



COMMONWEALTH of VIRGINIA

DEPARTMENT OF ENVIRONMENTAL QUALITY

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April 19, 2012

U.S. Army Corps of Engineers
ATTN: CECW-CO-R
441 G Street, NW
Washington, DC 20314-1000

RE: Federal Consistency Determination for the Reissuance of Nationwide Permits and Virginia Regional Conditions, U.S. Army Corps of Engineers, DEQ 12-047F.

Dear Sir or Madam:

The Commonwealth of Virginia has completed its consistency review of the reissuance of the Nationwide Permits (NWPs) and Virginia Regional Conditions by the U.S. Army Corps of Engineers (Corps). The Department of Environmental Quality (DEQ) is responsible for coordinating Virginia's review of federal consistency documents submitted under the Coastal Zone Management Act (CZMA) and responding to appropriate officials on behalf of the Commonwealth. This letter is in response to the Corps' February 21, 2012 *Federal Register* notice (Vol. 77, No. 34, pages 10184-10290) announcing the reissuance of the NWPs, which serves as the Corps determination of CZMA consistency with the Virginia Coastal Zone Management Program. In addition, this letter responds to the consistency of the Virginia Regional Conditions submitted by the Corps Norfolk District in a February 24, 2012 letter. The following agencies and planning district commissions participated in this review:

Department of Environmental Quality
Department of Conservation and Recreation
Department of Game and Inland Fisheries
Virginia Marine Resources Commission
Department of Agriculture and Consumer Services
Department of Health
Department of Historic Resources
Hampton Roads Planning District Commission
Crater Planning District Commission
Richmond Regional Planning District Commission

In addition, the Department of Forestry, Virginia Institute of Marine Science, Accomack-Northampton Planning District Commission, Middle Peninsula Planning District Commission, Northern Neck Planning District Commission, George Washington Regional Commission and Northern Virginia Regional Commission were invited to comment on the proposed action.

DESCRIPTION OF THE PROPOSED ACTION

The U.S. Army Corps of Engineers proposes to reissue 48 of the 49 existing nationwide permits, general conditions and definitions, with some modifications. The Corps is also issuing two new NWPs, three new general conditions, and three new definitions. The Corps issues NWPs to authorize certain activities that require Department of the Army permits under Section 404 of the Clean Water Act and/or Section 10 of the Rivers and Harbors Act of 1899. Authorizations apply to activities such as aids to navigation, utility lines, bank stabilization, road crossings, stream and wetland restoration, residential developments, mining, commercial shellfish aquaculture, and agricultural. The NWPs are intended to protect the aquatic environment and the public interest while effectively authorizing activities that have minimal individual and cumulative adverse effects on the aquatic environment. In addition, it is sometimes necessary to add regional conditions to NWPs to address state water quality standards and to be consistent with state coastal zone management plans. Accordingly, the Corps Norfolk District has submitted regional conditions for Virginia that are applicable to specific NWPs. The NWPs and regional conditions are issued for a period of five years. The reissued NWPs and regional conditions are effective beginning March 19, 2012 to March 18, 2017.

PUBLIC PARTICIPATION

In accordance with 15 CFR §930.2, the public was invited to participate in the review of the Corps' submission under federal consistency. Public notice of this proposed action was published on the DEQ website from March 5, 2012 through March 30, 2012. No public comments were received in response to the notice.

FEDERAL CONSISTENCY ANALYSIS

Pursuant to the Coastal Zone Management Act of 1972 (§ 1456(c)), as amended, and the federal consistency regulations implementing the CZMA (15 CFR Part 930, Subpart C, § 930.30 *et seq.*) federal actions that can have reasonably foreseeable effects on Virginia's coastal uses or resources must be conducted in a manner which is consistent, to the maximum extent practicable, with the Virginia Coastal Zone Management Program (VCP). The VCP is comprised of a network of programs administered by several agencies. In order to be consistent with the VCP, the federal agency action must be consistent with all the applicable enforceable policies of the VCP prior to commencing the action.

The agencies responsible for the administration of the enforceable policies of the VCP generally agree with the Corps' determination. The Corps must ensure that the proposed action is consistent with the enforceable policies. The analysis which follows responds to the Corps' discussion of the enforceable policies of the VCP that apply to these activities and review comments submitted by agencies that administer the enforceable policies.

