



January 29, 2016

By Electronic Mail

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Re: Incorporation of Policies, Guidance, Regulations and Clarifications Specific to the VWP Program

Dear Mr. Norris, Ms. Winn and Mr. Davis:

I am writing on behalf of Mission H₂O to comment on the above-referenced regulatory changes. Mission H₂O was an active participant in the discussions of the proposed regulation and was represented on the citizen advisory group (“CAG”) formed to review the proposed regulatory changes. Water is an important resource to the Commonwealth of Virginia, and it is a critical need of our members, which include water providers, industrial and agricultural water users, and water resource professions. Certainty in the ability to withdraw and use water is a high priority for all of our members. For this reason, the proposed regulatory changes impacting the permitting program for surface water withdrawals is of significant interest to our membership.

Mission H₂O agrees with the Virginia Department of Environmental Quality’s (“DEQ”) proposal to separate out the surface water withdrawal permitting provisions from the wetland-related provisions. The CAG agreed with this change and deemed making this change a priority; that is not the case with the other substantive changes to the surface water withdrawal provisions that are being proposed. Mission H₂O respectfully requests that all other substantive changes to

the surface water withdrawal provisions be held in abeyance pending the formation of a new CAG to review and discuss the proposed changes.

Another reason that Mission H₂O makes this request is the limited representation on the CAG of municipal wastewater providers. There was also a limited number of representatives that either hold VWP water withdrawal permits or have surface water withdrawals. While Mission H₂O was represented on the CAG and was able to provide feedback on the proposed changes on behalf of our membership, many other stakeholders were not. This may be due to confusion about the scope of the expected changes, as well as the perceived priority placed on the wetland-related provisions and the need to reissue the general permits associated with the wetland program. Regardless of the reason, there was inadequate representation of the stakeholders most directly affected by the changes to the surface water withdrawal provisions.

Further discussion is needed on the substantive changes that are proposed, and on the surface water withdrawal permitting process more generally. Last year, the General Assembly tasked the Joint Legislative Audit Review Commission (“JLARC”) with studying water resource management in Virginia, and the outcome of this study should be incorporated into the review of the surface water withdrawal provisions. This is particularly true as Virginia works toward evaluating water on a more comprehensive basis. The scope of existing and protected water withdrawals, including riparian rights, water rights by grant, and prescriptive water rights, needs to be better understood in the permitting process. These issues were not part of the CAG discussion, are relevant, and must be understood before any further regulatory changes occur.

Additionally, some of the changes to the surface water withdrawal provisions, most notably the changes relating to the definition and use of the term “safe yield,” are related to changes expected to be made to the waterworks permitting provisions of the Virginia Department of Health (“VDH”). In order to avoid confusion and ensure that the changes are complementary, it makes sense to make them in conjunction with each other. Holding the substantive changes to the DEQ surface water provisions so that they coincide with the VDH waterworks permitting changes enables this to occur.

Should it be decided to move forward with the substantive changes to the surface water withdrawal provisions, rather than allow more opportunity for stakeholder involvement, Mission H₂O offers the following substantive comments.

1. Public Water Supply Safe Yield.

- A. Background – VDH

The term “safe yield” originated in the Virginia Administrative Code sections containing the VDH regulations governing operation of water treatment systems. When applying for a waterworks construction permit, the VDH regulations require applicants to submit an engineer’s report that includes information supporting the need for a given waterworks system and the

construction plans for that system. The construction plans must provide information regarding the source water for the system, including:

- the hydrological data, stream flow, and weather records;
- **Safe yield**, including all factors that may affect it;
- Maximum flood flow, together with approval for safety features of spillway and dam from appropriate reviewing authority;
- Summarized quality of raw water with special references to fluctuation in quality, changing meteorological conditions, sources of contamination, measures to protect the watershed, etc.

