VIRGINIA REGISTER OF REGULATIONS

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VIRGINIA REGISTER INFORMATION PAGE

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

ADOPTION, AMENDMENT, AND REPEAL OF REGULATIONS

Unless exempted by law, an agency wishing to adopt, amend, or repeal regulations must follow the procedures in the Administrative Process Act (§ 2.2-4000 et seq. of the Code of Virginia). Typically, this includes first publishing in the *Virginia Register* a notice of intended regulatory action; a basis, purpose, substance and issues statement; an economic impact analysis prepared by the Department of Planning and Budget; the agency's response to the economic impact analysis; a summary; a notice giving the public an opportunity to comment on the proposal; and the text of the proposed regulation.

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

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

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

The Governor may review the final regulation during this time and, if he objects, forward his objection to the Registrar and the agency. In addition to or in lieu of filing a formal objection, the Governor may suspend the effective date of a portion or all of a regulation until the end of the next regular General Assembly session by issuing a directive signed by a majority of the members of the appropriate legislative body and the Governor. The Governor's objection or suspension of the regulation, or both, will be published in the *Virginia Register*.

If the Governor finds that the final regulation contains changes made after publication of the proposed regulation that have substantial impact, he may require the agency to provide an additional 30-day public comment period on the changes. Notice of the additional public comment period required by the Governor will be published in the *Virginia Register*. Pursuant to § 2.2-4007.06 of the Code of Virginia, any person may request that the agency solicit additional public comment on certain changes made after publication of the proposed regulation. The agency shall suspend the regulatory process for 30 days upon such request from 25 or more individuals, unless the agency determines that the changes have minor or inconsequential impact.

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

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

FAST-TRACK RULEMAKING PROCESS

Section 2.2-4012.1 of the Code of Virginia provides an alternative to the standard process set forth in the Administrative Process Act for regulations deemed by the Governor to be noncontroversial. To use this process, the Governor's concurrence is required and advance notice must be provided to certain legislative committees. Fast-track regulations become effective on the date noted in the regulatory action if fewer than 10 persons object to using the process in accordance with § 2.2-4012.1.

EMERGENCY REGULATIONS

Pursuant to § 2.2-4011 of the Code of Virginia, an agency may adopt emergency regulations if necessitated by an emergency situation or when Virginia statutory law or the appropriation act or federal law or federal regulation requires that a regulation be effective in 280 days or fewer from its enactment. In either situation, approval of the Governor is required. The emergency regulation is effective upon its filing with the Registrar of Regulations, unless a later date is specified per § 2.2-4012 of the Code of Virginia. Emergency regulations are limited to no more than 18 months in duration; however, may be extended for six months under the circumstances noted in § 2.2-4011 D. Emergency regulations are published as soon as possible in the *Virginia Register* and are on the Register of Regulations website at register.dls.virgina.gov.

During the time the emergency regulation is in effect, the agency may proceed with the adoption of permanent regulations in accordance with the Administrative Process Act. If the agency chooses not to adopt the regulations, the emergency status ends when the prescribed time limit expires.

STATEMENT

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

CITATION TO THE *VIRGINIA REGISTER*

The *Virginia Register* is cited by volume, issue, page number, and date. **34:8 VA.R. 763-832 December 11, 2017,** refers to Volume 34, Issue 8, pages 763 through 832 of the *Virginia Register* issued on December 11, 2017.

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

PUBLICATION SCHEDULE AND DEADLINES

This schedule is available on the Virginia Register of Regulations website (http://register.dls.virginia.gov).

August 2020 through August 2021

Volume: Issue	Material Submitted By Noon*	Will Be Published On
36:25	July 15, 2020	August 3, 2020
36:26	July 29, 2020	August 17, 2020
37:1	August 12, 2020	August 31, 2020
37:2	August 26, 2020	September 14, 2020
37:3	September 9, 2020	September 28, 2020
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37:6	October 21, 2020	November 9, 2020
37:7	November 4, 2020	November 23, 2020
37:8	November 16, 2020 **(Monday)**	December 7, 2020
37:9	December 2, 2020	December 21, 2020
37:10	December 14, 2020 **(Monday)**	January 4, 2021
37:11	December 28, 2020 **(Monday)**	January 18, 2021
37:12	January 13, 2021	February 1, 2021
37:13	January 27, 2021	February 15, 2021
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37:20	May 5, 2021	May 24, 2021
37:21	May 19, 2021	June 7, 2021
37:22	June 2, 2021	June 21, 2021
37:23	June 16, 2021	July 5, 2021
37:24	June 30, 2021	July 19, 2021
37:25	July 14, 2021	August 2, 2021
37:26	July 28, 2021	August 16, 2021

*Filing deadlines are Wednesdays unless otherwise specified.

TITLE 12. HEALTH

STATE BOARD OF HEALTH

Initial Agency Notice

Title of Regulation: **12VAC5-371. Regulations for the Licensure of Nursing Facilities.**

Statutory Authority: §§ 32.1-12 and 32.1-127 of the Code of Virginia.

Name of Petitioner: James Sherlock.

Nature of Petitioner's Request: Change Virginia Nursing Facility Licensure Regulations to Align with Federal Medicare/Medicaid Certification Regulations. The weaknesses of Virginia's nursing facility (NF) and skilled nursing facility (SNF) system have been exposed by COVID-19 with deadly consequences. Virginia's regulations applicable to these facilities may be part of the problem. 12VAC5-371 Regulations for the Licensure of Nursing Facilities published by the Board of Health conflict with and are more permissive than the regulatory requirements for Medicare/Medicaid certification in 42 CFR Part 483 - Requirements for States and Long Term Care Facilities. The Virginia Department of Health, the state agency contracted with the Centers for Medicare/Medicaid Services to conduct certification inspections, must at least in theory enforce both sets of regulations. However, the Virginia regulations have little practical effect in that 95% of Virginia NFs and SNF's seek certification for Medicare and/or Medicaid and thus must comply with the more stringent federal regulations. Indeed many facilities contain both SNF and NF facilities and swing beds in a single complex. Under Medicaid regulations, NFs are required to meet virtually the same requirements that SNFs participating in Medicare must meet. There is no reason that Virginia regulations for licensing the other 5.0% should be different. I thus recommend Virginia nursing facility licensing regulations either mirror or incorporate by reference 42 CFR Part 483. I also recommend that the Board of Nursing review 18VAC90-19-250 (Criteria ford delegation) and other nursing practice regulations to ensure they align with the federal rules for nursing homes. I find important reasons why Virginia regulations should be aligned with federal regulations for the same facilities, and no provision in the Constitution of Virginia or existing Virginia law that prohibits such action. I also see no requirement for additional funding to do so. A few of the federal statutes or regulations allow for waivers in the presence of verified temporary shortages of health personnel or in the presence of equivalent alternative patient safeguards. CMS Medicare SNF waiver authority is re-delegated to the CMS Regional Offices (ROs). Waivers for NFs to provide licensed personnel on a 24-hour basis repose with the states. Life safety code waivers for NFs and Intermediate Care Facilities for Individuals with Intellectual Disabilities (ICF/IIDs) are the responsibility of the states (See 42 CFR 483.470(j)(2)(A)). I suggest that on the heels of the COVID-19 deaths, Virginia not waive or request a waiver for any federal nursing home regulation. But if such waivers exist, they should appear in the VAC in sequence with the federal regulation they waive. It will also prove useful to create a single Nursing and Skilled Nursing Facilities section of the VAC to offer a complete reference for operators and inspectors. Those actions will resolve current regulatory chaos and clarify the state's waivers of federal regulations. They will also save whatever time and cost has historically been expended in drafting, seeking public comments, resolving disagreements, and approving Virginia nursing facility licensure regulations that are, in the main, irrelevant.

Agency Plan for Disposition of Request: In accordance with Virginia law, the petition has been filed with the Registrar of Regulations and will be published on July 6, 2020, and posted to the Virginia Regulatory Town Hall at www.townhall.virginia.gov. Comment on the petition will be accepted until July 27, 2020. Following receipt of all comment on the petition, and within 90 days of July 27, 2020, the matter will be considered by the State Health Commissioner, acting on behalf of the board, in order to decide whether to grant or deny the petition or by the State Board of Health.

Public Comment Deadline: July 26, 2020.

Agency Contact: Rebekah E. Allen, Senior Policy Analyst, Virginia Department of Health, 9960 Mayland Drive, Suite 401, Richmond, VA 23233, telephone (804) 367-2102, FAX (804) 527-4502, or email regulatorycomment@vdh.virginia.gov.

VA.R. Doc. No. R20-54 Filed June 11, 2020, 11:24 a.m.

Initial Agency Notice

Title of Regulation: **12VAC5-371. Regulations for the Licensure of Nursing Facilities.**

Statutory Authority: §§ 32.1-12 and 32.1-127 of the Code of Virginia.

Name of Petitioner: Vic Nicholls.

Nature of Petitioner's Request: Virginia regulations must be changed to conform to federal Medicare and Medicaid regulations for long-term care facilities to comply with the clear direction of § 32.1-127 of the Code of Virginia. That law requires that Virginia regulations for hospitals and nursing homes "conform" to "health and safety standards established under provisions of Title XVIII (Medicare) and Title XIX (Medicaid) of the Social Security Act." 42 Code of Federal Regulations (CFR) Part 483 - Requirements for States and Long Term Care Facilities regulates Medicare and Medicaid certification pursuant to Title XVIII and Title XIX requirements. 12VAC5-371, Regulations for the Licensure of Nursing Facilities contains Virginia licensure regulations for the same facilities. The Virginia licensure regulations not

only do not conform to their federal certification counterparts but are weaker across the board. Ninety-Five percent of Virginia NFs and SNF's seek certification for Medicare and/or Medicaid and thus must comply with the more stringent federal regulations. There is no reason that Virginia regulations for licensing the other 5.0% should be different, and by Virginia law they may not be. A few of the federal regulations allow for waivers in the presence of verified temporary shortages of health personnel or in the presence of equivalent alternative patient safeguards. CMS Medicare SNF waiver authority is re-delegated to the CMS Regional Offices (ROs). Waivers for NFs to provide licensed personnel on a 24-hour basis repose with the states. Life safety code waivers for NFs and Intermediate Care Facilities for Individuals with Intellectual Disabilities (ICF/IIDs) are the responsibility of the states (See 42 CFR 483.470(j)(2)(A)).I recommend that the Board of Health delete the current contents of 12VAC5-371 and incorporate by reference 42 CFR Part 483 to comply with Virginia law. Incorporation by reference rather that mirroring the language will ensure that they are always in compliance with Virginia law and always up to date. I also recommend that the Board of Nursing review 18VAC90-19-250 (Criteria for delegation) and other nursing practice regulations to ensure they conform to the federal rules for nursing homes and hospitals. Similarly, the Department of Medical Assistance Services (DMAS) should review its regulations for conformity. A list of waived and emergency regulations, whether for a single home or for the industry, can be maintained on a web page of the Department of Health.

Agency Plan for Disposition of Request: In accordance with Virginia law, the petition has been filed with the Registrar of Regulations and will be published on July 6, 2020, and posted to the Virginia Regulatory Town Hall at www.townhall.virginia.gov. Comment on the petition will be accepted until July 27, 2020. Following receipt of all comment on the petition, and within 90 days of July 27, 2020, the matter will be considered by the State Health Commissioner, acting on behalf of the board, in order to decide whether to grant or deny the petition or by the State Board of Health.

Public Comment Deadline: July 26, 2020.

Agency Contact: Rebekah E. Allen, Senior Policy Analyst, Virginia Department of Health, 9960 Mayland Drive, Suite 401, Richmond, VA 23233, telephone (804) 367-2102, FAX (804) 527-4502, or email regulatorycomment@vdh.virginia.gov.

VA.R. Doc. No. R20-53 Filed June 11, 2020, 11:28 p.m.

TITLE 24. TRANSPORTATION AND MOTOR VEHICLES

COMMISSION ON THE VIRGINIA ALCOHOL SAFETY ACTION PROGRAM

Agency Decision

Title of Regulation: **24VAC35-60. Ignition Interlock Program Regulations.**

Statutory Authority: § 18.2-270.2 of the Code of Virginia.

Name of Petitioner: Cynthia Hites.

Nature of Petitioner's Request: "I, Cynthia Hites, a citizen of the Commonwealth of Virginia, pursuant to § 2.2-4007 of the Code of Virginia, do humbly submit this petition for the following amendment to Virginia Administrative Code 24VAC35-60-70 F 3 (Ignition Interlock Regulations). This petition does not seek to address ethanol specificity, as it is already established by law. 24VAC35-60-70 states Virginia ignition interlock machines "shall be alcohol specific," and 24VAC35-60-20 defines that alcohol as ethyl alcohol (C_2H_5OH). The machines shall be ethanol specific, and that is not in question. This petition directly addresses the state's usage of the electrochemical fuel cell for ignition interlock, and because it cannot meet the standards set forth by law, avenues must be opened to improve the science behind breath testing. The electrochemical fuel cell is a simple and unsophisticated tool used to detect alcohol, which, in chemistry, as in this context, does not mean drinking liquor, but simply means any organic compound that contains one or more hydroxl groups attached to a carbon atom. These alcohols include, but are not limited to: Sorbitol ($C_6H_{14}O6$), Isopropanol (C_3H_8O), Cholesterol ($C_{27}H_{46}O$), Xylitol ($C_5H_7(OH)_5$), Erythritol ($C_4H_{10}O4$), Methanol (CH_4O), Menthol ($C_{10}H_{20}O$), and Cortisol ($C_{21}H_{30}O_5$). For this reason, Virginia law 24VAC35-60-20 explicitly defines alcohol as the compound C_2H_5OH, which is ethanol. Being non-ethanol specific, the electrochemical fuel cell measures and records citizen's private biological medical information and misconstrues it falsely as ethanol. I believe this is an invasion of the medical privacy afforded by the Health Insurance Portability and Affordability Act. Measuring a litany of bodily organic compounds and claiming them to be ethanol is unethical, invasive, and totally misleading to the general public. It goes against the intent of the statute. To have any lesser standard than ethanol specificity is a disservice to society, and because the electrochemical fuel cell measures an unknown and inexhaustive set of compounds, its usage must be suspended until such time a device can be proven to meet the standards set forth by 24VAC35-60-20 and 24VAC35-60-70. Currently, 24VAC35-60-70 F 3 states: '3. The ignition interlock device shall be alcohol specific, using an electrochemical fuel cell that reacts to and measures ethanol, minimizing positive results from other substances.' This

petition seeks to change the wording from 'an electrochemical fuel cell' to 'technology' and to change the word 'minimizing' to 'eliminating,' thus reading: '3. The ignition interlock device shall be alcohol specific, using technology that reacts to and measures ethanol, eliminating positive results from other substances.' A device that detects and measures only drinking alcohol is a product of science fiction. Electrochemical fuel cells measure and collect private health data and bodily emissions, aside from drinking alcohol, then uses that private health data to falsely accuse citizens of ethanol ingestion. Continued usage of electrochemical fuel cells for this purpose constitutes nothing less than governmental gaslighting."

Agency Decision: Request denied.

Statement of Reason for Decision: The term "alcohol-specific" began to be used in industry terminology years ago in order to differentiate early ignition interlocks from second generation interlocks. The early interlocks employed semiconductor (nonspecific) alcohol sensors. These semiconductor-type (Taguchi) interlocks did not hold calibration very well, were sensitive to altitude variation, and reacted positively to non-alcohol sources. By the early 1990s, the industry began to produce "second generation" interlocks with reliable and accurate fuel cell sensors, that were referred to as being "alcohol specific." "Alcohol-specific," as the language has come to be understood, does not mean the devices are totally ethanol specific, it just means they have high specificity to drinking alcohol or ethanol. It is extremely unlikely that the breath of a living human would contain any other substance to which fuel cell sensors will respond. Other types of alcohols (non-drinking) such as methanol or isopropanol to which the ignition interlock would yield a positive result are toxic and potentially lethal when consumed. As a safeguard though, VASAP has procedures in place to enable offenders to retest whenever they suspect a positive test is due to residual mouth alcohol (from something such as mouthwash) or a non-breath source such as hand sanitizer. Positive results, other than from consumed ethanol, can be minimized or eliminated by following the proper breath testing procedures and agreed terms of the ignition interlock contract. All current ignition interlocks in Virginia are required to meet National Highway Traffic Safety Administration standards as found in NHTSA's Model Specifications for Ignition Interlock Devices. The definition of "alcohol" found in the ignition interlock regulations is consistent with the definition for "alcohol" found in the Code of Virginia and NHTSA's model specifications. The subject matter of this petition has already been addressed in whole or in part by the commission in previous petitions. Therefore, no action was taken by the commission on this petition.

Agency Contact: Richard Foy, Field Service Specialist, Commission on the Virginia Alcohol Safety Action Program, 701 East Franklin Street, Suite 1110, Richmond VA 23219, telephone (804) 786-5895, or email rfoy@vasap.virginia.gov.

VA.R. Doc. No. R19-37 Filed June 6, 2020, 12:01 a.m.

TITLE 1. ADMINISTRATION

DEPARTMENT OF GENERAL SERVICES

Agency Notice

Pursuant to Executive Order 14 (as amended July 16, 2018) and §§ 2.2-4007.1 and 2.2-4017 of the Code of Virginia, the following regulation is undergoing a periodic review and a small business impact review: **1VAC30-11, Public Participation Guidelines**. The review of this regulation will be guided by the principles in Executive Order 14 (as amended July 16, 2018).

The purpose of this review is to determine whether this regulation should be repealed, amended, or retained in its current form. Public comment is sought on the review of any issue relating to this regulation, including whether the regulation (i) is necessary for the protection of public health, safety, and welfare or for the economical performance of important governmental functions; (ii) minimizes the economic impact on small businesses in a manner consistent with the stated objectives of applicable law; and (iii) is clearly written and easily understandable.

Public comment period begins July 6, 2020, and ends July 27, 2020.

Comments must include the commenter's name and address (physical or email) information in order to receive a response to the comment from the agency.

Following the close of the public comment period, a report of both reviews will be posted on the Virginia Regulatory Town Hall and published in the Virginia Register of Regulations.

Contact Information: Rhonda Bishton, Director's Executive Administrative Assistant, Department of General Services, 1100 Bank Street, Suite 420, Richmond, VA 23219, telephone (804) 786-3311, FAX (804) 371-8305, or email rhonda.bishton@dgs.virginia.gov.

TITLE 9. ENVIRONMENT

VIRGINIA WASTE MANAGEMENT BOARD

Agency Notice

Pursuant to Executive Order 14 (as amended July 16, 2018) and §§ 2.2-4007.1 and 2.2-4017 of the Code of Virginia, the following regulation is undergoing a periodic review and a small business impact review: **9VAC20-190, Litter Receptacle Regulations**. The review of this regulation will be guided by the principles in Executive Order 14 (as amended July 16, 2018).

The purpose of this review is to determine whether this regulation should be repealed, amended, or retained in its current form. Public comment is sought on the review of any issue relating to this regulation, including whether the regulation (i) is necessary for the protection of public health, safety, and welfare or for the economical performance of important governmental functions; (ii) minimizes the economic impact on small businesses in a manner consistent with the stated objectives of applicable law; and (iii) is clearly written and easily understandable.

Public comment period begins July 6, 2020, and ends July 27, 2020.

Comments must include the commenter's name and address (physical or email) information in order to receive a response to the comment from the agency.

Following the close of the public comment period, a report of both reviews will be posted on the Virginia Regulatory Town Hall and published in the Virginia Register of Regulations.

Contact Information: Melissa Porterfield, Department of Environmental Quality, 1111 East Main Street, Suite 1400, P.O. Box 1105, Richmond, VA 23218, telephone (804) 698-4238, FAX (804) 698-4178, or email melissa.porterfield@deq.virginia.gov.

TITLE 12. HEALTH

STATE BOARD OF HEALTH

Agency Notice

Pursuant to Executive Order 14 (as amended July 16, 2018) and §§ 2.2-4007.1 and 2.2-4017 of the Code of Virginia, the following regulations are undergoing a periodic review and a small business impact review: **12VAC5-410, Regulations for the Licensure of Hospitals in Virginia**. The review of this regulation will be guided by the principles in Executive Order 14 (as amended July 16, 2018).

The purpose of this review is to determine whether this regulation should be repealed, amended, or retained in its current form. Public comment is sought on the review of any issue relating to this regulation, including whether the regulation (i) is necessary for the protection of public health, safety, and welfare or for the economical performance of important governmental functions; (ii) minimizes the economic impact on small businesses in a manner consistent with the stated objectives of applicable law; and (iii) is clearly written and easily understandable.

Public comment period begins July 6, 2020, and ends July 27, 2020.

Comments must include the commenter's name and address (physical or email) information in order to receive a response to the comment from the agency.

Following the close of the public comment period, a report of both reviews will be posted on the Virginia Regulatory Town Hall and published in the Virginia Register of Regulations.

Contact Information: Rebekah E. Allen, Senior Policy Analyst, Virginia Department of Health, 9960 Mayland Drive, Suite 401, Richmond, VA 23233, telephone (804) 367-2102, FAX (804) 527-4502, or email regulatorycomment@vdh.virginia.gov.

TITLE 3. ALCOHOLIC BEVERAGES

ALCOHOLIC BEVERAGE CONTROL AUTHORITY

Emergency Regulation

Title of Regulation: **3VAC5-80. Games of Skill (adding 3VAC5-80-10 through 3VAC5-80-170).**

Statutory Authority: Chapters 1217 and 1277 of the 2020 Acts of Assembly.

Effective Dates: July 1, 2020, through July 1, 2021.

Agency Contact: LaTonya D. Hucks-Watkins, Legal Liaison, Virginia Alcoholic Beverage Control Authority, 2901 Hermitage Road, Richmond, VA 23220, telephone (804) 213-4698, FAX (804) 213-4574, or email latonya.hucks-watkins@abc.virginia.gov.

Preamble:

Section 2.2-4011 of the Code of Virginia authorizes an agency to adopt emergency regulations upon consultation with the Attorney General, and the necessity for the action is at the sole discretion of the Governor. Chapters 1217 and 1277 of the 2020 Acts of Assembly amended § 18.2-325 of the Code of Virginia relating to the definition of illegal gambling and skill games and added §§ 2.2-115.1 (COVID-19 Relief Fund) and 18.2-334.5 (Exemptions for family entertainment centers). The emergency regulatory action creates a new chapter, 3VAC5-80, that establishes the requirements, restrictions, and penalties associated with the operation of skill games at Virginia Alcoholic Beverage Control Authority licensed retail establishments and truck stops, including those for (i) registration, monthly reporting, and required bonds; (ii) the labeling for skill game machines; (iii) limits on the number of skill games allowed in a qualified location; and (iv) penalties for noncompliance.

CHAPTER 80
GAMES OF SKILL

3VAC5-80-10. Scope.

In conformance with Chapters 1217 and 1277 of the 2020 Acts of Assembly, this chapter adopts regulations relating to "games of skill." This chapter expires on July 1, 2021, subject to the provisions of 3VAC5-80-170.

3VAC5-80-20. Definitions.

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

"Authority" means the Virginia Alcoholic Beverage Control Authority as established in § 4.1-101 of the Code of Virginia.

"ABC retail licensee" means a person licensed by the authority pursuant to Title 4.1 of the Code of Virginia to sell alcoholic beverages.

"Board" means the Board of Directors of the Virginia Alcoholic Beverage Control Authority.

"Coin operated amusement games" means games that do not deliver or entitle the person playing or operating the game to receive cash; cash equivalents, gift cards, vouchers, billets, tickets, tokens, or electronic credits to be exchanged for cash; or merchandise or anything of value.

"COVID-19 relief fund" means the fund established in § 2.2-115.1 of the Code of Virginia.

"Distributor" shall mean any person that (i) manufactures and sells skill games, including software and hardware, and distributes such devices to an ABC retail licensee or truck stop or (ii) purchases or leases skill games from a manufacturer and provides such devices to an ABC retail licensee or a truck stop, or that otherwise maintains such games and is otherwise responsible for onsite data collection and accounting.

"Family entertainment center" means an establishment that (i) is located in a building that is owned, leased, or occupied by the establishment for the primary purpose of providing amusement and entertainment to the public; (ii) offers coin operated amusement games and skill games pursuant to the exclusion created by this regulation; and (iii) markets its business to families with children.

"Gambling device" means:

a. Any device, machine, paraphernalia, equipment, or other thing, including books, records, and other papers, that are actually used in an illegal gambling operation or activity; and

b. Any machine, apparatus, implement, instrument, contrivance, board or other thing, or electronic or video versions thereof, including those dependent upon the insertion of a coin or other object for their operation, that operates, either completely automatically or with the aid of some physical act by the player or operator, in such a

manner that, depending upon the elements of chance, it may eject something of value or determine the prize or thing of value to which the player is entitled; provided, however, that the return to the user of nothing more than additional chances or the right to use such machine is not deemed something of value within the meaning of this chapter and provided further that machines that only sell or entitle the user to items of merchandise of equivalent value that may differ from each other in composition, size, shape, or color shall not be deemed gambling devices within the meaning of this section.

"Skill" means the knowledge, dexterity, or any other ability or expertise of a natural person.

"Skill games" means an electronic, computerized, or mechanical contrivance, terminal, machine, or other device that requires the insertion of a coin, currency, ticket, token, or similar object to operate, activate, or play a game, the outcome of which is determined by any element of skill of the player and that may deliver or entitle the person playing or operating the device to receive cash, cash equivalents, gift cards, vouchers, billets, tickets, tokens, or electronic credits to be exchanged for cash, merchandise, or anything of value whether the payoff is made automatically from the device or manually.

Each terminal of a skill game machine where a player may play a game shall constitute a game made available for play, regardless of whether it is a standalone terminal or a terminal that is part of a skill game machine that has multiple terminals.

"Truck stop" means an establishment (i) that is equipped with diesel islands used for fueling commercial motor vehicles; (ii) has sold, on average, at least 50,000 gallons of diesel or biodiesel fuel each month for the previous 12 months, or is projected to sell an average of at least 50,000 gallons of diesel or biodiesel fuel each month for the next 12 months; (iii) has parking spaces dedicated to commercial motor vehicles; (iv) has a convenience store; and (v) is situated on not less than three acres of land that the establishment owns or leases.

3VAC5-80-30. Exclusions from chapter, certain skill games offered at family entertainment centers.

The provisions of this chapter shall not apply to coin operated amusement games located on family entertainment centers operated in accordance with § 18.2-334.5 of the Code of Virginia, nor shall such coin operated amusement games be considered a gambling device or otherwise unlawful pursuant to § 18.2-325 of the Code of Virginia.

3VAC5-80-40. Applicability of chapter.

The provisions of this chapter shall only apply to ABC retail licensees in good standing that possess a valid authority retail license issued by the board pursuant to Title 4.1 of the Code of Virginia and the regulations applicable to any such retail license or truck stops meeting the definition in 3VAC5-80-20. For purposes of this section, a retail licensee is not in good standing if the license has been suspended or is inactive for any reason.

3VAC5-80-50. Initial registration and monthly reporting.

A. No later than July 7, 2020, each distributor shall file a registration statement with the Authority Bureau of Law Enforcement on such form that may be prescribed by the authority. The registration statement shall include all skill games that are available for play by the distributor filing the registration statement as of June 30, 2020. The registration statement shall include such information as may be prescribed by the authority. The registration statement shall include (i) the total number of skill games provided for play in Virginia by the distributor; (ii) the address of each location where skill games are provided for play in Virginia by the distributor; (iii) the total number of skill games provided for play by the distributor at each respective location; (iv) the total amount wagered during the previous month on each skill game provided for play in Virginia by the distributor at each respective location where the skill game was provided; (v) the total amount of prizes or winnings awarded during the previous month on each skill game provided for play in Virginia by the distributor at each respective location where the skill game was provided; and (vi) the name, address, and contact information of the individual person responsible for full and total compliance with this chapter and law and a statement that such individual shall be responsible for any penalty assessed for violations of this chapter or law applicable to the distributor of any skill game. Such individual shall certify that the initial registration is a true and accurate accounting of the information provided in the initial registration statement.

Failure to file the registration statement by July 7, 2020, shall result in the barring of any such games not registered. Any such game not included in the registration statement shall be considered an illegal gambling device.

B. Each distributor shall, no later than the 20th of the succeeding month, file with the Authority Bureau of Law Enforcement on such form prescribed by the authority the following requisite information.

The monthly report shall include (i) the total number of skill games provided for play in Virginia by the distributor; (ii) the address of each location where skill games are provided for play in Virginia by the distributor; (iii) the total number of skill games provided for play by the distributor at each respective location; (iv) the total amount wagered during the previous month on each skill game provided for play in Virginia by the distributor at each respective location where the skill game was provided; (v) the total amount of prizes or winnings awarded during the previous month on each skill game provided for play in Virginia by the distributor at each

respective location where the skill game was provided; and (vi) the name, address, and contact information of the individual person responsible for full and total compliance with this chapter and law and a statement that such individual shall be responsible for any penalty assessed for violations of this chapter or law applicable to the distributor of any skill game. Such individual shall certify that the monthly report is a true and accurate accounting of the information provided in the monthly report.

C. No distributor or combination of distributors shall locate more than eight skill game machines at any ABC retail licensed establishment or more than 24 skill game machines at any truck stop. No ABC retail licensee or truck stop shall exceed this maximum number of games.

D. Failure to file such form by the 20th of the month shall result in a civil penalty of at least $25,000 per incident. Each incident of noncompliance shall constitute a separate offense.

3VAC5-80-60. Labeling of skill game machines.

No later than July 20, 2020, the distributor of each skill game placed in an ABC retail licensed establishment or truck stop that the distributor has registered pursuant to 3VAC5-80-50 shall cause to be adhered to each skill game a label as prescribed by the Authority Bureau of Law Enforcement. The authority shall provide the required labels. All labels shall be adhered on the side of all skill games in a conspicuous and visible location to the authority, its law-enforcement agents, and players of the game. Any skill game without the requisite label adhered to the skill game machine by July 20, 2020, shall be in violation of this chapter.

3VAC5-80-70. Total number of skill games by any single distributor.

A. The total number of skill games provided for play in ABC retail establishments and truck stops shall not exceed the total number of such machines reported by a distributor to the authority as games provided for play as of June 30, 2020. Only those skill games that were provided by a distributor and available for play in ABC retail licensed establishments or truck stops as of June 30, 2020, and registered by the distributor by July 7, 2020, may continue to operate on or after July 1, 2020.

B. Any exceedance of the number of skill games machine determined by the authority shall result in a civil penalty of at least $25,000 per machine exceeding the total number of registered machines. Each day the violation continues shall constitute a separate offense. In addition, any such skill game machine exceeding the registered number or not baring the required label shall be deemed an illegal gambling device and may result in the loss of the authority issued retail license to sell or offer to sell alcoholic beverages.

3VAC5-80-80. Relocation of skill game machine from one establishment to another.

A. Skill game machines may be relocated from one qualified location to another qualified location or warehoused and subsequently placed in any qualified location, provided however, from July 1, 2020, through September 1, 2020, a distributor may not relocate skill game machines in excess of 20% of the total number of skill games initially registered and available for play on June 30, 2020. Additionally, from September 2, 2020, through July 1, 2021, a distributor may not relocate skill game machines in excess of 20% of the total number of skill games initially registered and available for play on June 30, 2020, by any distributor.

B. Prior to being relocated pursuant to subsection A of this section, the distributor shall provide notice, including an image (photograph with a clearly visible numeric identifier) of the obliterated label of the malfunctioning machine to the Authority Bureau of Law Enforcement. Such notice shall be provided at least 10 days prior to the relocation date. No skill game shall be relocated prior to approval by the Authority Bureau of Law Enforcement. Upon receipt of such notice and evidence and approval, the Authority Bureau of Law Enforcement may issue a new label to the distributor for the replacement machine. The new label shall be adhered to the replacement machine in accordance with 3VAC5-80-60 prior to the replacement game being enabled for play.

C. Notwithstanding subsections A and B of this section, a distributor may provide routine maintenance on any skill game machine located in a qualified location.

3VAC5-80-90. Taxation generally.

A. All skill games initially registered by a distributor pursuant to 3VAC5-80-50 shall be subject to the taxation requirements of the second enactment of Chapters 1217 and 1277 of the 2020 Acts of Assembly, that is, $1,200 for each skill game located and initially registered in the Commonwealth during the previous month by a distributor. Returns and payment vouchers shall be remitted to the Department of Taxation no later than August 20, 2020.

B. Returns and payment vouchers shall be due on September 20, 2020, and each month following through July 20, 2021, and shall be remitted to the Department of Taxation based on the number of skill game machines provided for play at ABC retail licensees or truck stops determined by the calculation determined in 3VAC5-80-80. Skill games placed in a warehouse for subsequent placement at a qualified location shall not be subject to such tax until such time as the skill game is relocated to a qualified location. Skill games placed in a warehouse for subsequent placement at qualified location shall be subject to taxation for all calendar months during which such games were in play for any portion of any day during the month.

C. Any single day of any calendar month during which a skill game machine is provided for play by a distributor at a qualified location shall remit the total $1,200 tax on such machine. No proration of the monthly tax shall be allowed.

3VAC5-80-100. Bond required.

Each distributor of a skilled game machine shall post a surety bond naming the authority as beneficiary. The authority may call the bond for any violation of this chapter or law regulating skill game machines. The bond shall be in the following amounts and shall remain in effect for 14 months following issuance:

Number of Skill Game Machines	Amount of Bond
1 – 50	$50,000
51 – 500	$250,000
501 – 1,000	$500,000
1,001 and above	$1 million

3VAC5-80-110. Records to be kept by distributors generally.

A. All distributors shall keep complete, accurate, and separate records for a period of one year. The records shall be available for inspection and copying by any member of the board or its special agents during reasonable hours. The board and its special agents shall be allowed free access during reasonable hours to every place in the Commonwealth where skill games are manufactured, sold, stored, offered for play, or played for the purpose of examining and inspecting all records, invoices, and accounts therein.

B. At a minimum, each distributor shall retain and maintain the following records: (i) the manufacturer, game name, model, and serial number of each skill game sold or otherwise provided for use and (ii) the name, address, and phone number of each entity to which the skill game was sold or otherwise provided.

C. Records may be retained at a skill game distributor's principal place of business, provided that records maintained at a location outside this Commonwealth are preserved in such a manner as to allow for the electronic transmission of records to the board or its special agents within a reasonable time.

D. "Reasonable hours" shall be deemed to include all business hours of operation and any other time at which there exists any indication of activity upon the premises.

E. All such records shall be maintained for a period of at least the 12 months next following July 1, 2021.

3VAC5-80-120. Minimum age of skill game player; consumer protection.

No person younger than 18 years of age shall be eligible to play any skill game. Any person playing a skill game may have consumer protection rights. It shall be the responsibility of the distributor to provide notice of such age eligibility to the proprietor of the establishment prior to the placement of any skill game machine in any ABC retail licensed establishment or truck stop. The distributor shall adhere to the front of any skill game machine a notice in font – Times New Roman Bold – 16 point as follows: "It is unlawful for any person under the age of eighteen (18) to play this game. The outcome of this game is not regulated by the state."

3VAC5-80-130. Referral to commonwealth attorney.

In the event that the authority determines that an illegal gambling device is located in a retail licensed establishment or truck stop, such skill game may constitute illegal gambling activity pursuant to § 18.2-331 of the Code of Virginia, and the authority may refer such allegation to the Commonwealth's Attorney for the jurisdiction in which the skill game is located.

3VAC5-80-140. Penalty.

Any distributor found by the authority to be in violation of this chapter shall be subject to a civil penalty of not less than $25,000 and not more than $50,000 per incident. All civil penalties shall be paid to the authority and remitted by the authority to the COVID-19 Relief Fund.

3VAC5-80-150. Compliance with COVID-19 related executive orders.

Distributors and qualified locations shall comply with provisions of any effective Executive Order related to social distancing and other applicable provisions in the placement of any skill game machines within a qualified location.

3VAC5-80-160. Public records.

Any information received as the result of required monthly reports shall be determined public information and subject to the provisions Virginia Freedom of Information Act (§ 2.2-3700 of the Code of Virginia) without exclusions.

3VAC5-80-170. Effect of expiration.

A. The expiration of this chapter on July 1, 2021, does not relieve a distributor from filing the required month report for June 2021. The required report shall be filed not later than July 20, 2021. Distributors shall maintain such records in accordance with 3VAC5-80-110 B.