FEDERAL CONSISTENCY CONDITIONAL CONCURRENCE

Based on the comments submitted by the agencies administering the enforceable policies of the VCP, DEQ concurs that the reissuance of the NWP's and Virginia Regional Conditions, as proposed, is consistent with the VCP **provided** that the following conditions, discussed below, are satisfied:

- 1) Prior to construction, applicants shall obtain all required permits and approvals not yet secured for the activities to be performed that are applicable to the VCP's enforceable policies and that applicants also adhere to all the conditions contained therein.
 - The Virginia Marine Resources Commission's (VMRC) concurrence of consistency with the subaqueous lands management enforceable policy is based on the recognition that prospective permittees may be required to obtain additional state and/or local approvals prior to commencement of work in waters of the United States from the VMRC and/or the local wetlands board. Such approvals must precede implementation of the projects.
 - Similarly, the Department of Conservation and Recreation, Division of Stormwater Management, Local Implementation (formerly the Division of Chesapeake Bay Local Assistance) concurs that the proposed action is consistent with the coastal lands management enforceable policy provided projects are designed and constructed in a manner consistent with all state and local requirements pursuant to the Chesapeake Bay Preservation Act ("the Act") (Virginia Code §10.1-2100 et seq.) and the Chesapeake Bay Preservation Area Designation and Management Regulations (9 VAC 10-20 et seq.). Applicable projects must receive local approval to be consistent with the coastal lands management enforceable policy.
- 2) The State Water Control Board has provided §401 Clean Water Act Water Quality Certification for the NWP's and Virginia Regional Conditions. Therefore, the activities that qualify for the NWP's meet the requirements of DEQ's Virginia Water Protection Permit Regulation, provided that the permittee abides by the conditions of the NWP. As to the exceptions for activities that would otherwise qualify for one of these Nationwide Permits, the State will continue to process applications for individual §401 Certification through a Virginia Water Protection General or Individual Permit pursuant to 9 VAC 25-210-10 et seq. The Commonwealth requests that the Corps forward to DEQ pre-construction

notifications for any activities that fall into an excepted category for individual review of certain activities.

In addition, we recommend that the Corps continue to work with the Department of Game and Inland Fisheries on the development of an agreement providing for the agency's review and comment on NWP's to ensure impacts to aquatic resources are addressed and to ensure consistency with the fisheries management enforceable policy of the VCP.

In accordance with the *Federal Consistency Regulations* at 15 CFR Part 930, section 930.4, this conditional concurrence is based on the applicants demonstrating to the Corps that they have obtained, or will obtain, all necessary authorizations prior to implementing a project which qualifies for a NWP. If the requirements of section 930.4, sub-paragraphs (a)(1) through (a)(3) are not met, this conditional concurrence becomes an objection under 15 CFR Part 930, section 940.43.

Other state approvals which may apply to this project are not included in this consistency concurrence. Therefore, the Corps must ensure that the action is administered in accordance with all applicable federal, state, and local laws and regulations.

APPLICABLE ENFORCEABLE POLICIES OF THE VCP

1. Fisheries Management.

1(a) Agency Jurisdiction.

(i) Department of Game and Inland Fisheries

The Department of Game and Inland Fisheries (DGIF), as the Commonwealth's wildlife and freshwater fish management agency, exercises enforcement and regulatory jurisdiction over wildlife and freshwater fish, including state- or federally-listed endangered or threatened species, but excluding listed insects (Virginia Code Title 29.1). DGIF is a consulting agency under the U.S. Fish and Wildlife Coordination Act (16 U.S.C. sections 661 *et seq.*) and provides environmental analysis of projects or permit applications coordinated through DEQ and several other state and federal agencies. DGIF determines likely impacts upon fish and wildlife resources and habitat, and recommends appropriate measures to avoid, reduce or compensate for those impacts. For more information, see the DGIF website at www.dgif.virginia.gov.

(ii) Virginia Marine Resources Commission

The Virginia Marine Resources Commission (Virginia Code 28.2-200 to 28.2-713) and the Department of Game and Inland Fisheries (Virginia Code 29.1-100 to 29.1-570) have management authority for the conservation and enhancement of finfish and shellfish resources in the Commonwealth.

(iii) Virginia Department of Health

The Virginia Department of Health's (VDH) Division of Shellfish Sanitation (DSS) is responsible for protecting the health of the consumers of molluscan shellfish and crustacea by ensuring that shellfish growing waters are properly classified for harvesting, and that molluscan shellfish and crustacea processing facilities meet sanitation standards. The mission of this Division is to minimize the risk of disease from molluscan shellfish and crustacea products at the wholesale level by classifying shellfish waters for safe commercial and recreational harvest; by implementing a statewide regulatory inspection program for commercial processors and shippers; and by providing technical guidance and assistance to the shellfish and crustacea industries regarding technical and public health issues.