12 VAC 5-590-200. The VDH regulations specify that the safe yield of the source shall be determined as follows:

- a. Simple intake (free-flowing stream). The safe yield is defined as the minimum withdrawal rate available during a day and recurring every 30 years (30 year - one day low flow). To generate the report for this, data is to be used to illustrate the worst drought of record in Virginia since 1930. If actual gauge records are not available for this, gauges are to be correlated from similar watersheds and numbers are to be synthesized; and
- b. Complex intake (impoundments in conjunction with streams). The safe yield is defined as the minimum withdrawal rate available to withstand the worst drought of record in Virginia since 1930. If actual gauge records are not available, correlation is to be made with a similar watershed and numbers synthesized in order to develop the report.

Note: Local governments may request this aid from the State Water Control Board (SWCB) by contacting either the Health Department's Office of Water Programs or the SWCB's headquarters office in Richmond.

12 VAC 5-590-830.A.2. Thus, the safe yield concept was developed as part of the waterworks permitting process, and was meant to ensure the adequacy and reliability of drinking water systems.

B. DEQ Historic Use of Safe Yield Term

DEQ has historically issued guidance that includes the safe yield of municipal surface water supply systems in Virginia. *See, e.g.,* DEQ Planning Bulletin #335, Safe Yield of Municipal Surface Water Supply Systems in Virginia. This guidance was issued, according to DEQ, pursuant to Va. Code § 62.1-44.38.B, which gives DEQ the authority to establish plans and programs for the management of water resources in Virginia, known as river basin plans. The plans are required to include a wide variety of information, including an evaluation, **in**

cooperation with VDH and local water supply managers, of the current and future capability of public water systems to provide adequate quantity and quality of water. *Id.* (emphasis added).

DEQ's guidance also provides that the purpose of the safe yield bulletin is "to provide reliable estimates of the water supply capabilities of existing publicly owned and operated surface water supply systems in Virginia." In other words, to calculate safe yield. The Bulletin cites the VDH definition of safe yield. As in the VDH regulation, the primary focus of the calculation is on the sustainability of the water works treatment system, not on the environmental impacts of the withdrawal. The concern is assuring adequate flows to meet the need projected for the water works system.

The Planning Bulletin acknowledges that the issue of an environmental flowby requirement or minimum instream flow is separate and distinct from the safe yield calculation. In other words, the preservation of flow for instream beneficial uses has historically been a distinct concept from the safe yield of municipal waterworks. The two concepts serve two different purposes.

DEQ's Town Hall Agency Background Document itself states "DEQ is responsible for evaluating, in cooperation with VDH and local water supply managers, the current and future capability of public water systems to provide adequate quantity and quality of water." Town Hall Agency Background Document at page 4.

C. DEQ Current Use of Term

The term "safe yield" is currently used in the DEQ regulations in two places. First, when evaluating project alternatives for VWP surface water withdrawals, DEQ's regulations provide that the safe yield of existing supply sources should be considered. 9 VAC 25-210-115. Second, in the water supply planning regulation, DEQ requires localities to include information about community water systems, including the design capacity for average daily and maximum daily withdrawals from the reservoirs, the **safe yield** of the reservoirs, the capacity of any associated water treatment plant, the Department of Health permitted capacity of the systems, and any limitations on withdrawal established by permits issued by the board. 9 VAC 25-780-70. In both instances, the term is connected to public water supply systems and the VDH permitting process.

A definition of safe yield is not currently included in the DEQ regulations. The DEQ website includes a glossary with the following definition of safe yield:

Safe Yield: The annual amount of water that can be taken from a source of supply over a period of years without depleting that source beyond its ability to be replenished naturally in "wet years."

This definition is different from that in the VDH regulations and that proposed by DEQ as part of this regulatory process.

See <http://www.deq.virginia.gov/Resources/Glossary/GlossaryS.aspx>.

D. DEQ's Proposed Changes

DEQ is now proposing to add a definition of public water supply safe yield to its Virginia Water Protection permit regulation, with a new definition that reads as follows:

“Safe yield” means the highest average annual volumetric rate of water that can be withdrawn by a surface water withdrawal during the worst drought of record in Virginia since 1930 under specific operational conditions established in a Virginia Water Protection permit.