B. Any alleged violation of this chapter, ongoing on July 1, 2021, or commenced prior to July 1, 2022, shall continue until such time as an agreed resolution is achieved or a final non-appealable order has been issued by a court of competent jurisdiction.

NOTICE: Forms used in administering the regulation have been filed by the agency. The forms are not being published; however, online users of this issue of the Virginia Register of Regulations may click on the name of a form with a hyperlink to access it. The forms are also available from the agency contact or may be viewed at the Office of the Registrar of Regulations, 900 East Main Street, 11th Floor, Richmond, Virginia 23219.

FORMS (3VAC5-80)

Final Skill Game Registration Statement Form (undated, filed 6/2020)

Final Skill Game Monthly Report (undated, filed 6/2020)

VA.R. Doc. No. R20-6392; Filed June 25, 2020, 7:57 a.m.

TITLE 4. CONSERVATION AND NATURAL RESOURCES

MARINE RESOURCES COMMISSION

Final Regulation

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

Title of Regulation: **4VAC20-270. Pertaining to Blue Crab Fishery (amending 4VAC20-270-15, 4VAC20-270-30, 4VAC20-270-40, 4VAC20-270-51).**

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

Effective Date: July 5, 2020.

Agency Contact: Jennifer Farmer, Regulatory Coordinator, Marine Resources Commission, 380 Fenwick Road, Fort Monroe, VA 23651, telephone (757) 247-2248, or email jennifer.farmer@mrc.virginia.gov.

Summary:

The amendments establish management provisions for the July 5, 2020, through July 4, 2021, blue crab fisheries.

4VAC20-270-15. Definitions.

The following word or term when used in this chapter shall have the following meaning unless the context indicates otherwise:

"Crab" ~~or "crabs"~~ as described in this chapter refers solely to the crustacean Callinectes sapidus.

4VAC20-270-30. Daily time limits.

A. It shall be unlawful for any person licensed to catch and sell crabs taken by crab pot or peeler pot to take and harvest crabs from any crab pot or peeler pot, or to retrieve, bait, or set any crab pot or peeler pot, except during the lawful daily time periods described in subsections A, B, C, and D of this section. The lawful daily time periods for the commercial harvesting of crabs by crab pot or peeler pot shall be from 6 a.m. to 2 p.m. during the lawful seasons, as described in 4VAC20-270-40 A, except as described in subsections B, C, and D of this section. The lawful daily time periods for the commercial harvesting of crabs by crab pot or peeler pot shall be from 5 a.m. to 1 p.m. during the months of May, June, July, and August, as described in 4VAC20-270-40 A, except as specified in subsections B, C, and D of this section. Crab pots or peeler pots already on board a boat at the end of the lawful daily time period, as defined in subsections A, B, and C of this section, may be set immediately following the end of lawful daily time period to one hour after the lawful daily time period ends.

B. Any licensed crab pot or peeler pot fisherman who provides an opinion and supporting documentation from an attending physician to the commissioner of an existing medical condition that prevents him from adhering to the daily time limit established in subsection A of this section may be permitted by the commissioner or his designee to take and harvest crabs from his crab pot or peeler pot, or to retrieve, bait, or set his crab pot or peeler pot during an alternate eight-hour daily time limit. That alternative eight-hour daily time limit will be prescribed by the commissioner or his designee in accordance with the medical condition that forms a basis for the exception to the daily time limit as described in subsection A of this section.

Nothing in this regulation shall prohibit any licensed crab pot or peeler pot fisherman, who has been granted an exception to the eight-hour work schedule, on a medical basis, from using another licensed crab pot or peeler pot fisherman as a mate; provided, however, during the designated alternate work hours, only the crab pots or peeler pots of the fisherman receiving the exception shall be fished. Further, it shall be unlawful for the licensed crab fisherman, who has been granted an exception, or his mate, who is a licensed crab pot or peeler pot fisherman, to fish, set, retrieve, or bait, during the alternate work hours, any crab pot or peeler pot that is not owned and licensed by the fisherman granted the exception.

C. Any licensed crab pot or peeler pot fisherman who requests and obtains an alternate eight-hour daily time limit permit shall be authorized to take and harvest crabs from his crab pot or peeler pot or to retrieve, bait, or set his crab pot or peeler pot one hour earlier than described in subsection A of this section, only for the months of June, July, August, and September. During the months of March, April, May,

October, and November, the lawful daily time period described in subsection A of this section applies to any crab pot or peeler pot licensee. The alternate lawful daily time periods for the commercial harvesting of crabs by crab pot or peeler pot shall be from 4 a.m. to 12 noon from June 1 through August 31 and from 5 a.m. to 1 p.m. from September 1 through September 30. ~~Individuals~~ Licensed crab pot or peeler pot fishermen must apply for this permit on an annual basis and shall adhere to the alternate daily time limit from the day the permit is issued through September 30, as well as subdivisions 1, 2, and 3 of this subsection.

1. It shall be unlawful for two or more licensed crab pot or peeler pot fishermen, or their agents, to crab aboard the same vessel if their authorized eight-hour daily time limits are not identical.

2. ~~After January 1, 2012, requests~~ Requests for an alternate eight-hour time limit permit shall be submitted to the Marine Resources Commission annually and prior to May 15. Requests submitted on or after May 15 will not be considered.

3. Once any legal crab pot or peeler pot licensee obtains an alternate eight-hour daily time limit permit, that permittee shall be legally bound by the alternate eight-hour daily time limit as described in this subsection.

D. The lawful daily time periods for the commercial harvest of crabs by crab pot or peeler pot may be rescinded by the Commissioner of Marine Resources when ~~he~~ the commissioner determines that a pending weather event is sufficient cause for the removal of crab pots from the tidal waters of the Commonwealth.

4VAC20-270-40. Season limits.

A. In ~~2019~~ 2020, the lawful season for the commercial harvest of crabs by crab pot shall be March 17 through November 30. In ~~2020~~ 2021, the lawful season for the commercial harvest of crabs by crab pot shall be March 17 through November 30. For all other lawful commercial gear used to harvest crabs, as described in 4VAC20-1040, the lawful seasons for the harvest of crabs shall be April 1 through October 31.

B. It shall be unlawful for any person to harvest crabs or to possess crabs on board a vessel, except during the lawful season as described in subsection A of this section.

C. It shall be unlawful for any person knowingly to place, set, fish, or leave any hard crab pot in any tidal waters of Virginia from December 1, ~~2019~~ 2020, through March 16, ~~2020~~ 2021. It shall be unlawful for any person to knowingly place, set, fish, or leave any lawful commercial gear used to harvest crabs, except any hard crab pot or any gear as described in 4VAC20-460-25, in any tidal waters of Virginia from November 1, ~~2019~~ 2020, through March 31, ~~2020~~ 2021.

D. It shall be unlawful for any person knowingly to place, set, fish, or leave any fish pot in any tidal waters from March 12 through March 16, except as provided in subdivisions 1 and 2 of this subsection.

1. It shall be lawful for any person to place, set, or fish any fish pot in those Virginia waters located upriver of the following boundary lines:

a. In the James River the boundary shall be a line connecting Hog Point and the downstream point at the mouth of College Creek.

b. In the York River the boundary lines shall be the Route 33 bridges at West Point.

c. In the Rappahannock River the boundary line shall be the Route 360 bridge at Tappahannock.

d. In the Potomac River the boundary line shall be the Route 301 bridge that extends from Newberg, Maryland to Dahlgren, Virginia.

2. This subsection shall not apply to legally licensed eel pots as described in 4VAC20-500-50.

E. It shall be unlawful for any person to place, set, or fish any number of fish pots in excess of 10% of the amount allowed by the gear license limit, up to a maximum of 30 fish pots per vessel, when any person on that vessel has set any crab pots.

1. This subsection shall not apply to fish pots set in the areas described in subdivision D 1 of this section.

2. This subsection shall not apply to legally licensed eel pots as described in 4VAC20-500.

3. This subsection shall not apply to fish pots constructed of a mesh less than one-inch square or hexagonal mesh.

4VAC20-270-51. Daily commercial harvester, vessel, and harvest and possession limits.

A. Any barrel used by a harvester to contain or possess any amount of crabs will be equivalent in volume to no more than three bushels of crabs.

B. From July 5, ~~2019~~ 2020, through November 30, ~~2019~~ 2020, and April 1, ~~2020~~ 2021, through July 4, ~~2020~~ 2021, any commercial fisherman registration licensee legally licensed for any crab pot license, as described in 4VAC20-270-50 B, shall be limited to the following maximum daily harvest and possession limits for any of the following crab pot license categories:

1. 10 bushels, or three barrels and one bushel, of crabs if licensed for up to 85 crab pots.

2. 14 bushels, or four barrels and two bushels, of crabs if licensed for up to 127 crab pots.

3. 18 bushels, or six barrels, of crabs if licensed for up to 170 crab pots.

4. 29 bushels, or nine barrels and two bushels, of crabs if licensed for up to 255 crab pots.

5. 47 bushels, or 15 barrels and two bushels, of crabs if licensed for up to 425 crab pots.

C. From March 17, ~~2020~~ 2021, through March 31, ~~2020~~ 2021, any commercial fisherman registration licensee legally licensed for any crab pot license, as described in 4VAC20-270-50 B, shall be limited to the following maximum daily harvest and possession limits for any of the following crab pot license categories:

1. Eight bushels, or two barrels and two bushels, of crabs if licensed for up to 85 crab pots.

2. 10 bushels, or three barrels and one bushel, of crabs if licensed for up to 127 crab pots.

3. 13 bushels, or four barrels and one bushel, of crabs if licensed for up to 170 crab pots.

4. 21 bushels, or seven barrels, of crabs if licensed for up to 255 crab pots.

5. 27 bushels, or nine barrels, of crabs if licensed for up to 425 crab pots.

D. When a single harvester or multiple harvesters are on board any vessel, that vessel's daily harvest and possession limit shall be equal to only one daily harvest and possession limit, as described in subsections B and C of this section, and that daily limit shall correspond to the highest harvest and possession limit of only one licensee on board that vessel.

E. When transporting or selling one or more legal crab pot licensee's crab harvest in bushels or barrels, any agent shall possess either the crab pot license of that one or more crab pot licensees or a bill of lading indicating each crab pot licensee's name, address, commercial fisherman registration license number, date, and amount of bushels or barrels of crabs to be sold.

F. If any police officer finds crabs in excess of any lawful daily bushel, barrel, or vessel limit, as described in this section, that excess quantity of crabs shall be returned immediately to the water by the licensee or licensees who possess that excess over lawful daily harvest or possession limit. The refusal to return crabs, in excess of any lawful daily harvest or possession limit, to the water shall constitute a separate violation of this chapter.

G. When any person on board any boat or vessel possesses a crab pot license, it shall be unlawful for that person or any other person aboard that boat or vessel to possess a seafood buyers boat license and buy any crabs on any day.

VA.R. Doc. No. R20-6424; Filed June 23, 2020, 3:42 p.m.

Final Regulation

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

Title of Regulation: **4VAC20-450. Pertaining to the Taking of Bluefish (amending 4VAC20-450-15, 4VAC20-450-20, 4VAC20-450-30).**

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

Effective Date: July 1, 2020.

Agency Contact: Jennifer Farmer, Regulatory Coordinator, Marine Resources Commission, 380 Fenwick Road, Fort Monroe, VA 23651, telephone (757) 247-2248, or email jennifer.farmer@mrc.virginia.gov.

Summary:

The amendments establish the commercial bluefish quota for 2020, using Virginia's percent allocation (11.8795%) of the coastwide commercial bluefish quota.

4VAC20-450-15. Definitions.

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

"Annual quota" means Virginia's 11.8795% share of the annual coastwide commercial bluefish quota managed by the Atlantic States Marine Fisheries Commission.

"Bluefish" means any fish of the species Pomatomus saltatrix.

"Captain" means the person licensed by the U.S. Coast Guard to carry passengers for hire who operates the charter boat or head boat.

"Charter vessel" or "for-hire vessel" means a vessel operating with a captain who possesses either a Class A Fishing Guide License, Class B Fishing Guide License, or Fishing Guide Reciprocity Permit.

4VAC20-450-20. ~~Bluefish~~ Recreational bluefish possession limits.

A. It shall be unlawful for any person fishing recreationally to harvest or possess more than three bluefish, except as described in subsection B of this section. Any bluefish taken after the possession limit has been reached shall be returned to the water immediately.

B. It shall be unlawful for any person fishing from a charter or for-hire vessel to harvest or possess more than five bluefish. Any bluefish taken after the possession limit has been reached shall be returned to the water immediately.

C. When fishing from a boat or vessel where the entire catch is held in a common hold or container, the possession limit shall be for the boat or vessel and shall be equal to the number of persons on board who are legally eligible to fish multiplied by the personal possession limits as described in subsections A and B of this section. The captain or operator of the boat or vessel shall be responsible for any boat or vessel possession limit.

4VAC20-450-30. Commercial landings quota.

A. The commercial landings of bluefish shall be limited to ~~915,857 pounds during the current calendar year~~ the annual quota, except as specified in subsection B of this section.

B. If a quota transfer occurs between Virginia and another state participating in the Interstate Fishery Management Plan for bluefish, Virginia's annual quota for the current calendar year shall be limited to the annual quota amount as adjusted for transfers.

C. When it is projected that 95% of the commercial landings quota has been realized, a notice will be posted to close commercial harvest and landings from the bluefish fishery within five days of posting.

~~C.~~ D. It shall be unlawful for any person to harvest or land bluefish for commercial purposes after the closure date set forth in the notice described in subsection ~~B~~ C of this section.

VA.R. Doc. No. R20-6427; Filed June 23, 2020, 12:45 p.m.

Final Regulation

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

Title of Regulation: **4VAC20-490. Pertaining to Sharks (amending 4VAC20-490-20, 4VAC20-490-30, 4VAC20-490-40, 4VAC20-490-42).**

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

Effective Date: July 1, 2020.

Agency Contact: Jennifer Farmer, Regulatory Coordinator, Marine Resources Commission, 380 Fenwick Road, Fort Monroe, VA 23651, telephone (757) 247-2248, or email jennifer.farmer@mrc.virginia.gov.

Summary:

The amendments establish the commercial spiny dogfish annual quota for the 2020 fishing year using Virginia's percent allocation (10.795%) of the coastwide commercial spiny dogfish quota and to require the use of nonoffset, nonstainless steel circle hooks when fishing for sharks recreationally, except when fishing with flies or artificial lures.

4VAC20-490-20. Definitions.

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

"Agent" means any person who possesses the Commercial Fisherman Registration License, fishing gear license, or fishing permit of a registered commercial fisherman in order to fish that commercial fisherman's gear or sell that commercial fisherman's harvest.

"Annual quota" means Virginia's 10.795% share of the annual coastwide commercial spiny dogfish quota managed by the Atlantic States Marine Fisheries Commission.

"Carcass length" means that length measured in a straight line from the anterior edge of the first dorsal fin to the posterior end of the shark carcass.

"Circle Hook" means a non-offset, non-stainless steel hook with the point turned sharply and straight back toward the shank.

"COLREGS Line" means the COLREGS Demarcation Line, as defined in the Code of Federal Regulations (33 CFR 80.510 Chesapeake Bay Entrance, VA).

"Commercial shark fisherman" means any commercial fisherman permitted to land or possess sharks (excluding spiny dogfish) that has landed and sold one pound of shark or more (excludes spiny dogfish) in that calendar year (January 1 through December 31).

"Commercially permitted aggregated large coastal shark" means any of the following species:

Blacktip, Carcharhinus limbatus

Bull, Carcharhinus leucas

Lemon, Negaprion brevirostris

Nurse, Ginglymostoma cirratum

Silky, Carcharhinus falciformis

Spinner, Carcharhinus brevipinna

Tiger, Galeocerdo cuvier

"Commercially permitted hammerhead shark" means any of the following species:

Great hammerhead, Sphyrna mokarran

Scalloped hammerhead, Sphyrna lewini

Smooth hammerhead, Sphyrna zygaena

"Commercially permitted nonblacknose small coastal shark" means any of the following species:

Atlantic sharpnose, Rhizoprionodon terraenovae

Bonnethead, Sphyrna tiburo

Finetooth, Carcharhinus isodon

"Commercially permitted pelagic shark" means any of the following species:

Blue, Prionace glauca

Oceanic whitetip, Carcharhinus longimanus

Porbeagle, Lamna nasus

Shortfin mako, Isurus oxyrinchus

Thresher, Alopias vulpinus

"Commercially prohibited shark" means any of the following species:

Atlantic angel, Squatina dumeril

Basking, Cetorhinus maximus

Bigeye sand tiger, Odontaspis noronhai

Bigeye sixgill, Hexanchus nakamurai

Bigeye thresher, Alopias superciliosus

Bignose, Carcharhinus altimus

Blacknose, Carcharhinus acronotus

Caribbean reef, Carcharhinus perezii

Caribbean sharpnose, Rhizoprionodon porosus

Dusky, Carcharhinus obscurus

Galapagos, Carcharhinus galapagensis

Longfin mako, Isurus paucus

Narrowtooth, Carcharhinus brachyurus

Night, Carcharhinus signatus

Sand tiger, Carcharias taurus

Sevengill, Heptranchias perlo

Sixgill, Hexanchus griseus

Smalltail, Carcharhinus porosus

Whale, Rhincodon typus

White, Carcharodon carcharias

"Control rule" means a time-certain date, past, present, or future, used to establish participation in a limited entry fishery and may or may not include specific past harvest amounts.

"Dressed weight" means the result from processing a fish by removal of head, viscera, and fins, but does not include removal of the backbone, halving, quartering, or otherwise further reducing the carcass.

"Finning" means removing the fins and returning the remainder of the shark to the sea.

"Fork length" means the length of a fish measured from the most forward projection of the snout, with the mouth closed, to the fork of the tail along the midline, using a straight-line measure, not measured over the curve of the body.

"Large mesh gill net" means any gill net with a stretched mesh of greater than five inches.

"Longline" means any fishing gear that is set horizontally, either anchored, floating or attached to a vessel, and that consists of a mainline or groundline, greater than 1,000 feet in length, with multiple leaders (gangions) and hooks, whether retrieved by hand or mechanical means.

"Movable gill net"means any gill net other than a staked gill net.

"Permitted commercial gear" means rod and reel, handlines, shark shortlines, small mesh gill nets, large mesh gill nets, pound nets, and weirs.

"Recreational shore angler" means a person neither fishing from a vessel nor transported to or from a fishing location by a vessel.

"Recreational vessel angler" means a person fishing from a vessel or transported to or from a fishing location by a vessel.

"Recreationally permitted shark" means any of the following species:

Atlantic sharpnose, Rhizoprionodon terraenovae

Blacknose, Carcharhinus acronotus

Blacktip, Carcharhinus limbatus

Blue, Prionace glauca

Bonnethead, Sphyrna tiburo

Bull, Carcharhinus leucas

Finetooth, Carcharhinus isodon

Great hammerhead, Sphyrna mokarran

Lemon, Negaprion brevirostris

Nurse, Ginglymostoma cirratum

Oceanic whitetip, Carcharhinus longimanus

Porbeagle, Lamna nasus

Scalloped hammerhead, Sphyrna lewini

Shortfin mako, Isurus oxyrinchus

Smooth dogfish, Mustelus canis

Smooth hammerhead, Sphyrna zygaena

Spinner, Carcharhinus brevipinna

Thresher, Alopias vulpinus

Tiger, Galeocerdo cuvier

"Recreationally prohibited shark" means any of the following species:

Atlantic angel, Squatina dumeril

Basking, Cetorhinus maximus

Bigeye sand tiger, Odontaspis noronhai

Bigeye sixgill, Hexanchus nakamurai

Bigeye thresher, Alopias superciliosus

Bignose, Carcharhinus altimus

Caribbean reef, Carcharhinus perezii

Caribbean sharpnose, Rhizoprionodon porosus

Dusky, Carcharhinus obscurus

Galapagos, Carcharhinus galapagensis

Longfin mako, Isurus paucus

Narrowtooth, Carcharhinus brachyurus

Night, Carcharhinus signatus

Sand tiger, Carcharias taurus

Sandbar, Carcharhinus plumbeus

Sevengill, Heptranchias perlo

Silky, Carcharhinus falciformis

Sixgill, Hexanchus griseus

Smalltail, Carcharhinus porosus

Whale, Rhincodon typus

White, Carcharodon carcharias

"Research only shark" means any of the following species:

Sandbar, Carcharhinus plumbeus

"Shark shortline" means a fish trotline that is set horizontally, either anchored, floating or attached to a vessel, and that consists of a mainline or groundline, 1,000 feet in length or less, with multiple leaders (gangions) and no more than 50 corrodible circle hooks, whether retrieved by hand or mechanical means.

"Small mesh gill net" means any gill net with a stretched mesh of equal to or less than five inches.

"Smooth dogfish" means any shark of the species Mustelus canis. Smooth dogfish are also known as "smoothhound shark."

"Snout" means the most forward projection from a fish's head that includes the upper and lower jaw.

"Spiny dogfish" means any shark of the species Squalus acanthias.

4VAC20-490-30. ~~Gear~~ Commercial gear restrictions.

A. It shall be unlawful for any person to place, set, or fish any longline in Virginia's tidal waters.

B. It shall be unlawful for any person to place, set, or fish any shark shortline in Virginia's tidal waters with more than 50 hooks. All hooks must be corrodible circle hooks. In addition, any person aboard a vessel fishing shortlines must practice the protocols and possess the federally required release equipment, for pelagic and bottom longlines, for the safe handling, release and disentanglement of sea turtles and other nontarget species; all captain and vessel owners must be certified in using handling and release equipment.

C. It shall be unlawful for a person to possess more than two shark shortlines on board a vessel.

~~D. It shall be unlawful for any person fishing recreationally to take any shark using any gear other than handline or rod and reel.~~

~~E.~~ D. It shall be unlawful for any person fishing for commercial purposes to possess any shark caught by means other than permitted commercial gear.

~~F.~~ E. Any ~~commercial shark fisherman~~ person fishing commercially for sharks shall check all ~~of his~~ large mesh gill nets at least once every two hours.

4VAC20-490-40. Recreational harvest limitations and gear restrictions.

A. Recreational fishing vessels are allowed a maximum possession limit of one recreationally permitted shark, excluding smooth dogfish, per trip, regardless of the number of people on board the vessel. In addition, each recreational vessel angler may possess one bonnethead and one Atlantic sharpnose per trip. The possession aboard a vessel of more than one recreationally permitted shark, excluding smooth dogfish, or the possession of more than one Atlantic sharpnose shark or one bonnethead shark, per person, shall constitute a violation of this regulation. When fishing from any boat or vessel where the entire catch is held in a common hold or container, the possession limits for Atlantic sharpnose shark or bonnethead shark shall be for the boat or vessel and shall be equal to the number of persons on board legally eligible to fish, plus one additional recreationally permitted shark. The captain or operator of the boat or vessel shall be responsible for any boat or vessel possession limits.

B. A recreational shore angler is allowed a maximum possession limit of one recreationally permitted shark, excluding smooth dogfish, per calendar day. In addition, a recreational shore angler may harvest one additional bonnethead and one additional Atlantic sharpnose per calendar day. The possession of more than one recreationally permitted shark, excluding smooth dogfish, or the possession of more than one bonnethead and one Atlantic sharpnose, by any person, shall constitute a violation of this regulation.

C. It shall be unlawful for any person to possess any recreationally prohibited shark.

D. It shall be unlawful for any person to possess any recreationally permitted shark landed under the recreational harvest limitations described in this section that is less than 54 inches in fork length except as described in subdivisions 1, 2, and 3 of this subsection:

1. It shall be unlawful for any person to possess any recreationally caught female shortfin mako shark that is less than 83 inches in fork length or any male shortfin mako shark that is less than 71 inches in fork length.

2. It shall be unlawful for any person to possess any recreationally caught great hammerhead, scalloped hammerhead, or smooth hammerhead shark that is less than 78 inches in fork length.

3. Atlantic sharpnose, bonnethead, finetooth, blacknose, and smooth dogfish sharks are exempt from the recreational size limit described in this subsection.

E. It shall be unlawful for any person to take, harvest, land, or possess any blacktip, bull, great hammerhead, lemon, nurse, scalloped hammerhead, smooth hammerhead, spinner or tiger shark from May 15 through July 15 of any calendar year.

F. All sharks must have heads, tails and fins attached naturally to the carcass. Anglers may gut and bleed the carcass as long as the head and tail are not removed. Filleting any shark is prohibited until that shark is offloaded at the dock or on shore.

G. It shall be unlawful for any person fishing recreationally to take any shark using any gear other than handline or rod and reel.

H. Any person fishing recreationally for sharks shall use non-offset, corrodible, non-stainless steel circle hooks except when fishing with flies or artificial lures.

4VAC20-490-42. Spiny dogfish commercial quota and harvest limitations.

A. ~~From~~ The fishing year for spiny dogfish shall be from May 1 of the current calendar year through April 30 of the following calendar year. For the fishing year, the commercial spiny dogfish landings quota shall be limited to ~~2,215,484 pounds~~ annual quota except as specified in subsection B of this section.

B. If a quota transfer occurs between Virginia and another state or region participating in the Interstate Fishery Management Plan for spiny dogfish, Virginia's annual quota for the fishing year shall be limited to the annual quota amount as adjusted for transfers.

C. It shall be unlawful for any person to take, harvest, or possess aboard any vessel or to land in Virginia any spiny dogfish harvested from federal waters for commercial purposes after it has been announced that the federal quota for spiny dogfish has been taken.

~~C.~~ D. It shall be unlawful for any person to take, harvest, or possess aboard any vessel or to land in Virginia more than 6,000 pounds of spiny dogfish per day for commercial purposes.

~~D.~~ E. It shall be unlawful for any person to take, harvest ~~or to land in~~, or possess aboard any vessel or to land in Virginia any spiny dogfish for commercial purposes after the annual quota specified in ~~subsection~~ subsections A and B of this section has been landed and announced as such.

~~E.~~ F. Any spiny dogfish harvested from state waters or federal waters, for commercial purposes, shall only be sold to a federally permitted dealer.

~~F.~~ G. It shall be unlawful for any buyer of seafood to receive any spiny dogfish after any commercial harvest or ~~landing~~ annual quota described in this section has been ~~attained~~ landed and announced as such.

VA.R. Doc. No. R20-6425; Filed June 23, 2020, 3:13 p.m.

Final Regulation

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

Title of Regulation: **4VAC20-910. Pertaining to Scup (Porgy) (amending 4VAC20-910-20, 4VAC20-910-45).**

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

Effective Date: July 1, 2020.

Agency Contact: Jennifer Farmer, Regulatory Coordinator, Marine Resources Commission, 380 Fenwick Road, Fort Monroe, VA 23651, telephone (757) 247-2248, or email jennifer.farmer@mrc.virginia.gov.

Summary:

The amendments establish the commercial scup Summer period fishery quota for 2020, using Virginia's allocation (0.165%) of the coastwide commercial scup Summer period quota.

4VAC20-910-20. Definitions.

The following words and terms, when used in this chapter shall have the following meaning unless the context clearly indicates otherwise.

"Scup" means any fish of the species Stenotomus chrysops, commonly referred to as porgy.

"Snout" means the most forward projection from a fish's head that includes the upper and lower jaw.

"Total length" means the length of a fish measured from the most forward projection of the snout, with the mouth closed, to the tip of the longer lobe of the tail (caudal) fin, measured with the tail compressed along the midline, using a straight-line measure, not measured over the curve of the body.

"Virginia Summer period quota" means Virginia's 0.165% share of the annual coastwide commercial scup Summer period quota managed by the Atlantic States Marine Fisheries Commission.

4VAC20-910-45. Possession limits and harvest quotas.

A. During the commercial Winter I period January 1 through April 30 of each year, it shall be unlawful for any person to do any of the following:

1. Possess aboard any vessel in Virginia more than 50,000 pounds of scup;

2. Land in Virginia more than a total of 50,000 pounds of scup during each consecutive seven-day landing period, with the first seven-day period beginning on January 1; or

3. When it is projected and announced that 80% of the coastwide quota for the Winter I period has been attained, possess aboard any vessel or land in Virginia more than a total of 1,000 pounds of scup.

B. During the commercial Winter II period October 1 through December 31 of each year, it shall be unlawful for any person to possess aboard any vessel or to land in Virginia ~~more than 27,000 pounds of scup~~ any amount of scup totaling more than the federal per trip possession limit that has been announced by National Marine Fisheries Service. This federal per trip possession limit will be posted on the commission website.

C. ~~During the Summer period May 1 through September 30 of each year, the commercial harvest and landing of scup in Virginia shall be limited to 14,296 pounds, and it~~ The commercial scup Summer period May 1 through September 30 shall be allocated 100% of the Virginia Summer period quota. It shall be unlawful for any person to possess aboard any vessel in Virginia more than 5,000 pounds of scup during the Summer period.

D. For each of the time periods set forth in this section, the Marine Resources Commission will give timely notice to the industry of calculated poundage possession limits and quotas and any adjustments thereto. It shall be unlawful for any person to possess or to land any scup for commercial purposes after any winter period coastwide quota or summer period Virginia quota has been attained and announced as such.

E. It shall be unlawful for any buyer of seafood to receive any scup after any commercial harvest or landing quota has been attained and announced as such.

F. It shall be unlawful for any person fishing with hook and line, rod and reel, spear, gig, or other recreational gear to possess more than 30 scup. When fishing is from a boat or vessel where the entire catch is held in a common hold or container, the possession limit shall be for the boat or vessel and shall be equal to the number of persons on board legally eligible to fish multiplied by 30. The captain or operator of the boat or vessel shall be responsible for any boat or vessel possession limit. Any scup taken after the possession limit has been reached shall be returned to the water immediately.

VA.R. Doc. No. R20-6426; Filed June 23, 2020, 2:35 p.m.

Final Regulation

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

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

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

Effective Date: July 5, 2020.

Agency Contact: Jennifer Farmer, Regulatory Coordinator, Marine Resources Commission, 380 Fenwick Road, Fort Monroe, VA 23651, telephone (757) 247-2248, or email jennifer.farmer@mrc.virginia.gov.

Summary:

The amendments close crab dredging in Virginia waters from December 1, 2020, through March 31, 2021.

4VAC20-1140-20. Crab dredging prohibited.

In accordance with the provisions of § 28.2-707 of the Code of Virginia, the crab dredging season of December 1, ~~2019~~ 2020, through March 31, ~~2020~~ 2021, is closed, and it shall be unlawful to use a dredge for catching crabs from the waters of the Commonwealth during that season.

VA.R. Doc. No. R20-6428; Filed June 23, 2020, 12:32 p.m.

TITLE 8. EDUCATION

STATE BOARD OF EDUCATION

Forms

REGISTRAR'S NOTICE: Forms used in administering the regulation have been filed by the agency. The forms are not being published; however, online users of this issue of the Virginia Register of Regulations may click on the name of a

form with a hyperlink to access it. The forms are also available from the agency contact or may be viewed at the Office of the Registrar of Regulations, 900 East Main Street, 11th Floor, Richmond, Virginia 23219.

Title of Regulation: **8VAC20-70. Regulations Governing Pupil Transportation.**

Contact Information: Kerry Miller, Associate Director, Pupil Transportation, Department of Education, 101 North 14th Street, Richmond, VA 23219, email kerry.miller@doe.virginia.gov.

FORMS (8VAC20-70)

~~School Bus Driver's Application for Physician's Certificate, Form EB.001, (rev. 5/2017)~~

School Bus Driver's Application for Physician's Certificate, Form EB.001, (rev. 6/2020)

VA.R. Doc. No. R20-6390; Filed June 3, 2020, 4:26 p.m.

TITLE 9. ENVIRONMENT

VIRGINIA WASTE MANAGEMENT BOARD

Forms

REGISTRAR'S NOTICE: Forms used in administering the regulation have been filed by the agency. The forms are not being published; however, online users of this issue of the Virginia Register of Regulations may click on the name of a form with a hyperlink to access it. The forms are also available from the agency contact or may be viewed at the Office of the Registrar of Regulations, 900 East Main Street, 11th Floor, Richmond, Virginia 23219.

Title of Regulation: **9VAC20-90. Solid Waste Management Permit Action Fees and Annual Fees.**

Contact Information: Gary Graham, Regulatory Analyst, Department of Environmental Quality, 1111 East Main Street, Suite 1400, Richmond, VA 23219, telephone (804) 698-4103, or email gary.graham@deq.virginia.gov.

FORMS (9VAC20-90)

Solid Waste Information and Assessment Program Reporting Table, Form DEQ 50-25 with Statement of Economic Benefits Form and Instructions (rev. 12/2018)

~~Solid Waste Annual Permit Fee Quarter Payment Form PF001 (rev. 6/2019)~~

Solid Waste Annual Permit Fee Quarter Payment, Form PF001 (rev. 6/2020)

VA.R. Doc. No. R20-6403; Filed June 9, 2020, 12:50 p.m.

STATE WATER CONTROL BOARD

Final Regulation

Title of Regulation: **9VAC25-900. Certification of Nonpoint Source Nutrient Credits (adding 9VAC25-900-10 through 9VAC25-900-350).**

Statutory Authority: § 62.1-44.19:20 of the Code of Virginia.

Effective Date: September 1, 2020.

Agency Contact: Debra Harris, Department of Environmental Quality, 1111 East Main Street, Suite 1400, P.O. Box 1105, Richmond, VA 23218, telephone (804) 698-4209, FAX (804) 698-4346, or email debra.harris@deq.virginia.gov.

Summary:

Pursuant to Chapter 748 of the 2012 Acts of Assembly, the new regulation establishes the process for the certification of nonpoint source nitrogen and phosphorus nutrient credits. The regulation includes application procedures, baseline requirements, credit calculation procedures, release and registration of credits, compliance and reporting requirements for nutrient credit-generating entities, enforcement requirements, application fees, and financial assurance requirements. Nonpoint source nutrient credits must be certified by the Department of Environmental Quality (DEQ) prior to release, placement on the registry, and exchange.

Changes since the revised proposed regulation include: (i) addition of a requirement to include the name and contact information of a DEQ staff person for all public notifications; (ii) addition of a requirement that DEQ shall, if warranted, perform a site visit of the proposed nutrient credit-generating project for applications received; and (iii) addition of a provision establishing survival for mixed-use plantings of evergreens and hardwoods, which include a minimum of 200 evergreens, after the first complete growing season.

As part of this action, the State Water Control Board voted unanimously to move the provisions regarding the exchange of credits in 9VAC25-900-90 C of the revised proposed regulation, which are amended to add Chlorophyll-a to the list of impairment types for the local water quality requirements, to a new section, 9VAC25-900-91, and defer submittal of 9VAC25-900-91 for publication in the Virginia Register of Regulations. Therefore, the effective date of 9VAC25-900-91 is delayed and the section will not become effective with the remainder of the chapter.

The board directed DEQ, prior to publication of 9VAC25-900-91 in the Register, to seek input on the development of guidance regarding implementation of 9VAC25-900-91 from a representative of private nutrient bank developers, conservation organizations, local governments, and nonpoint nutrient credit users. In accordance with the

board's action, the final provisions of 9VAC25-900-91 may be submitted for publication in the Register at such time as (i) DEQ receives approval of 9VAC25-900-91 pursuant to Executive Order No. 14 (2018) and (ii) the earlier of either the date the guidance is published in the Register or September 1, 2020. DEQ received approval on May 26, 2020, for the provisions of 9VAC25-900-91 pursuant to Executive Order No. 14 (2018) and will be submitting 9VAC25-900-91 for publication by September 1, 2020.

Summary of Public Comments and Agency's Response: A summary of comments made by the public and the agency's response may be obtained from the promulgating agency or viewed at the office of the Registrar of Regulations.

CHAPTER 900
CERTIFICATION OF NONPOINT SOURCE NUTRIENT CREDITS

Part I
Definitions

9VAC25-900-10. Definitions.

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

"300 animal units" means the term as defined in 9VAC25-192-10.

"Act" means the Chesapeake Bay Watershed Nutrient Credit Exchange Program, Article 4.02 (§ 62.1-44.19:12 et seq.) of Chapter 3.1 of Title 62.1 of the Code of Virginia.

~~"Agricultural lands" means cropland, hayland, or pastures.~~

"Animal feeding operation" means the term as defined by 9VAC25-31-10.

"Applicant" means the person who submits an application to the department for nutrient credit certification pursuant to this chapter.

