that any withdrawal has used in any 12-month period in the 10 years prior to the effective date of the revised VWP Permit Regulation. This exclusion can only apply if none of the other surface water withdrawal exclusions apply.

DEQ assumes that whatever activities occurred in surface waters to allow the withdrawal to operate did not require a federal Section 404 permit, which was the only trigger to require a VWP permit until 2000 when the General Assembly granted DEQ the authority to act independently of the federal permit action for activities in surface waters.

To address users who were unaware that the regulations changed, this exclusion provided an opportunity for the user to gain compliance under current regulation by submitting the required use information, as detailed in the regulation. The exclusion established a deadline of July 24, 2008 for submittal of the required water user and water use information by those wishing to qualify for this exclusion from VWP permitting. DEQ continues to work with the public toward resolution despite the deadline.

Users meeting this exclusion are not considered to be grandfathered users and must meet the criteria of the exclusion to continue withdrawing surface water. Unlike with grandfathered users, the water use data submitted by users qualifying for this VWP permit exclusion will form the basis of maximum water withdrawal limits. Users that qualify for this exclusion become subject to VWP permitting requirements if the historic water use is exceeded, or if some other project modification is proposed that triggers the need for a VWP permit.

4. Following are the surface water withdrawal exclusions added to the VWP Permit Program Regulation effective July 25, 2007 that focus primarily on smaller volumes/rates of surface water withdrawals and temporary activities.

An exception provision was added to Section 60 of the regulation to ensure that the excluded, smaller and temporary uses do not impact surface waters without the opportunity for agency review, public participation, and potential mitigation. The exception to exclusions in 9VAC25-210-60.B.3 through -60.B.15 states that no activity may 1) cause or contribute, or may reasonably be expected to cause or contribute to, a significant impairment of the state waters or fish and wildlife resources; 2) adversely impact other existing beneficial uses; or 3) cause or contribute to a violation of water quality standards. The exception does not apply to the grandfathered uses in exclusions -60.B 1 and 2. When responding to public inquiries about the following exclusions, VWP permit staff should emphasize the exception contained in -60.C.

- a. *Withdrawals from non-tidal surface waters for agricultural purposes that are less than one million gallons in any month.* The limit in this exclusion is based on agricultural science and operations, the institutional knowledge and experience of the DEQ staff and collaboration with agricultural stakeholders, while being protective of instream beneficial uses. One million gallons in any month is also the limit above which agricultural users are required to report their irrigation water use.
- b. *Withdrawals from non-tidal surface waters for all other purposes that total less than 10,000 gallons per day.* This activity was determined to have minor or no impacts to surface waters based on institutional knowledge and experience of the DEQ staff and collaboration with commercial and industrial stakeholders. For purposes of reference, ten thousand gallons per day is approximately the volume of 11 acre-inches per month, or in other terms, the approximate volume needed to irrigate two football fields by applying 4.4 inches per month.
- c. *Surface water withdrawals from tidal waters for nonconsumptive uses.* This exclusion addresses those uses where surface water is returned to the water body, such as is often the case with aquaculture operations, and where de-watering of the water body is unlikely due to tidal action. Examples include soft-shell crab shedding operations, clam hatchery operations, and once-through cooling water for power generation purposes.
- d. *Agricultural surface water withdrawals from tidal waters that total less than 60 million gallons in a single month.* The higher volume/rate in this exclusion as compared to the nontidal agricultural exclusion reflects the consumptive nature of agricultural uses, where de-watering of the water body and impacts to habitat are unlikely due to tidal action. This exclusion is also based on discussions with agricultural stakeholders who withdraw surface water from tidal freshwater sources or in areas where the tidal/nontidal interface migrates up and downstream. The units of million gallons in a single month reflects standard irrigation practices for crops and the need for more water during certain months of the year, where a daily limit may be exceeded but a monthly limit would not be exceeded.
- e. *Surface water withdrawals from tidal waters for all other consumptive purposes that total less than two million gallons per day.* The higher volume/rate in this exclusion as compared to the nontidal exclusion reflects the consumptive nature of the uses, while de-watering of the water body and impacts to habitat are unlikely due to tidal action. The units of million gallons per day reflect the nature of commercial and industrial operations where a more constant rate of water withdrawal is needed. Although rare, some examples may be golf courses, small municipalities, and small power generators.
- f. *Surface water withdrawals for firefighting or for the training activities related to firefighting, such as dry hydrants and emergency surface water withdrawals.*