1(b) Agency Findings.

(i) Department of Game and Inland Fisheries

According to DGIF, it is difficult to determine that all of the NWP's are consistent with the fisheries management enforceable policy of the VCP, as currently there is no process to review each project covered by these permits. In many situations, the regional and standard permit conditions required through coverage by the NWP result in consistency with the fisheries management enforceable policy. However, there are situations, depending on project location and scope, where these conditions may not adequately protect the fisheries resources known from the impacted waterbody. DEQ has provided Section 401 Clean Water Act (CWA) certification for some of the NWP's, allowing the agency to waive DEQ permit issuance for some projects occurring in coastal waters. In these cases, there is no review of the project by DGIF to ensure protection of important fisheries resources and listed species.

DGIF is currently working on the development of an agreement with the Corps Norfolk District and the resource agencies to define a project review process. This agreement may result in a process that allows DGIF to review Corps permit applications of interest to the agency.

(ii) Virginia Marine Resources Commission

VMRC has no comments specific to its fisheries management responsibilities and the reissuance of the NWP's and Virginia Regional Conditions.

(iii) Virginia Department of Health

The Virginia Department of Health finds that the proposed reissuance of the NWP's and Virginia Regional Conditions does not conflict with regulations administered by the Division of Shellfish Sanitation.

1(c) Conclusion. DGIF concludes that the reissuance of the Corps NWP and Virginia Regional Conditions is consistent with the fisheries management enforceable policy under its jurisdiction, provided the Corps continues to coordinate with DGIF to address its concerns with the impacts of permitted actions on aquatic resources.

For additional information, contact DGIF, Amy Ewing at (804) 367-2211; VRMC, Robert Neikirk at (757) 247-2254; and/or VDH-DSS, Robert Croonenberghs at (804) 864-7480.

2. Subaqueous Lands Management.

2(a) Agency Jurisdiction. Pursuant to Section 28.2-1204 of the Code of Virginia the Virginia Marine Resources Commission has jurisdiction over any encroachments in, on, or over any state-owned rivers, streams, or creeks in the Commonwealth. Accordingly, any portion of the project involving encroachments channelward of mean low water below the fall line may require a permit.

VMRC serves as the clearinghouse for the Joint Permit Application (JPA) used by:

- VMRC for encroachments on or over state-owned subaqueous beds as well as tidal wetlands;
- U.S. Army Corps of Engineers (Corps) for issuing permits pursuant to Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act;
- DEQ for issuance of a Virginia Water Protection Permit; and
- local wetlands board for impacts to wetlands.

2(b) Agency Findings. VRMC finds that many of the activities authorized by the NWP may require permits from VMRC or a Local Wetlands Board pursuant to the requirements of Chapter 12 or Title 28.2 of the Code of Virginia (Tony Watkinson and Ellie Irons, May 18, 2012 telephone conversation). Should projects covered by the NWP and those covered by the Virginia Regional Conditions result in encroachments in, on or over state-owned submerged lands, a JPA will need to be submitted to VMRC for review.

2(c) Conclusion. VMRC has no objection to the proposed reissuance of the Corps' Nationwide Permits and Virginia Regional Conditions. Accordingly, the proposed action will be consistent with the subaqueous lands management enforceable policy of the VCP provided the applicants obtain any required permit for encroachment in, on or over subaqueous lands.

For additional information, contact VMRC, Tony Watkinson at (757) 247-2250.

3. Wetlands Management.

3(a) Agency Jurisdiction.

(i) Department of Environmental Quality

The State Water Control Board (SWCB) promulgates Virginia's water regulations, covering a variety of permits to include Virginia Pollutant Discharge Elimination System Permit, Virginia Pollution Abatement Permit, Surface and Groundwater Withdrawal Permit, and the Virginia Water Protection Permit (VWPP). The VWPP is a state permit which governs wetlands, surface water, and surface water withdrawals/impoundments. It also serves as § 401 certification of the federal *Clean Water Act* § 404 permits for dredge and fill activities in waters of the U.S. The VWPP Program is under the Office of Wetlands and Water Protection/Compliance, within the DEQ Division of Water Quality Programs. In addition to central office staff that review and issue VWP permits for transportation and water withdrawal projects, the six DEQ regional offices perform permit application reviews and issue permits for the covered activities.

(ii) Virginia Marine Resources Commission

Tidal wetlands are administered by the Virginia Marine Resources Commission under the authority of Virginia Code 28.2-1301 through 28.2-1320.

3(b) Agency Findings.