"Bankfull event" means the storm event that corresponds with the stream stage at its incipient point of flooding. The bankfull discharge associated with the bankfull event is the flow that transports the majority of a stream's sediment load over time and thereby forms and maintains the channel dimension, pattern, and profile.

"Baseline" means the practices, actions, or levels of reductions that must be in place before credits can be generated. The best management practices to be implemented for achieving baseline are provided in 9VAC25-900-100.

"Best management practice," "practice," or "BMP" means a structural practice, nonstructural practice, or other management practice used to prevent or reduce nutrient loads reaching surface waters or the adverse effects thereof.

"Board" means the State Water Control Board.

~~"CDA" means contributing drainage area.~~

"Certification of nutrient credits" or "nutrient credit certification" means the approval of nutrient credits issued by the department as specified in 9VAC25-900-80. Nutrient credit certification does not include the certification of point source credits generated by point sources regulated under the Watershed General Virginia Pollutant Discharge Elimination System Permit issued pursuant to § 62.1-44.19:14 of the State Water Control Law.

"Chesapeake Bay Watershed" means the land areas draining to the following Virginia river basins: the Potomac River Basin, the James River Basin, the Rappahannock River Basin, the Chesapeake Bay and small coastal basins, or the York River Basin.

"Concentrated animal feeding operation" means the term as defined by 9VAC25-31-10.

"Cropland" means land that is used for the production of grain, oilseeds, silage or industrial crops not defined as hay or pasture.

"DCR" means the Department of Conservation and Recreation.

"Delivery factor" means the estimated percentage of a total nitrogen or total phosphorus load delivered to tidal waters as determined by the specific geographic location of the nutrient source. For point source discharges the delivery factor accounts for attenuation that occurs during riverine transport between the point of discharge and tidal waters. For nonpoint source loads the delivery factor accounts for attenuation that occurs during riverine transport as well as attenuation between the nutrient source and the edge of the nearest stream. Delivery factors values shall be as specified by the department. In the Chesapeake Bay Watershed, the Chesapeake Bay Program Partnership's approved delivery factors shall be used.

"Department" means the Department of Environmental Quality.

"Director" means the Director of the Department of Environmental Quality or his designee.

"Exchange" means the transaction in which a person ~~buys~~ acquires released nutrient credits produced by a nutrient ~~credit generating entity~~ credit-generating project.

"Field office technical guide" or "FOTG" means technical guides about conservation of soil, water, air, and related plant and animal resources and are the primary scientific reference for the U.S. Department of Agriculture's Natural Resource Conservation Service. These guides are used in each field office and are localized so that they apply specifically to the geographic area for which they are prepared.

"Hayland" means land that is used to grow a grass, legume, or other plants such as clover or alfalfa, which is cut and dried for feed.

"Highly erodible soils" means land that is defined as highly erodible by the Sodbuster, Conservation Reserve, and Conservation Compliance parts of the Food Security Act of 1985 (P.L. 99-198) and the Food, Agriculture, Conservation, and Trade Act of 1990 (P.L. 101-624). Lists of highly erodible and potential highly erodible map units are maintained in NRCS field office technical guide.

"HUC" means the hydrologic unit code.

"Impaired waters" means those waters identified as impaired in the 305(b)/303(d) Water Quality Assessment Integrated Report ~~(see 9VAC25-900-70)~~ prepared pursuant to § 62.1-44.19:5 of the State Water Control Law.

"Implementation plan" means a plan that has been developed to meet the requirements of 9VAC25-900-120 and is submitted as part of the application.

"Invasive plant species" means non-native plant species that are contained on DCR's ~~List of Invasive Alien Plant Species of Virginia (see 9VAC25-900-70).~~ Virginia Invasive Plant Species List.

"Innovative practice" means practices or BMPs not approved by the Chesapeake Bay Program Partnership or the Virginia Stormwater BMP Clearinghouse. Nutrient credits generated by innovative practices may only be certified as term credits.

"Landowner" means any person or group of persons acting individually or as a group that owns the parcel on which a nutrient credit-generating project is sited including: (i) the Commonwealth or any of its political subdivisions, including localities, commissions, and authorities; (ii) any public or private institution, corporation, association, firm, or company organized or existing under the laws of this or any other state or country; or (iii) any officer or agency of the United States.

"Land use controls" means legal measures or instruments that restrict the activity, use, and access to property.

"Land use conversion" means a change from a more intensive to less intensive land use resulting in nutrient reductions.

"Management area" means all contiguous parcels deeded to the same landowner that includes the site of the nutrient credit-generating ~~site~~ project within its boundaries. The term contiguous means the same or adjacent parcels that may be divided by public or private right-of-way. [~~The~~ For a public entity that owns or operates an MS4 and generates credits within the MS4 service area, the] management area ~~does not include publicly owned roads or rights-of-way.~~ [~~for an MS4 generating nutrient credits~~] is the MS4 service area.

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

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

"Mitigation banking instrument" means the legal document for the establishment, operation, and use of a stream or wetland mitigation bank.

"MS4" means a municipal separate storm sewer system as defined in 9VAC25-870-10.

"MS4 service area" means [(i) for Phase I MS4 permittees, the service area delineated in accordance with the permit issued pursuant to 9VAC25-870-380 A 3; and, (ii) for Phase II MS4 permittees,] the term as described in 9VAC25-890.

"Non-land use conversion" means practices, except for land use conversion, that are used by a nutrient credit-generating ~~entity~~ project to produce nutrient reductions.

"Nonpoint source pollution" or "nonpoint source" means pollution such as sediment, nitrogen, phosphorus, hydrocarbons, heavy metals, and toxics whose sources cannot be pinpointed but rather are washed from the land surface in a diffuse manner by stormwater runoff.

"NRCS" mean the U.S. Department of Agriculture's Natural Resource Conservation Service.

"Nutrient credit" or "credit" means a nonpoint source nutrient reduction that is certified pursuant to this chapter and expressed in pounds of phosphorus and nitrogen either (i) delivered to tidal waters when the credit is generated within the Chesapeake Bay Watershed or (ii) as otherwise specified when generated in the Southern Rivers watersheds. Nutrient credit does not include point source nitrogen credits or point source phosphorus credits as defined in § 62.1-44.19:13 of the Code of Virginia.

["Nutrient credit-generating entity" means an entity that implements practices for the generation of nonpoint source nutrient credits.]

"Nutrient credit-generating project" or "project" means a project developed to reduce the load of nitrogen and phosphorous nonpoint source pollution in order to generate nutrient credits for certification pursuant to this chapter.

"Nutrient reductions" means the reduction in the load of nitrogen and phosphorous nonpoint source pollution.

"Owner" means the Commonwealth or any of its political subdivisions, including ~~but not limited to~~ sanitation district

commissions and authorities and any public or private institution, corporation, association, firm, or company organized or existing under the laws of this or any other state or country, or any officer or agency of the United States, or any person or group of persons acting individually or as a group that owns, operates, charters, rents, or otherwise exercises control over or is responsible for any nutrient credit-generating ~~entity~~ project.

"Pasture" means land that supports the grazing of domesticated animals for forages.

"Performance standards" means the minimum objectives or specifications required of a particular management practice by the department in order to assure predicted nutrient reductions will be achieved.

"Perpetual nutrient credits" or "perpetual credits" mean credits that are generated by practices that result in permanent nutrient reductions from baseline and certified as permanent in accordance with this chapter.

"Person" means any individual, corporation, partnership, association, state, municipality, commission, or political subdivision of a state, governmental body, including a federal, state, or local entity as applicable, any interstate body or any other legal entity.

"Potential nutrient credits" means the possible credits generated by a nutrient credit-generating ~~entity~~ project as calculated pursuant to 9VAC25-900-110. These potential nutrient credits shall be expressed in terms of the estimated number of phosphorus and nitrogen credits generated.

"Redevelopment" means a project that includes new development on previously developed land.

"Registry" means the online Virginia Nutrient Credit Registry established and maintained by the department in accordance with § 62.1-44.1.19:20 D of the Code of Virginia.

"Released nutrient credit" means credits that the department has determined to be eligible for ~~exchange~~ placement on the Virginia Nutrient Credit Registry.

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

"Retrofit" means a project that provides improved nutrient reductions to previously developed land through the implementation of new BMPs or upgrades to existing BMPs.

"Site" means the physical location within the management area where the nutrient credit-generating ~~entity~~ project and its associated practices, both baseline and credit-generating, are located.

"Site protection instrument" means a deed restriction, conservation easement, or other legal mechanism approved by the department that provides assurance that the credits will be maintained ~~for the term of the credit.~~ in accordance with this chapter and the certification requirements.

"Southern Rivers watersheds" means the land areas draining to the following river basins: the Albemarle Sound, Coastal; the Atlantic Ocean, Coastal; the Big Sandy River Basin; the Chowan River Basin; the Clinch-Powell River Basin; the New Holston River Basin (Upper Tennessee); the New River Basin; the Roanoke River Basin; or the Yadkin River Basin~~, or those water bodies draining directly to the Atlantic Ocean~~.

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

"Steward" or "long-term steward" means any person who is responsible for implementation of the long-term management plan of a perpetual nutrient credit-generating project.

"Structural BMPs" means any ~~manmade~~ man-made stormwater control measure or feature that requires routine maintenance in order to function or provide the hydrologic, hydraulic, or water quality benefit as designed. Structural practices include~~, but are not limited to~~ bioretention, infiltration facilities, wet ponds, extended detention, wet and dry swales, permeable pavement, rainwater harvesting, vegetated roofs, underground or surface chambers or filters, and other manufactured treatment devices (MTDs).

"T" means the soil loss tolerance rate as defined by the NRCS.

"Term nutrient credit" or "term credit" means nutrient reduction activities that generate credits for a determined and finite period of at least one year but no greater than five years.

"Total maximum daily load" or "TMDL" means the sum of the individual wasteload allocations (WLAs) for point sources, load allocations (LAs) for nonpoint sources, natural background loading, and a margin of safety. TMDLs can be expressed in terms of either mass per time, toxicity, or other appropriate measure. The TMDL process provides for point versus nonpoint source trade-offs. ~~TMDL is not necessarily a daily load but may be expressed in other units of time.~~ TMDLs in Virginia are expressed as both a daily load and an annual load. For nutrient trading, ~~yearly~~ annual loads are most often utilized.

"Tributary" means those river basins for which separate tributary strategies were prepared pursuant to § 2.2-218 of the Code of Virginia and includes the Potomac, Rappahannock, York, and James River basins, and the Eastern Coastal Basin, which encompasses the creeks and rivers of the Eastern Shore of Virginia that are west of Route 13 and drain into the

Chesapeake Bay. For areas outside of the Chesapeake Bay Watershed, "tributary" includes the following watersheds: Albemarle Sound, Coastal; Atlantic Ocean, Coastal; Big Sandy; Chowan; Clinch-Powell; New Holston (Upper Tennessee); New River; Roanoke; and Yadkin.

"Urban lands" means lands characterized by developed areas with buildings, asphalt, concrete, suburban gardens, and a systematic street pattern. Classes of urban development include residential, commercial, industrial, institutional, transportation, communications, utilities, and mixed urban. Undeveloped land surrounded by developed areas, such as cemeteries, golf courses, and urban parks is recognized as urban lands.

"VACS BMP Manual" means the Virginia Agricultural Cost Share BMP Manual [~~(see 9VAC25-900-70)~~].

"Virginia Chesapeake Bay TMDL Watershed Implementation Plan," "Watershed Implementation Plan," or "WIP" means the Phase I watershed implementation plan strategy submitted by Virginia and approved by the U.S. Environmental Protection Agency (EPA) in December 2010 to meet the nutrient and sediment allocations prescribed in the Chesapeake Bay Watershed TMDL or any subsequent revision approved of EPA [~~(see 9VAC25-900-70)~~].

"Virginia Pollutant Discharge Elimination System permit" or "VPDES permit" means a document issued by the State Water Control Board pursuant to the State Water Control Law authorizing, under prescribed conditions, the potential or actual discharge of pollutants from a point source to surface waters and the use or disposal of sewage sludge.

"Virginia Stormwater Management Program" or "VSMP" means a program to manage the quality and quantity of runoff resulting from land-disturbing activities and includes such items as local ordinances, rules, permit requirements, annual standards and specifications, policies and guidelines, technical materials, and requirements for plan review, inspection, and enforcement, where authorized in the Stormwater Management Act and pursuant to 9VAC25-870, 9VAC25-880, or 9VAC25-890.

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

"VPA" means Virginia Pollution Abatement.

"VPDES" means Virginia Pollutant Discharge Elimination System.

"VSMP authority" means a Virginia stormwater management program authority as defined in 9VAC25-870-10.

"VWP" means Virginia Water Protection.

"Water body with perennial flow" means a body of water that flows in a natural or man-made channel year-round during a year of normal precipitation as a result of groundwater discharge or surface runoff. Such water bodies exhibit the typical biological, hydrological, and physical characteristics commonly associated with the continuous conveyance of water.

"Water Quality Guide" means Virginia's Forestry Best Management Practices for Water Quality ~~(see 9VAC25-900-70)~~.

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

Part II
General Information

9VAC25-900-20. Authority and delegation of authority.

A. This chapter is issued under authority of § 62.1-44.19:20 of the Act.

B. The director may perform any act of the board provided under this ~~regulation~~ chapter except as limited by § 62.1-44.14 of the Code of Virginia.

9VAC25-900-30. Purpose and applicability.

A. The purpose of this chapter is to establish standards and procedures pertaining to the certification of nutrient credits that will be placed on the registry for exchange.

B. This chapter applies to all persons who submit an application for and to all persons that receive a certification of nutrient credits from the department in accordance with the Act and this chapter.

C. Nutrient credits from stormwater nonpoint nutrient credit-generating ~~entities~~ projects in receipt of a Nonpoint Nutrient Offset Authorization for Transfer letter from the department prior to ~~the effective date of this chapter~~ (insert the effective date of this chapter) shall be considered certified nutrient credits and shall not be subject to further nutrient credit certification requirements or to the credit retirement requirements of this chapter. However, such ~~entities~~ projects shall be subject to all other provisions of this chapter, including registration [of nutrient credits] under 9VAC25-900-90 and the requirements of Part IV (9VAC25-900-140 et seq.) of this chapter including inspection, reporting, and enforcement.

D. This chapter does not apply to the certification of point source nutrient credits that may be generated from effective

nutrient controls or removal practices associated with the types of facilities or practices historically regulated by the board, such as water withdrawal and treatment and wastewater collection, treatment, and beneficial reuse.

E. This chapter does not apply to stream or wetland restoration projects constructed prior to July 1, 2005, as no usable nutrient reductions are deemed to be generated from these projects and, therefore, no nutrient credits can be certified.

9VAC25-900-40. Relationship to other laws and regulations.

A. Specific requirements regarding the use of nutrient credits are found in the following regulations and statutes:

1. Virginia Stormwater Management Program (VSMP) Regulation (9VAC25-870).

a. VSMP Individual Permits for Discharges from Construction Activities. As specified in § 62.1-44.19:21 B of the Act, those applicants required to comply with water quality requirements for land-disturbing activities operating under a construction individual permit issued pursuant to 9VAC25-870 may acquire and use perpetual nutrient credits placed on the registry for exchange.

b. VSMP Individual Permits for Municipal Separate Storm Sewer Systems. As specified in § 62.1-44.19:21 A of the Act, an MS4 permittee may acquire, use, and transfer nutrient credits for purposes of compliance with any wasteload allocations established as effluent limitations in an MS4 individual permit issued pursuant to 9VAC25-870. Such method of compliance may be approved by the department following review of a compliance plan submitted by the permittee that includes the use of nutrient credits and is in accordance with the provisions of § 62.1-44.19:21 A.

2. General VPDES Permit for Discharges of Stormwater from Construction Activities (9VAC25-880). As specified in § 62.1-44.19:21 B of the Act, those applicants required to comply with water quality requirements for land-disturbing activities operating under a general VSMP permit for discharges of stormwater from construction activities issued pursuant to 9VAC50-880 may acquire and use perpetual nutrient credits placed on the registry for exchange.

3. General VPDES Permit for Discharges of Stormwater from Small Municipal Separate Storm Sewer Systems (9VAC25-890). As specified in § 62.1-44.19:21 A of the Act, an MS4 permittee may acquire, use, and transfer nutrient credits for purposes of compliance with any wasteload allocations established as effluent limitations in an MS4 general permit issued pursuant to 9VAC25-890. Such method of compliance may be approved by the department following review of a compliance plan submitted by the permittee that includes the use of nutrient credits and is in accordance with the provisions of § 62.1-44.19:21 A.

4. Virginia Pollutant Discharge Elimination System (VPDES) Permit Regulation (9VAC25-31). As specified in § 62.1-44.19:21 C of the Act, owners of confined or concentrated animal feeding operations issued individual permits pursuant to 9VAC25-31 may acquire, use, and transfer credits for compliance with any wasteload allocations contained in the provisions of a VPDES permit. Such method of compliance may be approved by the department following review of a compliance plan submitted by the permittee that includes the use of nutrient credits.

5. General Virginia Pollutant Discharge Elimination System (VPDES) Permit for Discharges of Storm Water Associated with Industrial Activity (9VAC25-151). As specified in § 62.1-44.19:21 D of the Act, owners of facilities registered for coverage under 9VAC25-151 for the general VPDES permit may acquire, use, and transfer credits for compliance with any wasteload allocations established as effluent limitations in a VPDES permit. Such method of compliance may be approved by the department following review of a compliance plan submitted by the permittee that includes the use of nutrient credits.

6. General Virginia Pollutant Discharge Elimination System (VPDES) Watershed Permit Regulation for Total Nitrogen and Total Phosphorus Discharges and Nutrient Trading in the Chesapeake Bay Watershed in Virginia (9VAC25-820). Nutrient credits certified pursuant to this chapter may be acquired to offset mass loads of total nitrogen or total phosphorus discharged by new or expanded facilities regulated by 9VAC25-820.

B. This chapter shall not be construed to limit or otherwise affect the authority of the board to establish and enforce more stringent water quality-based effluent limitations for total nitrogen or total phosphorus in permits where those limitations are necessary to protect local water quality. The exchange or acquisition of credits pursuant to this chapter shall not affect any requirement to comply with such local water quality-based limitations.

9VAC25-900-50. Appeal process.

Any person applying to establish a nutrient credit-generating [entity ~~project~~] or an owner of a nutrient credit-generating [entity ~~project~~] aggrieved by any action of the department taken in accordance with this chapter, or by inaction of the department, shall have the right to review in accordance with the provisions of the Administrative Process Act (§ 2.2-4000 et seq. of the Code of Virginia).

9VAC25-900-60. Limitations, liability, and prohibitions.

A. ~~The department~~ Except to the extent it may be an owner as defined by this chapter, none of the following shall ~~not~~ have responsibility or liability for the performance of practices at a nutrient credit-generating ~~entity~~ project evaluated using the procedures established in this chapter: (i) the department, (ii) a VSMP authority, or (iii) any political subdivision of the Commonwealth.

B. Those persons with whom the department contracts, including those serving as technical evaluators on an advisory committee, are advisors to the department, and the department remains solely responsible for decisions made regarding implementation of this chapter.

C. For the purposes of this chapter, the certification of nutrient credits that are generated from practices funded in part or in whole by federal or state water quality grant funds is prohibited other than controls and practices under § 62.1-44.19:20 B 1 a of the Act; however, establishing baseline as specified in 9VAC25-900-100 may be achieved through the use of such grants.

D. The option to acquire nutrient credits for compliance purposes shall not eliminate any requirement to comply with local water quality requirements, including such requirements lawfully imposed by a locality or local MS4.

E. The issuance of a nutrient credit certification under this chapter does not convey any property rights of any sort or any exclusive privilege.

F. The issuance of a nutrient credit certification under this chapter does not authorize any injury to persons or property or invasion of other private rights, or any infringement of state or local law or regulations.

G. Nutrient credit certifications are not transferable except ~~after notice to the department~~ in accordance with 9VAC25-900-180. The department may require modification or revocation and reissuance of nutrient credit certifications to change the name of the owner of the nutrient credit-generating ~~entity~~ project and incorporate such other requirements as may be necessary under the State Water Control Law or the Clean Water Act.

H. No person shall offer for exchange nutrient credits except in compliance with the provisions of this chapter.

I. No nutrient credit shall be generated by practices previously implemented to comply with: (i) the requirements for a VPDES (9VAC25-31), VPA (9VAC25-32), VWP (9VAC25-210), or VSMP (9VAC25-870) permit; (ii) erosion and sedimentation control requirements pursuant to 9VAC25-840; or (iii) the requirements of the Chesapeake Bay Preservation Act pursuant to § 62.1-44.15:67-79 of the Code of Virginia.

J. Nutrient credit generation and use shall be contemporaneous with the applicable permit's compliance period.

9VAC25-900-70. [~~Documents and Internet accessible resources~~ (Reserved.)]

~~This chapter refers to documents and Internet accessible resources to be used by applicants in gathering information to be submitted to the department. Therefore, in~~ [~~In order to assist the applicants, the citations for the documents and the uniform resource locator (URL) for the Internet resources referenced in this chapter~~] ~~are as follows:~~ [~~are:~~

~~1.~~] ~~Virginia Chesapeake Bay TMDL Watershed Implementation Plan, November 29, 2010, Department of Environmental Quality. Available at the following Internet address:~~
~~http://www.deq.virginia.gov/Portals/0/DEQ/Water/TMDL/Baywip/vatmdlwipphase1.pdf.~~

~~2.~~ [~~Virginia Agricultural BMP Cost Share BMP Manual, Program Year~~] ~~2014, July 2013,~~ [~~2018, Department of Conservation and Recreation, Division of Soil and Water Conservation, Richmond, Virginia. Available at the following Internet address:~~]
~~http://dswcapps.dcr.virginia.gov/htdocs/agbmpman/csmanual.pdf.~~
[~~http://dswcapps.dcr.virginia.gov/htdocs/agbmpman/agbmptoc.htm.~~]

~~3. List of Invasive Alien Plant Species of Virginia,~~ [~~2. Virginia Invasive Plant Species List, Department of Conservation and Recreation, Division of Natural Heritage, Richmond, Virginia. Available at the following Internet address:~~
~~http://www.dcr.virginia.gov/natural_heritage/invsppdflist.shtml.~~]

~~4.~~ [~~3. Field Office Technical Guide, Natural Resources Conservation Service, United States Department of Agriculture, Washington, D.C. Available at the following Internet address:~~
~~http://efotg.sc.egov.usda.gov/efotg_locator.aspx.~~]

~~5. 305(b)/303(d) Water Quality Assessment Integrated Report, 2012 , Department of Environmental Quality. Available at the following Internet address:~~

~~http://www.deq.virginia.gov/Programs/Water/WaterQualityInformationTMDLs/WaterQualityAssessments/2012305(b)303(d)IntegratedReport.aspx.~~

~~6. Virginia's Forestry Best Management Practices for Water Quality,Fifth Edition 2011, Department of Forestry. Available at the following Internet address:~~

~~http://www.dof.virginia.gov/print/water/BMP/Manual/2011_Manual_BMP.pdf~~

Part III
Administrative and Technical Criteria

9VAC25-900-80. Procedure for application for certification of nutrient credits.

A. ~~Application submittal.~~ An applicant requesting certification of nutrient credits shall submit an application to the department in accordance with this part. Applicants requesting a renewal of a certification of term nutrient credits shall submit an application to the department at least 60 days prior to the expiration of the nutrient credit term. If the renewal application is not received by the department at least 60 days prior to the expiration of the nutrient credit term, the application will be deemed a new application. The application or renewal application shall be in the form required by the department including signature in accordance with 9VAC25-900-130 and shall include the following elements:

1. A brief narrative description of the nutrient credit-generating ~~entity~~ project.

2. Contact information for the applicant including name, address, and telephone number.

3. Contact information for the nutrient credit-generating ~~entity~~ project, including the ~~entity's~~ project's mailing address, street address, telephone number, and the contact person's name and email address.

4. Status of the applicant as owner, co-owner, operator, or lessee of the nutrient credit-generating ~~entity~~ project or the site on which the ~~entity~~ project is located. The applicant shall provide documentation of the applicant's right to exercise control of the nutrient credit-generating ~~entity or~~ project and the site on which it is located for the purposes of generating and maintaining the proposed nutrient credit-generating ~~entity.~~ project via a title, deed, grant, lease, or easement agreement. Evidence of such documentation must be recorded in the property chain of title and must identify contact information for the applicant or long-term steward for perpetual credits. If the applicant cannot demonstrate control, those parties who singularly or in conjunction with the applicant exercise control over the nutrient credit-generating ~~entity~~ project or the site on which it is located shall be required to jointly apply for nutrient credit certification with the applicant.

5. The name, mailing address, telephone number, and responsibilities of all known contractors responsible for any operational or maintenance aspects of the nutrient credit-generating ~~entity~~ project.

6. The number and type of potential nutrient credits to be generated and supporting information including (i) a description of the baseline practices in place within the management area and the nutrient credit-generating ~~entity's~~ project's practices that may result in generation of nutrient credits beyond baseline requirements; (ii) the potential nutrient credit calculation including the efficiencies and factors used; and (iii) the associated documentation supporting the potential nutrient credits calculation. Baseline shall be determined in accordance with the requirements of 9VAC25-900-100. The number of potential nutrient credits shall be as calculated in accordance with 9VAC25-900-110.

7. A topographic map, survey, or another type of map deemed acceptable by the department that delineates the property boundary of the management area and clearly shows the location of ~~the~~ all practices, including nutrient credit-generating ~~entity~~ projects and any baseline practices.

8. A description of current site conditions with ~~photos~~ photographs.

9. The 8-digit, 10-digit, and 12-digit HUC in which the nutrient credit-generating ~~entity~~ project is located.

10. For land use conversion projects, [~~provide~~] documentation of the condition of the land and land use controls in place as of the date specified in 9VAC25-900-100 E noting any changes in the condition of the land or land use controls since that date.

11. An implementation plan that meets the requirements of 9VAC25-900-120.

12. For structural BMPs~~, the~~ or restoration projects required to submit and maintain financial assurance in accordance with 9VAC25-900-230, the draft financial assurance documents and financial assurance cost estimate calculated pursuant to Part VI (9VAC25-900-230 et seq.) of this chapter. As required by the schedule of release provisions of subsection B of 9VAC25-900-90, prior to the release of nutrient credits all required financial assurance mechanisms shall be established per Part VI (9VAC25-900-230 et seq.) of this chapter and approved by the department.

13. The appropriate fee required pursuant to Part V (9VAC25-900-190 et seq.) of this chapter.

14. ~~The~~ For perpetual credits, a draft of the proposed site protection instrument ~~or instruments~~ for ~~perpetual credits~~ the site on which the nutrient credit-generating project is located. If the landowner is not an individual, documentation will be required establishing that the person executing the protection instrument has the authority to do so.

15. A description of other permits and approvals that may be necessary to operate the nutrient credit-generating ~~entity~~ project.

16. A description of any state or federal water quality grants received for water quality actions in the management area.

17. For perpetual credits, ~~notarized proof that all management area property used to generate credits is held with clear title by the owner and free of any unsubordinated liens~~ [demonstration by] the applicant [~~shall demonstrate~~] that the site on which the nutrient credit-generating project is located is held with title free from all defects, liens, and encumbrances that would interfere with or be in conflict with the establishment and operation of the nutrient credit-generating project. The demonstration may include documentation of the subordination of property interests (e.g., mineral rights, mortgages, easement) if the department determines that the property interest would interfere with or be in conflict with the establishment and operation of the nutrient credit-generating project.

18. For term credits, the desired term of the credit shall be submitted; however, the term shall not exceed five-years.

~~18.~~ 19. A tax map showing the management area and adjacent parcels.

20. For nutrient credit-generating projects using innovative practices, the department may request submittal of additional information in order to review the innovative practice. This additional information may include application provisions that are deemed relevant to the innovative practice.

~~19.~~ 21. Any other information deemed necessary by the department.

B. Applications for certification of nutrient credits based on nutrient reductions from practices other than land conversion shall be processed in accordance with this subsection.

1. Administrative ~~completeness~~ review. Upon receiving an application pursuant to subsection A of this section, the department shall ~~conduct an administrative completeness review prior to the technical review and respond~~ perform a cursory review of the application within 30 calendar days of ~~application~~ receipt. If the application ~~is not administratively complete~~ does not contain all the necessary elements in accordance with subsection A of this section, the department shall notify the applicant of the ~~administrative deficiencies. If the application is administratively complete,~~ missing elements. Otherwise, the department shall notify the applicant that the application will be ~~technically reviewed~~ evaluated for nutrient credit certification.

~~C.~~ 2. Public notification. ~~The~~ After receipt of an application, the department shall post a public notification of the proposed nutrient credit-generating ~~entity~~ project on its website. The public notification shall include the name of the [~~applicant~~ nutrient credit generating entity that proposes to generate nonpoint source nutrient credits], the location of the nutrient credit-generating project, and a description of the practices utilized. [The public notification shall also include the name and contact information for a department staff person.]

~~D.~~ 3. Technical ~~review~~ evaluation. Once the application ~~is deemed administratively complete~~ contains all the required elements, the department shall perform a technical ~~review~~ evaluation of the application. As part of the ~~technical review~~ evaluation, additional information may be required and the [~~nutrient credit-generating entity project and management area may be visited~~ department shall, if warranted, perform a site visit of the proposed nutrient credit-generating project]. Additionally, ~~if~~ the department ~~chooses,~~ may convene a certification advisory committee ~~may be convened~~ to provide input regarding the review of an application such as those which incorporate the use of innovative practices by the nutrient credit-generating project. Within ~~90~~ 120 days of the ~~receipt of an administratively complete application~~ department's notification that the application will be evaluated, the department shall notify the applicant of the status of the ~~technical review~~ evaluation of the application and, for innovative practices, provide a projected processing timeline for the application.

~~E. Technical completeness~~ 4. Completeness. The nutrient credits shall not be certified until the application is ~~administratively and technically~~ complete; however, a determination that an application is complete shall not require the department to issue the nutrient credit certification.

a. An application for nutrient credit certification is ~~technically~~ complete when the department receives an application in accordance with subsection A of this section, and the application~~,~~ and any supplemental information fulfills the application requirements to the department's satisfaction.

~~F.~~ b. For applications for certification of nutrient credits generated from innovative practices, a second public notification shall be provided after the application is complete and prior to the issuance of the nutrient credit certification. The department shall post on its website a public notification of its intent to issue a nutrient credit certification, and the notification shall include the name of the applicant, the location of the nutrient credit-generating project, a description of the innovative practice, and the proposed quantity of term nutrient credits to be certified. [The public notification shall also include the name and contact information for a department staff person.]

5. Nutrient credit certification. ~~The department shall notify the applicant of approval of the nutrient credit certification and provide any applicable conditions required for credit certification including retirement and release of credits in accordance with 9VAC25-900-90, or the department shall notify the applicant that the nutrient credit-generating~~

~~entity does not qualify for any certified credits pursuant to the requirements of this part.~~ Once the application is deemed complete, the department shall either (i) deny the application and notify the applicant that the nutrient credit-generating project does not qualify for any certified credits pursuant to the requirements of this chapter or (ii) approve the application by issuance of a nutrient credit certification and provide any applicable conditions including the schedule of release and retirement of nutrient credits in accordance with 9VAC25-900-90.

C. Applications for nutrient credit certification based on nutrient reductions solely from land conversion practices shall be processed in accordance with this subsection.

1. Application review. Within 30 days of receipt of an application, the department shall, if warranted, conduct a site visit. Within 45 days of receipt of an application, the department shall either determine that the application is complete or request additional specific information from the applicant. A determination that an application for a land conversion project is complete shall not require the department to issue a nutrient credit certification.

2. Public notification. After receipt of the application, the department shall post a public notification of the proposed nutrient credit-generating project on its website. The public notification shall include the name of the [~~applicant~~ nutrient credit generating entity that proposes to generate nonpoint source nutrient credits], the location of the nutrient credit-generating project, and a description of the land conversion practice. [The notification shall also include the name and contact information for the department staff person.]

3. Nutrient credit certification. Within 15 days of the department's determination that the application is complete pursuant to subdivision 1 of this subsection, the department shall either (i) deny the application and notify the applicant that the nutrient credit-generating project does not qualify for any certified credits pursuant to the requirements of this chapter or (ii) approve the application by issuance of a nutrient credit certification and provide any applicable conditions including the schedule of release and retirement of nutrient credits in accordance with 9VAC25-900-90.

9VAC25-900-90. Nutrient credit release and registration.

A. Retirement of credits.

1. Pursuant to the requirements of § 62.1-44.19:20 of the Act, 5.0% of the total credits certified will be retired by the department at the time of nutrient credit certification and will not be placed on the registry for exchange.

2. When phosphorus credits are acquired ~~for compliance with 9VAC25-870,~~ in accordance with 9VAC25-870-69, the associated nitrogen credits generated by the nutrient credit-generating ~~entity~~ project will be retired and removed from the registry by the department.

3. When nitrogen credits are ~~exchanged~~ acquired for purposes other than compliance with ~~9VAC25-870~~ 9VAC25-870-69, the associated phosphorus credits generated by the ~~nutrient credit entity~~ nutrient credit-generating project shall not be available for compliance under ~~9VAC25-870~~ 9VAC25-870-69.

4. Except as limited by this subsection, associated nitrogen and phosphorus credits generated by a nutrient credit-generating project may be exchanged independently.

B. Schedule of release of nutrient credits. The department shall establish a schedule for release of credits as follows:

1. For nutrient credit-generating ~~entities~~ projects using land use conversion, 25% of the credits will be released by the department after the department has verified completion of the conditions of the nutrient credit certification. [For afforestation projects, an additional 25% of credits will be released by the department after the site has been planted with a minimum of 400 woody stems per acre.] The remaining [~~75%~~ balance] of credits will be released by the department after it is satisfied that the implementation plan's performance criteria required pursuant to 9VAC25-900-120 has been achieved. When a request for credit release is made concurrently with the application for nutrient credit certification from land conversion practices, the concurrent 25% initial release [, and additional 25% release if planting has occurred,] shall be processed on the same timeline as the application as provided in 9VAC25-900-80 C. When the request for credit release is from a previously approved land conversion project, the department shall schedule a site visit, if warranted, within 30 days of the request and shall deny, approve, or approve with conditions the release of the remaining 75% of the nutrient credits within 15 days of the site visit or determination that a site visit is not warranted.

2. For nutrient credit-generating projects using wetland or stream restoration, after construction 25% of the credits may be released by the department after the department has verified completion of the conditions of the nutrient credit certification. Every monitoring year thereafter, 25% of the credits may be released if all performance standards are met, the area or channel is stable, and, for streams, evidence is presented that a bankfull event occurred within the monitoring year. For streams, if a bankfull event did not occur, but performance standards are met and the channel is stable, 10% of the credits may be released. No additional credits will be released after the fourth monitoring year until a bankfull event has occurred. After the fourth monitoring year, if a bankfull event occurs, the channel is stable, and all performance standards are met, 25% of the credits may be released that monitoring year, not to exceed the remaining credits available. The schedule

for release of credits shall also require, prior to the release of credits, the approval of any required financial assurance mechanism established pursuant to Part VI (9VAC25-900-230 et seq.) of this chapter.

3. For nutrient credit-generating ~~entities~~ projects using practices other than land use conversion or wetland or stream restoration, the schedule for release of credits will be determined by the department on a case-by-case basis and provided to the applicant with the nutrient credit certification. For ~~entities~~ projects using structural BMPs, the schedule shall also require, prior to release of credits, the approval of ~~the~~ any required financial assurance mechanism established pursuant to Part VI (9VAC25-900-230 et seq.) of this chapter.