This exclusion supports those often temporary yet necessary surface water withdrawals for human health and safety purposes and emergencies. Dry hydrants are fixtures typically placed in rural ponds or streams, where fire department trucks can connect a hose. In cases where the firefighting activity requires that an impoundment be created by installing a dam on a stream, the activities of placing fill and/or backflooding surface waters may require a VWP permit but the water withdrawal does not.

- g. *Surface water withdrawals placed into portable containers by persons owning property on, or holding easements to, riparian lands.* This exclusion is based on standard agricultural, municipal, and commercial development needs and practices, such as dust control, off-stream watering of live stock, and residential use. This exclusion does not apply to non-riparian property owners wanting, for example, to fill a tank truck during a drought from a public bridge or public boat ramp. Due to comments received during the regulation development process, the potential for abuse is lessened by specifying the exclusion applies to the owner or easement holder, and does not apply to other parties whether or not permission is granted by the owner or easement holder. The intent of this exclusion is to provide small-volume and/or periodic withdrawals without having to apply for a permit and pay the application fee. Generally speaking, small-volume and/or periodic withdrawals are viewed as causing minimal environmental harm, depending on conditions in the watershed, such as precipitation, land use practices, or existing water uses. While there is no volume limit established in regulation for this exclusion, users who impact the environment may be subject to permitting. *see 9VAC25-210-60.C.*
- h. *Surface water withdrawals for the purposes of hydrostatic pressure testing of water tight containers, pipelines, and vessels.* This exclusion reflects the temporary and often one-time need for surface water for these types of tests.
- i. *Surface water withdrawals for normal single family home residential gardening, lawn, and landscape maintenance.* This exclusion is based on the typical water needs of the individual homeowner where the withdrawal is unlikely to impact surface waters, and is reflective of the exclusion for residential activities in surface waters that involve fill, discharge, or excavation in -60.A. of the regulation.
- j. *Surface water withdrawals that are located on a property, such that the withdrawal returns to the stream of origin; not more than half of the instantaneous flow is diverted; not more than 1,000 feet of stream channel separate the withdrawal point from the return point; and both banks of the affected stream segment are located within that property boundary.* This exclusion was developed for *nonconsumptive* diversions of surface water, such as fish hatchery or other aquaculture operations, small-scale or residential power generation, educational and interpretive exhibits, and “in-the-dry” construction activities in surface waters.

- k. *Surface water withdrawals from quarry pits, such that the withdrawal does not alter the physical, biological, or chemical properties of surface waters connected to the quarry pit.* DEQ has encouraged the use of water from quarry pits for certain activities. Care must be taken when applying this exclusion due to potential connectivity to other surface or groundwater sources and the physical characteristics of karst topography in certain areas of the Commonwealth.
 - l. *Surface water withdrawals from a privately owned agriculture pond, emergency water storage facility, or other water retention facility, provided that such pond or facility is not placed in the bed of a perennial or intermittent stream or wetland. Surface water withdrawals from such facilities constructed in beds of ephemeral streams are excluded from permit requirements.* This exclusion acts primarily as a “catch-all” for those activities unique to certain user groups and that are often located in upland areas.
- D. *9VAC25-210-75 – Preapplication procedures for a new or expanded VWP permit for major surface water withdrawals.*

9VAC25-210-75.A:

This optional process formalizes the pre-VWP permit application coordination that often occurs for proposed projects affecting surface waters. Following this process can be particularly useful for complicated water supply projects that require multi-agency review, coordination, and/or action and also may help avoid public controversy and unexpected delays in obtaining permits.