Draft 9 VAC 25-210-300. Additionally, the term “public water supply safe yield” has been added to the section discussing water withdrawal permit conditions:

B. Instream flow conditions. Subject to the provisions of Chapter 24 (§ 62.1-242 et seq.) of Title 62.1 of the Code of Virginia, and subject to the authority of the State Corporation Commission over hydroelectric facilities contained in Chapter 7 (§ 62.1-80 et seq.) of Title 62.1 of the Code of Virginia, instream flow conditions may include but are not limited to conditions that limit the volume and rate at which surface water may be withdrawn at certain times, **the public water supply safe yield**, and conditions that require water conservation and reductions in water use.

Draft 9 VAC 25-210-370 (emphasis added).

The changes proposed by DEQ are problematic. DEQ's appropriation of the term and application in the VWP surface water withdrawal regulation removes it from the context of the reliability of a waterworks system. While DEQ has always played a role in determining safe yield, it has done so in conjunction with VDH and in the context of the reliability of the proposed waterworks system, as reflected in the Town Hall Agency Background Document. This is what is contemplated in the statute. Va. Code § 62.1-44.38.B. Applying the term outside of that context creates confusion and adds another layer to the water withdrawal permitting program for non-waterworks systems. Moreover, imposing the term in the VWP water withdrawal permitting context makes it a tool of environmental protection rather than a tool for the protection of public health. Using the term in this manner creates confusion about whether safe yield would effectively serve as a limit for all future new surface water withdrawals. Changing the focus from human health to the environment makes it unclear what the term will mean or how it will be evaluated in the VDH waterworks permitting process.

This change is also problematic because it is unclear how and when the safe yield calculation will apply to grandfathered water withdrawals. Surface water withdrawals taking place prior to July 1, 1989 are grandfathered from the VWP permitting requirements. However, waterworks operations are subject to the VDH permitting process regardless of whether their source water withdrawal is grandfathered. While DEQ states in the Town Hall Agency Background Document that it intends the new safe yield definition and its use in the VWP permitting context to be “prospective in nature, applying only to new withdrawals or grandfathered withdrawals that need a new 401 certificate to increase the withdrawal beyond what it was before July 1, 1989,” this limiting language is not included in the regulation and requests that DEQ do so were rejected.

Finally, there is no clear understanding of how and whether the term “safe yield” will continue to be used in the VDH waterworks permitting context. As described above, the term has been used historically as one element of the waterworks permitting process, largely to ensure the reliability of a proposed waterworks system. If the term is going to continue to be used by VDH, but with a new definition, there is uncertainty about the impact this will have on the VDH permitting program. This is the reason that Mission H₂O is asking for the opportunity to review the proposed regulatory changes for the two programs contemporaneously, rather than allowing the DEQ changes to move forward in isolation.

For all of these reasons, Mission H₂O respectfully requests that DEQ not include the definition of public water supply safe yield in the revised regulation.

2. Definitions.

DEQ is proposing to amend the definition of "beneficial use" to read as follows:

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

Proposed 9 VAC 25-210-10.

This new definition specifically addresses instream flow. Because DEQ is adding “preservation of instream flows” to this definition, at a minimum DEQ should further include documented water rights by grant, which are conveyed for both water quality and quantity purposes and which, in many instances, convey a specified volume that is known and should be

included as a beneficial use protected against future withdrawal decisions. Likewise, grandfathered withdrawals are protected by statute. Va. Code 62.1-44.15:22. The volume of grandfathered withdrawals is known, because these withdrawals have been registered with DEQ in accordance with statutory and regulatory requirements. Thus, grandfathered withdrawals should also be recognized within this definition.

3. Time Period to Apply for Renewal.

The proposed regulation includes a specific time period of 270 days for applying to renew a surface water withdrawal permit. 9 VAC 25-210-350. This time period seems unduly lengthy. The time period for applying for a permit renewal should be 180 days in advance of the existing permit's expiration date, consistent with the renewal application process for Virginia Pollutant Discharge Elimination System ("VPDES") permits. *See* 9 VAC 25-31-100.E.

4. Coordinated Review with VDH for Public Water Supply Withdrawals.

Proposed Section 9 VAC 25-210-310 provides for the coordinated review with the Virginia Marine Resource Commission for surface water withdrawals. For public water supply withdrawals, coordination with VDH should also be referenced.