C. Registration of nutrient credits. Credits will be placed on the registry and classified as term or perpetual credits by the department. The registry will also indicate the number of credits that have been released for exchange. Only credits released by the department are available for exchange. [~~Exchange of a credit released by the department is:~~

~~1. Subject to the provisions of § 62.1-44.15:35, 62.1-44.19:15, or 62.1-44.19:21 of the Code of Virginia; and~~

~~2. Where necessary to ensure compliance with local water quality requirements, conditioned as follows:~~

~~a. Within the Chesapeake Bay Watershed, the exchange of credits within an area subject to an approved local TMDL for total phosphorus or total nitrogen with allocations more stringent than the Chesapeake Bay Watershed TMDL shall be limited to those credits generated upstream of where the discharge reaches impaired waters~~] ~~and within the approved local TMDL watershed~~ [~~.~~

~~b. Within the Southern Rivers watersheds, the exchange of credits within an area subject to an approved local TMDL for total phosphorus or total nitrogen shall be limited to those credits generated upstream of where the discharge reaches impaired waters~~] ~~and within the approved local TMDL watershed~~ [~~.~~

~~c. Within an area with waters impaired for dissolved oxygen, benthic community, or nutrients but with no approved local TMDL, the exchange of credits shall be limited to those credits generated in accordance with the following hierarchy:~~

~~(1) Upstream of where the discharge reaches impaired waters, if credits are available;~~

~~(2) Within the same 12-digit HUC, if credits are available;~~

~~(3) Within the same 10-digit HUC, if credits are available;~~

~~(4) Within the same 8-digit HUC, if credits are available;~~

~~(5) Within an adjacent 8-digit HUC within the same tributary, if credits are available; or~~

~~(6) Within the same tributary.~~

~~The hierarchy of this subdivision shall not apply should it be demonstrated to the department's satisfaction that (i) the water quality impairment is not likely caused by nutrients; (ii) the use of credits would not reasonably be considered to cause or contribute to the impairment; or (iii) the department determines through issuance of a VPDES permit that local water quality cannot be protected unless exchange of credits are restricted to upstream of where the discharge reaches impaired waters.~~

9VAC25-900-91. (Reserved.)]

EDITOR'S NOTE: This section is reserved because the State Water Control Board deferred submittal of the provisions of 9VAC25-900-91 for final publication until such time as (i) the Department of Environmental Quality receives approval of the provisions of 9VAC25-900-91 pursuant to Executive Order No. 14 (2018) and (ii) the date the board-required guidance is submitted for publication, pursuant to § 2.2-4002.1 of the Code of Virginia, or September 1, 2020, whichever is earlier. DEQ received approval on May 26, 2020, for the provisions of 9VAC25-900-91 pursuant to Executive Order No. 14 (2018) and will be submitting 9VAC25-900-91 for publication by September 1, 2020.

The revised proposed regulatory text showing as bracketed and stricken in subsection C of 9VAC25-900-90 was moved to 9VAC25-900-91 and amended to include Chlorophyll-a in the list of impairment types for the local water quality requirements.

9VAC25-900-100. Establishing baseline.

A. Practices for establishing baseline must be in place prior to the generation of any credits by a nutrient credit-generating ~~entity~~ project except in the case of land use conversion as described in subsection E of this section. The practices for establishing baselines, as provided in this section, shall be implemented and properly maintained for each type of operation within the management area. Baselines are applicable statewide for nutrient credit-generating ~~entities~~ projects including those located in either the Chesapeake Bay Watershed or the Southern Rivers watersheds. [~~Baselines~~ Baseline] practices are, at a minimum, in accordance with the requirements of the WIP or an approved TMDL, whichever is more stringent.

B. ~~Agricultural cropland~~ Cropland, hayland, and pastures. ~~The baseline for agricultural management areas are those practices implemented to achieve a level of reduction assigned in the WIP or an approved TMDL.~~ Baselines for cropland, hayland, or pastures within the management area

shall be established in accordance with ~~either~~ subdivision 1, 2, or 3 of this subsection.

1. The owner holds a valid Certificate of Resource Management Plan Implementation for the management area that has been issued pursuant to the Resource Management Plans regulation (4VAC50-70).

2. If the owner does not hold a valid Certificate of Resource Management Plan Implementation for the management area, ~~he~~ the owner shall implement the following practices for establishing baseline:

a. Soil conservation. Soil conservation practices for the management area shall be implemented and maintained to achieve a maximum soil loss rate not to exceed "T" and to address gross erosion when it is present as gullies or other severely eroding conditions.

b. Nutrient management. Implementation and maintenance of the nutrient management practices required by the nutrient management plan written by a certified nutrient management planner pursuant to the Nutrient Management Training and Certification Regulations (4VAC50-85).

c. Riparian buffer. A woodland or grass riparian buffer shall be installed and maintained around all water bodies with perennial flow within the management area and shall be installed and maintained along all water bodies with perennial flow bordering the management area. The riparian buffer shall be a minimum width of 35 feet as measured from the top of the channel bank to the edge of the cropland, hayland, or pasture and in accordance with DCR Specifications for NO. FR-3 or DCR Specifications for NO. WQ-1 contained in the VACS BMP Manual.

d. Cover crop. For croplands, cover crops shall be planted to meet the standard planting date and other specifications in accordance with DCR Specifications for NO. SL-8B contained in the VACS BMP Manual. This requirement applies to all croplands where summer annual crops are grown and the summer annual crop receives greater than a total of 50 pounds per acre of nitrogen application from any nutrient source; however, if the cropland is planted to winter cereal crops for harvest in the spring, then cover crops do not need to be planted on these croplands during that production year.

e. Livestock water body exclusion. For pastures or when livestock are present within the management area, livestock exclusion fencing shall be placed around perennial streams, rivers, lakes, ponds, or other water bodies having perennial flow. This exclusionary fencing shall be constructed in accordance with DCR Specification NO. [~~WP-2~~ WP-2W] contained in the VACS BMP Manual in order to restrict livestock access to the water body. Livestock shall be provided with an alternative watering source. The livestock exclusion fencing shall be placed at least 35 feet from the top of the channel bank and this exclusion zone shall contain the riparian buffer required by subdivision 2 c of this subsection. Access points for livestock watering or crossing over a water body shall be a hardened surface constructed to DCR Specifications for NO. [~~WP-2~~ WP-2W] contained in the VACS BMP Manual and shall be fenced to limit livestock access to the water body at the crossing point. Ponds that have been specifically built for the purpose of livestock watering and that do not have perennial flow through an overflow pipe or spillway are not required to meet the provisions of this subdivision 2 e.

3. The department may approve a load-based baseline determination equivalent to full implementation of the practices identified in subdivision 2 of this subsection.

C. Agricultural animal feeding operations. Baselines for agricultural animal feeding operations within the management area shall be established in accordance with either subdivision 1 or 2 of this subsection:

1. The animal feeding operation ~~within the management area has~~ is in compliance with a valid VPDES or VPA permit in compliance with the board's regulations.

2. For animal feeding operations excluded from or not required to hold a VPDES or VPA permit under the board's regulations, the practices for establishing baseline shall be implemented and properly maintained as required in this subdivision 2.

a. Implementation and maintenance of the nutrient management practices required by the nutrient management plan written by a certified nutrient management planner pursuant to the Nutrient Management Training and Certification Regulations (4VAC50-85).

b. For animal feeding operations, except confined poultry operations, a storage facility designed and operated to prevent point source discharges of pollutants to state waters except in the case of a storm event greater than a 25-year/24-hour storm and to provide adequate waste storage capacity to accommodate periods when the ground is frozen or saturated, periods when land application of nutrients should not occur due to limited or nonexistent crop nutrient uptake, and periods when physical limitations prohibit the land application of waste shall be implemented and maintained.

c. For confined poultry operations, storage of poultry waste according to the nutrient management plan and in a manner that prevents contact with surface water and groundwater. Poultry waste that is stockpiled outside of the growing house for more than 14 days shall be kept in a facility or at a location that provides adequate storage.

Adequate storage management practices shall meet the following minimum requirements:

(1) The poultry waste shall be covered to protect it from precipitation and wind.

(2) Stormwater shall not run onto or under the area where the poultry waste is stored.

(3) The ground surface of the poultry waste storage area shall have a minimum of two feet separation distance to the seasonal high water table. If poultry waste is stored in an area where the seasonal high groundwater table lies within two feet of the ground surface, the storage area shall be underlain by a low-permeability, hard-surfaced barrier such as concrete or asphalt.

(4) For poultry waste that is not stored inside or under a roofed structure, the storage area must be at least 100 feet from any surface water, intermittent drainage, wells, sinkholes, rock outcrops, and springs.

D. Urban practices. ~~Baselines for urban development are applicable to the entire management area.~~ Achievement of baseline for new development, redevelopment, or retrofits to existing development shall be required prior to generation of credits. These baselines are:

1. For new development and redevelopment, baseline shall be achieved through compliance with the post-construction water quality design criteria requirements of the Virginia Stormwater Management Program (VSMP) Regulation under 9VAC25-870-63. Additionally, for development in a locality with a local stormwater management design criteria more stringent than 9VAC25-870-63, baselines shall be achieved through compliance with the local stormwater management ordinance.

2. For retrofits within the Chesapeake Bay Watershed, baseline shall be at a level necessary to achieve the nutrient reduction assigned in the urban sector of the WIP or the approved local TMDL, whichever is more stringent.

3. For retrofits within the Southern Rivers watersheds and within a watershed with an approved TMDL with total phosphorus or total nitrogen allocations, baselines shall be at a level necessary to achieve reductions of the approved TMDL. For all other retrofits within the Southern Rivers watersheds, baseline shall be achieved through compliance with the post-construction water quality design criteria requirements for development on prior developed lands pursuant to 9VAC25-870-63 A 2.

4. [~~For~~ No credits may be certified for] a nutrient credit-generating project owned by an MS4 permittee [~~, baseline shall only be achieved when~~ and located within the permittee's MS4 service area until] the level of nutrient reduction required by the WIP or approved TMDL, whichever is more stringent, is achieved for the entire MS4 service area. MS4 permittees generating credits for exchange [~~outside the MS4 service area~~] shall have an accounting system demonstrating that the exchanged credits are not used to satisfy the MS4 permit requirements.

E. Land use conversions. Baselines for land use conversion shall be established using the preconversion land use. The preconversion land use shall be based on the land use as of (i) July 1, 2005, for a nutrient credit-generating ~~entity~~ project located within the Chesapeake Bay Watershed; (ii) the date of the approved TMDL for a nutrient credit-generating ~~entity~~ project located within a TMDL watershed but not within the Chesapeake Bay Watershed; or (iii) July, 1, 2009, for a nutrient credit-generating ~~entity~~ project not within an approved TMDL watershed or the Chesapeake Bay Watershed.

F. Stream or wetland restoration. Baseline for stream restoration shall be established using the pre-restoration condition of the stream. Baseline for wetland restoration shall be established on a case-by-case basis, depending on the current land use of the proposed wetland restoration area.

G. Other nutrient credit-generating ~~entities~~ projects. The department shall establish baselines for other nutrient credit-generating ~~entities~~ projects not otherwise regulated by subsections B through ~~E~~ F of this section. The practices necessary for establishing baseline at these other nutrient credit-generating ~~entities~~ projects shall be in accordance with the requirements of the WIP or the approved TMDL and shall utilize the best available scientific and technical information regarding the practices.

9VAC25-900-110. Credit calculation procedures.

A. Pursuant to this section, the applicant shall calculate the potential nutrient credits generated by the practices implemented at the nutrient credit-generating ~~entity~~ [~~project~~ projects]. The applicable delivery factors, dependent upon the tributary in which the nutrient credit-generating ~~entity~~ project is located, shall be applied when calculating the potential credits generated.

B. For agricultural practices, except land use conversion, the potential nutrient credits shall be calculated using removal efficiencies for practices approved by the department. In the Chesapeake Bay Watershed, these practices shall be approved by the department based on the efficiencies assigned by the Chesapeake Bay Program. In the Southern Rivers watersheds, these practices shall be approved by the department based on submitted calculations and demonstrations. The standards and specifications for implementation of the practices will be established by the department and shall be in accordance with the VACS BMP Manual or the FOTG, as applicable.

C. For urban practices, the potential nutrient credits shall be calculated using the applicable removal efficiencies pursuant to 9VAC25-870-65 or using the best available scientific and technical information available at the time of nutrient credit

certification as approved by the department. Limitations on potential nutrient credits from certain BMPs are:

1. In the Chesapeake Bay Watershed, nutrient load reductions from practices in place prior to July 1, 2005, may not be used to generate credits. Removal efficiencies shall be based upon those efficiencies approved by the Chesapeake Bay Program partnership where applicable. These efficiencies shall be reviewed at the time of certification renewal and adjusted as necessary based upon changes made by the Chesapeake Bay Program Partnership.

2. In the Southern Rivers watersheds, nutrient load reductions from practices in place prior to July 1, 2009, may not be used to generate credits.

D. For land use conversions, conversion of land to a more intensive land use activity will not generate nutrient credits. The number of potential nutrient credits shall be determined by calculating the nutrient credits per acre and multiplying that number by the total acreage that will undergo land use conversion. The nutrient credits per acre is equal to the amount calculated by subtracting the load per acre of nutrient nonpoint source pollution for the proposed land use after conversion from the load per acre for the preconversion land use. The values used for the loadings per acre in this calculation shall be based on the applicable loading levels provided in the WIP or the approved TMDL, where applicable. The preconversion land use shall be based on the land use as of the date specified in 9VAC25-900-100 E. The load per acre for the preconversion land use shall reflect the implementation of any applicable baseline practices necessary to comply with 9VAC25-900-100 B, C, and D. No credits shall be generated from the conversion of land within 35 feet of a water body with perennial water flow as measured from the top of the channel bank.

E. For wetland or stream restoration, an existing conditions assessment survey will be completed prior to restoration activities to use as a pre-restoration condition (baseline pursuant to of 9VAC25-900-100 F) and will be used for comparison to post-restoration conditions. The potential number of credits shall be determined by applying protocols or guidance on a case-by-case basis using the best available scientific and technical information, as approved by the department.

F. For a practice not previously approved by the department, the department will perform a case-by-case review in order to calculate the number of potential nutrient credits generated. The owner shall submit the removal efficiency calculation information for the practice and the calculation of the potential number of credits generated using that efficiency. The department may also request that the submittal include requirements for demonstration projects, the collection of sufficient data to evaluate the results, and any other information the department deems necessary to determine the validity of the credits. In the Chesapeake Bay Watershed, for a practice not approved by the Chesapeake Bay Program Partnership, the department will perform a case-by-case review in order to calculate the number of potential nutrient credits generated on a term basis.

9VAC25-900-120. Implementation plan.

A. The implementation plan submitted pursuant to 9VAC25-900-80 shall provide information detailing how the nutrient credit-generating ~~entity~~ project will generate credits for the term of the credits. The implementation plan will include the applicable information as required in subsections B through ~~I~~ J of this section.

B. For all nutrient credit-generating ~~entities~~ projects, the implementation plan shall include:

1. An operation and maintenance plan that provides a description and schedule of operation and maintenance requirements and detailed written specifications and process diagrams for the practices used at the nutrient credit-generating ~~entity~~ project. The plan must be adhered to for the term of the credits and shall include a description of site management activities to be performed after meeting all performance standards to ensure long-term sustainability of the site.

2. The performance standards that shall be used to evaluate whether the nutrient credit-generating ~~entity~~ project is generating credits as calculated in 9VAC25-900-110.

3. Applicable requirements for the project required pursuant to Part IV (9VAC25-900-140 et seq.) of this chapter.

C. For nutrient credit-generating ~~entities~~ projects utilizing managed afforestation land use conversion, the implementation plan shall also include:

1. A project plan submitted in the form required by the department and prepared by a person trained in (i) forestry management, (ii) nutrient management, or (iii) other applicable land management training that includes an understanding of whole land management planning. The project plan shall include~~, but is not limited to~~ (i) methods for invasive plant species control and eradication if woody invasive plant species impacts 5.0% or more of the nutrient credit-generating ~~entity's~~ project's acreage; (ii) a requirement that any harvesting of timber shall adhere to best management practices as set forth by ~~DOF's~~ Department of Forestry's Water Quality Guide and any other applicable local, state, or federal laws or requirements; (iii) the land management goals; (iv) a statement that no fertilizer is to be used on the nutrient credit-generating ~~entity's~~ project's land conversion acreage for the term of the credit generated; (v) a planting plan to include size, species, and spacing of trees; and (vi) any planting phases planned for the project if the area will not

be planted all at one time, but will be planted in different phases. Additionally, if timbering is planned within the land conversion area, a copy of the timbering plan shall be submitted to the department at least 90 days prior to the occurrence of any land disturbance or timbering.

2. Provisions for planting forests to achieve an initial survival density of a minimum of 400 deciduous tree or evergreen tree woody stems per acre including any noninvasive volunteers. Survival of planted deciduous trees shall not be established until the start of the second complete growing season following planting. Survival of planted evergreen trees may be established after completion of the first complete growing season following planting. [Survival of mixed specie plantings with a minimum of 200 evergreen trees per acre may be established after completion of the first complete growing season following planting.]

3. A description of agricultural baseline requirements implemented in accordance with 9VAC50-900-100 B and C that apply to any remaining portions of the management area that are not undergoing land use conversion.

4. Performance standards and reporting procedures demonstrating ongoing compliance with the baseline requirements of 9VAC25-900-100 B and C.

D. For nutrient credit-generating ~~entities~~ projects utilizing natural succession land use conversion, the implementation plan shall also include provisions for:

1. Forests to achieve an initial density of a minimum of 400 noninvasive woody stems per acre.

2. Invasive plant species control and eradication if woody invasive plant species impacts 5.0% or more of the nutrient credit-generating ~~entity's~~ project's acreage.

3. A description of agricultural baseline requirements implemented in accordance with 9VAC25-900-100 B and C that apply to any remaining portions of the management area not undergoing land use conversion.

4. Performance standards for demonstrating ongoing compliance with the agricultural baseline requirements of 9VAC25-900-100 B and C.

E. For nutrient credit-generating ~~entities~~ projects utilizing other land use conversion not subject to either subsection C, D, or G of this section, the implementation plan shall also include:

1. Description of the land use conversion project and its implementation and maintenance criteria.

2. Description of the applicable baseline practices implemented in accordance with 9VAC25-900-100 for the management area including the nutrient credit-generating ~~entity~~ project.

3. Performance standards and reporting procedures demonstrating ongoing compliance with the baseline practices requirements of 9VAC25-900-100.

F. For nutrient credit-generating ~~entities~~ projects utilizing non-land use conversion agricultural practices, the implementation plan shall also include:

1. A description of the entire management area. This description shall include (i) the acreage and use including descriptions for the proposed practices of the nutrient credit-generating ~~entity~~ project and baseline area ~~or areas~~; (ii) water features including all streams, ponds, lakes, and wetlands; (iii) environmentally sensitive sites as defined in 4VAC50-85-10; (iv) areas with highly erodible soils; and (v) the current agricultural operations, crops, or animal facilities.

2. Copies of the current nutrient management plans developed by a certified nutrient management planner and approved by the department and any soil conservation plans completed by a certified conservation planner.

3. Information on the location and status of all existing and proposed BMPs including implementation schedules, lifespan, and maintenance procedures for each BMP that constitutes the baseline requirements.

G. For nutrient credit-generating ~~entities~~ projects utilizing ~~existing~~ approved wetland and stream mitigation projects pursuant to § 62.1-44.15:23 of the Code of Virginia, the implementation plan shall also include:

1. A copy of the approved mitigation banking instrument.

2. A plan view map clearly delineating and labeling areas to be considered for credit conversion.

3. A spreadsheet or table listing each labeled area. For each labeled area, the table shall include:

a. The type of eligible land use conversion or restoration practice;

b. The acreage or linear feet of the area;

c. The available mitigation credits;

d. The potential nutrient credits; and

e. The ratio of mitigation credits to nutrient credits.

4. Documentation that complies with the department-approved procedure to ensure credits are not used for both wetland or stream credit and nutrient credit purposes. ~~This documentation shall include the approval by the mitigation banking Interagency Review Team.~~

5. Documentation shall include written approval from the Interagency Review Team, which oversees stream and wetland mitigation projects pursuant to 33 CFR 332.8 and § 62.1-44.15:23 of the Code of Virginia, to establish a

nutrient credit generating site within an approved mitigation bank.

H. For nutrient credit-generating projects utilizing proposed new wetland or stream restoration projects not subject to 33 CFR 332.8 and § 62.1-44.15:23 of the Code of Virginia, the implementation plan shall also include, where appropriate to the type of restoration and project:

1. Certification that the owner will obtain all appropriate permits or other authorizations needed to construct and maintain the restoration activities, prior to initiating work in state waters.

2. An initial wetland restoration plan, which shall include the following:

a. The goals and objectives in terms of proposed nutrient reductions and restoration activities;

b. A detailed location map (e.g., a U.S. Geologic Survey topographic quadrangle map) including latitude and longitude to the nearest second and the hydrologic unit code (HUC) at the center of the site;

c. A description of the surrounding land use;

d. A hydrologic analysis, including a draft water budget based on expected monthly inputs and outputs that will project water level elevations for a typical year, a dry year, and a wet year;

e. The groundwater elevation data or, if not available, the proposed location of groundwater monitoring wells to collect this data;

f. Wetland delineation confirmation and data sheets and maps for existing surface water areas on the proposed site;

g. A preliminary grading plan;

h. A preliminary wetland planting scheme, including suggested plant species and zonation of each vegetation type proposed;

i. Descriptions of existing soils, including general information on topsoil and subsoil conditions, permeability, and the need for soil amendments;

j. A preliminary design of any water control systems or structures for wetland restoration or establishment;

k. Depiction of any land conversion or other buffer areas associated with the nutrient credit-generating entity;

l. A description of any structures or features necessary for the success of the site; and

m. A preliminary schedule for site construction.

3. An initial stream restoration plan, which shall include the following:

a. The goals and objectives in terms of proposed nutrient reductions and restoration activities;

b. A detailed location map (e.g., a U.S. Geologic Survey topographic quadrangle map), including the latitude and longitude (to the nearest second) and the hydrologic unit code (HUC) at the center of the site;

c. A description of the surrounding land use;

d. The preliminary proposed stream segment restoration locations, including plan view, profile, and cross-section sketches;

e. The existing stream deficiencies that need to be addressed;

f. The proposed restoration measures to be employed, including channel measurements, proposed design flows, types of instream structures, and conceptual planting scheme for streambank plantings;

g. Reference stream data, if available;

h. Depiction of any land conversion or other buffer areas associated with the nutrient credit-generating project; and,

i. A preliminary schedule for site construction.

4. Prior to construction of the restoration site, the following final plans shall be submitted where appropriate to the type of restoration:

a. The final wetland restoration plan, which shall include all of the items listed in subdivision H 2 of this section and the following:

(1) A summary of the type and acreage of existing stream and wetland impacts anticipated during the construction of the restoration site and the proposed compensation for these impacts;

(2) A site access plan;

(3) An erosion and sediment control plan meeting the requirements of 9VAC25-840;

(4) The final construction schedule; and

(5) A monitoring plan as detailed in subdivision H 4 c of this section.

b. A final stream restoration plan, which shall include the items listed in subdivision H 3 of this section of this section and the following:

(1) A summary of the type and acreage or linear feet of impacts to state waters anticipated during the construction of the restoration site and the proposed compensation for these impacts;

(2) [~~Detailed~~ A detailed] plan view, profile, and cross-section sketches with the location of proposed restoration measures;

(3) A site access plan;

(4) An erosion and sediment control plan meeting the requirements of 9VAC25-840;

(5) [~~Final~~ The final] construction schedule; and

(6) A monitoring plan as detailed in subdivision H 4 c of this section.

c. A monitoring plan, which shall include: (i) monitoring goals; (ii) proposed performance standards; (iii) parameters to be monitored; (iv) methods of monitoring; (v) length of monitoring period; (vi) monitoring and reporting schedule; (vii) reporting requirements; and, (viii) projects responsible for monitoring and reporting.

(1) Performance standards for wetland or stream restoration shall include specific, measureable parameters for determination of performance in comparison to as-built conditions. For wetland restoration, performance standards may include applicable parameters to demonstrate characteristics of wetland formation and stability for the type of wetland restored, including hydrology, soils, vegetation, and stability of any water control structures or berms. For stream restoration, performance standards may include applicable parameters to demonstrate characteristics of channel stability, including dimension, pattern, profile, materials, and stability of the channel and any structures.

(2) Monitoring methods and parameters shall be selected based on type of wetland or stream restoration, the implementation plan, and performance standards of the nutrient credit-generating project, and will be outlined in the monitoring plan. For wetland restoration, the monitoring plan shall include the location and number of photo stations, monitoring wells, vegetation sampling points, other monitoring equipment, and reference wetlands, if available. For stream restoration, the plan shall include the location and number of stations utilized for photo-monitoring, cross-sections, profiles, pattern measurements, streambank stability measurements, streambank vegetation surveys, bank pins, scour chains, stream gages, rain gages, other monitoring equipment, and reference streams, if available.

(3) The monitoring and reporting schedule shall include an as-built survey conducted directly following construction and at least six monitoring and reporting events over a 10-year monitoring period following construction. All monitoring activities shall occur during the growing season, with the exception that after year three, physical monitoring of stream condition (cross-section, profiles, pattern) may be conducted outside the growing season. For any year in which planting was conducted, monitoring of woody vegetation shall take place no earlier than October and at least six months following planting. If all performance standards have not been met in the 10th year, then a monitoring report shall be required for each consecutive year until two sequential annual reports indicate that all performance standards have been successfully satisfied. The extent of monitoring may be reduced, upon approval by the department, on a case-by-case basis, in response to exceptional attainment of performance standards. Submittal of a final monitoring report, typically prepared the 10th growing season following construction completion, shall be required as a baseline for long-term management.

5. A long-term management plan, which shall include:

a. Restoration projects shall include minimization of active engineering features (e.g., pumps) that require long-term management and appropriate site selection to ensure that natural hydrology and landscape context will support long-term sustainability;

b. Long-term management and maintenance shall include basic management as necessary to ensure long-term sustainability of the nutrient credit-generating project such as long-term repair or replacement, maintenance of water control or other structures, or easement enforcement;

c. The owner shall designate a responsible long-term steward in the plan. The owner of the nutrient credit-generating project is the default long-term steward and is responsible for implementing the long term management plan and management of the financial assurance. However, the owner may transfer the long-term management responsibilities and management of the long-term financial assurance to a long-term steward or land stewardship project, such as a public agency, nongovernmental organization, or private land manager, upon review and approval by the department [~~.~~ :]

d. Long-term management needs, annual cost estimates for these needs, and identifying the funding mechanism that will be used to meet these needs shall be included.

~~H.~~ I. For nutrient credit-generating ~~entities~~ projects utilizing urban practices, the implementation plan shall also include:

1. A description of the contributing drainage area (CDA) for the proposed nutrient credit-generating ~~entity's~~ project's BMP. This description shall include (i) the acreage and land covers (e.g., impervious, forest or open space, managed turf); (ii) water features including all streams, ponds, lakes, and wetlands; (iii) identification of all impaired waters and approved TMDLs; and (iv) ~~identification/mapping~~ identification or mapping of the soil types within the CDA, by USDA hydrological soil group.

2. A list of all of the current urban nutrient management plans developed by a certified nutrient management planner and being implemented within the CDA.

3. Information on the location and description of existing BMPs within the CDA. For BMPs that constitute the baseline requirements include implementation schedules, lifespan, and maintenance procedures.

4. For development and redevelopment projects, the implementation plan shall include the erosion and sediment control plan and the stormwater management plan developed in accordance 9VAC25-870.

5. For retrofits, the implementation plan shall include relevant credit calculations and documentation as deemed appropriate by the department.

~~I.~~ J. For other types of activities or projects not presented in subsections C through ~~H~~ I of this section, the implementation plan shall include information as deemed appropriate by the department in order to evaluate the credits for nutrient credit certification.

9VAC25-900-130. Signature requirements.

A. All applications for certification of nutrient credits shall be signed as follows:

1. For a corporation, the application shall be signed by a responsible corporate officer. For the purpose of this section, a responsible corporate officer means a president, secretary, treasurer, or vice-president of the corporation in charge of a principal business function or any other person who performs similar policy-making or decision-making functions for the corporation or the manager of the nutrient credit-generating ~~entity~~ project provided the manager is authorized to make management decisions that govern the operation of the ~~entity~~ project;

2. For a partnership or sole proprietorship, the application shall be signed by a general partner or the proprietor, respectively; or

3. For a municipality, state, federal, or other public agency, the application shall be signed by either a principal executive officer or ranking elected official. For purposes of this section, a principal executive officer of a federal agency includes the chief executive officer of the agency or a senior executive officer having responsibility for the overall operations of a principal geographic unit of the agency.

B. All reports required by this chapter and other information requested by the department shall be signed by a person described in subsection A of this section or by a duly authorized representative of that person. A person is a duly authorized representative only if:

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

2. The authorization specifies either an individual or a position having responsibility for the overall operation of the ~~entity~~ project; and

3. The written authorization is submitted to the department.

C. If an authorization under subsection B of this section is no longer accurate because a different individual or position has responsibility for the overall operation of the ~~entity~~ project, a new authorization satisfying the requirements of subsection B of this section shall be submitted to the department prior to or together with any reports or information to be signed by an authorized representative.

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

Part IV
Compliance and Enforcement

9VAC25-900-140. Inspections and information to be furnished.

A. The owner of the nutrient credit-generating entity project shall allow the director or an authorized representative, including an authorized contractor acting as a representative of the department, upon presentation of credentials, to:

1. Enter the management area including the premises where the nutrient credit-generating entity project is located and where records are kept in accordance with this chapter or the nutrient credit certification. Records to be retained include the approved implementation plan, operations and maintenance plan, and, if required, confirmation of financial assurance documents.

2. Have access to and copy, at reasonable times, any records that must be kept under the conditions of this chapter, the approved plans listed in subdivision A 1 of this section, or as otherwise required by the nutrient credit certification. The owner will make available any records requested by the department that detail nutrient credit-generating entity project operations, status, records of transactions, or other actions that demonstrate the status of credits and operations of the nutrient credit-generating entity project including records required to be kept under

any implementation plan, operations and maintenance plan, or financial assurance documents;

3. Inspect at reasonable times any entities projects, equipment, practices, or operations regulated or required under the provisions of this chapter, the approved plans listed in subdivision A 1 of this section, or as otherwise required by the nutrient credit certification; and

4. Sample or monitor at reasonable times, for the purposes of assuring compliance with the provisions of this chapter, the nutrient credit certification, or as otherwise authorized by state law or regulation.

B. For purposes of this section, the time for inspection shall be deemed reasonable during regular business hours. Nothing in this section shall make an inspection unreasonable during an emergency when applicable.

C. The owner of the nutrient credit-generating entity project shall furnish to the department, within a reasonable time, any information that the department may request to determine (i) whether cause exists for suspension of nutrient credit exchange, modifying, revoking and recertifying, or terminating nutrient credit certification or (ii) compliance with the provisions of this chapter or the implementation plan, operations and maintenance plan, or financial assurance approved under this chapter. The department may require the owner of the nutrient credit-generating entity project to furnish, upon request, such plans, specifications, and other pertinent information as may be necessary to determine the effect of the operation of the nutrient credit-generating entity project on the quality of state waters, or such other information as may be necessary to accomplish the purposes of the law. The owner of the nutrient credit-generating entity project shall also furnish to the department, upon request, copies of records required to be kept under the provisions of this chapter or the nutrient credit certification including the approved implementation plan, operations and maintenance plan, or proof of financial assurance records.

9VAC25-900-150. Recordkeeping and reporting.

A. The owner of the nutrient credit-generating ~~entity~~ project shall maintain all records relevant to the management, operations, and maintenance of the nutrient credit-generating ~~entity~~ project, including copies of all reports required by this chapter, the nutrient credit certification or the implementation plan, operations and maintenance plan, or financial assurance approved under this chapter. Records of all data used to complete the application for certification of nutrient credits shall be kept. All records shall be maintained for at least five years following the final exchange of any credits. This period of retention shall be extended automatically during the course of any unresolved litigation regarding the regulated activity or regarding control standards applicable to the owner of the nutrient credit-generating ~~entity~~ project, or as requested by the board.

B. All applications, reports, or information submitted to the department shall be signed and certified as required by 9VAC25-900-130.

C. Reporting requirements.

1. The owner of the nutrient credit-generating ~~entity~~ project shall give advance notice to the department as soon as possible of any planned physical alterations or additions to the ~~entity~~ project when the alteration or addition could change the amount of nutrient reductions generated.

2. The owner of the nutrient credit-generating ~~entity~~ project shall give advance notice to the department of any planned changes in the ~~entity~~ project that may result in noncompliance with the Act, this chapter, or the nutrient credit certification.

3. Reports of compliance or noncompliance with~~,~~ or any progress reports on achieving conditions specified in the nutrient credit certification shall be submitted no later than 14 days following each schedule date.

4. Where the owner of the nutrient credit-generating ~~entity~~ project becomes aware that incorrect information has been submitted in an application for nutrient credit certification or in any report to the department, the owner shall promptly submit the corrected information.

5. Each owner shall submit an annual report on the status of the nutrient credit-generating ~~entity~~ project operations including credit-generating practices, confirmation of the continued implementation and maintenance of practices required to establish baseline in accordance with 9VAC25-900-100, statement of financial assurances, and an up-to-date credit ledger detailing credits available for exchange, credits exchanged, and associated purchaser information. This report shall contain recent photographs of any structural BMPs implemented to achieve baseline or for nutrient credit generation ~~and it shall cover the period from July 1 through June 30 of each year~~. The report shall cover the period from July 1 through June 30 of each year and be submitted annually by August 15 unless an alternative reporting period and submittal date are provided for in the nutrient credit certification.

6. In addition to the annual report detailed in subdivision 5 of this subsection, nutrient credit-generating projects utilizing wetland or stream restoration shall conduct post-construction monitoring and submit monitoring reports, according to the monitoring plan approved as part of the implementation plan pursuant to 9VAC25-900-120.

7. Exchange of credits shall be recorded on the registry. The exchange of credits by the owner of the nutrient credit-generating ~~entity~~ project shall be reported to the department within 14 calendar days of the date of the exchange. This report shall include:

a. The identification for the credits exchanged;

b. The name of and contact information for the buyer;

c. The name of the seller;

d. The amount of credits exchanged; and

e. If applicable, the name of the facility and the associated permit number that shall use the purchased credits.

9VAC25-900-160. Enforcement and penalties.

The board may enforce the provisions of this chapter utilizing all applicable procedures under the State Water Control Law.

9VAC25-900-170. Suspension of credit exchange.

A. If the department tentatively decides to suspend the ability of an owner of a nutrient credit-generating ~~entity~~ project to exchange credits, the department shall issue a notice of its tentative decision to the owner. If the department determines that suspension is appropriate, it will also remove the ability for the owner to show credits for exchange on the registry. The ability to exchange credits shall remain suspended until such time as the owner brings the nutrient credit-generating ~~entity~~ project into compliance with this chapter and the nutrient credit certification to the department's satisfaction.

B. The following are causes for the department to suspend the exchange of credits:

1. Noncompliance by the owner of the nutrient credit-generating ~~entity~~ project with any condition of the nutrient credit certification or any plans approved under or required by the nutrient credit certification or this chapter;

2. Failure of the owner of the nutrient credit-generating ~~entity~~ project to disclose fully all relevant material facts or, the misrepresentation of any relevant material facts in applying for certification of nutrient credits or in any other report or document required under the law, this chapter, the nutrient credit certification, or any plans approved or required under the nutrient credit certification;

3. A change in any condition that results in a temporary or permanent elimination of the best management practices approved as part of the nutrient credit certification; or

4. There exists a material change in the basis on which the nutrient credit certification was issued that requires either a temporary or permanent elimination of activities controlled by the nutrient credit certification necessary to protect human health or the environment; however, credit quantities established using the best available scientific and technical information at the time of certification may not be reduced.

9VAC25-900-180. Nutrient credit certification transfer, modification, revocation and ~~recertification~~ reissuance, or termination.

A. Nutrient credit certifications may be modified, revoked and reissued, or terminated either at the request of the party holding the certification or upon the department's initiative for cause. The filing of a request by the holder of the nutrient credit certification for a modification, revocation and reissuance, or termination of a certification, or a notification of planned changes or anticipated noncompliance with regulatory requirements does not stay any condition of a nutrient credit certification.

B. If the department decides that a request for modification, revocation and reissuance, or termination is not justified, it shall send the requester a brief response giving a reason for the decision.

C. If the department tentatively decides to modify or revoke and reissue a nutrient credit certification, it may request the submission of a new application.

D. If the department tentatively decides to terminate a nutrient credit certification and the owner of the nutrient credit-generating ~~entity~~ project objects, the department shall issue a notice of intent to terminate and shall contemporaneously notify any known buyers of the ~~entity's~~ project's nutrient credits of its intent to terminate.