The pre-application review panel process is optional to the applicant and involves agency and public interaction early in the development of a proposed project, rather than initiating this interaction later after having perhaps invested considerable time and money into design plans.

If the applicant wishes to use the pre-application review panel process, VWP staff must arrange for the panel by inviting agency participation and coordinating with the applicant on informational materials and meeting logistics. Processing information for VWP staff is located in the VWP Permit Manual. Meetings of the pre-application review panel do not need to be public noticed. Template materials have been developed for VWP staff use and can be found on DEQNet under the VWP Permit Program.

9VAC25-210-75.B:

The public notice procedures in this subsection are mandatory. This subsection of the regulation requires that, at some point prior to the submittal of a Joint Permit Application, the applicant provide a public notice in a paper distributed in the project area for two consecutive weeks at his/her expense. Informational criteria for the notice are detailed in the regulation. Should a commenter request it, a public meeting may be required at the

perspective applicant's time and expense. While VWP staff is encouraged to attend, it is not mandatory. In the case a public meeting is held, the applicant must also public notice the meeting at least 14 days in advance.

The public notice requirement for pre-application submittal may be waived if an applicant has held a public information meeting within the last two years for the purposes of a local or regional water supply plan, developed under the requirements of 9VAC25-780, where the preferred alternative is in the plan. Prior to making the waiver determination, discuss the situation with your Regional Director and the Director of the Water Division.

- E. *9VAC25-210-80 – Application for a VWP Permit.* Several provisions of this section of the regulation were added or revised to incorporate the unique aspects of surface water withdrawal projects, to address agency needs for certain information to perform its mission and program responsibilities, and to reduce the regulatory burden on some user groups.

This section distinguishes the informational requirements for projects exclusively involving a surface water withdrawal from those projects that may involve other impacts to streams and/or wetlands. Examples include but are not limited to 9VAC25-210-80.B.2.f through -80.B.2.h. The informational requirements in -80.B.2.i were added to encourage certain users (i.e., irrigation) to evaluate their operations and consider adding a storage component for their water supply needs. The basis for the requirements is that some applicants accept VWP permit conditions that prohibit withdrawal during low stream flows, rather than consider the construction of storage facilities to supplement water needs during those periods.

By their very nature, large water withdrawals for projects such a municipal pump/storage facility or a hydroelectric operation often involve both construction activities in surface waters and the physical withdrawal of surface water, whereas smaller water withdrawals may not. To address those projects where no fill, discharge, or excavation is proposed, DEQ developed a specific VWP permit application modeled after the Standard Joint Permit Application (JPA), which is entitled *DEQ Application for New or Expanded Minor Surface Water Withdrawals Initiated On or After July 25, 2007*. Refer to the VWP Permit Manual for more information on processing this application.

The emergency VWP permit application provisions were added to address public water supply problems during drought conditions (Severe Intensity Drought D2 or higher) and to address 2003 legislation that established an emergency VWP permitting process for public water supply during drought (Acts of Assembly Chapter 399; HB 1505). Information requirements were added regarding current use, conservation, and management of surface waters. This supported the efforts to implement the Water Supply Planning Regulation being developed at the same time the VWP Permit Program Regulation was being revised. Issuance of emergency permits for public water supply is expected to occur during prolonged droughts where perhaps a municipality does not have adequate means to store or obtain water to meet their needs. The intent is to encourage

long-term water supply planning and management and to ensure that applicants are using all possible resources and means to meet their water supply needs prior to requesting an emergency VWP permit. Emergency permitting provisions do not apply to circumstances other than drought, such as when a sudden or accidental pollution of a surface water source makes the source unusable. DEQ staff may find information about drought conditions by referencing <http://www.deq.virginia.gov/waterresources/drought/homepage.html> or by calling the DEQ Office of Surface and Groundwater Supply Planning. For procedures on processing emergency VWP applications, refer to the most recent version of the VWP Permit Manual.