(i) Department of Environmental Quality

The State Water Control Board has provided unconditional §401 Water Quality Certification for all of the Norfolk District Regional Conditions and for certain NWP, as meeting the requirements of the Virginia Water Protection Permit Regulation, which serves as the Commonwealth's §401 Water Quality Certification. NWP not receiving unconditional certification are discussed as follows.

The following NWP meet the requirements of the Virginia Water Protection Permit Regulation, provided that any compensatory mitigation meets the requirements in the Code of Virginia, Section 62.1-44.15:23 A through C:

- NWP 14: *Linear Transportation Projects*
- NWP 21: *Surface Coal Mining Activities*
- NWP 29: *Residential Developments (Single Family Dwelling Only)*

The following NWP were granted conditional §401 Water Quality Certification provided that any compensatory mitigation meets certain requirements in the Code of Virginia, Section 62.1-44.15:23 A through C (the detailed conditions are attached):

- NWP 7: *Outfall Structures and Maintenance*

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NWP 12: *Utility Line Activities*
NWP 16: *Return Water from Upland Contained Disposal Areas*
NWP 18: *Minor Discharges*
NWP 19: *Minor Dredging*
NWP 25: *Structural Discharges*
NWP 27: *Stream and Wetland Restoration Activities*
NWP 32: *Completed Enforcement Actions*
NWP 40: *Agricultural Activities*
NWP 41: *Reshaping Drainage Ditches*
NWP 42: *Recreational Facilities*
NWP 43: *Stormwater Management Facilities*
NWP 44: *Mining Activities*
NWP 48: *Commercial Shellfish Aquaculture Activities*
NWP 51: *Land Based Renewable Energy Generation Facilities*
NWP 52: *Water-Based Renewable Energy Generation Pilot Projects*

The following NWP is not currently applicable in the Commonwealth and, therefore, does not require §401 Certification:

NWP 24: *Indian Tribe or State Administered Section 404 Programs*

The following NWP is suspended for use in the State of Virginia and the activities that it authorized are covered under of the Norfolk District State Program General Permit SPGP-01, or other subsequent SPGPs:

NWP 39: *Commercial and Institutional Developments*

The State Water Control Board denies §401 Water Quality Certification for the following NWP, as these types of projects require individual review under state laws:

NWP 17: *Hydropower Projects*

As to the exceptions for activities that would otherwise qualify for one of these Nationwide Permits, the State will continue to process applications for individual §401 Certification through a Virginia Water Protection General or Individual Permit pursuant to 9 VAC 25-210-10 *et seq.* The Commonwealth requests that the Corps forward to DEQ pre-construction notifications for any activities that fall into an excepted category for individual review of certain activities.

(ii) Virginia Marine Resources Commission

According to VMRC, many of the activities authorized by the NWPs may require permits from VMRC or a Local Wetlands Board pursuant to the requirements of Chapter 12 or Title 28.2 of the Code of Virginia. Should projects covered by the NWPs and those covered by the Virginia Regional Conditions result in encroachments to tidal wetlands, a Joint Permit Application will need to be submitted to VMRC for review.

3(c) Conclusion. DEQ has no objection to, and supports, the reissuance of the Corps' Nationwide Permits and Virginia Regional Conditions. Full details of DEQ's §401 Water Quality Certification is attached. Applicants which qualify for NWP's that will impact tidal wetlands must submit a JPA to VMRC for review prior to any disturbance.

For additional information, contact DEQ-OWWP, David Davis at (804) 698-4105 or VMRC, Tony Watkinson at (757) 247-2250.

4. Dunes Management.

4(a) Agency Jurisdiction. Dune protection is carried out pursuant to the Coastal Primary Sand Dune Protection Act and is intended to prevent destruction or alteration of primary dunes and beaches. This program is administered by the Marine Resources Commission (Virginia Code 28.2-1400 through 28.2-1420).

4(b) Agency Findings. Should projects covered by the NWP's and those covered by the Virginia Regional Conditions result in encroachments to primary dunes and beaches, a Joint Permit Application must be submitted to VMRC for review.

4(c) Conclusion. For consistency with the dunes management enforceable policy of the VCP, applicants for NWP's that will impact dunes and beaches must submit a JPA to VMRC for review.

For additional information, contact VMRC, Tony Watkinson at (757) 247-2250.

5. Nonpoint Source Pollution Control.

5(a) Agency Jurisdiction. The Department of Conservation and Recreation (DCR) Division of Stormwater Management (DSM) administers the nonpoint source pollution control enforceable policy through the *Virginia Erosion and Sediment Control Law and Regulations (VESCL&R)* and *Virginia Stormwater Management Law and Regulations (VSWML&R)*.