E. A certification of nutrient credits may be modified, revoked and reissued, or terminated for cause.

1. Causes for modification. The following are causes for modification, revocation, and reissuance of a certification of nutrient credits:

a. There are material and substantial alterations or additions to the nutrient credit-generating ~~entity~~ project that occurred after certification of nutrient credits and that justify the application of conditions that are different or absent in the existing nutrient credit certification.

b. The department has received new technical information that would have justified the application of different conditions at the time of issuance; however, credit quantities established using the best available scientific and technical information at the time of certification may not be reduced.

c. The department determines good cause exists for modification of milestones within the nutrient credit certification.

d. To correct technical mistakes, such as errors in calculation, or mistaken interpretations of law made in determining nutrient credit certification conditions.

e. The department has received notification of a proposed transfer of ownership of the nutrient credit-generating ~~entity~~ project.

2. Causes for termination. The following are causes for terminating a nutrient credit certification during its term or for denying an application for certification of nutrient credits after notice and opportunity for ~~a hearing~~ an informal fact finding proceeding in accordance with § 2.2-4019 of the Administrative Process Act:

a. The owner of the nutrient credit-generating ~~entity~~ project has violated any regulation or order of the board or department, any provision of the law, or any order of a court, where such violation results in a release of harmful substances into the environment or poses a substantial threat of release of harmful substances into the environment or presents a hazard to human health or the violation is representative of a pattern of serious or repeated violations that, in the opinion of the department, demonstrates the owner's disregard for or inability to comply with applicable laws, regulations, or requirements;

b. Noncompliance by the owner of the nutrient credit-generating ~~entity~~ project with any condition of the nutrient credit certification or any plans approved under or required by the nutrient credit certification or this chapter;

c. Failure of the owner of the nutrient credit-generating ~~entity~~ project to disclose fully all relevant material facts or the misrepresentation of any relevant material facts in applying for a certification of nutrient credits or in any other report or document required under the law, this chapter, the nutrient credit certification, or any plans approved or required under the nutrient credit certification;

d. A determination that the credit-generating activity endangers human health or the environment and can only be regulated to acceptable levels by modification or termination of the nutrient credit certification;

e. A change in any condition that results in a permanent elimination of any of the best management practices approved as part of the nutrient credit certification; or

f. There exists a material change in the basis on which the nutrient credit certification was issued that requires either a temporary or a permanent elimination of activities controlled by the nutrient credit certification necessary to protect human health or the environment; however, credit quantities established using the best available scientific and technical information at the time of certification may not be reduced.

g. Failure of the owner of the nutrient credit-generating ~~entity~~ project to operate and maintain the required baseline practices throughout the management area.

F. Except as provided in subsection G of this section, a nutrient credit certification may be transferred to a new owner or operator only if the certification has been modified or revoked and reissued to identify the new owner or operator and incorporate such other requirements as may be necessary under the Act and this chapter.

G. As an alternative to transfers under subsection F of this section, any certification of nutrient credits may be automatically transferred if:

1. The current holder of the certification of nutrient credits notifies the department at least 30 days in advance of the proposed transfer date in subdivision 2 of this subsection;

2. The notice includes a written agreement between the existing and new owners containing a specific date for transfer of responsibility, coverage, and liability for the nutrient credit-generating ~~entity~~ project between them; and

3. If the department does not notify the existing holder of the certification of nutrient credits and the proposed holder of its intent to modify or revoke and reissue the nutrient credit certification within the 30 days of receipt of the holder's notification of transfer, the transfer is effective on the date specified in the agreement mentioned in subdivision 2 of this subsection.

~~H. The department shall follow the applicable procedures in this chapter when terminating any nutrient credit certification, except when the baseline or nutrient reduction practices used at a nutrient credit-generating entity are permanently terminated or eliminated the department may then terminate the nutrient credit certification by notice to the owner of the nutrient credit-generating entity. Termination by notice shall be effective 30 days after notice is sent, unless the owner objects within that time. If the owner objects during that period, the department shall follow the applicable procedures for termination under this section.~~

Part V
Fees

9VAC25-900-190. Purpose and applicability of fees.

A. The purpose of this part is to establish a schedule of fees collected by the department in the support of its programs under this chapter and as permitted under the Act.

B. This part applies to all persons who submit an application for a certification of nutrient credits in accordance with 9VAC25-900-80. The fees shall be assessed in accordance with this part.

9VAC25-900-200. Determination of application fee amount.

A. Each nutrient credit-generating ~~entity~~ project application and each nutrient credit-generating ~~entity~~ project modification application is a separate action and shall be assessed a separate fee. The amount of such fees is determined on the basis of this section.

B. Perpetual nutrient credit certifications.

1. An applicant for certification of perpetual nutrient credits is assessed a base fee as shown in Table 1 of 9VAC25-900-220 A.

2. An applicant is assessed a supplementary fee based on the number of potential nutrient credits of phosphorus generated in addition to the base fee specified in subdivision 1 of this subsection. The supplementary fees are shown in Table 1 of 9VAC25-900-220 A.

3. Modifications of approved perpetual nutrient credit certifications will be assessed the base fee only unless the modifications generate additional perpetual credits then a supplementary fee based on the number of additional potential nutrient credits of phosphorus will be assessed in addition to the base fee as specified in subdivision 2 of this subsection.

4. The total fee (base fee plus supplementary fee) shall not exceed $10,000. If the calculated fee is greater than $10,000 then the applicant shall only pay $10,000.

C. Term nutrient credit certifications.

1. An applicant for certification of term nutrient credits is assessed a base fee plus a supplementary fee based on the number of potential term credits and the requested term of those credits as shown in Table 2 of 9VAC25-900-220 A.

2. A modification of an approved term nutrient credit certification is assessed a base fee plus a supplementary fee based on the number of term credits and the requested term of those credits as shown in Table 2 of 9VAC25-900-220 A.

3. A renewal will be assessed a base fee plus a supplementary fee based on the number of renewing term credits as shown in Table 3 of 9VAC25-900-220 A if there are (i) no changes to the site or practices that were submitted with the previously approved nutrient credit certification application; (ii) the renewal application submitted ~~is an exact duplicate of the application for~~ does not contain any new practices and is substantial the same as the previously approved nutrient credit certification; and (iii) the application is submitted at least 60 days prior to the end date of the term credits for which renewal is sought. If the renewal application includes changes to the site, changes to practices, or new practices or is submitted less than 60 days prior to the end date of the term credits, the application shall be deemed a new application and shall be assessed a fee as provided in subdivision 1 of this subsection.

4. The total fee (base fee plus supplementary fee) shall not exceed $10,000. If the calculated fee is greater than $10,000 then the applicant shall only pay $10,000.

9VAC25-900-210. Payment of application fees.

A. Due date. All application fees are due on the day of application and must accompany the application.

B. Method of payment. Fees shall be paid by check, draft, or postal money order made payable to "Treasurer of Virginia" and shall be sent to the Department of Environmental Quality, Receipts Control, P.O. Box 1104, Richmond, VA 23218. When the department is able to accept electronic payments, payments may be submitted electronically.

C. Incomplete payments. All incomplete payments will be deemed nonpayments.

D. Late payment. Pursuant to 9VAC25-900-80, no applications will be deemed to be complete until the department receives ~~proper payment~~ the fee paid in full.

9VAC25-900-220. Application fee schedule.

A. Fees.

Table 1. Perpetual Nutrient Credits Certification Application Fees

Base Fee	$3,000
Supplementary Fees – Total Number of Perpetual Phosphorus Credits (X)	
$X \leq 30$	$1,000
$30 < X \leq 60$	$3,000
$60 < X \leq 90$	$5,000
$X > 90$	$7,000

Table 2. Term Nutrient Credits Certification Application Fees

Base Fee	$3,000
Supplementary Fees	$/(Credit*Term Years)
1st 100 term nutrient credits (1 to 100)	$4.00
2nd 100 term nutrient credits (101 to 200)	$3.00
3rd 100 term nutrient credits (201 to 300)	$2.00
4th 100 term nutrient credits (> 300)	$1.00

Table 3. Renewal Term Nutrient Credits Certification Application Fees

Base Fee	$1,000
Supplementary Fees	$/(Credit*Term Years)
1st 100 term nutrient credits (1 to 100)	$4.00

2nd 100 term nutrient credits (101 to 200)	$3.00
3rd 100 term nutrient credits (201 to 300)	$2.00
4th 100 term nutrient credits (> 300)	$1.00

B. Illustrative examples.

1. Example 1. The applicant is submitting an application for nutrient credit certification of a nutrient credit-generating ~~entity~~ project that will generate perpetual credits. The number of potential perpetual credits calculated is 150. The required fee is calculated as follows:

Base fee	$3,000
Supplementary fee for 150 perpetual P credits	+$7,000
Total fee	= $10,000

2. Example 2. The applicant is submitting an application for nutrient credit certification of a nutrient credit-generating ~~entity~~ project that generated credits with a five-year term. The number of potential nutrient credits calculated is 275. The required fee is calculated as follows:

Base fee	$3,000
Supplementary fee for 1 to 100 credits	+(100*5*$4)=$2,000
Supplementary fee for 101 to 200 credits	+(100*5*$3)=$1,500
Supplementary fee for 201 to 275 credits	+ (75*5*$2)= $750
Total fee	= $7,250

3. Example 3. The applicant is submitting a renewal application for annual credits generated at a nutrient credit-generating ~~entity~~ project for a five-year term. The number of annual credits being renewed for another term is 165. The required fee is calculated as follows:

Base fee	$1,000
Supplementary fee for 1 to 100 credits	+(100*5*$4)=$2,000
Supplementary fee for 101 to 200 credits	+(65*5*$3)=$975
Total fee	= $3,975

4. Example 4. The applicant is submitting an application for nutrient credit certification of a nutrient credit-generating project that generates credits with a five-year term. The number of potential nutrient credits calculated is 1000. The required fee is calculated as follows:

Base fee	$3,000
Supplementary fee for 1 to 100 credits	+(100*5*$4)=$2,000
Supplementary fee for 101 to 200 credits	+(100*5*$3)=$1,500
Supplementary fee for 201 to 300 credits	+(100*5*$2)=$1,000
Supplementary fee for 301 to 1000 credits	+(700*5*$1)=$3,500
Total	= $11,000
Total fee	= $10,000 (fee cannot exceed $10,000)

Part VI
Financial Assurance

9VAC25-900-230. Financial assurance applicability.

A. An owner of a nutrient credit-generating ~~entity~~ project that utilizes structural BMPs for the generation of perpetual credits shall submit and maintain financial assurance in accordance with this part. The financial assurance mechanism shall be submitted to and approved by the department prior to the release of credits.

B. An owner of a nutrient credit-generating ~~entity~~ project that utilizes structural BMPs for the generation of term credits with terms that exceed one year shall submit and maintain financial assurance in accordance with this part. ~~The~~ However, an owner of a nutrient credit-generating project that utilizes structural BMPs for the generation of term credits with terms that exceed one year shall not be required to submit and maintain financial assurance in accordance with this part, provided that the department annually approves the generation of the term nutrient credits prior to release of the credits. In accordance with 9VAC25-900-90 B, the financial assurance mechanism shall be submitted to and approved by the department prior to the release of credits. For the purposes of this part, term credit shall refer to credit with a term greater than one year but not perpetual.

C. An owner of a nutrient credit-generating ~~entity that utilizes structural BMPs for the generation of credits with a term of one year shall not be required to provide financial assurance. D.~~ project using proposed new wetland or stream restoration practices not subject to 33 CFR 332.8 and § 62.1-44.15:23 of the Code of Virginia for the generation of perpetual credits shall be required to submit and maintain financial assurance in accordance with this chapter. In accordance with 9VAC25-900-90 B, the financial assurance mechanism shall be submitted to and approved by the department prior to the release of credits. The following financial assurances shall be provided for these new wetland or stream restoration projects:

1. A monitoring plan financial assurance mechanism shall be established to ensure implementation of the monitoring plan pursuant to 9VAC25-900-120 for any nutrient credits generated from wetland or stream restoration. When the owner conducts the required monitoring and submits a complete monitoring report as specified in the monitoring plan and report requirements, then the owner may request a reduction of the required financial assurance amount equivalent to the cost of one year of monitoring, subject to department approval. If any funds remain in the financial assurance mechanism after the monitoring period, the mechanism shall be maintained until the final monitoring report is submitted and approved, at which point the mechanism shall be released by the department; and

2. A long-term management fund financial assurance mechanism shall be established in support of required long-term management plan tasks pursuant to 9VAC25-900-120 for any nutrient credits generated from wetland or stream restoration. Long-term management funds shall be placed in a separate interest bearing trust account in an appropriate financial institution and may be funded from a sufficient percentage of all credit sale proceeds, a single lump sum payment, or an approved schedule of payments, subject to department approval. No long-term management funds shall be used to finance any expense or activity other than those specified in the long-term management plan unless approved by the department. Responsibility for and access to the long-term management fund is given to the owner or long-term steward and may be transferred to any new long-term steward that is designated by the owner and approved by the department.

~~E.~~ D. When the nutrient credits are generated or used by a locality, authority, utility, sanitation district, or owner operating an MS4 or a point source permitted under 9VAC25-870, the ~~existing~~ existence of tax or rate authority may be used ~~to provide evidence~~ by such entity at its option in satisfaction of the financial assurance required pursuant to this part. ~~The locality, authority, utility, sanitation district, or owner shall certify as a condition of their application that such tax or rate authority will be used to ensure an adequate supply of credits to meet the entity's obligation, whether by continued operation and maintenance of the structural BMPs at the nutrient credit-generating entity or by other means.~~

9VAC25-900-240. Suspension of nutrient credit exchange.

Failure to provide or maintain adequate evidence of financial assurance in accordance with this part shall be cause for the department to suspend the exchange of credits in accordance with 9VAC25-900-170 or terminate the nutrient credit certification in accordance with 9VAC25-900-180.

9VAC25-900-250. Cost estimates for perpetual and term credit nutrient credit-generating ~~entities~~ projects.

A. The owner of a nutrient credit-generating ~~entity~~ project shall prepare for approval by the department a detailed written cost estimate providing the cost of ~~either~~ repairing or restoring, as appropriate, and operating and maintaining any structural BMPs ~~generating perpetual nutrient credits or term nutrient credits with a term of greater than one year~~ required to submit and maintain financial assurance pursuant to 9VAC25-900-230. This written cost estimate shall be submitted as part of the application in accordance with 9VAC25-900-80 and shall include:

1. For structural BMPs generating perpetual nutrient credits, the cost estimate shall equal the ~~estimated~~ full cost for ~~either~~ repairing or restoring, as appropriate, the structural BMPs plus the cost for ~~five~~ fifty years of operation and maintenance of the structural BMPs in accordance with the implementation plan.

2. For structural BMPs generating term nutrient credits, the cost estimate shall equal the full cost for ~~either~~ repairing or restoring, as appropriate, the structural BMPs plus the cost for the operation and maintenance of the structural BMPs in accordance with the implementation plan for the term of the credits or for five years, whichever is less.

3. The cost estimate shall be based on and include the costs of hiring a third party to either repair or restore and operate and maintain the structural BMPs generating nutrient credits. The third party may not be either a parent corporation or subsidiary of the owner.

B. The owner of the nutrient credit-generating project utilizing proposed new wetland or stream restoration practices not subject to 33 CFR 332.8 and § 62.1-44.15:23 of the Code of Virginia will develop a separate written cost estimate for each of the applicable financial assurance requirements provided in 9VAC25-900-230 D. All cost estimates shall be submitted as part of the application in accordance with 9VAC25-900-80.

1. Monitoring plan financial assurance cost estimates shall be sufficient to hire another qualified entity to monitor and report on performance standards for the nutrient credit-generating project in the event of noncompliance with this chapter.

2. Long-term management fund financial assurance cost estimates shall be based on the size and complexity of the implementation plan, long-term management plan tasks, and any other factors that the department deems appropriate and will state the total dollar amount required to fund this financial assurance.

C. For a nutrient credit-generating ~~entity~~ project generating perpetual credit ~~from structural BMPs~~, the cost estimate shall be ~~reviewed~~ updated by the owner and submitted to the

department for its review for sufficiency ~~by the department~~ at least once every five years.

9VAC25-900-260. Financial assurance requirements for term credits.

A. For a nutrient credit-generating ~~entity~~ project generating term credits ~~with a term of greater than one year~~ and required to submit and maintain financial assurance pursuant to 9VAC25-900-230, the owner shall demonstrate financial assurance using any one or a combination of the mechanisms specified in 9VAC25-900-290 through 9VAC25-900-330.

B. The financial assurance mechanism ~~or mechanisms~~ shall provide funding for the full amount of the cost estimate at all times.

C. The financial assurance mechanism ~~or mechanisms~~ used to provide evidence of the financial assurance shall ensure that the funds necessary will be available whenever they are needed.

D. The owner shall provide continuous financial assurance coverage for the term credit nutrient credit-generating ~~entity~~ project in accordance with this part until released by the department.

E. After submittal of a complete financial assurance mechanism, the department shall notify the owner of the tentative decision to approve or reject the financial assurance mechanism.

F. A financial assurance mechanism must be in a form that ensures that the department will receive proper notification in advance of any termination or revocation. The owner may, at their discretion and with prior approval of the department, replace the financial assurance or financial institution that issued the financial assurance. The owner shall provide the department with prior notice of its desire to replace the issuing institution and a draft of the new mechanism for review. The provisions of the new mechanism shall conform to the provisions of the former mechanism and this part.

9VAC25-900-270. Financial assurance requirements for perpetual credits.

A. Subject to the requirements and limitations outlined in this section, the owner shall demonstrate financial assurance for the ~~perpetual credit~~ nutrient credit-generating ~~entity~~ project generating perpetual nutrient credits using any one or combination of the mechanisms specified in 9VAC25-900-290 through 9VAC25-900-330. However, for restoration projects, the owner may only use a trust fund as provided in 9VAC25-900-290 to demonstrate financial assurance for the long-term management fund as described in 9VAC25-900-230 C 2.

B. The financial assurance mechanism ~~or mechanisms~~ used shall provide funding for the full amount of the cost estimate or of the sum of all cost estimates at all times.

C. The owner may only establish or continue to use insurance, as outlined in 9VAC25-900-330, to demonstrate financial assurance for that portion of the total cost estimate that does not include credits that have been exchanged. On an annual basis, the owner shall either establish or increase the noninsurance mechanism ~~or mechanisms~~ outlined in 9VAC25-900-290 through 9VAC25-900-320 in an amount to be determined in accordance with the following formula ~~below~~:

CE/TCIAS * CEDAAP

where:

CE = Cost Estimate

TCIAS = Total Number of Credits Initially Available for Exchange

CEDAAP = Number of Credits Exchanged During the Applicable Annual Period

D. The owner shall establish or increase the mechanism ~~or mechanisms~~ as required by subsection C of this section no later than 30 days after the current anniversary date of the nutrient credit certification. The applicable annual period for credits exchanged is the one culminating on the anniversary date of the nutrient credit certification.

E. The financial assurance mechanisms used to provide evidence of the financial assurance shall ensure that the funds necessary will be available whenever they are needed.

F. After submittal of a complete financial assurance mechanism, the department shall notify the owner of the tentative decision to approve or reject the financial assurance mechanism.

G. A financial assurance mechanism must be in a form that ensures that the department will receive proper notification in advance of any termination or revocation. The owner may, at its discretion and with prior approval of the department, replace the financial assurance or financial institution that issued the financial assurance. The owner shall provide the department with prior notice of its desire to replace the issuing institution and a draft of the new mechanism for review. The provisions of the new mechanism shall conform to the provisions of the former mechanism and this part.

9VAC25-900-280. Allowable financial mechanisms.

A. Subject to the limitations and requirements outlined in 9VAC25-900-260 and 9VAC25-900-270, an owner of nutrient credit-generating ~~entity~~ project using structural BMPs to generate term or perpetual nutrient credits and required to submit financial assurance pursuant to 9VAC25-900-230 may use any one or combination of mechanisms listed in 9VAC25-900-290 through 9VAC25-900-330 to meet the financial assurance requirements of this ~~part~~ chapter.

B. Subject to the limitation and requirements outlined in 9VAC25-900-270, an owner of a nutrient credit-generating project utilizing wetland or stream restoration practices to generate perpetual credits and required to submit financial assurance pursuant to 9VAC25-900-230, may use any one or combination of mechanisms listed in 9VAC25-900-290 through 9VAC25-900-330 to meet the financial assurance requirements for the monitoring plan; however, only a trust fund may be used to meet the financial assurance requirements for the long-term management fund.

9VAC25-900-290. Trust.

A. An owner may satisfy the requirements of this part by establishing a trust fund that conforms to the requirements of this section and by submitting an originally signed triplicate of the trust agreement to the director. The owner shall also place a copy of the trust agreement into the nutrient credit-generating ~~entity's~~ project's operating record. The trustee for the trust fund shall be a bank or financial institution that has the authority to act as a trustee and whose trust operations are regulated and examined by a state or federal agency.

B. Payments into the trust fund shall be made by the owner whenever necessary under the requirements of 9VAC25-900-260 or 9VAC25-900-270.

C. During any annual period when a payment into the fund is necessary under the applicable requirements outlined in 9VAC25-900-260 and 9VAC25-900-270, the owner must submit the following information to the director no later than the anniversary date of the initial approval by the department of the release of credits for exchange:

1. The calculation for determining the appropriate payment amount into the trust; and

2. A statement from the trustee indicating the amount of the currently required deposit into the trust fund and the subsequent balance of the fund.

D. The owner shall compare the cost estimate with the trustee's most recent annual valuation of the trust fund:

1. Annually, at least 60 days prior to the anniversary date of the initial approval by the department of the release of credits for exchange. If the value of the fund is less than the amount of the cost estimate, the owner shall, by the anniversary date of the initial approval by the department of the release of credits for exchange, deposit a sufficient amount into the fund so that its value after payment at least equals the amount of the cost estimate, or obtain other financial assurance as specified in this part to cover the difference. If the value of the trust fund is greater than the total amount of the cost estimate, the owner may submit a written request to the director for release of the amount that is in excess of the cost estimate; and

2. Whenever the cost estimate changes. If the value of the fund is less than the amount of the new cost estimate, the owner shall, within 60 days of the change in the cost estimate, deposit a sufficient amount into the fund so that its value after payment at least equals the amount of the new estimate, or obtain other financial assurance as specified in this part to cover the difference. If the value of the trust fund is greater than the total amount of the cost estimate, the owner may submit a written request to the director for release of the amount that is in excess of the cost estimate.

E. The department shall withdraw funds from the trust when the owner has failed to monitor, operate and maintain, perform long-term maintenance for, or repair or replace, as applicable, the practices utilized by the nutrient credit-generating project in accordance with this chapter and the nutrient credit certification. The department shall use the funds to pay for the performance of monitoring, operation, and maintenance, or the performance of long-term maintenance, or repair and replacement, as applicable, of the practices utilized by the nutrient credit-generating project.

F. Subject to the limitations and requirements outlined in 9VAC25-900-260 and 9VAC25-900-270, if the owner substitutes other financial assurance as specified in this part for all or part of the trust fund, the owner may submit a written request to the director for release of the amount in excess of the current cost estimate covered by the trust fund.

~~F.~~ G. Within 60 days after receiving a request from the owner for release of funds as described in subsections ~~E~~ F and ~~G~~ H of this section, the director shall instruct the trustee to release to the owner such funds as the director deems appropriate, if any, in writing.

~~G.~~ H. The director shall agree to terminate the trust when:

1. The owner substitutes alternate financial assurance as specified in this part; or

2. The director notifies the owner that the owner is no longer required by this part to maintain financial assurance for the ~~operation and maintenance or replacement of the~~ nutrient credit-generating ~~entity's structural BMPs~~ project.

~~H.~~ I. The trust agreement shall be worded as described in 9VAC25-900-350, except that instructions in parentheses are to be replaced with the appropriate information and the ~~parantheses~~ parentheses deleted, and the trust agreement shall be accompanied by a formal certification of acknowledgment and Schedules A and B.

9VAC25-900-300. Surety bond.

A. An owner may satisfy the requirements of this part by obtaining a surety bond that conforms to the requirements of this section and by submitting an originally signed duplicate of the bond to the department. The surety company issuing the bond shall be licensed to operate as a surety in the Commonwealth of Virginia and be among those listed as

acceptable sureties on federal bonds in the latest Circular 570 of the U.S. Department of the Treasury.

B. Under the terms of the bond, the surety shall become liable on the bond obligation when the owner fails to perform as guaranteed by the bond.

C. The bond shall guarantee that the owner or any other authorized person ~~will~~ shall perform all or any of the following activities for which the bond is used to satisfy the requirements of this part:

1. Operate and maintain, monitor, repair, or replace any ~~structural BMPs~~ practices for achieving nutrient reductions at the nutrient credit-generating ~~entity~~ project in question and in accordance with the nutrient credit certification; or,

2. Operate and maintain, monitor, repair, or replace any ~~structural BMPs~~ practices following an order to do so that has been issued by the department or by a court.

D. The owner shall compare the cost estimate with the penal sum of the bond:

1. Annually, at least 60 days prior to the anniversary date of the initial approval by the department of the release of credits for exchange. If the penal sum of the bond is less than the amount of the cost estimate, the owner shall, by the anniversary date of the initial approval by the department of the release of credits for exchange, increase the penal sum of the bond so that its value at least equals the amount of the cost estimate, or obtain other financial assurance as specified in this part to cover the difference. If the penal sum of the bond is greater than the total amount of the cost estimate, the owner may submit a written request to the director for permission to reduce the penal sum of the bond to the amount of the cost estimate; and

2. Whenever the cost estimate changes. If the penal sum of the bond is less than the amount of the new cost estimate, the owner shall, within 60 days of the change in the cost estimate, increase the penal sum of the bond so that its value at least equals the amount of the new estimate, or obtain other financial assurance as specified in this part to cover the difference. If the penal sum of the bond is greater than the total amount of the cost estimate, the owner may submit a written request to the director for permission to reduce the penal sum of the bond to the amount of the cost estimate.

E. The surety bond shall guarantee that the owner shall provide alternate evidence of financial assurance as specified in this part within 60 days after receipt by the department of a notice of cancellation of the bond from the surety.

F. The bond shall remain in force for its term unless the surety sends written notice of cancellation by certified mail to the owner and to the department. Cancellation cannot occur, however, during the 120 days beginning on the date of receipt of the notice of cancellation by the department as shown on the signed return receipt. The surety shall provide written notification to the department by certified mail no less than 120 days prior to the expiration date of the bond that the bond will expire and the date the bond will expire.

G. The department shall cash the surety bond ~~if it~~:

1. When it is not replaced 60 days prior to expiration with alternate evidence of financial assurance acceptable to the department; or ~~if~~

2. If the owner ~~fails to fulfill the conditions of the bond.~~ has failed to monitor, operate and maintain, or repair or replace, as applicable, the practices utilized by the nutrient credit-generating project in accordance with this chapter and the nutrient credit certification. The department shall use the funds from the surety bond to pay for the performance of monitoring, operation, and maintenance or repair and replacement, as applicable, of the practices utilized by the nutrient credit-generating project.

H. The department shall return the original surety bond to the surety for termination when:

1. The owner substitutes acceptable alternate evidence of financial assurance; or

2. The ~~department~~ director notifies the owner that the owner is no longer required by this part to maintain evidence of financial assurance for ~~operation and maintenance or replacement of the~~ nutrient credit-generating ~~entity's structural BMPs~~ project.

I. The surety bond shall be worded as described in 9VAC25-900-350, except that instructions in parentheses are to be replaced with the relevant information and the parentheses deleted.

9VAC25-900-310. Letter of credit.

A. An owner may satisfy the requirements of this part by obtaining an irrevocable standby letter of credit that conforms to the requirements of this section and by submitting an originally signed duplicate of the letter of credit to the department. The issuing institution shall be an entity that has the authority to issue letters of credit in the Commonwealth of Virginia and whose letter-of-credit operations are regulated and examined by a federal agency or the Virginia State Corporation Commission.

B. The letter of credit shall be irrevocable and issued for a period of at least one year. The letter of credit shall provide that the expiration date will be automatically extended for a period of at least one year. If the issuing institution decides not to extend the letter of credit beyond the current expiration date, it shall, at least 120 days before the expiration date, notify both the owner and the department by certified mail of that decision. The 120-day period will begin on the date of receipt of letter of credit's notice of cancellation by the department as shown on the signed return receipt. If the letter

of credit is canceled by the issuing institution, the owner shall obtain alternate evidence of financial assurance to be in effect prior to the expiration date of the letter of credit.

C. The owner shall compare the cost estimate with the face amount of the letter of credit:

1. Annually, at least 60 days prior to the anniversary date of the initial approval by the department of the release of credits for exchange. If the face amount of the letter of credit is less than the amount of the cost estimate, the owner shall, by the anniversary date of the initial approval by the department of the release of credits for exchange, increase the face amount of the letter of credit so that its value at least equals the amount of the cost estimate, or obtain other financial assurance as specified in this part to cover the difference. If the face amount of the letter of credit is greater than the total amount of the cost estimate, the owner may submit a written request to the director for permission to reduce the face amount of the letter of credit to the amount of the cost estimate; and

2. Whenever the cost estimate changes. If the face amount of the letter of credit is less than the amount of the new cost estimate, the owner shall, within 60 days of the change in the cost estimate, increase the face amount of the letter of credit so that its value at least equals the amount of the new estimate or obtain other financial assurance as specified in this part to cover the difference. If the face amount of the letter of credit is greater than the total amount of the cost estimate, the owner may submit a written request to the director for permission to reduce the face amount of the letter of credit to the amount of the cost estimate.

D. The issuing institution may cancel the letter of credit only if alternate evidence of financial assurance acceptable to the department is substituted as specified in this part or if the owner is released by the department from the requirements of financial assurance.

E. The department shall cash the letter of credit when:

1. The issuing institution has provided proper notification, as outlined in subsection B of this section, of its intent not to renew the letter of credit, and the owner has not, within 30 days prior to expiration, replaced the letter of credit with alternate evidence of financial assurance acceptable to the department; or

2. The owner has failed to monitor, operate, and maintain or repair or replace, as applicable, the practices utilized by the nutrient credit-generating ~~entity's structural BMPs~~ project in accordance with this chapter and the nutrient credit certification. The department shall use the funds from the letter of credit to pay for the performance of monitoring, operation, and maintenance or repair and replacement, as applicable, of the practices utilized by the nutrient credit-generating project.

F. The department shall return the original letter of credit to the issuing institution for termination when:

1. The owner substitutes acceptable alternate evidence of financial assurance; or

2. The department notifies the owner that the owner is no longer required by this part to maintain evidence of financial assurance for ~~the structural BMPs at his~~ the nutrient credit-generating ~~entity~~ project.

G. The letter of credit shall be worded as described in 9VAC25-900-350, except that instructions in parentheses are to be replaced with the relevant information and the parentheses deleted.

9VAC25-900-320. Certificate of deposit.

A. An owner may satisfy the requirements of this chapter, wholly or in part, by obtaining a certificate of deposit and assigning all rights, title, and interest in the certificate of deposit to the department, conditioned so that the owner shall ~~operate and maintain or replace the structural BMPs at~~ perform the applicable monitoring, operation, and maintenance or repair or replacement for the practices utilized by the nutrient credit-generating ~~entity~~ project. The issuing institution shall be an entity that has the authority to issue certificates of deposit in the Commonwealth of Virginia and whose operations are regulated and examined by a federal agency or the Virginia State Corporation Commission. The owner must submit the originally signed assignment and the originally signed certificate of deposit, if applicable, to the department.

B. ~~The amount of the certificate of deposit shall be at least equal to the approved cost estimate.~~ The owner shall ~~maintain the certificate of deposit and assignment until such time as the owner is released by the department from financial assurance.~~ compare the cost estimate with the amount of the certificate of deposit:

1. Annually, at least 60 days prior to the anniversary date of the initial approval by the department of the release of credits for exchange. If the amount of the certificate of deposit is less than the amount of the cost estimate, the owner shall, by the anniversary date of the initial approval by the department of the release of credits for exchange, increase the amount of the certificate of deposit so that its value at least equals the amount of the cost estimate, or obtain other financial assurance as specified in this part to cover the difference. If the amount of the certificate of deposit is greater than the total amount of the cost estimate, the owner may submit a written request to the director for permission to withdraw funds from the certificate of deposit to the amount of the cost estimate; and

2. Whenever the cost estimate changes. If the amount of the certificate of deposit is less than the amount of the new cost estimate, the owner shall, within 60 days of the change

in the cost estimate, increase the amount of certificate of deposit so that its value at least equals the amount of the new estimate or obtain other financial assurance as specified in this part to cover the difference. If the amount of the certificate of deposit is greater than the total amount of the cost estimate, the owner may submit a written request to the director for permission to withdraw funds from the certificate of deposit to the amount of the cost estimate.

C. The owner shall be entitled to demand, receive, and recover the interest and income from the certificate of deposit as it becomes due and payable as long as the market value of the certificate of deposit used continues to at least equal the amount of the current approved cost estimate.

D. The department shall cash the certificate of deposit if the owner has failed to monitor, operate, and maintain or repair or replace ~~his~~, as applicable, the practices utilized by the nutrient credit-generating ~~entity's structural BMPs~~ project in accordance with this chapter and the nutrient credit certification. The department shall use the funds from the certificate of deposit to pay for the performance of monitoring, operation, and maintenance or repair and replacement, as applicable, of the practices utilized by the nutrient credit-generating project.

E. ~~Whenever the approved cost estimate increases to an amount greater than the amount of the certificate of deposit, the owner shall, within 60 days of the increase, cause the amount of the certificate of deposit to be increased to an amount at least equal to the new estimate or obtain another certificate of deposit to cover the increase. F.~~ The department shall return the original assignment and certificate of deposit, if applicable, to the issuing institution for termination when:

1. The owner substitutes acceptable alternate evidence of financial assurance as specified in this part; or

2. The department notifies the owner that the owner is no longer required by this part to maintain evidence of financial assurance ~~for the structural BMPs~~.

~~G.~~ F. The assignment shall be worded as described in 9VAC25-900-350, except that instructions in parentheses shall be replaced with the relevant information and the parentheses deleted.

9VAC25-900-330. Insurance.

A. An owner may demonstrate financial assurance for ~~replacement~~ applicable costs ~~and~~ for monitoring, repair, or replacement or operation and maintenance by obtaining insurance that conforms to the requirements of this section. The insurance shall be effective before the credits are released by the department for exchange. The insurer must be licensed pursuant to Chapter 10 (§ 38.2-1000 et seq.) of Title 38.2 of the Code of Virginia. The owner shall provide the department with ~~an original~~ a signed copy of the insurance policy. The department shall be listed as an additional insured on the policy, but the department shall not be obligated for payment of the premium in any manner.

B. The insurance policy shall guarantee that funds will be available to fund ~~the replacement of the structural BMPs and reasonable and necessary costs for the operation and maintenance of the structural BMPs~~ (i) for projects using wetland or stream restoration, the cost for fulfilling the requirements of the monitoring plan or (ii) for projects using structural BMPs, the reasonable and necessary cost of repair, replacement, or operation and maintenance or any combination of these activities.

C. The owner shall compare the cost estimate with the liability limit of the insurance policy:

1. Annually, at least 60 days prior to the anniversary date of the initial approval by the department of the release of credits for exchange. If the liability limit of the insurance policy is less than the amount of the cost estimate, the owner shall, by the anniversary date of the initial approval by the department of the release of credits for exchange, increase the liability limit of the insurance policy so that it at least equals the amount of the cost estimate, or obtain other financial assurance as specified in this part to cover the difference. If the liability limit of the insurance policy is greater than the total amount of the cost estimate, the owner may submit a written request to the director for permission to lower the liability limit of the insurance policy to the amount of the cost estimate; and

2. Whenever the cost estimate changes. If the liability limit of the insurance policy is less than the amount of the new cost estimate, the owner shall, within 60 days of the change in the cost estimate, increase the liability limit of the insurance policy so that it at least equals the amount of the new estimate or obtain other financial assurance as specified in this part to cover the difference. If the liability limit of the insurance policy is greater than the total amount of the cost estimate, the owner may submit a written request to the director for permission to lower the liability limit of the insurance policy to the amount of the cost estimate.