- F. *9VAC25-210-110 – Establishing applicable standards, limitations or other VWP permit conditions.* The subsection regarding minimum instream flow was expanded to include consideration of cumulative impacts to surface waters and their watersheds from existing and new users and consideration of alternatives for water supply.

Minimum instream flow (MIF) is a rate, usually expressed in cubic feet per second (cfs) or million gallons per day (mgd), and refers to that flow which must be maintained to support the beneficial uses established in the particular stream reach of interest. Another common rate or measure used when permitting a water withdrawal or diversion project is “flowby”, which is typically a rate or volume that is released from an impoundment (a.k.a. “release”), or a rate or volume that is allowed to pass by an intake structure. Releases from impoundments can pose challenges to developing permit conditions, as impounded headwater streams may not receive flow during times of drought, where if not impounded to begin with, the stream bed would be dry (e.g., carrying no base flow). Evaluating such projects should be done on a case-by-case basis and may require researching historical water inputs to the watershed. Current program policy does not intend to require a release from an impoundment when the stream would be dry (no base flow) under drought conditions, if it were not for the impounding structure. Computer modeling is the typical tool used to determine what the MIF or release should be for each use or combination of uses.

Establishing a minimum instream flow most frequently applies to projects utilizing an intake structure in a stream for the point of withdrawal, whether permanent or temporary (such as municipal water supply or irrigation projects); projects utilizing a reservoir or pond for the point of withdrawal (such as municipal water supply or irrigation projects); or projects diverting a portion of a stream’s flow (such as hydroelectric power generation, historic structure restoration, aquaculture, or irrigation projects).

When developing a VWP permit, staff must consider balancing instream and offstream beneficial uses as defined in the regulation, and whether or not the proposed withdrawal is consumptive, nonconsumptive, or a combination of both. Applying limits on the surface water withdrawal, such as rate limits or time of year restrictions, helps achieve that balance. VWP permit staff should coordinate with the staff in the Office of Surface and Groundwater Supply Planning to evaluate withdrawal proposals, which now has in-house computer modeling tools to assist VWP staff with the development of VWP permit

conditions. Also, the typical individual permit coordination with the Departments of Game and Inland Fisheries and Conservation and Recreation will further assist staff in developing permit conditions. Note that the primary uses of most interest and under the jurisdiction of these agencies are aquatic habitat/wildlife and recreation. Refer to the most recent version of the VWP Permit Manual for procedures for obtaining assistance from the Office of Surface and Groundwater Supply Planning and for evaluating any applicant-provided modeling data.

This section of the regulation also addresses the special considerations VWP staff must make when withdrawals from the Potomac River are proposed, as the Commonwealth of Virginia is a signatory to the Potomac River Low Flow Allocation Agreement.

Since 1978, Virginia's responsibilities for protecting the sustainability of water supplies in metropolitan Washington, D.C. were carried out through Maryland permit programs. However, the 2003 *Virginia v. Maryland* decision by the United States Supreme Court held that Virginia activities in the Potomac River do not require Maryland permits and are validly regulated under Virginia law.

Water withdrawals from the Potomac will be treated the same as water withdrawals from any other Virginia stream with regard to their need for a VWP permit, including the application of permitting exclusions. If a water withdrawal had a Maryland permit but would be otherwise excluded from VWP permitting because it met one of the exclusions, then no VWP permit is issued. Because Maryland permits are no longer valid, withdrawals permitted by Maryland must be permitted by Virginia, unless the withdrawal is excluded from VWP permitting.

Permits for withdrawals from the Potomac River shall contain a condition that requires the permittee to reduce withdrawals when the Restriction or Emergency stage is declared in the Washington Metropolitan Area. 9VAC25-210-110.A.2. This condition only applies to withdrawals upstream of Little Falls and downstream of the confluence of the Potomac and Shenandoah Rivers. Please refer to the most recent version of the VWP Permit Manual for further information.