5(b) Agency Comments. DCR-DSM did not comment on the reissuance of the NWP's.

For additional information, contact DCR-DSM, John McCutcheon at (804) 371-7440,

6. Point Source Pollution Control.

6(a) Agency Jurisdiction. The State Water Control Board (SWCB) promulgates Virginia's water regulations, covering a variety of permits to include Virginia Pollutant Discharge Elimination System Permit (VPDES), Virginia Pollution Abatement Permit, Surface and Groundwater Withdrawal Permit, and the Virginia Water Protection Permit. In addition to the VWPP, DEQ issues individual VPDES permits to both municipal and industrial facilities. Permit requirements, special conditions, effluent limitations and

monitoring requirements are determined for each facility on a site specific basis in order to meet applicable water quality standards. General permits are permits written for a general class of dischargers including Discharges of Storm Water Associated With Industrial Activity (9 VAC 25-151 (VAR 05)). The six DEQ regional offices perform permit application reviews and issue permits for the covered activities.

6(b) Agency Comments. As previously discussed (**3. Wetlands Management**), the State Water Control Board has provided §401 Water Quality Certification for the NWP's and Virginia Regional Conditions. In addition, the VWPP program coordinated the §401 Certification review with the VPDES program (Steve Hardwick and John Fisher, April 18, 2012 telephone conversation).

6(c) Conclusion. The reissuance of the NWP's and Virginia Regional Conditions is consistent, to the maximum extent practicable, with the point source pollution control enforceable policy of the VCP.

For additional information, contact DEQ-OWWP, David Davis at (804) 698-4105.

7. Shoreline Sanitation.

7(a) Agency Jurisdiction. This program is administered by the Department of Health, Division of Onsite Sewage and Water Services (Virginia Code 32.1-164 through 32.1-165) to regulate the installation of septic tanks, set standards concerning soil types suitable for septic tanks, and specify minimum distances that tanks must be placed away from streams, rivers, and other waters of the Commonwealth.

7(b) Agency Findings. The Virginia Department of Health finds that the proposed reissuance of the NWP's and Virginia Regional Conditions does not conflict with regulations administered by the Division of Onsite Sewage and Water Services.

For additional information, contact VDH-DOSWS, Marcia Degen at (804) 387-1883.

8. Air Pollution Control.

8(a) Agency Jurisdiction. DEQ's Air Quality Division, on behalf of the State Air Pollution Control Board, is responsible to develop regulations that become Virginia's *Air Pollution Control Law*. DEQ is charged to carry out mandates of the state law and related regulations as well as Virginia's federal obligations under the *Clean Air Act* as amended in 1990. The objective is to protect and enhance public health and quality of life through control and mitigation of air pollution. The division ensures the safety and quality of air in Virginia by monitoring and analyzing air quality data, regulating sources of air pollution, and working with local, state and federal agencies to plan and implement strategies to protect Virginia's air quality. The appropriate regional office is directly responsible for the issue of necessary permits to construct and operate all stationary sources in the region as well as to monitor emissions from these sources for compliance. As a part of this mandate, the environmental documents of new projects to

be undertaken in the state are also reviewed. In the case of certain projects, additional evaluation and demonstration must be made under the general conformity provisions of state and federal law.

8(b) Agency Findings. According to the DEQ Air Division, NWP's may be issued for projects located in a designated ozone maintenance areas and ozone nonattainment area and emission control area for volatile organic compounds (VOCs) and oxides of nitrogen (NO_x). Precursors to ozone (O₃) pollution include VOCs and NO_x.

8(c) Recommendation. The applicant should take all reasonable precautions to limit emissions of VOCs and NO_x, principally by controlling or limiting the burning of fossil fuels.

8(d) Requirements. The project applicant must comply with the following requirements as applicable.

(i) Fugitive Dust

During land-disturbing activities, fugitive dust must be kept to a minimum by using control methods outlined in 9 VAC 5-50-60 *et seq.* of the *Regulations for the Control and Abatement of Air Pollution*. These precautions include, but are not limited to, the following:

- Use, where possible, of water or chemicals for dust control;
- Installation and use of hoods, fans, and fabric filters to enclose and vent the handling of dusty materials;
- Covering of open equipment for conveying materials; and
- Prompt removal of spilled or tracked dirt or other materials from paved streets and removal of dried sediments resulting from soil erosion.