~~C.~~ D. The insurance policy shall be issued and maintained for ~~a face amount~~ an overall liability limit at least equal to the current cost estimate for applicable ~~costs for replacement and operation and maintenance.~~ activities covered under the policy (i.e., monitoring, repair, and replacement or operation and maintenance). The term ~~face amount~~ "overall liability limit" means the total amount the insurer is obligated to pay under the policy. Actual payments by the insurer will not change the ~~face amount~~ overall liability limit although the insurer's future liability will be lowered by the amount of the payments.

~~D.~~ E. The insurance policy shall provide that the insurer shall pay, as applicable, for the monitoring, repair, or replacement ~~and~~ or operation and maintenance of the ~~structural BMPs~~ nutrient credit-generating project's practices. Justification and documentation of the expenditures must be submitted to and approved by the director. Requests for payment will be granted by the insurer only if the remaining value of the policy is sufficient to cover the remaining costs of monitoring, repair, or replacement ~~and~~ or operation and maintenance of the ~~structural BMP~~ nutrient credit-generating project's practices, or if the director approves the payment. The insurer shall notify the director when a payment has been made.

~~E.~~ F. Each policy shall contain a provision allowing assignment of the policy to a successor owner. Such assignment may be conditional upon consent of the insurer, provided that such consent is not unreasonably refused.

~~F.~~ G. The insurance policy shall provide that the insurer may not cancel, ~~or terminate, or fail to renew the policy~~ except for failure to pay the premium. In addition, the policy shall provide that, subject to payment of premium, it will automatically renew on an annual basis for a period of up to 10 years. The automatic renewal of the policy shall, at a minimum, provide the insured with the option of renewal at the face amount of the expiring policy. If there is a failure to pay the premium, the insurer may cancel or terminate the policy by sending notice of cancellation or termination by certified mail to the owner and to the department 120 days in advance of cancellation or termination. Within 60 days of receipt of notice from the insurer that it ~~does not intend~~ intends either to ~~renew~~ cancel or terminate the policy, the owner shall obtain alternate financial assurance and submit it to the department.

~~G.~~ H. The owner may cancel the insurance policy only if alternate financial assurance is substituted as specified in this part, or if the owner is no longer required to demonstrate financial responsibility.

~~H.~~ I. Within 10 days after commencement of a voluntary or involuntary proceeding under Title 11 (Bankruptcy) of the United States Code, naming an owner as debtor, the owner shall notify the director by certified mail of such commencement.

~~I.~~ J. The wording of the insurance endorsement shall be identical to the wording specified in 9VAC25-900-350. ACORD Certificates of Insurance are not valid proof of insurance.

9VAC25-900-340. Incapacity of financial providers or owner.

A. An owner that fulfills the requirements of this part by obtaining a trust fund, a letter of credit, a surety bond, or an insurance policy shall be deemed to be without the required financial assurance in the event of bankruptcy of the trustee or issuing institution, or a suspension or revocation of the authority of the trustee institution to act as trustee or of the institution issuing a surety bond, letter of credit, or insurance policy to issue such mechanisms. The owner or operator shall establish other financial assurance within 60 days of such event.

B. An owner shall notify the director by certified mail of the commencement of a voluntary or involuntary proceeding under Title 11 (Bankruptcy) of the United States Code, naming the owner or operator as debtor, within 10 days after commencement of the proceeding. ~~A guarantor of a corporate guarantee as specified in 9VAC20-70-220 shall make such a notification if he is named as debtor, as required under the terms of the corporate guarantee.~~

9VAC25-900-350. Wording of the financial assurance mechanism.

A. The wording of the financial assurance mechanisms shall be as provided in this section.

B. Wording of trust agreements.

(NOTE: Instructions in parentheses are to be replaced with the ~~relevant~~ applicable information for the nutrient credit-generating project's practices (i.e., structural BMPs or wetland/stream restoration) and the non-relevant information and parentheses deleted.)

TRUST AGREEMENT

Trust agreement, the "Agreement," entered into as of (date) by and between (name of the owner), a (State) (corporation, partnership, association, proprietorship), the "Grantor," and (name of corporate trustee), a (State corporation) (national bank), the "Trustee."

Whereas, the State Water Control Board has established certain regulations applicable to the Grantor, requiring that the owner of a nutrient credit-generating ~~entity~~ project must provide assurance that funds will be available when needed for (operation and maintenance and/or repair or replacement of the ~~entity,~~ project's structural BMPs) (monitoring and/or long-term maintenance of the project's wetland/stream restoration),

Whereas, the Grantor has elected to establish a trust to provide (all or part of) such financial assurance for the ~~entity~~ project identified herein,

Whereas, the Grantor, acting through its duly authorized officers, has selected the Trustee to be the trustee under this agreement, and the Trustee is willing to act as trustee,

Now, therefore, the Grantor and the Trustee agree as follows:

Section 1. Definitions. As used in this Agreement:

A. The term "fiduciary" means any person who exercises any power of control, management, or disposition or renders investment advice for a fee or other compensation, direct or

indirect, with respect to any moneys or other property of this trust fund, or has any authority or responsibility to do so, or who has any authority or responsibility in the administration of this trust fund.

B. The term "Grantor" means the owner who enters into this Agreement and any successors or assigns of the Grantor.

C. The term "Trustee" means the Trustee who enters into this Agreement and any successor Trustee.

Section 2. Identification of ~~Entity~~ Project and Cost Estimates. This Agreement pertains to ~~entity(ies)~~ project(s) and cost estimates identified on attached Schedule A.

(NOTE: On Schedule A, for each ~~entity~~ project, list, as applicable, name, address, and the current cost estimates for operation and maintenance and/or repair or replacement ~~,~~ for the project's structural BMPs; or the current cost estimates for the monitoring and/or long-term maintenance of the project's wetland/stream restoration, or portions thereof, for which financial assurance is demonstrated by this Agreement.)

Section 3. Establishment of Fund. The Grantor and the Trustee hereby establish a trust fund, the "Fund," for the benefit of the Department of Environmental Quality, Commonwealth of Virginia. The Grantor and the Trustee intend that no third party have access to the Fund except as herein provided. The Fund is established initially as property consisting of cash or securities, which are acceptable to the Trustee, described in Schedule B attached hereto. Such property and any other property subsequently transferred to the Trustee is referred to as the fund, together with all earnings and profits thereon, less any payments or distributions made by the Trustee pursuant to this Agreement. The Fund will be held by the Trustee, IN TRUST, as hereinafter provided. The Trustee undertakes no responsibility for the amount or adequacy of, nor any duty to collect from the Grantor, any payments to discharge any liabilities of the Grantor established by the Commonwealth of Virginia's Department of Environmental Quality.

Section 4. Payment for (operation and maintenance and/or repair or replacement for the project's structural BMPs) (monitoring and/or long-term maintenance for the project's wetland/stream restoration). The Trustee will make such payments from the Fund as the Department of Environmental Quality, Commonwealth of Virginia will direct, in writing, to provide for the payment of the costs of (operation and maintenance and/or repair or replacement ~~)~~ for the project's structural BMPs) (monitoring and/or long-term maintenance for the project's wetland/stream restoration) of the ~~entity~~ project covered by this Agreement. The Trustee will reimburse the Grantor or other persons as specified by the Department of Environmental Quality, Commonwealth of Virginia, from the Fund for (operation and maintenance and/or repair or replacement for the project's structural BMPs) (monitoring and/or long-term maintenance for the project's wetland/stream restoration) expenditures in such amounts as the Department of Environmental Quality will direct, in writing. In addition, the Trustee will refund to the Grantor such amounts as the Department of Environmental Quality specifies in writing. Upon refund, such funds will no longer constitute part of the Fund as defined herein.

Section 5. Payments Comprising the Fund. Payments made to the Trustee for the fund will consist of cash or securities acceptable to the Trustee.

Section 6. Trustee Management. The Trustee will invest and reinvest the principal and income of the Fund and keep the Fund invested as a single fund, without distinction between principal and income, in accordance with investment guidelines and objectives communicated in writing to the Trustee from time to time by the Grantor, subject, however, to the provisions of this Section. In investing, reinvesting, exchanging, selling and managing the Fund, the Trustee or any other fiduciary will discharge his duties with respect to the trust fund solely in the interest of the beneficiary and with the care, skill, prudence, and diligence under the circumstances then prevailing which persons of prudence, acting in a like capacity and familiar with such matters, would use in the conduct of any enterprise of a like character and with like aims; except that:

A. Securities or other obligations of the Grantor, or any other owner of the ~~entity,~~ project, or any of their affiliates as defined in the Investment Company Act of 1940, as amended, 15 USC § 80a-2(a), will not be acquired or held, unless they are securities or other obligations of the federal or a state government;

B. The Trustee is authorized to invest the Fund in time or demand deposits of the Trustee, to the extent insured by an agency of the federal or state government; and

C. The Trustee is authorized to hold cash awaiting investment or distribution uninvested for a reasonable time and without liability for the payment of interest thereon.

Section 7. Commingling and Investment. The Trustee is expressly authorized in its discretion:

A. To transfer from time to time any or all of the assets of the Fund to any common, commingled or collective trust fund created by the Trustee in which the Fund is eligible to participate subject to all of the provisions thereof, to be commingled with the assets of other trusts participating herein. To the extent of the equitable share of the Fund in any such commingled trust, such commingled trust will be part of the Fund; and

B. To purchase shares in any investment company registered under the Investment Company Act of 1940, 15 USC § 80a-1 et seq., or one which may be created, managed, underwritten, or to which investment advice is rendered or the shares of

which are sold by the Trustee. The Trustees may vote such shares in its discretion.

Section 8. Express Powers of Trustee. Without in any way limiting the powers and discretions conferred upon the Trustee by the other provisions of this Agreement or by law, the Trustee is expressly authorized and empowered:

A. To sell, exchange, convey, transfer or otherwise dispose of any property held by it, by private contract or at public auction. No person dealing with the Trustee will be bound to see to the application of the purchase money or to inquire into the validity or expediency of any such sale or other dispositions;

B. To make, execute, acknowledge and deliver any and all documents of transfer and conveyance and any and all other instruments that may be necessary or appropriate to carry out the powers herein granted;

C. To register any securities held in the fund in its own name or in the name of a nominee and to hold any security in bearer form or in book entry, or to combine certificates representing such securities with certificates of the same issue held by the Trustee in other fiduciary capacities, or to deposit or arrange for the deposit of such securities in a qualified central depository even though, when so deposited, such securities may be merged and held in bulk in the name of the nominee of such depository with other securities deposited therein by another person, or to deposit or arrange for the deposit of any securities issued by the United States government, or any agency or instrumentality thereof with a Federal Reserve Bank, but the books and records of the Trustee will at all times show that all such securities are part of the Fund;

D. To deposit any cash in the fund in interest-bearing accounts maintained or savings certificates issued by the Trustee, in its separate corporate capacity, or in any other banking institution affiliated with the Trustee, to the extent insured by an agency of the Federal or State government; and

E. To compromise or otherwise adjust all claims in favor of or against the Fund.

Section 9. Taxes and Expenses. All taxes of any kind that may be assessed or levied against or in respect of the Fund and all brokerage commissions incurred by the Fund will be paid from the Fund. All other expenses incurred by the Trustee in connection with the administration of this Trust, including fees for legal services rendered to the Trustee, the compensation of the Trustee to the extent not paid directly by the Grantor, and all other proper charges and disbursements of the Trustee will be paid from the Fund.

Section 10. Annual Valuation. The Trustee will annually, at the end of the month coincident with or preceding the anniversary date of establishment of the Fund, furnish the Grantor and to the director of the Department of Environmental Quality, Commonwealth of Virginia, a statement confirming the value of the Trust. Any securities in the Fund will be valued at market value as of no more than 30 days prior to the date of the statement. The failure of the Grantor to object in writing to the Trustee within 90 days after the statement has been furnished to the Grantor and the director of the Department of Environmental Quality, Commonwealth of Virginia will constitute a conclusively binding assent by the Grantor, barring the Grantor from asserting any claim or liability against the Trustee with respect to matters disclosed in the statement.

Section 11. Advice of Counsel. The Trustee may from time to time consult with counsel, who may be counsel to the Grantor, with respect to any question arising as to the construction of this Agreement or any action to be taken hereunder. The Trustee will be fully protected, to the extent permitted by law, in acting upon the advice of counsel.

Section 12. Trustee Compensation. The Trustee will be entitled to reasonable compensation for its services as agreed upon in writing from time to time with the Grantor.

Section 13. Successor Trustee. The Trustee may resign or the Grantor may replace the Trustee, but such resignation or replacement shall not be effective until the Grantor has appointed a successor trustee and this successor accepts the appointment. The successor trustee shall have the same powers and duties as those conferred upon the Trustee hereunder. Upon acceptance of the appointment by the successor trustee, the Trustee will assign, transfer and pay over to the successor trustee the funds and properties then constituting the Fund. If for any reason the grantor cannot or does not act in the event of the resignation of the Trustee, the Trustee may apply to a court of competent jurisdiction for the appointment of a successor trustee or for instructions. The successor trustee and the date on which he assumes administration of the trust will be specified in writing and sent to the Grantor, the director of the Department of Environmental Quality, Commonwealth of Virginia, and the present trustees by certified mail 10 days before such change becomes effective. Any expenses incurred by the Trustee as a result of any of the acts contemplated by this section will be paid as provided in Section 9.

Section 14. Instructions to the Trustee. All orders, requests and instructions by the Grantor to the Trustee will be in writing, signed by such persons as are designated in the attached Exhibit A or such other designees as the Grantor may designate by amendment to Exhibit A. The Trustee will be fully protected in acting without inquiry in accordance with the Grantor's orders, requests and instructions. All orders, requests, and instructions by the Director of the Department of Environmental Quality, Commonwealth of Virginia, to the Trustee will be in writing, signed by the Director and the Trustee will act and will be fully protected in acting in accordance with such orders, requests and

instructions. The Trustee will have the right to assume, in the absence of written notice to the contrary, that no event constituting a change or a termination of the authority of any person to act on behalf of the Grantor or the Commonwealth of Virginia's Department of Environmental Quality hereunder has occurred. The Trustee will have no duty to act in the absence of such orders, requests and instructions from the Grantor and/or the Commonwealth of Virginia's Department of Environmental Quality, except as provided for herein.

Section 15. Notice of Nonpayment. The Trustee will notify the Grantor and the Director of the Department of Environmental Quality, Commonwealth of Virginia, by certified mail within 10 days following the expiration of the 30-day period after the anniversary of the establishment of the Trust, if no payment is received from the Grantor during that period. After the pay-in period is completed, the Trustee is not required to send a notice of nonpayment.

Section 16. Amendment of Agreement. This Agreement may be amended by an instrument in writing executed by the Grantor, the Trustee, and the Director of the Department of Environmental Quality, Commonwealth of Virginia, or by the Trustee and the Director of the Department of Environmental Quality, Commonwealth of Virginia, if the Grantor ceases to exist.

Section 17. Irrevocability and Termination. Subject to the right of the parties to amend this Agreement as provided in Section 16, this Trust will be irrevocable and will continue until terminated at the written agreement of the Grantor, the Trustee, and the Director of the Department of Environmental Quality, Commonwealth of Virginia, or by the Trustee and the Director if the Grantor ceases to exist. Upon termination of the Trust, all remaining trust property, less final trust administration expenses, will be delivered to the Grantor.

Section 18. Immunity and Indemnification. The Trustee will not incur personal liability of any nature in connection with any act or omission, made in good faith, in the administration of this Trust, or in carrying out any directions by the Grantor or the Director of the Department of Environmental Quality, Commonwealth of Virginia, issued in accordance with this Agreement. The Trustee will be indemnified and saved harmless by the Grantor or from the Trust Fund, or both, from and against any personal liability to which the Trustee may be subjected by reason of any act or conduct in its official capacity, including all expenses reasonably incurred in its defense in the event the Grantor fails to provide such defense.

Section 19. Choice of Law. This Agreement will be administered, construed and enforced according to the laws of the Commonwealth of Virginia.

Section 20. Interpretation. As used in the Agreement, words in the singular include the plural and words in the plural include the singular. The descriptive headings for each section of this Agreement will not affect the interpretation of the legal efficacy of this Agreement.

In witness whereof the parties have caused this Agreement to be executed by their respective officers duly authorized and their corporate seals to be hereunto affixed and attested as of the date first above written. The parties below certify that the wording of this Agreement is substantively identical to the wording specified in 9VAC25-900-350 B, as such regulations were constituted on the date shown immediately below.

(Signature of Grantor)

By: (Title) (Date)

Attest:

(Title) (Date)

(Seal)

(Signature of Trustee)

By

Attest:

(Title)

(Seal) (Date)

Certification of Acknowledgment:

COMMONWEALTH OF VIRGINIA

STATE OF _____

CITY/COUNTY OF _____

On this date, before me personally came (owner) to me known, who being by me duly sworn, did depose and say that she/he resides at (address), that she/he is (title) of (corporation), the corporation described in and which executed the above instrument; that she/he knows the seal of said corporation; that the seal affixed to such instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that she/he signed her/his name thereto by like order.

(Signature of Notary Public)

C. Wording of surety bond guaranteeing performance or payment.

(NOTE: Instructions in parentheses are to be replaced with the ~~relevant~~ applicable information for the nutrient credit-generating project's practices (i.e., structural BMPs or wetland/stream restoration) and the non-relevant information and parentheses deleted.)

PERFORMANCE OR PAYMENT BOND

Date bond executed: _____

Effective date: _____

Principal: (legal name and business address) _____

Type of organization: (insert "individual," "joint venture," "partnership," or "corporation") _____

State of incorporation: _____

Surety: (name and business address) _____

Name, address, and ~~(operation and maintenance and/or replacement)~~ cost estimate or estimates for the ~~entity~~ project: _____

Penal sum of bond: $_____

Surety's bond number: _____

Know all men by these present, That we, the Principal and Surety hereto are firmly bound to the Department of Environmental Quality, Commonwealth of Virginia, (hereinafter called the Department) in the above penal sum for the payment of which we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally; provided that, where the Surety(ies) are corporations acting as co-sureties, we, the Sureties, bind ourselves in such sum "jointly and severally" only for the purpose of allowing a joint action or actions against any or all of us, and for all other purposes each Surety binds itself, jointly and severally with the Principal, for the payment of each sum only as is set forth opposite the name of such Surety, but if no limit of liability is indicated, the limit of liability shall be the full amount of the penal sum.

Whereas, said Principal is required to have from the Department of Environmental Quality, Commonwealth of Virginia, in order to own or operate the, nutrient credit-generating ~~entity~~ project identified above, and

Whereas, said Principal is required to provide financial assurance for (operation and maintenance and/or repair or replacement for the project's structural BMPs) (monitoring and/or long-term maintenance for the project's wetland/stream restoration) of the ~~entity~~ project as a condition of an order issued by the department,

Now, therefore the conditions of this obligation are such that if the Principal shall faithfully perform (operation and maintenance and/or repair or replacement of structural BMPs) (monitoring wetland/stream restoration), whenever required to do so, of the ~~entity~~ project identified above in accordance with the order or the (operation and maintenance and/or repair or replacement of structural BMPs) (monitoring wetland/stream restoration) submitted to receive and other requirements of as such plan and may be amended or renewed pursuant to all applicable laws, statutes, rules, and regulations, as such laws, statutes, rules, and regulations may be amended,

Or, if the Principal shall faithfully perform (operation and maintenance and/or repair or replacement of structural BMPs) (monitoring wetland/stream restoration) following an order to begin (operation and maintenance and/or repair or replacement of structural BMPs) (monitoring wetland/stream restoration) issued by the Commonwealth of Virginia's Department of Environmental Quality or by a court, or following a notice of termination of the permit,

Or, if the Principal shall provide alternate financial assurance as specified in the Department's regulations and obtain the director's written approval of such assurance, within 90 days of the date notice of cancellation is received by the Director of the Department of Environmental Quality from the Surety, then this obligation will be null and void, otherwise it is to remain in full force and effect for the life of the nutrient credit-generating ~~entity~~ project identified above.

The Surety shall become liable on this bond obligation only when the Principal has failed to fulfill the conditions described above. Upon notification by the Director of the Department of Environmental Quality, Commonwealth of Virginia, that the Principal has been found in violation of the requirements of the Department's regulations, the Surety must either perform (operation and maintenance and/or repair or replacement of structural BMPs) (monitoring wetland/stream restoration) in accordance with the approved plan and other requirements or forfeit the (operation and maintenance and/or repair or replacement of structural BMPs) (monitoring wetland/stream restoration) amount guaranteed for the nutrient credit-generating ~~entity~~ project to the Commonwealth of Virginia.

Upon notification by the Director of the Department of Environmental Quality, Commonwealth of Virginia, that the Principal has been found in violation of an order to begin operation and maintenance and/or replacement) the Surety must either perform (operation and maintenance and/or repair or replacement of structural BMPs) (monitoring wetland/stream restoration) in accordance with the order or forfeit the amount of the (operation and maintenance and/or repair or replacement of structural BMPs) (monitoring wetland/stream restoration) guaranteed for the nutrient credit-generating ~~entity~~ project to the Commonwealth of Virginia.

The Surety hereby waives notification of amendments to the operation and maintenance and/or replacement, orders, applicable laws, statutes, rules, and regulations and agrees that such amendments shall in no way alleviate its obligation on this bond.

For purposes of this bond, (operation and maintenance and/or repair or replacement of structural BMPs) (monitoring wetland/stream restoration) shall be deemed to have been completed when the Director of the Department of Environmental Quality, Commonwealth of Virginia, determines that the conditions of the approved plan have been met.

The liability of the Surety shall not be discharged by any payment or succession of payments hereunder, unless and until such payment or payments shall amount in the aggregate to the penal sum of the bond, but the obligation of the Surety hereunder shall not exceed the amount of said penal sum unless the Director of the Department of Environmental Quality, Commonwealth of Virginia, should prevail in an action to enforce the terms of this bond. In this event, the Surety shall pay, in addition to the penal sum due under the terms of the bond, all interest accrued from the date the

Director of the Department of Environmental Quality, Commonwealth of Virginia, first ordered the Surety to perform. The accrued interest shall be calculated at the judgment rate of interest pursuant to § 6.2-302 of the Code of Virginia.

The Surety may cancel the bond by sending written notice of cancellation to the owner and to the Director of the Department of Environmental Quality, Commonwealth of Virginia, provided, however, that cancellation cannot occur (1) during the 120 days beginning on the date of receipt of the notice of cancellation by the director as shown on the signed return receipt; or (2) while an enforcement action is pending.

The Principal may terminate this bond by sending written notice to the Surety, provided, however, that no such notice shall become effective until the Surety receives written authorization for termination of the bond by the Director of the Department of Environmental Quality, Commonwealth of Virginia.

In witness whereof, the Principal and Surety have executed this Performance Bond and have affixed their seals on the date set forth above.

The persons whose signatures appear below hereby certify that they are authorized to execute this surety bond on behalf of the Principal and Surety and I hereby certify that the wording of this surety bond is substantively identical to the wording specified in 9VAC25-900-350 C as such regulations were constituted on the date shown immediately below.

Principal

Signature(s): _____

Name(s) and Title(s): (typed)_____

Corporate Surety

Name and Address: _____

State of Incorporation: _____

Liability Limit: $___

Signature(s): _____

Name(s) and Title(s): (typed)_____

Corporate Seal:

D. Wording of irrevocable standby letter of credit.

(NOTE: Instructions in parentheses are to be replaced with the ~~relevant~~ applicable information for the nutrient credit-generating project's practices (i.e., structural BMPs or wetland/stream restoration) and the non-relevant information and parentheses deleted.)

IRREVOCABLE STANDBY LETTER OF CREDIT

Director

Department of Environmental Quality

P.O. Box 1105

Richmond, Virginia 23218

Dear (Sir or Madam):

We hereby establish our Irrevocable Letter of Credit No..... in your favor at the request and for the account of (owner's name and address) up to the aggregate amount of (in words) U.S. dollars $____, available upon presentation of

1. Your sight draft, bearing reference to this letter of credit No ____ together with

2. Your signed statement declaring that the amount of the draft is payable pursuant to regulations issued under the authority of the Department of Environmental Quality, Commonwealth of Virginia.

The following amounts are included in the amount of this letter of credit: (Insert the nutrient credit-generating ~~entity~~ project name and address, and the ~~operation and maintenance and/or replacement~~ appropriate cost estimate or estimates, or portions thereof, for which financial assurance is demonstrated by this letter of credit.)

This letter of credit is effective as of (date) and will expire on (date at least one year later), but such expiration date will be automatically extended for a period of (at least one year) on (date) and on each successive expiration date, unless, at least 120 days before the current expiration date, we notify you and (owner or operator's name) by certified mail that we decide not to extend the Letter of Credit beyond the current expiration date. In the event you are so notified, unused portion of the credit will be available upon presentation of your sight draft for 120 days after the date of receipt by you as shown on the signed return receipt or while a compliance procedure is pending, whichever is later.

Whenever this letter of credit is drawn on under and in compliance with the terms of this credit, we will duly honor such draft upon presentation to us, and we will pay to you the amount of the draft promptly and directly.

I hereby certify that I am authorized to execute this letter of credit on behalf of (issuing institution) and I hereby certify that the wording of this letter of credit is substantively identical to the wording specified in 9VAC25-900-350 D as such regulations were constituted on the date shown immediately below.

Attest:

(Print name and title of official of issuing institution) (Date)

(Signature) (Date)

This credit is subject to the most recent edition of the Uniform Customs and Practice for Documentary Credits, International Chamber of Commerce Publication No. 600, and any subsequent revisions thereof approved by a congress of the International Chamber of Commerce and adhered to by

us. If this credit expires during an interruption of business as described in Article 36 of said Publication 600, the bank hereby specifically agrees to effect payment if this credit is drawn against within thirty (30) days after resumption of our business.

E. Assignment of certificate of deposit account.

City _____, 20___

FOR VALUE RECEIVED, the undersigned assigns all right, title and interest to the Virginia Department of Environmental Quality, Commonwealth of Virginia, and its successors and assigns the Virginia Department of Environmental Quality the principal amount of the instrument, including all moneys deposited now or in the future to that instrument, indicated below:

This assignment includes all interest now and hereafter accrued.

Certificate of Deposit Account No. _____

This assignment is given as security to the Virginia Department of Environmental Quality in the amount of _____ Dollars ($_____).

Continuing Assignment. This assignment shall continue to remain in effect for all subsequent terms of the automatically renewable certificate of deposit.

Assignment of Document. The undersigned also assigns any certificate or other document evidencing ownership to the Virginia Department of Environmental Quality.

Additional Security. This assignment shall secure the payment of any financial obligation of the (name of owner) to the Virginia Department of Environmental Quality for (operation and maintenance and/or repair or replacement of structural BMPs) (monitoring wetland/stream restoration) at the ~~(entity~~ (project name) located (physical address).

Application of Funds. The undersigned agrees that all or any part of the funds of the indicated account or instrument may be applied to the payment of any and all financial assurance obligations of (name of owner) to the Virginia Department of Environmental Quality for (operation and maintenance and/or repair or replacement) (monitoring) at the ~~(entity~~ (project name and address). The undersigned authorizes the Virginia Department of Environmental Quality to withdraw any principal amount on deposit in the indicated account or instrument including any interest, if indicated, and to apply it in the Virginia Department of Environmental Quality's discretion to fund (operation and maintenance and/or repair or replacement) (monitoring) at the ~~(entity~~ (project name) or in the event of (owner) failure to comply with the 9VAC25-900. The undersigned agrees that the Virginia Department of Environmental Quality may withdraw any principal and/or interest from the indicated account or instrument without demand or notice. (The undersigned) agrees to assume any and all loss of penalty due to federal regulations concerning the early withdrawal of funds. Any partial withdrawal of principal or interest shall not release this assignment.

The party or parties to this Assignment set their hand or seals, or if corporate, has caused this assignment to be signed in its corporate name by its duly authorized officers and its seal to be affixed by authority of its Board of Directors the day and year above written.

_____ SEAL

(Owner)

_____

(print owner's name)

_____ SEAL

(Owner)

_____

(print owner's name)

THE FOLLOWING SECTION IS TO BE COMPLETED BY THE BRANCH OR LENDING OFFICE:

The signature(s) as shown above compare correctly with the name(s) as shown on record as owner(s) of the Certificate of Deposit indicated above. The above assignment has been properly recorded by placing a hold in the amount of $ _____ for the benefit of the Department of Environmental Quality.

The accrued interest on the Certificate of Deposit indicated above shall be maintained to capitalize versus being mailed by check or transferred to a deposit account.

_____ _____

(Signature) (Date)

_____

(print name)

_____

(Title)

F. Wording of insurance endorsement.

ENDORSEMENT.

~~[~~ (NOTE: ~~The instructions~~ Instructions in ~~brackets~~ parentheses are to be replaced ~~by~~ with the ~~relevant~~ applicable information ~~and~~ for the ~~brackets~~ nutrient credit-generating project's practices (i.e., structural BMPs or restoration) and the non-relevant information and parentheses deleted.)

Name: ~~[~~ (name of each covered location ~~]~~)

Address: ~~[~~ (address of each covered location ~~]~~)

Policy number:

Period of coverage: ~~[~~ (current policy period ~~]~~)

Name of Insurer:

Address of Insurer:

Name of insured:

Address of insured:

Endorsement:

1. This endorsement certifies that the policy to which the endorsement is attached provides insurance covering the (operation and maintenance and/or repair or replacement of the nutrient credit-generating project's structural BMPs) (monitoring of the nutrient credit-generating project's wetland/stream restoration) in connection with the insured's obligation to demonstrate financial responsibility under the 9VAC25-900).

[(List the name(s) and address(es) of the nutrient credit-generating ~~entity(s)~~ project(s)) for [~~insert: "operation~~ (the operation and maintenance and/or repair or replacement of the nutrient credit-generating ~~entity~~ project's structural BMPs) (monitoring of the nutrient credit-generating project's wetland/stream restoration) in accordance with and subject to the limits of liability, exclusions, conditions, and other terms of the policy;

The limits of liability are [~~insert the~~ (provide the dollar amount of the operation and maintenance, monitoring, and/or repair or replacement), exclusive of legal defense costs, which, if applicable, are subject to a separate limit under the policy. This coverage is provided under (provide the policy number). The effective date of said policy is ~~date~~ (insert the effective date).

2. The insurance afforded with respect to such occurrences is subject to all of the terms and conditions of the policy; provided, however, that any provisions inconsistent with subsections (a) through (d) for occurrence policies and (a) through (e) for claims-made policies of this paragraph 2 are hereby amended to conform with subsections (a) through (e):

a. Bankruptcy or insolvency of the insured shall not relieve the insurer of its obligations under the policy to which this endorsement is attached.

b. The insurer is liable for the payment of amounts within any deductible applicable to the policy to the provider of monitoring, operation and maintenance and/or repair or replacement, with a right of reimbursement by the insured for any such payment made by the insurer. This provision does not apply with respect to that amount of any deductible for which coverage is demonstrated under another mechanism or combination of mechanisms as specified in 9VAC25-900.

c. Whenever requested by the State Water Control Board, the insurer agrees to furnish to State Water Control Board a signed duplicate original of the policy and all endorsements.

d. The insurer may not ~~fail to renew~~ cancel or terminate the policy during the policy period except for failure to pay the premium. The policy shall automatically renew at the department's discretion on an annual basis for a period of up to ten years. The automatic renewal of the policy shall, at a minimum, provide the insured with the option of renewal at the face amount of the expiring policy.

e. The insured may cancel the insurance policy only if alternate financial assurance is substituted as specified in 9VAC25-900, or if the owner is no longer required to demonstrate financial responsibility in accordance with 9VAC25-900.

f. Cancellation for nonpayment of premium or misrepresentation by the insured will be effective only upon written notice and only after expiration of a minimum of 120 days after a copy of such written notice is received by the insured and the State Water Control Board.

[(Insert for claims made policies:])

g. The insurance covers claims otherwise covered by the policy that are reported to the insurer within six months of the effective date of cancellation or nonrenewal of the policy except where the new or renewed policy has the same retroactive date or a retroactive date earlier than that of the prior policy, and which arise out of any covered occurrence that commenced after the policy retroactive date, if applicable, and prior to such policy renewal or termination date. Claims reported during such extended reporting period are subject to the terms, conditions, limits, including limits of liability, and exclusions of the policy.

I hereby certify that the wording of this endorsement is in no respect less favorable than the coverage specified in 9VAC25-900. I further certify that the insurer is licensed to transact the business of insurance or eligible to provide insurance as an excess or surplus lines insurer in the Commonwealth of Virginia.

[(Signature of authorized representative of insurer])

[(Name of the person signing])

[(Title of the person signing), authorized representative of [(name of the insurer])

[(Address of the representative])

(Title of person signing)

Signature of witness or notary:

(Date)

DOCUMENTS INCORPORATED BY REFERENCE (9VAC25-900)

[~~DCR Specifications for No. FR-3, Woodland Buffer Filter Area, Virginia Agricultural Cost-Share BMP Manual, Program~~

~~Year~~] ~~2014, July 2013,~~ [~~2018 (rev. March 2016), Department of Conservation and Recreation~~

~~DCR Specifications for No. SL-8B, Small Grain Cover Crop for Nutrient Management and Residue Management, Virginia Agricultural Cost Share BMP Manual, Program Year~~] ~~2014, July 2013,~~ [~~2018 (rev. March 2017), Department of Conservation and Recreation~~

~~DCR Specifications for No. WP-2, Stream Protection, Virginia Agricultural Cost Share BMP Manual, Program Year~~] ~~2014, July 2013,~~ [~~2018 (rev. March 2016), Department of Conservation and Recreation~~

~~DCR Specifications for No. WQ-1, Grass Filter Strips, Virginia Agricultural Cost Share BMP Manual, Program Year~~] ~~2014, July 2013,~~ [~~2018 (rev. March 2016), Department of Conservation and Recreation~~

DCR Specifications for No. FR-3, Woodland Buffer Filter Area, Virginia Agricultural Cost Share BMP Manual, Program Year 2020 (rev. April 2019), Department of Conservation and Recreation

DCR Specifications for No. SL-8B, Small Grain Cover Crop for Nutrient Management and Residue Management, Virginia Agricultural Cost Share BMP Manual, Program Year 2020 (rev. April 2019), Department of Conservation and Recreation

DCR Specifications for No. WP-2W, Stream Protection, Virginia Agricultural Cost Share BMP Manual, Program Year 2020 (rev. April 2019), Department of Conservation and Recreation

DCR Specifications for No. WQ-1, Grass Filter Strips, Virginia Agricultural Cost Share BMP Manual, Program Year 2020 (rev. April 2019), Department of Conservation and Recreation]

Virginia's Forestry Best Management Practices for Water Quality Technical Manual, Fifth Edition 2011, Department of Forestry. Available at http://www.dof.virginia.gov/infopubs/BMP-Technical-Guide_pub.pdf.

Virginia Chesapeake Bay TMDL Phase I Watershed Implementation Plan, November 29, 2010, Department of Environmental Quality

Virginia Chesapeake Bay TMDL Phase II Watershed Implementation Plan, March 30, 2012, Department of Environmental Quality

[Virginia Agricultural BMP Cost Share Manual, Program Year 2020, Department of Conservation and Recreation, Division of Soil and Water Conservation, Richmond, Virginia

Virginia Invasive Plant Species List, 2014, Department of Conservation and Recreation, Division of Natural Heritage, Richmond, Virginia

Field Office Technical Guide, Natural Resources Conservation Service, United States Department of Agriculture, Washington, D.C. (Web-based document available at the following internet address: https://efotg.sc.egov.usda.gov/%23/details)]

VA.R. Doc. No. R13-3379; Filed June 9, 2020, 4:53 p.m.

TITLE 12. HEALTH

STATE BOARD OF HEALTH

Final Regulation

REGISTRAR'S NOTICE: The State Board of Health is claiming an exemption from Article 2 of the Administrative Process Act in accordance with § 2.2-4006 A 4 a of the Code of Virginia, which excludes regulations that are necessary to conform to changes in Virginia statutory law or the appropriation act where no agency discretion is involved. The State Board of Health will receive, consider, and respond to petitions by any interested person at any time with respect to reconsideration or revision.

Title of Regulation: **12VAC5-371. Regulations for the Licensure of Nursing Facilities (amending 12VAC5-371-10, 12VAC5-371-300).**

Statutory Authority: §§ 32.1-12 and 32.1-127 of the Code of Virginia.

Effective Date: August 6, 2020.

Agency Contact: Rebekah E. Allen, Senior Policy Analyst, Virginia Department of Health, 9960 Mayland Drive, Suite 401, Richmond, VA 23233, telephone (804) 367-2102, FAX (804) 527-4502, or email regulatorycomment@vdh.virginia.gov.