- G. *9VAC25-210-115 – Evaluation of project alternatives.* This section of the regulation was revised to expand on the requirement that users applying for major water withdrawals, public water supply withdrawals (whether major or minor), and alterations of instream flows perform an alternatives analysis.

9VAC25-210-115.C lists the criteria for an alternatives analysis, incorporating by reference the United State Environmental Protection Agency (USEPA) "Section 404(b)(1) guidelines" and the first principal of mitigating impacts, avoidance and minimization.

Also in -115.C is a list of required analyses that must be performed for public water supply projects. Most of the concepts are not new except for the fact that localities seeking new public water supply projects must look at regional alternatives, whether or

not they are within their jurisdiction. Such regional alternatives may be described in the locality's regional water supply plan. The applicable alternative analyses items must be included in the VWP permit application for non-public water supply withdrawals.

H. *9VAC25-210-140 – Public notice of VWP permit applications, permit actions and public comment periods.*

This section of the regulation requires DEQ to simultaneously publish a public notice with the Virginia Marine Resources Commission (VMRC) in cases where both agencies are required to issue a permit for a “water resource” project. The requirement is based on comments received from stakeholders during the development of the regulation revisions where they desired an opportunity to provide information or voice concerns before a VWP permit is drafted for certain surface water withdrawals.

The Code of Virginia requires that the initial permit application receive a simultaneous notice. This will be either a joint notice or two separate notices published on the same day. The required contents of the public notice for VWP permit purposes are listed in subsection D of 9VAC25-210-140, although all of the informational items may not apply to every application. When issuing a separate notice, use the appropriate public notice template located on DEQNet (same notice that is typically used for permit issuance).

Certain types of water resource projects are exempt from VMRC permitting, and include public water supply dams and agricultural intakes where there is no permanent structure (see §28.2-1203 of the Code of Virginia). The VMRC also exempts any structure on a stream with a drainage area smaller than five square miles; any structure located on a stream that is part of a king's grant (or crown grant); and any intake built in a lake or reservoir unless the intake structure is located on top of the original stream channel.

A king's grant is the ownership of real property, including water bodies, as bequeathed to a person by the King of England, such as that held by the City of Lynchburg. The Commonwealth of Virginia does not have regulatory jurisdiction over such lands for the purposes of permitting surface water withdrawals. Staff may request documentation providing support for a claim under a king's or crown grant.

I. *9VAC25-210-175 – Variance from VWP permit conditions.*

This section of the regulation was added to create a procedure to provide temporary relief from VWP Permit conditions in times of drought. Issuing a variance is a case decision for the purposes of the VWP permit program. Implementation of the variance process is intended to provide the necessary flexibility to address specific drought conditions.

A permittee requesting a variance must meet certain requirements in order to be eligible for a variance. The permittee must exhaust all other reasonable options regarding the management of his/her water supply, such as implementing reduced operating hours or implementing conservation measures, prior to being granted a variance. The variance assists the permittee in avoiding a public health or safety emergency.

Public and non-public water users may request a variance. For public water supply uses, the information required is the same as that required for the application for an emergency VWP permit and is detailed in 9VAC25-210-80.D. For other uses, the permittee must demonstrate that public health and safety interests are being addressed by the variance and that all management actions have been exhausted.

Regardless of the type of permitted use, permittees must take specific actions to reduce the likelihood of needing subsequent variances in future drought situations, such as building a surface water storage facility (-175.C and D). This provision is intended to provide a one time variance.

Variances are issued for the shortest time period that is necessary to remedy the supply shortage problem, which may include applying for a new VWP permit or for a modification of the existing VWP permit.

The same public notice procedures are followed for a variance action as is followed for the issuance of a draft VWP permit or major modification of a VWP permit (see 9VAC25-210-140.B through D). The public comment period begins with the issuance of the variance. At the end of the comment period, any necessary changes to the variance are made based on the comments. For more information about processing a variance, refer to the most recent version of the VWP Permit Manual.