(ii) Open Burning

If project activities include open burning, this activity must meet the requirements of 9 VAC 5-130-10 through 9 VAC 5-130-60 and 9 VAC 5-130-100 of the *Regulations* for open burning, and it may require a permit. The *Regulations* provide for, but do not require, the local adoption of a model ordinance concerning open burning. The applicant should contact the appropriate local officials to determine what local requirements, if any, exist.

For additional information, contact the DEQ Air Division, Kotur Narasimhan at (804) 698-4415.

9. Chesapeake Bay Preservation Areas.

9(a) Agency Jurisdiction. The DCR-DSM Local Assistance (LI) administers the coastal lands management enforceable policy of the VCP, which is governed by the *Chesapeake Bay Preservation Act* (Virginia Code §10.1-2100-10.1-2114) and *Chesapeake Bay Preservation Area Designation and Management Regulations* (9 VAC 10-20 *et seq.*).

9(b) Agency Findings. According to Section 9 VAC 10-20-120 B 11 of the *Regulations*, local governments are required to obtain evidence that all wetlands permits required by state and federal agencies have been obtained prior to the initiation of any onsite land-disturbing activity. The issuance of a NWP for an activity in a wetland that is designated by the local government as a Resource Protection Area (RPA) does not override the requirements in Section 9 VAC 10-20-130 of the *Regulations* that limits development activities in RPAs. The local government is still required to ensure that any permitted activity within a designated RPA complies with all applicable requirements as outlined under the *Regulations*, regardless of whether or not such an activity has received a permit from the Corps.

9(c) Conclusion. DCR-DSM-LI concludes that the reissuance of the NWPs and Virginia Regional Conditions would be consistent with the coastal lands management enforceable policy of the VCP as administered through the *Chesapeake Bay Preservation Act and Regulations*, since specific projects under NWPs will be reviewed by the locality to ensure that all other applicable requirements under their local *Bay Act* program will be enforced.

For additional information, contact DCR-DSM-LI, Joan Salvati at (804) 225-3440.

ADDITIONAL ENVIRONMENTAL CONSIDERATIONS

In addition to the enforceable policies of the VCP, comments were also provided with respect to applicable requirements and recommendations of the following programs:

1. Solid and Hazardous Wastes.

1(a) Agency Jurisdiction. Solid and hazardous wastes in Virginia are regulated by the Virginia Department of Environmental Quality, the Virginia Waste Management Board (VWMB) and the U.S. Environmental Protection Agency. They administer programs created by the federal Resource Conservation and Recovery Act, Comprehensive Environmental Response Compensation and Liability Act, commonly called Superfund, and the Virginia Waste Management Act. DEQ administers regulations established by the VWMB and reviews permit applications for completeness and conformance with facility standards and financial assurance requirements. All Virginia localities are required, under the Solid Waste Management Planning Regulations, to identify the strategies they will follow on the management of their solid wastes to include items such

as facility siting, long-term (20-year) use, and alternative programs such as materials recycling and composting.

1(b) Requirements.

(i) Waste Management

Any soil that is suspected of contamination or wastes that are generated during construction-related activities must be tested and disposed of in accordance with applicable federal, state, and local laws and regulations. Some of the applicable state laws and regulations are:

- Virginia Waste Management Act (Code of Virginia Section 10.1-1400 *et seq.*);
- Virginia Hazardous Waste Management Regulations (VHWMR) (9 VAC 20-60);
- Virginia Solid Waste Management Regulations (VSWMR) (9 VAC 20-80);
- Virginia Regulations for the Transportation of Hazardous Materials (9 VAC 20-110).

Some of the applicable federal laws and regulations are:

- Resource Conservation and Recovery Act (RCRA) (42 U.S.C. Section 6901 *et seq.*);
- Title 40 of the Code of Federal Regulations; and
- U.S. Department of Transportation Rules for Transportation of Hazardous materials (49 CFR Part 107).

(ii) Asbestos-containing Material and Lead-based Paint

Any existing structures to be demolished or otherwise impacted by construction should be checked for asbestos-containing materials (ACM) and lead-based paint (LBP) prior to construction. If ACM or LBP are found, in addition to the federal waste-related regulations mentioned above, state regulations 9 VAC 20-80-640 for ACM and 9 VAC 20-60-261 for LBP must be followed.

1(c) Recommendations.

(i) Data Base Search

DEQ recommends that permit applicants conduct an environmental investigation on and near the property to identify any solid or hazardous waste sites or issues before work begins. This investigation should include a search of the following waste-related databases:

- <http://www.epa.gov/superfund/sites/cursites/index.htm> or
- http://www.epa.gov/enviro/html/rcris/rcris_query_java.html.