Summary:

Pursuant to Chapter 846 of the 2020 Acts of Assembly, the amendments allow nursing facility employees who are authorized to possess, distribute, or administer medications to patients to store, dispense, or administer cannabidiol oil or THC-A oil to a patient who has been issued a valid written certification for the use of cannabidiol oil or THC-A oil and has registered with the Board of Pharmacy.

Part I
Definitions and General Information

12VAC5-371-10. Definitions.

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

"Abuse" means the willful infliction of injury, unreasonable confinement, intimidation, or punishment with resulting physical harm, pain or mental anguish, or deprivation by an

individual, including caretaker, of goods or services that are necessary to attain or maintain physical, mental, and psychosocial well-being. This includes verbal, sexual, physical or mental abuse.

"Administrator" means the individual licensed by the Virginia Board of Long-Term Care Administrators and who has the necessary authority and responsibility for management of the nursing facility.

"Admission" means the process of acceptance into a nursing facility, including orientation, rules and requirements, and assignment to appropriate staff. Admission does not include readmission to the facility after a temporary absence.

"Advance directive" means (i) a witnessed written document, voluntarily executed by the declarant in accordance with the requirements of § 54.1-2983 of the Code of Virginia, or (ii) a witnessed oral statement, made by the declarant subsequent to the time he is diagnosed as suffering from a terminal condition and in accordance with the provision of § 54.1-2983 of the Code of Virginia.

"Assessment" means the process of evaluating a resident for the purpose of developing a profile on which to base services. Assessment includes information gathering, both initially and on an ongoing basis, designed to assist the multi-disciplinary staff in determining the resident's need for care, and the collection and review of resident-specific data.

"Attending physician" means a physician currently licensed by the Virginia Board of Medicine and identified by the resident, or legal representative, as having the primary responsibility in determining the delivery of the resident's medical care.

"Board" means the Board of Health.

"Cannabidiol oil" means the same as the term is defined in subsection A of § 54.1-3408.3 of the Code of Virginia.

"Certified nurse aide" means the title that can only be used by individuals who have met the requirements to be certified, as defined by the Virginia Board of Nursing, and who are listed in the nurse aide registry.

"Chemical restraint" means a psychopharmacologic drug (a drug prescribed to control mood, mental status, or behavior) that is used for discipline or convenience and not required to treat medical symptoms or symptoms from mental illness or mental retardation that prohibit an individual from reaching his highest level of functioning.

"Clinical record" means the documentation of health care services, whether physical or mental, rendered by direct or indirect resident-provider interactions. An account compiled by physicians and other health care professionals of a variety of resident health information, such as assessments and care details, including testing results, medicines, and progress notes.

"Commissioner" means the State Health Commissioner.

"Complaint" means any allegation received by the Department of Health other than an incident reported by the facility staff. Such allegations include abuse, neglect, exploitation, or violation of state or federal laws or regulations.

"Comprehensive plan of care" means a written action plan, based on assessment data, that identifies a resident's clinical and psychosocial needs, the interventions to meet those needs, treatment goals that are measurable and that documents the resident's progress toward meeting the stated goals.

"Construction" means the building of a new nursing facility or the expansion, remodeling, or alteration of an existing nursing facility and includes the initial and subsequent equipping of the facility.

"Department" means the Virginia Department of Health.

"Dignity" means staff, in their interactions with residents, carry out activities which assist a resident in maintaining and enhancing the resident's self-esteem and self-worth.

"Discharge" means the process by which the resident's services, delivered by the nursing facility, are terminated.

"Discharge summary" means the final written summary of the services delivered, goals achieved and post-discharge plan or final disposition at the time of discharge from the nursing facility. The discharge summary becomes a part of the clinical record.

"Drug" means (i) articles or substances recognized in the official United States "Drug" Pharmacopoeia National Formulary or official Homeopathic Pharmacopoeia of the United States, or any supplement to any of them; (ii) articles or substances intended for the use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animal; (iii) articles or substances, other than food, intended to affect the structure or any function of the body of man or other animal; and (iv) articles or substances intended for use as a component of any article specified in clause (i), (ii), or (iii). This does not include devices or their components, parts or accessories.

"Electronic monitoring" means an unmanned video recording system with or without audio capability installed in the room of a resident.

"Emergency preparedness plan" means a component of a nursing facility's safety management program designed to manage the consequences of natural disasters or other emergencies that disrupt the nursing facility's ability to provide care.

"Employee" means a person who performs a specific job function for financial remuneration on a full-time or part-time basis.

"Facility-managed" means an electronic monitoring system that is installed, controlled, and maintained by the nursing facility with the knowledge of the resident or resident's responsible party in accordance with the facility's policies.

"Full-time" means a minimum of 35 hours or more worked per week in the nursing facility.

"Guardian" means a person legally invested with the authority and charged with the duty of taking care of the resident, managing his property, and protecting the rights of the resident who has been declared by the circuit court to be incapacitated and incapable of administering his own affairs. The powers and duties of the guardian are defined by the court and are limited to matters within the areas where the resident in need of a guardian has been determined to be incapacitated.

"Medication" means any substance, whether prescription or over-the-counter drug, that is taken orally or injected, inserted, topically applied, or otherwise administered.

"Neglect" means a failure to provide timely and consistent services, treatment, or care to a resident necessary to obtain or maintain the resident's health, safety, or comfort or a failure to provide timely and consistent goods and services necessary to avoid physical harm, mental anguish, or mental illness.

"Nursing facility" means any nursing home as defined in § 32.1-123 of the Code of Virginia.

"OLC" means the Office of Licensure and Certification of the Virginia Department of Health.

"Person" means any individual, corporation, partnership, association, trust, or other legal entity, whether governmental or private, owning, managing, or operating a nursing facility.

"Physical restraint" means any manual method or physical or mechanical device, material, or equipment attached or adjacent to the resident's body that the individual cannot remove easily which restricts freedom of movement or normal access to one's own body.

"Policy" means a written statement that describes the principles and guides and governs the activities, procedures and operations of the nursing facility.

"Procedures" means a series of activities designed to implement program goals or policy, which may or may not be written, depending upon the specific requirements within this chapter. For inspection purposes, there must be evidence that procedures are actually implemented.

"Progress note" means a written statement, signed and dated by the person delivering the care, consisting of a pertinent, chronological report of the resident's care. A progress note is a component of the clinical record.

"Qualified" means meeting current legal requirements of licensure, registration or certification in Virginia; having appropriate training and experience commensurate with assigned responsibilities; or, if referring to a professional, possessing an appropriate degree or having documented equivalent education, training or experience.

"Quality assurance" means systematic activities performed to determine the extent to which clinical practice meets specified standards and values with regard to such things as appropriateness of service assignment and duration, appropriateness of facilities and resources utilized, adequacy and clinical soundness of care given. Such activities should also assure changes in practice that do not meet accepted standards. Examples of quality assurance activities include the establishment of facility-wide goals for resident care, the assessment of the procedures used to achieve the goals, and the proposal of solutions to problems in attaining those goals.

"Readmission" means a planned return to the nursing facility following a temporary absence for hospitalization, off-site visit or therapeutic leave, or a return stay or confinement following a formal discharge terminating a previous admission.

"Resident" means the primary service recipient, admitted to the nursing facility, whether that person is referred to as a client, consumer, patient, or other term.

"Resident-managed" means an electronic monitoring system that is installed, controlled, and maintained by the resident with the knowledge of the nursing facility.

"Responsible person or party" means an individual authorized by the resident to act for him as an official delegate or agent. The responsible person may be a guardian, payee, family member or any other individual who has arranged for the care of the resident and assumed this responsibility. The responsible person or party may or may not be related to the resident. A responsible person or party is not a guardian unless so appointed by the court.

"Supervision" means the ongoing process of monitoring the skills, competencies and performance of the individual supervised and providing regular, face-to-face guidance and instruction.

"THC-A oil" means the same as the term is defined in subsection A of § 54.1-3408.3 of the Code of Virginia.

"Volunteer" means a person who, without financial remuneration, provides services to the nursing facility.

12VAC5-371-300. Pharmaceutical services.

A. Provision shall be made for the procurement, storage, dispensing, and accounting of drugs and other pharmacy products in compliance with 18VAC110-20. This may be by arrangement with an off-site pharmacy, but must include provisions for 24-hour emergency service.

B. Each nursing facility shall develop and implement policies and procedures for the handling of drugs and

biologicals, including procurement, storage, administration, self-administration and disposal of drugs.

C. Each nursing facility shall have a written agreement with a qualified pharmacist to provide consultation on all aspects of the provision of pharmacy services in the facility.

D. The consultant pharmacist shall make regularly scheduled visits, at least monthly, to the nursing facility for a sufficient number of hours to carry out the function of the agreement.

E. ~~No~~ Excluding cannabidiol oil and THC-A oil,no drug or medication shall be administered to any resident without a valid verbal order or a written, dated and signed order from a physician, dentist ~~or~~, podiatrist, nurse practitioner, or physician assistant, licensed in Virginia.

F. Nursing facility employees who are authorized to possess, distribute, or administer medications to residents may store, dispense, or administer cannabidiol oil or THC-A oil to a resident who has:

1. Been issued a valid written certification for the use of cannabidiol oil or THC-A oil in accordance with subsection B of § 54.1-3408.3 of the Code of Virginia; and

2. Registered with the Board of Pharmacy.

~~F.~~ G. Verbal orders for drugs or medications shall only be given to a licensed nurse, pharmacist or physician.

~~G.~~ H. Drugs and medications not limited as to time or number of doses when ordered shall be automatically stopped, according to the written policies of the nursing facility, and the attending physician shall be notified.

~~H.~~ I. Each resident's medication regimen shall be reviewed by a pharmacist licensed by the Virginia Board of Pharmacy. Any irregularities identified by the pharmacist shall be reported to the physician and the director of nursing, and their response documented.

~~I.~~ J. Medication orders shall be reviewed at least every 60 days by the attending physician, nurse practitioner, or physician's assistant.

~~J.~~ K. Prescription and nonprescription drugs and medications may be brought into the nursing facility by a resident's family, friend or other person provided:

1. The individual delivering the drugs and medications assures timely delivery, in accordance with the nursing facility's written policies, so that the resident's prescribed treatment plan is not disrupted;

2. Each drug or medication is in an individual container; and

3. Delivery is not allowed directly to an individual resident.

In addition, prescription medications shall be obtained and labeled as required by law.

VA.R. Doc. No. R20-6336; Filed June 15, 2020, 10:39 a.m.

Final Regulation

REGISTRAR'S NOTICE: The State Board of Health is claiming an exemption from Article 2 of the Administrative Process Act in accordance with § 2.2-4006 A 4 a of the Code of Virginia, which excludes regulations that are necessary to conform to changes in Virginia statutory law or the appropriation act where no agency discretion is involved. The State Board of Health will receive, consider, and respond to petitions by any interested person at any time with respect to reconsideration or revision.

Title of Regulation: **12VAC5-391. Regulations for the Licensure of Hospice (amending 12VAC5-391-10, 12VAC5-391-430).**

Statutory Authority: §§ 32.1-12 and 32.1-162.5 of the Code of Virginia.

Effective Date: August 6, 2020.

Agency Contact: Rebekah E. Allen, Senior Policy Analyst, Virginia Department of Health, 9960 Mayland Drive, Suite 401, Richmond, VA 23233, telephone (804) 367-2102, FAX (804) 527-4502, or email regulatorycomment@vdh.virginia.gov.

Summary:

Pursuant to Chapter 846 of the 2020 Acts of Assembly, the amendments allow hospice and hospice facility employees who are authorized to possess, distribute, or administer medications to patients to store, dispense, or administer cannabidiol oil or THC-A oil to a patient who has been issued a valid written certification for the use of cannabidiol oil or THC-A oil and has registered with the Board of Pharmacy.

Part I
Definitions and General Information

12VAC5-391-10. Definitions.

The following words and terms when used in these regulations shall have the following meaning unless the context clearly indicates otherwise.

"Activities of daily living" means bathing, dressing, toileting, transferring, bowel control, bladder control and eating/feeding.

"Administer" means the direct application of a controlled substance, whether by injection, inhalation, ingestion, or any other means, to the body of a patient by (i) a practitioner or by his authorized agent and under his supervision or (ii) the patient at the direction and in the presence of the practitioner as defined in § 54.1-3401 of the Code of Virginia.

"Administrator" means a person designated, in writing, by the governing body as having the necessary authority for the day-to-day management of the hospice program. The administrator must be a member of the hospice staff. The administrator, director of nursing, or another clinical director may be the same individual if that individual is dually qualified.

"Adverse outcome" means the result of drug or health care therapy that is neither intended nor expected in normal therapeutic use and that causes significant, sometimes life-threatening conditions or consequences at some future time. Such potential future adverse outcome may require the arrangement of appropriate follow-up surveillance and perhaps other departures from the usual plan of care.

"Attending physician" means a physician licensed in Virginia, according to Chapter 29 (§ 54.1-2900 et seq.) of Title 54.1 of the Code of Virginia, or licensed in an adjacent state and identified by the patient as having the primary responsibility in determining the delivery of the patient's medical care. The responsibilities of physicians contained in this chapter may be implemented by nurse practitioners or physician assistants as assigned by the supervising physician and within the parameters of professional licensing.

"Available at all times during operating hours" means an individual is available on the premises or by telecommunications.

"Barrier crimes" means certain offenses specified in § 32.1-162.9:1 of the Code of Virginia that automatically bar an individual convicted of those offenses from employment with a hospice program.

"Bereavement service" means bereavement counseling as defined in 42 CFR 418.3.

"Cannabidiol oil" means the same as that term is defined in subsection A of § 54.1-3408.3 of the Code of Virginia.

"Commissioner" means the State Health Commissioner.

"Coordinated program" means a continuum of palliative and supportive care provided to a terminally ill patient and ~~his~~ the patient's family, 24 hours a day, seven days a week.

"Core services" means those services that must be provided by a hospice program. Such services are: (i) nursing services, (ii) physician services, (iii) counseling services, and (iv) medical social services.

"Counseling services" means the provision of bereavement services, dietary services, spiritual and any other counseling services for the patient and family while the person is enrolled in the program.

"Criminal record report" means the statement issued by the Central Criminal Records Exchange, Virginia Department of State Police.

"Dispense" means to deliver a drug to the ultimate user by or pursuant to the lawful order of a practitioner, including the prescribing and administering, packaging, labeling or compounding necessary to prepare the substance for that delivery as defined in § 54.1-3401 of the Code of Virginia.

"Employee" means an individual who is appropriately trained and performs a specific job function for the hospice program on a ~~full~~ full-time or part-time basis with or without financial compensation.

"Governing body" means the individual, group, or governmental agency that has legal responsibility and authority over the operation of the hospice program.

"Home attendant" means a nonlicensed individual performing personal care and environmental services, under the supervision of the appropriate health professional, to a patient in the patient's residence. Home attendants are also known as certified nursing assistants or CNAs, home care aides, home health aides, and personal care aides.

"Hospice" means a hospice as defined in § 32.1-162.1 of the Code of Virginia.

"Hospice facility" means an institution, place, or building as defined in § 32.1-162.1 of the Code of Virginia.

"Inpatient" means the provision of services, such as food, laundry, housekeeping, and staff to provide health or health-related services, including respite and symptom management, to hospice patients, whether in a hospital, nursing facility, or hospice facility.

"Interdisciplinary group" means the group responsible for assessing the health care and special needs of the patient and the patient's family. Providers of special services, such as mental health, pharmacy, and any other appropriate associated health services may also be included on the team as the needs of the patient dictate. The interdisciplinary group is often referred to as the IDG.

"Licensee" means a licensed hospice program provider.

"Medical director" means a physician currently licensed in Virginia, according to Chapter 29 (§ 54.1-2900 et seq.) of Title 54.1 of the Code of Virginia, and responsible for the medical direction of the hospice program.

"Medical record" means a continuous and accurate documented account of services provided to a patient, including the prescription and delivery of the treatment or care.

"Medication error" means one or more violations of the five principles of medication administration: the correct drug to the right patient at the prescribed time in the prescribed dose via the prescribed route.

"Nursing services" means the patient care performed or supervised by a registered nurse according to a plan of care.

"OLC" means the Office of Licensure and Certification of the Virginia Department of Health.

"Operator" means any individual, partnership, association, trust, corporation, municipality, county, local government agency, or any other legal or commercial entity responsible for the day-to-day administrative management and operation of the hospice.

"Palliative care" means treatment directed at controlling pain, relieving other symptoms, and focusing on the special needs of the patient and family as they experience the stress of the dying process. Palliative care means treatment to enhance comfort and improve the quality of a patient's life during the last phase of his life.

"Patient" means a hospice patient as defined in § 32.1-162.1 of the Code of Virginia.

"Patient's family" means a hospice patient's family as defined in § 32.1-162.1 of the Code of Virginia.

"Patient's residence" means the place where the individual or patient makes his home.

"Person" means any individual, partnership, association, trust, corporation, municipality, county, local government agency, or any other legal or commercial entity that operates a hospice.

"Plan of care" means a written plan of services developed by the interdisciplinary group to maximize patient comfort by symptom control to meet the physical, psychosocial, spiritual, and other special needs that are experienced during the final stages of illness, during dying, and bereavement.

"Primary caregiver" means an individual that, through mutual agreement with the patient and the hospice program, assumes responsibility for the patient's care.

"Progress note" means a documented statement contained in a patient's medical record, dated and signed by the person delivering the care, treatment, or service, describing the treatment or services delivered and the effect of the care, treatment, or services on the patient.

"Quality improvement" means ongoing activities designed to objectively and systematically evaluate the quality of care and services, pursue opportunities to improve care and services, and resolve identified problems. Quality improvement is an approach to the ongoing study and improvement of the processes of providing services to meet the needs of patients and their families.

"Separate and distinct entrance" means an entrance to the hospice facility other than the formal public entrance used by patients and family members.

"Staff" means an employee who receives financial compensation.

"Supervision" means the ongoing process of monitoring the skills, competencies, and performance of the individual supervised and providing regular face-to-face guidance and instruction.

"Terminally ill" means a medical prognosis that life expectancy is six months or less if the illness runs its usual course.

"THC-A oil" means the same as that term is defined in subsection A of § 54.1-3408.3 of the Code of Virginia.

"Volunteer" means an employee who receives no financial compensation.

12VAC5-391-430. Pharmacy services.

A. All prescription drugs shall be prescribed and properly dispensed to the patient according to the provisions of Chapters 33 (§ 54.1-3300 et seq.) and 34 (§ 54.1-3400 et seq.) of Title 54.1 of the Code of Virginia and the regulations of the Virginia Board of Pharmacy, except for prescription drugs authorized by § 54.1-3408 of the Drug Control Act, such as epinephrine for emergency administration, normal saline and heparin flushes for the maintenance of IV lines, and adult immunizations, which may be given by a nurse pursuant to established protocol.

B. Home attendants may administer normally self-administered drugs in the patient's private residence as allowed by § 54.1-3408 of the Virginia Drug Control Act (Chapter 34 (§ 54.1-3400 et seq.) of Title 54.1 of the Code of Virginia). Any other drug shall be administered only by a licensed nurse or physician assistant.

C. The hospice program shall develop written policies and procedures for the administration of infusion therapy medications that include~~, but are not limited to~~:

1. Developing a plan of care;

2. Initiation of medication administration based on a prescriber's order and monitoring of the patient for response to the treatment and any adverse reactions or side effects;

3. Assessment of any factors related to the home environment that may affect the prescriber's decisions for initiating, modifying, or discontinuing medications;

4. Communication with the prescriber concerning assessment of the patient's response to therapy, any other patient specific needs, any significant change in the patient's condition;

5. Communication with the patient's provider pharmacy concerning problems or needed changes in a patient's medication;

6. Maintaining a complete and accurate record of medications prescribed, medication administration data, patient assessments, any laboratory tests ordered to

monitor response to drug therapy and results, and communications with the prescriber and pharmacy provider;

7. Educating or instructing the patient, family members, or other caregivers involved in the administration of infusion therapy in the proper storage of medication, in the proper handling of supplies and equipment, in any applicable safety precautions, in recognizing potential problems with the patient, and actions to take in an emergency; and

8. Initial training and retraining of all hospice program staff providing infusion therapy.

D. The hospice program shall employ a registered nurse who holds a current active license with the Virginia Board of Nursing, has completed training in infusion therapy and has the knowledge, skills, and competencies to safely administer infusion therapy to supervise medication administration by staff. This person shall be responsible for ensuring compliance with applicable laws and regulations, adherence to the policies and procedures related to administration of medications, and conducting periodic assessments of staff competency in performing infusion therapy.

E. Hospice and hospice facility employees who are authorized to possess, distribute, or administer medications to patients may store, dispense, or administer cannabidiol oil or THC-A oil to a patient who has:

1. Been issued a valid written certification for the use of cannabidiol oil or THC-A oil in accordance with subsection B of § 54.1-3408.3 of the Code of Virginia; and

2. Registered with the Board of Pharmacy.

VA.R. Doc. No. R20-6335; Filed June 3, 2020, 4:29 p.m.

Final Regulation

REGISTRAR'S NOTICE: The State Board of Health is claiming an exemption from Article 2 of the Administrative Process Act in accordance with § 2.2-4006 A 4 a of the Code of Virginia, which excludes regulations that are necessary to conform to changes in Virginia statutory law or the appropriation act where no agency discretion is involved. The State Board of Health will receive, consider, and respond to petitions by any interested person at any time with respect to reconsideration or revision.

Title of Regulation: **12VAC5-410. Regulations for the Licensure of Hospitals in Virginia (amending 12VAC5-410-230, 12VAC5-410-280, 12VAC5-410-1170).**

Statutory Authority: §§ 32.1-12 and 32.1-127 of the Code of Virginia.

Effective Date: August 6, 2020.

Agency Contact: Rebekah E. Allen, Senior Policy Analyst, Virginia Department of Health, 9960 Mayland Drive, Suite 401, Richmond, VA 23233, telephone (804) 367-2102, FAX (804) 527-4502, or email regulatorycomment@vdh.virginia.gov.

Summary:

The amendments conform regulation to statutes adopted during the 2020 Session of the General Assembly. Pursuant to Chapter 714, amendments establish protocols to ensure that any patient scheduled to receive an elective surgical procedure for which the patient can reasonably be expected to require outpatient physical therapy as a follow-up treatment after discharge is informed that the patient (i) is expected to require outpatient physical therapy as a follow-up treatment and (ii) will be required to select a physical therapy provider prior to being discharged from the hospital. Pursuant to Chapter 942, amendments require each hospital with an emergency department to establish a protocol for treatment of individuals experiencing a substance use-related emergency to include the completion of appropriate assessments or screenings to identify medical interventions necessary for the treatment of the individual in the emergency department.

Article 2
Patient Care Services

12VAC5-410-230. Patient care management.

A. All patients shall be under the care of a member of the medical staff.

B. Each hospital shall have a plan that includes effective mechanisms for the periodic review and revision of patient care policies and procedures.

C. Each hospital shall establish a protocol relating to the rights and responsibilities of patients based on Joint Commission on Accreditation of Healthcare Organizations' 2000 Hospital Accreditation Standards, January 2000. The protocol shall include a process reasonably designed to inform patients of their rights and responsibilities. Patients shall be given a copy of their rights and responsibilities upon admission.

D. No medication or treatment shall be given except on the signed order of a person lawfully authorized by state statutes.

1. Hospital personnel, as designated in medical staff bylaws, rules and regulations, or hospital policies and procedures, may accept emergency telephone and other verbal orders for medication or treatment for hospital patients from physicians and other persons lawfully authorized by state statute to give patient orders.

2. As specified in the hospital's medical staff bylaws, rules and regulations, or hospital policies and procedures, emergency telephone and other verbal orders shall be signed within a reasonable period of time not to exceed 72 hours, by the person giving the order, or, when such person

is not available, cosigned by another physician or other person authorized to give the order.

E. Each hospital shall have a reliable method for identification of each patient, including newborn infants.

F. Each hospital shall include in its visitation policy a provision allowing each adult patient to receive visits from any individual from whom the patient desires to receive visits, subject to other restrictions contained in the visitation policy including the patient's medical condition and the number of visitors permitted in the patient's room simultaneously.

G. Each hospital that is equipped to provide life-sustaining treatment shall develop a policy to determine the medical or ethical appropriateness of proposed medical care, which shall include:

1. A process for obtaining a second opinion regarding the medical and ethical appropriateness of proposed medical care in cases in which a physician has determined proposed care to be medically or ethically inappropriate;

2. Provisions for review of the determination that proposed medical care is medically or ethically inappropriate by an interdisciplinary medical review committee and a determination by the interdisciplinary medical review committee regarding the medical and ethical appropriateness of the proposed health care of the patient;

3. Requirements for a written explanation of the decision of the interdisciplinary medical review committee, which shall be included in the patient's medical record; and

4. Provisions to ensure the patient, the patient's agent, or the person authorized to make the patient's medical decisions in accordance with § 54.1-2986 of the Code of Virginia is informed of the patient's right to obtain the patient's medical record and the right to obtain an independent medical opinion and afforded reasonable opportunity to participate in the medical review committee meeting.

The policy shall not prevent the patient, the patient's agent, or the person authorized to make the patient's medical decisions from obtaining legal counsel to represent the patient or from seeking other legal remedies, including court review, provided that the patient, the patient's agent, person authorized to make the patient's medical decisions, or legal counsel provide written notice to the chief executive officer of the hospital within 14 days of the date of the physician's determination that proposed medical treatment is medically or ethically inappropriate as documented in the patient's medical record.

H. Each hospital shall establish a protocol requiring that, before a health care provider arranges for air medical transportation services for a patient who does not have an emergency medical condition as defined in 42 USC § 1395dd(e)(1), the hospital shall provide the patient or the patient's authorized representative with written or electronic notice that the patient (i) may have a choice of transportation by an air medical transportation provider or medically appropriate ground transportation by an emergency medical services provider and (ii) will be responsible for charges incurred for such transportation in the event that the provider is not a contracted network provider of the patient's health insurance carrier or such charges are not otherwise covered in full or in part by the patient's health insurance plan.

I. Each hospital shall provide written information about the patient's ability to request an estimate of the payment amount for which the participant will be responsible pursuant to § 32.1-137.05 of the Code of Virginia. The written information shall be posted conspicuously in public areas of the hospital, including admissions or registration areas, and included on any website maintained by the hospital.

J. Each hospital shall establish protocols to ensure that any patient scheduled to receive an elective surgical procedure for which the patient can reasonably be expected to require outpatient physical therapy as a follow-up treatment after discharge is informed that the patient:

1. Is expected to require outpatient physical therapy as a follow-up treatment; and

2. Will be required to select a physical therapy provider prior to being discharged from the hospital.

12VAC5-410-280. Emergency service.

A. Hospitals with an emergency department/service shall have 24-hour staff coverage and shall have at least one physician on call at all times. Hospitals without emergency service shall have written policies governing the handling of emergencies.

B. No less than one registered nurse shall be assigned to the emergency service on each shift. Such assignment need not be exclusive of other duties, but must have priority over all other assignments.

C. Those hospitals that provide ambulance services shall comply with Article 2.1 (§ 32.1-111.1 et seq.) of Chapter 4 of Title 32.1 of the Code of Virginia and 12VAC5-31.

D. The hospital shall provide equipment, drugs, supplies, and ancillary services commensurate with the scope of anticipated needs, including radiology and laboratory services and facilities for handling and administering of blood and blood products. Emergency drugs and equipment shall remain accessible in the emergency department at all times.

E. Current roster of medical staff members on emergency call, including alternates and medical specialists or consultants shall be posted in the emergency department.

F. Hospitals shall make special training available, as required, for emergency department personnel.

G. Toxicology reference material and poison antidote information shall be available along with telephone numbers of the nearest poison control centers.

H. Each emergency department shall post notice of the existence of a human trafficking hotline to alert possible witnesses or victims of human trafficking to the availability of a means to gain assistance or report crimes. This notice shall be in a place readily visible and accessible to the public, such as the patient admitting area or public or patient restrooms. The notice shall meet the requirements of § 40.1-11.3 C of the Code of Virginia.

I. Every hospital with an emergency department shall establish protocols to ensure that security personnel of the emergency department receive training appropriate to the populations served by the emergency department. This training may include training based on a trauma-informed approach in identifying and safely addressing situations involving patients or other persons who pose a risk of harm to themselves or others due to mental illness or substance abuse or who are experiencing a mental health crisis.

J. Each hospital with an emergency department shall establish a protocol for treatment of individuals experiencing a substance use-related emergency to include the completion of appropriate assessments or screenings to identify medical interventions necessary for the treatment of the individual in the emergency department. The protocol may also include a process for patients who are discharged directly from the emergency department for the recommendation of follow-up care following discharge for any identified substance use disorder, depression, or mental health disorder, as appropriate, that may include:

1. Instructions for distribution of naloxone;

2. Referrals to peer recovery specialists and community-based providers of behavioral health services; or

3. Referrals for pharmacotherapy for treatment of drug or alcohol dependence or mental health diagnoses.

12VAC5-410-1170. Policy and procedures manual.

A. Each outpatient surgical hospital shall develop a policy and procedures manual that shall include provisions covering the following items:

1. The types of emergency and elective procedures that may be performed in the facility.

2. Types of anesthesia that may be used.

3. Admissions and discharges, including ~~criteria~~:

a. Criteria for evaluating the patient before admission and before discharge; and

b. Protocols to ensure that any patient scheduled to receive an elective surgical procedure for which the patient can reasonably be expected to require outpatient physical therapy as a follow-up treatment after discharge is informed that the patient:

(1) Is expected to require outpatient physical therapy as a follow-up treatment; and

(2) Will be required to select a physical therapy provider prior to being discharged from the hospital.

4. Written informed consent of patient prior to the initiation of any procedures.

5. Procedures for housekeeping and infection control and prevention.

6. Disaster preparedness.

7. Facility security.

B. A copy of approved policies and procedures and revisions thereto shall be made available to the OLC upon request.

C. Each outpatient surgical hospital shall establish a protocol relating to the rights and responsibilities of patients based on Joint Commission on Accreditation of Healthcare Organizations' Standards for Ambulatory Care (2000 Hospital Accreditation Standards, January 2000). The protocol shall include a process reasonably designed to inform patients of their rights and responsibilities. Patients shall be given a copy of their rights and responsibilities upon admission.

D. Each outpatient surgical hospital shall obtain a criminal history record check pursuant to § 32.1-126.02 of the Code of Virginia on any compensated employee not licensed by the Board of Pharmacy whose job duties provide access to controlled substances within the outpatient surgical hospital pharmacy.

VA.R. Doc. No. R20-6334; Filed June 15, 2020, 10:36 a.m.

TITLE 14. INSURANCE

STATE CORPORATION COMMISSION

Final Regulation

REGISTRAR'S NOTICE: The State Corporation Commission is claiming an exemption from the Administrative Process Act in accordance with § 2.2-4002 A 2 of the Code of Virginia, which exempts courts, any agency of the Supreme Court, and any agency that by the Constitution is expressly granted any of the powers of a court of record.

Title of Regulation: **14VAC5-300. Rules Governing Credit for Reinsurance (amending 14VAC5-300-40, 14VAC5-300-90, 14VAC5-300-95, 14VAC5-300-150; adding 14VAC5-300-97).**

Statutory Authority: §§ 12.1-13 and 38.2-1316.2 of the Code of Virginia.

Effective Date: July 1, 2020.

Agency Contact: Raquel C. Pino, Insurance Policy Advisor, Bureau of Insurance, State Corporation Commission, P.O. Box 1157, Richmond, VA 23218, telephone (804) 371-9499, FAX (804) 371-9873, or email raquel.pino@scc.virginia.gov.

Summary:

The amendments conform the regulation to the provisions of § 38.2-1316.2 of the Code of Virginia to reflect changes made pursuant to Chapter 208 of the 2020 Acts of Assembly eliminating the reinsurance collateral requirements for assuming insurers (reciprocal reinsurers) that have their head office or are domiciled in a reciprocal jurisdiction and that meet certain solvency requirements. Reciprocal jurisdictions include non-United States jurisdictions subject to an in-force covered agreement, United States jurisdictions accredited under the National Association of Insurance Commissioners Financial Standards and Accreditation Program, or qualified jurisdictions determined by the State Corporation Commission. The solvency requirements for reciprocal reinsurers include (i) maintaining a minimum capital and surplus; (ii) maintaining a minimum solvency or capital ratio; (iii) providing notice to the commission in the event of noncompliance with the minimum capital and surplus and minimum solvency requirements, serious noncompliance with applicable law, consent to service of process, consent to payment of final judgments, and nonparticipation in solvent schemes; (iv) providing certain documentation specified by the commission; and (v) maintaining a practice of prompt payment of claims.

AT RICHMOND, JUNE 12, 2020

COMMONWEALTH OF VIRGINIA, ex rel.

STATE CORPORATION COMMISSION

CASE NO. INS-2020-00074

Ex Parte: In the matter of Adopting
Revisions to the Rules Governing
Credit for Reinsurance

ORDER ADOPTING REVISIONS TO RULES

By Order to Take Notice ("Order") entered April 14, 2020, insurers and all other interested persons were ordered to take notice that subsequent to June 1, 2020, the State Corporation Commission ("Commission") would consider the entry of an order adopting proposed revisions to the rules set forth in Chapter 300 of Title 14 of the Virginia Administrative Code, entitled Rules Governing Credit for Reinsurance, 14 VAC 5-300-10 et seq. ("Rules"), as well as the addition of a new Rule at 14 VAC 5-300-97, unless on or before June 1, 2020 any interested person filed written comments or a request for hearing to consider the amendments to the Rules with the Clerk of the Commission ("Clerk").

One comment was filed with the Clerk in support of the revisions to the Rules. No other comments and no requests for a hearing were filed with the Clerk.

The revisions to Chapter 300 are necessary to implement the provisions of § 38.2-1316.2 of the Code of Virginia, which were amended during the 2020 General Assembly (Chapter 208 of the 2020 Acts of Assembly). The amendments eliminate reinsurance collateral requirements for Assuming Insurers (Reciprocal Reinsurers) that have their head office or are domiciled in a Reciprocal Jurisdiction and that meet certain solvency requirements.

Following the Order to Take Notice, several editorial and conforming changes were made to the proposed rules, which are neither substantive nor material in nature.

NOW THE COMMISSION, having considered the proposed revisions to the Rules, is of the opinion that the attached revisions to the Rules should be adopted, effective July 1, 2020.

Accordingly, IT IS ORDERED THAT:

(1) The revisions to the Rules Governing Credit for Reinsurance at Chapter 300 of Title 14 of the Virginia Administrative Code, which revise the Rules at 14 VAC 5-300-40, 14 VAC 5-300-90, 14 VAC 5-300-95, and 14 VAC 5-300-150; and add a new Rule at 14 VAC 5-300-97, which are attached hereto and made a part hereof, are hereby ADOPTED effective July 1, 2020.

(2) The Bureau of Insurance forthwith shall give notice of the adoption of the revisions to the Rules to all insurers, burial societies, fraternal benefit societies, health services plans, risk retention groups, joint underwriting associations, group self-insurance pools, and group self-insurance associations licensed by the Commission, to qualified reinsurers in Virginia, and to all interested persons designated by the Bureau of Insurance.

(3) The Commission's Division of Information Resources forthwith shall cause a copy of this Order, together with the revisions to the Rules, to be forwarded to the Virginia Registrar of Regulations for appropriate publication in the Virginia Register of Regulations.

(4) The Commission's Division of Information Resources shall make available this Order and the attached amendments to the Rules on the Commission's website: http://www.scc.virginia.gov/case.

(5) The Bureau shall file with the Clerk of the Commission a certificate of compliance with the notice requirements of Ordering Paragraph (2) above.

(6) This case is dismissed, and the papers herein shall be placed in the file for ended

causes.

A COPY hereof shall be sent electronically by the Clerk of the Commission to: C. Meade Browder, Jr., Senior Assistant Attorney General, Office of the Attorney General, Division of Consumer Counsel, at mbrowder@oag.state.va.us, 202 N. 9th Street, 8th Floor, Richmond, Virginia 23219-3424; and a copy hereof shall be delivered to the Commission's Office of General Counsel and the Bureau of Insurance in care of Deputy Commissioner Donald C. Beatty.

14VAC5-300-40. Definitions.