5. Permit Modifications.

DEQ has proposed a new section on permit modifications for surface water withdrawal permits. Proposed 9 VAC 25-210-380. Under this section, major modifications (including a public comment process and DEQ approval) to a permit are required for "significant" changes to the location of the withdrawal system; changes to a withdrawal (including increasing storage capacity) that cause more than a "minimal" change to the instream flow requirements; and changes to the purpose of the withdrawal. The terms used to describe the changes are subjective in nature. It is unclear who determines whether a change is "minimal," and at what point in the process. As drafted, the provision creates a situation where permitted withdrawers would need to consult with DEQ before making any changes to ensure that a formal modification is not needed.

Of particular concern is 9 VAC 25-210-380.A.4, which requires a major permit modification when a new use not identified in the permit application, or a modification of the existing use, occurs. If a withdrawal is for a public water supply, but a new business locates in the locality and begins purchasing water, is this a change in use that requires a major permit modification? A change in the type of use should not necessitate a major permit modification unless the new use results in greater consumptive use of the resource.

Additionally, minor modifications (requiring submission of an application to DEQ with supporting documentation) are required for "minor" changes to the location of the withdrawal system, temporary changes to instream flow requirements or operational permit requirements; changes to the project that do not affect the permitted withdrawal volumes or rates; and changes

to monitoring methods or locations or monitoring sites. It is unclear whether mere changes to intake screens, pump operations and other maintenance would necessitate a minor modification. This lack of clarity creates confusion to water withdrawing entities. Requiring a permit modification for changes that are operational or administrative in nature would be unduly burdensome.

This section also cross-references the wetlands-related sections of the VWP regulation in a confusing way. The timing and approval process that applies both to major and minor modifications is unclear. If the purpose of the separation is to make the applicable requirements more clear, this section should constitute a stand-alone provision governing modifications to surface water withdrawal permits.

6. Permit Transfers.

The new surface water withdrawal section does not address the transfer of permits. Such provisions should be included in the event of a change in ownership.

7. Transition.

Proposed 9 VAC 25-210-610 governs the transition to the new VWP surface water withdrawal provisions. It states that VWP individual permits issued prior to the new regulation remain in full force and effect until the permits expire, or are revoked or terminated. This section should include a complementary provision that safe yield determinations made prior to the effective date of the regulation, whether by DEQ or VDH, likewise remain in full force and effect until such permits expire or are revoked or terminated.

8. Project Alternatives.

It is unclear whether proposed 9 VAC 25-210-360 applies to all water withdrawals or only to public water supply withdrawals. The first sentence states that applicants must demonstrate that a project meets an “established local water supply need.” It is unclear what this means given the current state water supply planning efforts and the conclusions of the State Water Resources Plan, which highlight the need for additional water storage and identify areas where water will be needed in the future. With the increased understanding of water management needs, it seems that traditional definitions of need should be expanded.

It is also unclear how the above text relating to “local water supply need” applies in the context of a withdrawal by an industrial or agricultural user, particularly when industrial and agricultural water users have no ability to ensure that local water supply plans adequately and accurately document their needs. Many of the other provisions in this section would appear inapplicable to private withdrawers.

Additionally, subsection 4 states that alternative analysis performed for surface water withdrawals other than for public water supply must include the relevant items from subdivision 3. Such a general statement does not provide sufficient guidance to private withdrawers as to the level and components of the required alternatives analysis. Clarification is needed about the demonstration of need required for industrial and agricultural water users.

Thank you for your consideration of these comments. Mission H₂O members need certainty about water availability and the VWP surface water withdrawal regulations must recognize and prioritize the use of water for critical purposes such as public health, commerce and agriculture. Accordingly, our members strongly believe that the proposed substantive changes to the surface water withdrawal provisions should be held in abeyance until additional discussion can take place. Source and yield protection must be prioritized and protected, and a more representative CAG is needed to vet the issues and ensure that the proposed changes do so. Mission H₂O looks forward to continuing to work with DEQ on these proposed changes. If you have any questions about these comments, please call me at 804-697-1406.

Sincerely,



Andrea W. Wortzel

AWW/hmn

cc: Mission H₂O Members