(ii) Pollution Prevention

DEQ recommends the implementation of pollution prevention principles, including the reduction, reuse, and recycling of all solid wastes generated. All generation of hazardous wastes should be minimized and handled appropriately.

Contact DEQ Division of Land Protection and Revitalization (DLPR), Steve Coe at (804) 698-4229, for additional information.

2. Natural Heritage Resources.

2(a) Agency Jurisdiction. The mission of the Virginia Department of Conservation and Recreation (DCR) is to conserve Virginia's natural and recreational resources. The DCR-Natural Heritage Program's (DCR-DNH) mission is conserving Virginia's biodiversity through inventory, protection, and stewardship. The *Virginia Natural Area Preserves Act*, 10.1-209 through 217 of the *Code of Virginia*, was passed in 1989 and codified DCR's powers and duties related to statewide biological inventory: maintaining a statewide database for conservation planning and project review, land protection for the conservation of biodiversity, and the protection and ecological management of natural heritage resources (the habitats of rare, threatened, and endangered species, significant natural communities, geologic sites, and other natural features).

2(b) Agency Comments. DCR-DNH provided comments on the following NWP's.

(i) Regional Conditions Applicable to Specific NWP's

NWP 12-Utility Line Activities

Existing maintained utility line corridors may provide habitat for natural heritage resources including rare plants. As part of the pre-construction notification, DCR recommends a database search be conducted for construction, maintenance, repair of utility lines to determine if documented natural heritage resources occur within the project area. For avoiding and minimizing impacts to the documented resources, DCR recommends coordination with the Division of Natural Heritage for specific protection recommendations.

(ii) Regional Conditions Applicable to Multiple and/or All NWP's

4. Conditions for Federal-Listed Species and Designed Critical Habitat

DCR recommends that species with state-listed status, but no federal-listed status, be included as part of the pre-construction notification for NWP's provided 401 Water Quality Certification. If a state-listed species is documented within the project area and determined to be adversely impacted by the proposed project, DCR recommends the

activity not be authorized under a NWP and the permittee be required to obtain an individual permit.

7. Conditions Regarding Invasive Species

Invasive species are the second largest threat to natural heritage resources. DCR supports the condition of not using invasive species as identified on the most current *Virginia Department of Conservation and Recreation's Invasive Alien Plant List* for re-vegetation activities authorized by any NWP and using only native plants (see http://www.dcr.virginia.gov/natural_heritage/nativeplants.shtml) for restoration activities.

8. Conditions Pertaining to Countersinking of Pipes and Culverts in Nontidal Waters

DCR supports countersinking of pipes to maintain natural water velocities and allow movement of aquatic organisms. DCR also supports countersinking during the emergency pipe replacements and after the initial repair is completed if necessary.

- f. ii. Under a Memorandum of Agreement established between the Virginia Department of Agriculture and Consumer Services (VDACS) and the Department of Conservation and Recreation, DCR represents VDACS in comments regarding potential impacts on state-listed threatened and endangered plant and insect species. As part of the pre-notification process, DCR recommends the permittee coordinate with DGIF and DCR if a state listed species is identified within the search area.

9. Conditions for the Repair of Pipes

- A. b. During the pre-construction notification, DCR recommends the Corps Norfolk District conduct a database search and consult with DCR and DGIF if a state-listed species is identified within the search area.

Contact DCR-DNH, Rene Hypes at (804) 371-2807, for additional information.

3. Protected Plant and Insect Species

3(a) Agency Jurisdiction. The *Endangered Plant and Insect Species Act* of 1979, Chapter 39 §3.1-1020 through 1030 of the *Code of Virginia*, as amended, authorizes the Virginia Department of Agriculture and Consumer Services (VDACS) to conserve, protect, and manage endangered and threatened species of plants and insects. The VDACS Virginia Endangered Plant and Insect Species Program personnel cooperates with the U.S. Fish and Wildlife Service (USFWS), DCR-DNH and other agencies and organizations on the recovery, protection or conservation of listed threatened or endangered species and designated plant and insect species that are rare throughout their worldwide ranges. In those instances where recovery plans, developed by USFWS, are available, adherence to the order and tasks outlined in the plans are followed to the extent possible.

3(b) Agency Comments. VDACS has no comments with regard to endangered plant and insect species.

For additional information, contact VDACS, Keith Tignor at (804) 786-3515.

4. Water Supply.

4(a) Agency Jurisdiction. The Virginia Department of Health (VDH), Office of Drinking Water (ODW) reviews projects for the potential to impact public drinking water sources (groundwater wells, springs and surface water intakes).

4(b) Agency Findings. The Virginia Department of Health finds that the proposed reissuance of the NWPs and Virginia Regional Conditions does not conflict with regulations administered by the Office of Drinking Water.

Contact VDH-ODW, Diedre Forsgren at (804) 864-7241 for additional information.

5. Forest Resources.

5(a) Agency Jurisdiction. The mission of the Virginia Department of Forestry (VDOF) is to protect and develop healthy, sustainable forest resources for Virginians. VDOF was established in 1914 to prevent and suppress forest fires and reforest bare lands. Since the Department's inception, it has grown and evolved to encompass other protection and management duties including: protecting Virginia's forests from wildfire, protecting Virginia's waters, managing and conserving Virginia's forests, managing state-owned lands and nurseries, and managing regulated incentive programs for forest landowners.

5(b) Agency Findings. VDOF finds that the conditions outline in the Virginia Regional Conditions (3.b.ii.) for NWP 12 will result in no significant impact to the overall forest resources of the Commonwealth.

5(c) Recommendations. Measures to consider when tree harvesting occurs are as follows:

- Wherever feasible, existing groupings and/or clusters of trees and natural vegetation should remain on the site to provide esthetic and environmental benefits.
- Trees not slated for removal should be protected from the effects of construction activities associated with future construction. These trees should be marked and fenced at least to the drip line or the end of the root system, whichever extends farther from the stem. Marking should be done with highly visible ribbon so that equipment operators see the protected areas easily.

- Parking and stacking of heavy equipment and construction materials near trees can damage root systems by compacting the soil. Soil compaction, from weight or vibration, affects root growth, water and nutrient uptake, and gas exchange. The protection measures suggested above should be used for parking and stacking as well as for moving of equipment and materials. If parking and stacking are unavoidable, contractors should use temporary crossing bridges or mats to minimize soil compaction and mechanical injury to plants.
- Any stockpiling of soil should take place away from trees. Piling soil at a tree stem can kill the root system of the tree. Soil stockpiles should be covered, as well, to prevent soil erosion and fugitive dust.

For additional information, contact VDOF, Tom Harlan at (434) 220-9064.

6. Historic Resources.

6(a) Agency Jurisdiction. The Department of Historic Resources (DHR) conducts reviews of projects to determine their effect on historic structures or cultural resources under its jurisdiction. DHR, as the designated State's Historic Preservation Office, ensures that federal actions comply with *Section 106 of the National Historic Preservation Act of 1966 (NHPA)*, as amended, and its implementing regulation at 36 CFR Part 800. The NHPA requires federal agencies to consider the effects of federal projects on properties that are listed or eligible for listing on the National Register of Historic Places. Section 106 also applies if there are any federal involvements, such as licenses, permits, approvals or funding.

6(b) Agency Comments. DHR is working directly with the Corps under *Section 106 NHPA*.

For additional information, contact DHR, Roger Kirchen at (804) 482-6091.

7. Regional Planning Districts.

7(a) Agency Jurisdiction. In accordance with CFR 930, Subpart A, § 930.6(b) of the *Federal Consistency Regulations*, DEQ, on behalf of the state, is responsible for securing necessary review and comment from other state agencies, the public, regional government agencies, and local government agencies, in determining the Commonwealth's concurrence or objection to a federal consistency determination.

7(b) Findings.

(i) Hampton Roads Planning District Commission

The Hampton Roads Planning District Commission (HRPDC) finds the proposed reissuance of NWP's and Virginia Regional Conditions consistent with local and regional plans and policies.

(ii) Richmond Regional Planning District Commission

The staff of the Richmond Regional Planning District Commission (RRPDC) has no objection to the reissuance of the NWP's and the Virginia Regional Conditions.

(iii) Crater Planning District Commission

The Crater Planning District Commission (CPDC) staff finds the NWP's and Virginia Regional Conditions in full accord with the CPDC's environmental policy directives. CPDC supports the proposed action.

For more information contact HRPDC, John Carlock at (757) 420-8300, RRPDC, Barbara Jacocks at (804) 232-2033 and CPDC, Mark Bittner at (804) 861-1666 x237.

Thank you for the opportunity to review and respond to the reissuance of the Nationwide Permits and Virginia Regional Conditions. The detailed comments of reviewing agencies are attached for your review. If you have questions, please call Ellie Irons at (804) 698-4325 or John Fisher at (804) 698-4339.

Sincerely,



Rick Weeks, Chief Deputy
Executive Management

Enclosures

Ec: Ellie Irons, DEQ-OEIR
David Davis, DEQ-OWSP
Steve Coe, DEQ-DLPR
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