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

"The Act" means the provisions concerning reinsurance set forth in Article 3.1 (§ 38.2-1316.1 et seq.) of Chapter 13 of Title 38.2 of the Code of Virginia.

"Beneficiary" means the entity for whose sole benefit the trust described in 14VAC5-300-120, or the letter of credit described in 14VAC5-300-130, has been established and any successor of the beneficiary by operation of law, including, without limitation, any receiver, conservator, rehabilitator or liquidator.

"Certified reinsurer" has the meaning set forth in § 38.2-1316.1 of the Code of Virginia.

"Grantor" means the entity that has established a trust for the sole benefit of the beneficiary. However, when such a trust is established in conjunction with a reinsurance agreement that qualifies for credit under 14VAC5-300-120, the grantor shall not be an assuming insurer for which credit can be taken under § 38.2-1316.2 of the Code of Virginia.

"Mortgage-related security" means an obligation that is rated AA or higher (or the equivalent) by a securities rating agency recognized by the Securities Valuation Office of the NAIC and that either:

1. Represents ownership of one or more promissory notes or certificates of interest or participation in the notes (including any rights designed to assure servicing of, or the receipt or timeliness of receipt by the holders of the notes, certificates, or participation of amounts payable under, the notes, certificates or participation), that:

a. Are directly secured by a first lien on a single parcel of real estate, including stock allocated to a dwelling unit in a residential cooperative housing corporation, upon which is located a dwelling or mixed residential and commercial structure, or on a residential manufactured home as defined in 42 USCA § 5402(6), whether the manufactured home is considered real or personal property under the laws of the state in which it is located; and

b. Were originated by a savings and loan association, savings bank, commercial bank, credit union, insurance company, or similar institution that is supervised and examined by a federal or state housing authority, or by a mortgagee approved by the Secretary of Housing and Urban Development pursuant to 12 USCA §§ 1709 and 1715-b, or, where the notes involve a lien on the manufactured home, by an institution or by a financial institution approved for insurance by the Secretary of Housing and Urban Development pursuant to 12 USCA § 1703; or

2. Is secured by one or more promissory notes or certificates of deposit or participations in the notes (with or without recourse to the insurer of the notes) and, by its terms, provides for payments of principal in relation to payments, or reasonable projections of payments, or notes meeting the requirements of items 1 a and b of this definition.

"NAIC" means the National Association of Insurance Commissioners.

"Obligations", as used in 14VAC5-300-120 A 11, means:

1. Reinsured losses and allocated loss expenses paid by the ceding company, but not recovered from the assuming insurer;

2. Reserves for reinsured losses reported and outstanding;

3. Reserves for reinsured losses incurred but not reported; and

4. Reserves for allocated reinsured loss expenses and unearned premiums.

"Promissory note" means, when used in connection with a manufactured home, a loan, advance or credit sale as evidenced by a retail installment sales contract or other instrument.

"Qualified United States financial institutions" has the meanings set forth in § 38.2-1316.1 of the Code of Virginia.

"Solvent scheme of arrangement" means a foreign or alien statutory or regulatory compromise procedure subject to requisite majority creditor approval and judicial sanction in the assuming insurer's home jurisdiction either to finally commute liabilities of duly noticed classed members or creditors of a solvent debtor or to reorganize or restructure the debts and obligations of a solvent debtor on a final basis and that may be subject to judicial recognition and enforcement of the arrangement by a governing authority outside the ceding insurer's home jurisdiction.

14VAC5-300-90. Credit for reinsurance; reinsurers maintaining trust funds.

A. Pursuant to § 38.2-1316.2 C 4 of the Act, the commission shall allow credit for reinsurance ceded to a trusteed assuming

insurer which, as of the date of the ceding insurer's statutory financial statement:

1. Maintains a trust fund and trusteed surplus that complies with the provisions of § 38.2-1316.2 C 4;

2. Complies with the requirements set forth in subsections B, C, and D of this section; and

3. Reports annually to the commission on or before June 1 of each year in which a ceding insurer seeks reserve credit under the Act substantially the same information as that required to be reported on the NAIC annual statement form by licensed insurers, to enable the commission to determine the sufficiency of the trust fund. The accounting shall, among other things, set forth the balance to the trust and list the trust's investments as of the preceding year end and shall certify the date of termination of the trust, if so planned, or certify that the trust shall not expire prior to the next following December 31.

B. The following requirements apply to the following categories of assuming insurer:

1. The trust fund for a single assuming insurer shall consist of funds in trust in an amount not less than the assuming insurer's liabilities attributable to reinsurance ceded by United States domiciled insurers, and in addition, the assuming insurer shall maintain a trusteed surplus of not less than $20 million, except as provided in subdivision 2 of this subsection.

2. At any time after the assuming insurer has permanently discontinued underwriting new business secured by the trust for at least three full years, the commissioner with principal regulatory oversight of the trust may authorize a reduction in the required trusteed surplus, but only after a finding, based on an assessment of the risk, that the new required surplus level is adequate for the protection of United States ceding insurers, policyholders, and claimants in light of reasonably foreseeable adverse loss development. The risk assessment may involve an actuarial review, including an independent analysis of reserves and cash flows, and shall consider all material risk factors, including when applicable the lines of business involved, the stability of the incurred loss estimates, and the effect of the surplus requirements on the assuming insurer's liquidity or solvency. The minimum required trusteed surplus may not be reduced to an amount less than 30% of the assuming insurer's liabilities attributable to reinsurance ceded by United States ceding insurers covered by the trust.

3. a. The trust fund for a group including incorporated and individual unincorporated underwriters shall consist of:

(1) For reinsurance ceded under reinsurance agreements with an inception, amendment, or renewal date on or after January 1, 1993, funds in trust in an amount not less than the respective underwriters' several liabilities attributable to business ceded by United States domiciled ceding insurers to any underwriter of the group;

(2) For reinsurance ceded under reinsurance agreements with an inception date on or before December 31, 1992, and not amended or renewed after that date, notwithstanding the other provisions of this chapter, funds in trust in an amount not less than the respective underwriters' several insurance and reinsurance liabilities attributable to business written in the United States; and

(3) In addition to these trusts, the group shall maintain a trusteed surplus of which $100 million shall be held jointly for the benefit of the United States domiciled ceding insurers of any member of the group for all the years of account.

b. The incorporated members of the group shall not be engaged in any business other than underwriting as a member of the group and shall be subject to the same level of regulation and solvency control by the group's domiciliary regulator as are the unincorporated members. The group shall, within 90 days after its financial statements are due to be filed with the group's domiciliary regulator, provide to the commission:

(1) An annual certification by the group's domiciliary regulator of the solvency of each underwriter member of the group; or

(2) If a certification is unavailable, a financial statement prepared by independent public accountants of each underwriter member of the group.

4. a. The trust fund for a group of incorporated insurers under common administration, whose members possess aggregate policyholders surplus of $10 billion (calculated and reported in substantially the same manner as prescribed by the NAIC Annual Statement Instructions and the NAIC Accounting Practices and Procedures Manual) and which has continuously transacted an insurance business outside the United States for at least three years immediately prior to making application for accreditation, shall:

(1) Consist of funds in trust in an amount not less than the assuming insurers' several liabilities attributable to business ceded by United States domiciled ceding insurers to any members of the group pursuant to reinsurance contracts issued in the name of such group;

(2) Maintain a joint trusteed surplus of which $100 million shall be held jointly for the benefit of United States domiciled ceding insurers of any member of the group; and

(3) File a properly executed Certificate of Assuming Insurer as evidence of the submission to this Commonwealth's authority to examine the books and records of any of its members and shall certify that any

member examined will bear the expense of any such examination.

b. Within 90 days after the statements are due to be filed with the group's domiciliary regulator, the group shall file with the commission an annual certification of each underwriter member's solvency by the member's domiciliary regulators, and financial statements, prepared by independent public accountants, of each underwriter member of the group.

C. 1. Credit for reinsurance shall not be granted unless the form of the trust and any amendments to the trust have been approved by either the commissioner of the state where the trust is domiciled or the commissioner of another state who, pursuant to the terms of the trust instrument, has accepted responsibility for regulatory oversight of the trust. The form of the trust and any trust amendments also shall be filed with the commissioner of every state in which the ceding insurer beneficiaries of the trust are domiciled. The trust instrument shall provide that:

a. Contested claims shall be valid and enforceable out of funds in trust to the extent remaining unsatisfied 30 days after entry of the final order of any court of competent jurisdiction in the United States;

b. Legal title to the assets of the trust shall be vested in the trustee for the benefit of the grantor's United States policyholders and ceding insurers, their assigns and successors in interest;

c. The trust and the assuming insurer shall be subject to examination as determined by the commission;

d. The trust shall remain in effect for as long as the assuming insurer, or any member or former member of a group of insurers, shall have outstanding obligations under reinsurance agreements subject to the trust; and

e. No later than February 28 of each year the trustees of the trust (i) shall report to the commission in writing setting forth the balance in the trust and listing the trust's investments at the preceding year end and (ii) shall certify the date of termination of the trust, if so planned, or certify that the trust shall not expire prior to the next December 31.

2. a. Notwithstanding any other provisions in the trust instrument, if the trust fund is inadequate because it contains an amount less than the amount required by this subsection or if the grantor of the trust has been declared insolvent or placed into receivership, rehabilitation, liquidation, or similar proceedings under the laws of its state or country of domicile, the trustee shall comply with an order of the commissioner with regulatory oversight over the trust or with an order of a court of competent jurisdiction directing the trustee to transfer to the commissioner with regulatory oversight over the trust or other designated receiver all of the assets of the trust fund.

b. The assets shall be distributed by and claims shall be filed with and valued by the commissioner with regulatory oversight over the trust in accordance with the laws of the state in which the trust is domiciled applicable to the liquidation of domestic insurance companies.

c. If the commissioner with regulatory oversight over the trust determines that the assets of the trust fund or any part thereof are not necessary to satisfy the claims of the United States beneficiaries of the trust, the commissioner with regulatory oversight over the trust shall return the assets, or any part thereof, to the trustee for distribution in accordance with the trust agreement.

d. The grantor shall waive any right otherwise available to it under United States law that is inconsistent with this provision.

D. For purposes of this section, the term "liabilities" shall mean the assuming insurer's gross liabilities attributable to reinsurance ceded by United States domiciled insurers, excluding liabilities that are otherwise secured by acceptable means, and shall include:

1. For business ceded by domestic insurers authorized to write accident and health, and property and casualty insurance:

a. Losses and allocated loss expenses paid by the ceding insurer, recoverable from the assuming insurer;

b. Reserves for losses reported and outstanding;

c. Reserves for losses incurred but not reported;

d. Reserves for allocated loss expenses; and

e. Unearned premiums.

2. For business ceded by domestic insurers authorized to write life, health, and annuity insurance:

a. Aggregate reserves for life policies and contracts net of policy loans and net due and deferred premiums;

b. Aggregate reserves for accident and health policies;

c. Deposit funds and other liabilities without life or disability contingencies; and

d. Liabilities for policy and contract claims.

E. Assets deposited in trusts established pursuant to § 38.2-1316.2 of the Act and this section shall be valued according to their current fair market value and shall consist only of cash in United States dollars, certificates of deposit issued by a United States financial institution as defined in § 38.2-1316.1 of the Act, clean, irrevocable, unconditional, and "evergreen" letters of credit issued or confirmed by a

qualified United States financial institution, as defined in § 38.2-1316.1, and investments of the type specified in this subsection, but investments in or issued by an entity controlling, controlled by or under common control with either the grantor or beneficiary of the trust shall not exceed 5.0% of total investments. No more than 20% of the total of the investments in the trust may be foreign investments authorized under ~~subdivisions~~ subdivision 1 e, 3, 5 b, or 6 of this subsection, and no more than 10% of the total of the investments in the trust may be securities denominated in foreign currencies. For purposes of applying the preceding sentence, a depository receipt denominated in United States dollars and representing rights conferred by a foreign security shall be classified as a foreign investment denominated in a foreign currency. The assets of a trust established to satisfy the requirements of § 38.2-1316.2 shall be invested only as follows:

1. Government obligations that are not in default as to principal or interest, that are valid and legally authorized and that are issued, assumed, or guaranteed by:

a. The United States or by any agency or instrumentality of the United States;

b. A state of the United States;

c. A territory, possession, or other governmental unit of the United States;

d. An agency or instrumentality of a governmental unit referred to in subdivisions 1 b and c of this subsection if the obligations shall be by law (statutory or otherwise) payable, as to both principal and interest, from taxes levied or by law required to be levied or from adequate special revenues pledged or otherwise appropriated or by law required to be provided for making these payments, but shall not be obligations eligible for investment under this subsection if payable solely out of special assessments on properties benefited by local improvements; or

e. The government of any other country that is a member of the Organization for Economic Cooperation and Development and whose government obligations are rated A or higher, or the equivalent, by a rating agency recognized by the Securities Valuation Office of the NAIC;

2. Obligations that are issued in the United States, or that are dollar denominated and issued in a non-United States market, by a solvent United States institution (other than an insurance company) or that are assumed or guaranteed by a solvent United States institution (other than an insurance company) and that are not in default as to principal or interest if the obligations:

a. Are rated A or higher (or the equivalent) by a securities rating agency recognized by the Securities Valuation Office of the NAIC, or if not so rated, are similar in structure and other material respects to other obligations of the same institution that are so rated;

b. Are insured by at least one authorized insurer (other than the investing insurer or a parent, subsidiary or affiliate of the investing insurer) licensed to insure obligations in this Commonwealth and, after considering the insurance, are rated AAA (or the equivalent) by a securities rating agency recognized by the Securities Valuation Office of the NAIC; or

c. Have been designated as Class One or Class Two by the Securities Valuation Office of the NAIC;

3. Obligations issued, assumed or guaranteed by a solvent non-United States institution chartered in a country that is a member of the Organization for Economic Cooperation and Development or obligations of United States corporations issued in a non-United States currency, provided that in either case the obligations are rated A or higher, or the equivalent, by a rating agency recognized by the Securities Valuation Office of the NAIC;

4. An investment made pursuant to the provisions of subdivision 1, 2, or 3 of this subsection shall be subject to the following additional limitations:

a. An investment in or loan upon the obligations of an institution other than an institution that issues mortgage-related securities shall not exceed 5.0% of the assets of the trust;

b. An investment in any one mortgage-related security shall not exceed 5.0% of the assets of the trust;

c. The aggregate total investment in mortgage-related securities shall not exceed 25% of the assets of the trust; and

d. Preferred or guaranteed shares issued or guaranteed by a solvent United States institution are permissible investments if all of the institution's obligations are eligible as investments under subdivisions 2 a and 2 c of this subsection, but shall not exceed 2.0% of the assets of the trust;

5. Equity interests.

a. Investments in common shares or partnership interests of a solvent United States institution are permissible if:

(1) Its obligations and preferred shares, if any, are eligible as investments under this subsection; and

(2) The equity interests of the institution (except an insurance company) are registered on a national securities exchange as provided in the Securities Exchange Act of 1934, 15 USC §§ 78 a to 78 kk or otherwise registered pursuant to that Act, and if otherwise registered, price quotations for them are

furnished through a nationwide automated quotations system approved by the Financial Industry Regulatory Authority, or successor organization. A trust shall not invest in equity interests under this subdivision an amount exceeding 1.0% of the assets of the trust even though the equity interests are not so registered and are not issued by an insurance company;

b. Investments in common shares of a solvent institution organized under the laws of a country that is a member of the Organization for Economic Cooperation and Development if:

(1) All its obligations are rated A or higher, or the equivalent, by a rating agency recognized by the Securities Valuation Office of the NAIC; and

(2) The equity interests of the institution are registered on a securities exchange regulated by the government of a country that is a member of the Organization for Economic Cooperation and Development;

c. An investment in or loan upon any one institution's outstanding equity interests shall not exceed 1.0% of the assets of the trust. The cost of an investment in equity interests made pursuant to this subdivision, when added to the aggregate cost of other investments in equity interests then held pursuant to this subdivision, shall not exceed 10% of the assets in the trust;

6. Obligations issued, assumed, or guaranteed by a multinational development bank, provided the obligations are rated A or higher, or the equivalent, by a rating agency recognized by the Securities Valuation Office of the NAIC.

7. Investment companies.

a. Securities of an investment company registered pursuant to the Investment Company Act of 1940, 15 USC § 80 a, are permissible investments if the investment company:

(1) Invests at least 90% of its assets in the types of securities that qualify as an investment under subdivision 1, 2, or 3 of this subsection or invests in securities that are determined by the commission to be substantively similar to the types of securities set forth in subdivision 1, 2, or 3 of this subsection; or

(2) Invests at least 90% of its assets in the types of equity interests that qualify as an investment under subdivision 5 a of this subsection;

b. Investments made by a trust in investment companies under this subdivision shall not exceed the following limitations:

(1) An investment in an investment company qualifying under subdivision 7 a (1) of this subsection shall not exceed 10% of the assets in the trust and the aggregate amount of investment in qualifying investment companies shall not exceed 25% of the assets in the trust; and

(2) Investments in an investment company qualifying under subdivision 7 a (2) of this subsection shall not exceed 5.0% of the assets in the trust and the aggregate amount of investment in qualifying investment companies shall be included when calculating the permissible aggregate value of equity interests pursuant to subdivision 5 a of this subsection.

8. Letters of credit.

a. In order for a letter of credit to qualify as an asset of the trust, the trustee shall have the right and the obligation pursuant to the deed of trust or some other binding agreement (as duly approved by the commission) to immediately draw down the full amount of the letter of credit and hold the proceeds in trust for the beneficiaries of the trust if the letter of credit will otherwise expire without being renewed or replaced.

b. The trust agreement shall provide that the trustee shall be liable for its negligence, willful misconduct, or lack of good faith. The failure of the trustee to draw against the letter of credit in circumstances where such draw would be required shall be deemed to be negligence and/or willful misconduct.

F. A specific security provided to a ceding insurer by an assuming insurer pursuant to ~~14VAC5-300-100~~ 14VAC5-300-110 shall be applied, until exhausted, to the payment of liabilities of the assuming insurer to the ceding insurer holding the specific security prior to, and as a condition precedent for, presentation of a claim by the ceding insurer for payment by a trustee of a trust established by the assuming insurer pursuant to this section.

14VAC5-300-95. Credit for reinsurance; certified reinsurers.

A. Pursuant to § 38.2-1316.2 D of the Act, the commission shall allow credit for reinsurance ceded by a domestic insurer to an assuming insurer that has been certified as a reinsurer in this Commonwealth at all times for which statutory financial statement credit for reinsurance is claimed under this section. The credit allowed shall be based upon the security held by or on behalf of the ceding insurer in accordance with a rating assigned to the certified reinsurer by the commission. The security shall be in a form consistent with the provisions of § 38.2-1316.2 D and ~~14VAC5-300-110,~~ 14VAC5-300-120, 14VAC5-300-130, or 14VAC5-300-140. The amount of security required in order for full credit to be allowed shall correspond with the following requirements:

1. Ratings	Security Required
Secure – 1	0.0%
Secure – 2	10%

Secure – 3	20%
Secure – 4	50%
Secure – 5	75%
Vulnerable – 6	100%

2. Affiliated reinsurance transactions shall receive the same opportunity for reduced security requirements as all other reinsurance transactions.

3. The commission shall require the certified reinsurer to post 100%, for the benefit of the ceding insurer or its estate, security upon the entry of an order of rehabilitation, liquidation, or conservation against the ceding insurer.

4. In order to facilitate the prompt payment of claims, a certified reinsurer shall not be required to post security for catastrophe recoverables for a period of one year from the date of the first instance of a liability reserve entry by the ceding company as a result of a loss from a catastrophic occurrence that is likely to result in significant insured losses, as recognized by the commission. The one year deferral period is contingent upon the certified reinsurer continuing to pay claims in a timely manner. Reinsurance recoverables for only the following lines of business as reported on the NAIC annual financial statement related specifically to the catastrophic occurrence will be included in the deferral:

a. Line 1: Fire

b. Line 2: Allied Lines

c. Line 3: Farmowners multiple peril

d. Line 4: Homeowners multiple peril

e. Line 5: Commercial multiple peril

f. Line 9: Inland marine

g. Line 12: Earthquake

h. Line 21: Auto physical damage

5. Credit for reinsurance under this section shall apply only to reinsurance contracts entered into or renewed on or after the effective date of the certification of the assuming insurer. Any reinsurance contract entered into prior to the effective date of the certification of the assuming insurer that is subsequently amended by mutual agreement of the parties to the reinsurance contract after the effective date of the certification of the assuming insurer, or a new reinsurance contract, covering any risk for which collateral was provided previously, shall only be subject to this section with respect to losses incurred and reserves reported from and after the effective date of the amendment or new contract.

6. Nothing in this section shall prohibit the parties to a reinsurance agreement from agreeing to provisions establishing security requirements that exceed the minimum security requirements established for certified reinsurers under this section.

B. Certification procedure.

1. The commission shall post notice on the Bureau of Insurance's website promptly upon receipt of any application for certification, including instructions on how members of the public may respond to the application. The commission may not take final action on the application until at least 30 days after posting the notice required by this subdivision.

2. The commission shall issue written notice to an assuming insurer that has made application and been approved as a certified reinsurer. Included in such notice shall be the rating assigned the certified reinsurer in accordance with subsection A of this section. The commission shall publish a list of all certified reinsurers and their ratings.

3. In order to be eligible for certification, the assuming insurer shall meet the following requirements:

a. The assuming insurer shall be domiciled and licensed to transact insurance or reinsurance in a qualified jurisdiction, as determined by the commission pursuant to subsection C of this section.

b. The assuming insurer shall maintain capital and surplus, or its equivalent, of no less than $250 million calculated in accordance with subdivision 4 h of this subsection. This requirement may also be satisfied by an association including incorporated and individual unincorporated underwriters having minimum capital and surplus equivalents (net of liabilities) of at least $250 million and a central fund containing a balance of at least $250 million.

c. The assuming insurer shall maintain financial strength ratings from two or more rating agencies deemed acceptable by the commission. These ratings shall be based on interactive communication between the rating agency and the assuming insurer and shall not be based solely on publicly available information. These financial strength ratings will be one factor used by the commission in determining the rating that is assigned to the assuming insurer. Acceptable rating agencies include the following:

(1) Standard & Poor's;

(2) Moody's Investors Service;

(3) Fitch Ratings;

(4) A.M. Best Company; or

(5) Any other nationally recognized statistical rating organization.

d. The certified reinsurer shall comply with any other requirements reasonably imposed by the commission.

4. Each certified reinsurer shall be rated on a legal entity basis, with due consideration being given to the group rating where appropriate, except that an association including incorporated and individual unincorporated underwriters that has been approved to do business as a single certified reinsurer may be evaluated on the basis of its group rating. Factors that may be considered as part of the evaluation process include, but are not limited to, the following:

a. The certified reinsurer's financial strength rating from an acceptable rating agency. The maximum rating that a certified reinsurer may be assigned will correspond to its financial strength rating as outlined in the table below. The commission shall use the lowest financial strength rating received from an approved rating agency in establishing the maximum rating of a certified reinsurer. A failure to obtain or maintain at least two financial strength ratings from acceptable rating agencies will result in loss of eligibility for certification:

Ratings	Best	S&P	Moody's	Fitch
Secure – 1	A++	AAA	Aaa	AAA
Secure – 2	A+	AA+, AA, AA-	Aa1, Aa2, Aa3	AA+, AA, AA-
Secure – 3	A	A+, A	A1, A2	A+, A
Secure – 4	A-	A-	A3	A-
Secure – 5	B++, B+	BBB+, BBB, BBB-	Baa1, Baa2, Baa3	BBB+, BBB, BBB-
Vulnerable – 6	B, B-, C++, C+, C, C-, D, E, F	BB+, BB, BB-, B+, B, B-, CCC, CC, C, D, R	Ba1, Ba2, Ba3, B1, B2, B3, Caa, Ca, C	BB+, BB, BB-, B+, B, B-, CCC+, CC, CCC-, DD

b. The business practices of the certified reinsurer in dealing with its ceding insurers, including its record of compliance with reinsurance contractual terms and obligations;

c. For certified reinsurers domiciled in the United States, a review of the most recent applicable NAIC annual statement blank, either Schedule F (for property/casualty reinsurers) or Schedule S (for life and health reinsurers);

d. For certified reinsurers not domiciled in the United States, a review annually of the Assumed Reinsurance Form CR-F (for property/casualty reinsurers) or the Reinsurance Assumed Life Insurance, Annuities, Deposit Funds and Other Liabilities Form CR-S (for life and health reinsurers) of this chapter;

e. The reputation of the certified reinsurer for prompt payment of claims under reinsurance agreements, based on an analysis of ceding insurers' Schedule F reporting of overdue reinsurance recoverables, including the proportion of obligations that are more than 90 days past due or are in dispute, with specific attention given to obligations payable to companies that are in administrative supervision or receivership;

f. Regulatory actions against the certified reinsurer;

g. The report of the independent auditor on the financial statements of the insurance enterprise, on the basis described in subdivision 4 h of this subsection;

h. For certified reinsurers not domiciled in the United States, audited financial statements ~~(audited United States GAAP basis if available, audited IFRS basis statements are allowed but shall include an audited footnote reconciling equity and net income to a United States GAAP basis)~~, regulatory filings, and actuarial opinion (as filed with the non-United States jurisdiction ~~supervisor)~~ supervisor with a translation into English). Upon the initial application for certification, the commission will consider audited financial statements for the last ~~three~~ two years filed with its non-United States jurisdiction supervisor;

i. The liquidation priority of obligations to a ceding insurer in the certified reinsurer's domiciliary jurisdiction in the context of an insolvency proceeding;

j. A certified reinsurer's participation in any solvent scheme of arrangement, or similar procedure, which involves United States ceding insurers. The commission shall receive prior notice from a certified reinsurer that proposes participation by the certified reinsurer in a solvent scheme of arrangement; and

k. Any other information deemed relevant by the commission.

5. Based on the analysis conducted under subdivision 4 e of this subsection of a certified reinsurer's reputation for prompt payment of claims, the commission may make appropriate adjustments in the security the certified reinsurer is required to post to protect its liabilities to United States ceding insurers, provided that the commission shall, at a minimum, increase the security the certified reinsurer is required to post by one rating level under subdivision 4 a of this subsection if the commission finds that:

a. More than 15% of the certified reinsurer's ceding insurance clients have overdue reinsurance recoverables

on paid losses of 90 days or more that are not in dispute and that exceed $100,000 for each cedent; or

b. The aggregate amount of reinsurance recoverables on paid losses that are not in dispute that are overdue by 90 days or more exceeds $50 million.

6. The assuming insurer shall submit a properly executed Certificate of Certified Reinsurer as evidence of its submission to the jurisdiction of this Commonwealth, appointment of the commission as an agent for service of process in this Commonwealth, and agreement to provide security for 100% of the assuming insurer's liabilities attributable to reinsurance ceded by United States ceding insurers if it resists enforcement of a final United States judgment. The commission shall not certify any assuming insurer that is domiciled in a jurisdiction that the commission has determined does not adequately and promptly enforce final United States judgments or arbitration awards.

7. The certified reinsurer shall agree to meet applicable information filing requirements as determined by the commission, both with respect to an initial application for certification and on an ongoing basis. All information submitted by certified reinsurers that are not otherwise public information subject to disclosure shall be exempted from disclosure under §§ 38.2-221.3 and 38.2-1306.1 of the ~~Act~~ Code of Virginia and shall be withheld from public disclosure. The applicable information filing requirements are as follows:

a. Notification within 10 days of any regulatory actions taken against the certified reinsurer, any change in the provisions of its domiciliary license, or any change in rating by an approved rating agency, including a statement describing such changes and the reasons therefore;

b. Annually, Form CR-F or CR-S, as applicable;

c. Annually, the report of the independent auditor on the financial statements of the insurance enterprise, on the basis described in subdivision 7 d of this subsection;

d. Annually, the most recent audited financial statements ~~(audited United States GAAP basis if available, audited IFRS basis statements are allowed but shall include an audited footnote reconciling equity and net income to a United States GAAP basis)~~, regulatory filings, and actuarial opinion (as filed with the certified reinsurer's ~~supervisor)~~ supervisor with a translation into English). Upon the initial certification, audited financial statements for the last ~~three~~ two years filed with the certified reinsurer's supervisor;

e. At least annually, an updated list of all disputed and overdue reinsurance claims regarding reinsurance assumed from United States domestic ceding insurers;

f. A certification from the certified reinsurer's domestic regulator that the certified reinsurer is in good standing and maintains capital in excess of the jurisdiction's highest regulatory action level; and

g. Any other information that the commission may reasonably require.

8. Change in rating or revocation of certification.

a. In the case of a downgrade by a rating agency or other disqualifying circumstance, the commission shall upon written notice assign a new rating to the certified reinsurer in accordance with the requirements of subdivision 4 a of this subsection.

b. The commission shall have the authority to suspend, revoke, or otherwise modify a certified reinsurer's certification at any time if the certified reinsurer fails to meet its obligations or security requirements under this section, or if other financial or operating results of the certified reinsurer, or documented significant delays in payment by the certified reinsurer, lead the commission to reconsider the certified reinsurer's ability or willingness to meet its contractual obligations.

c. If the rating of a certified reinsurer is upgraded by the commission, the certified reinsurer may meet the security requirements applicable to its new rating on a prospective basis, but the commission shall require the certified reinsurer to post security under the previously applicable security requirements as to all contracts in force on or before the effective date of the upgraded rating. If the rating of a certified reinsurer is downgraded by the commission, the commission shall require the certified reinsurer to meet the security requirements applicable to its new rating for all business it has assumed as a certified reinsurer.

d. Upon revocation of the certification of a certified reinsurer by the commission, the assuming insurer shall be required to post security in accordance with 14VAC5-300-110 in order for the ceding insurer to continue to take credit for reinsurance ceded to the assuming insurer. If funds continue to be held in trust in accordance with 14VAC5-300-90, the commission may allow additional credit equal to the ceding insurer's pro rata share of such funds, discounted to reflect the risk of uncollectibility and anticipated expenses of trust administration. Notwithstanding the change of a certified reinsurer's rating or revocation of its certification, a domestic insurer that has ceded reinsurance to that certified reinsurer may not be denied credit for reinsurance for a period of three months for all reinsurance ceded to that certified reinsurer, unless the reinsurance is found by the commission to be at high risk of uncollectibility.

C. Qualified jurisdictions.

1. If, upon conducting an evaluation under this section with respect to the reinsurance supervisory system of any non-United States assuming insurer, the commission determines that the jurisdiction qualifies to be recognized as a qualified jurisdiction, the commission shall publish notice and evidence of such recognition in an appropriate manner. The commission may establish a procedure to withdraw recognition of those jurisdictions that are no longer qualified.

2. In order to determine whether the domiciliary jurisdiction of a non-United States assuming insurer is eligible to be recognized as a qualified jurisdiction, the commission shall evaluate the reinsurance supervisory system of the non-United States jurisdiction, both initially and on an ongoing basis, and consider the rights, benefits, and the extent of reciprocal recognition afforded by the non-United States jurisdiction to reinsurers licensed and domiciled in the United States. The commission shall determine the appropriate approach for evaluating the qualifications of such jurisdictions, and create and publish a list of jurisdictions whose reinsurers may be approved by the commission as eligible for certification. A qualified jurisdiction shall agree to share information and cooperate with the commission with respect to all certified reinsurers domiciled within that jurisdiction. Additional factors to be considered in determining whether to recognize a qualified jurisdiction, in the discretion of the commission, include but are not limited to the following:

a. The framework under which the assuming insurer is regulated.

b. The structure and authority of the domiciliary regulator with regard to solvency regulation requirements and financial surveillance.

c. The substance of financial and operating standards for assuming insurers in the domiciliary jurisdiction.

d. The form and substance of financial reports required to be filed or made publicly available by reinsurers in the domiciliary jurisdiction and the accounting principles used.

e. The domiciliary regulator's willingness to cooperate with United States regulators in general and the commission in particular.

f. The history of performance by assuming insurers in the domiciliary jurisdiction.

g. Any documented evidence of substantial problems with the enforcement of final United States judgments in the domiciliary jurisdiction. A jurisdiction will not be considered to be a qualified jurisdiction if the commission has determined that it does not adequately and promptly enforce final United States judgments or arbitration awards.

h. Any relevant international standards or guidance with respect to mutual recognition of reinsurance supervision adopted by the International Association of Insurance Supervisors or successor organization.

i. Any other matters deemed relevant by the commission.

3. A list of qualified jurisdictions shall be published through the NAIC committee process. The commission shall consider this list in determining qualified jurisdictions. If the commission approves a jurisdiction as qualified that does not appear on the list of qualified jurisdictions, the commission shall provide thoroughly documented justification with respect to the criteria provided under subdivisions 2 a through i of this subsection.

4. United States jurisdictions that meet the requirements for accreditation under the NAIC financial standards and accreditation program shall be recognized as qualified jurisdictions.

D. Recognition of certification issued by an NAIC accredited jurisdiction.

1. If an applicant for certification has been certified as a reinsurer in an NAIC accredited jurisdiction, the commission has the discretion to defer to that jurisdiction's certification, and to defer to the rating assigned by that jurisdiction, if the assuming insurer submits a properly executed Certificate of Certified Reinsurer and such additional information as the commission requires. The assuming insurer shall be considered to be a certified reinsurer in this Commonwealth.

2. Any change in the certified reinsurer's status or rating in the other jurisdiction shall apply automatically in this Commonwealth as of the date it takes effect in the other jurisdiction. The certified reinsurer shall notify the commission of any change in its status or rating within 10 days after receiving notice of the change.

3. The commission may withdraw recognition of the other jurisdiction's rating at any time and assign a new rating in accordance with subdivision B 8 a of this section.

4. The commission may withdraw recognition of the other jurisdiction's certification at any time, with written notice to the certified reinsurer. Unless the commission suspends or revokes the certified reinsurer's certification in accordance with subdivision B 8 b of this section, the certified reinsurer's certification shall remain in good standing in this Commonwealth for a period of three months, which shall be extended if additional time is necessary to consider the assuming insurer's application for certification in this Commonwealth.

E. Mandatory funding clause. In addition to the clauses required under 14VAC5-300-150, reinsurance contracts entered into or renewed under this section shall include a proper funding clause, which requires the certified reinsurer to provide and maintain security in an amount sufficient to avoid the imposition of any financial statement penalty on the ceding insurer under this section for reinsurance ceded to the certified reinsurer.

F. The commission shall comply with all reporting and notification requirements that may be established by the NAIC with respect to certified reinsurers and qualified jurisdictions.

14VAC5-300-97. Credit for reinsurance; reciprocal jurisdictions.

A. Pursuant to § 38.2-1316.2 E of the Act, the commission shall allow credit for reinsurance ceded by a domestic insurer to an assuming insurer that is licensed to write reinsurance by, and has its head office or is domiciled in a reciprocal jurisdiction and that meets the other requirements of this chapter.

B. A "reciprocal jurisdiction" is a jurisdiction, as designated by the commission pursuant to subsection D of this section, that meets one of the following:

1. A non-United States jurisdiction that is subject to an in-force covered agreement with the United States, each within its legal authority or, in the case of a covered agreement between the United States and the European Union, is a member state of the European Union. For purposes of this subsection, a "covered agreement" is an agreement entered into pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act (31 USC §§ 313 and 314) that is currently in effect or in a period of provisional application and addresses the elimination, under specified conditions, of collateral requirements as a condition for entering into any reinsurance agreement with a ceding insurer domiciled in this Commonwealth or for allowing the ceding insurer to recognize credit for reinsurance;

2. A United States jurisdiction that meets the requirements for accreditation under the NAIC financial standards and accreditation program; or

3. A qualified jurisdiction, as determined by the commission pursuant to § 38.2-1316.2 D of the Code of Virginia and 14VAC5-300-95 C, that is not otherwise described in subdivision 1 or 2 of this subsection and that the commission determines meets all of the following additional requirements:

a. Provides that an insurer that has its head office or is domiciled in such qualified jurisdiction shall receive credit for reinsurance ceded to a United States-domiciled assuming insurer in the same manner as credit for reinsurance is received for reinsurance assumed by insurers domiciled in such qualified jurisdiction;

b. Does not require a United States-domiciled assuming insurer to establish or maintain a local presence as a condition for entering into a reinsurance agreement with any ceding insurer subject to regulation by the non-United States jurisdiction or as a condition to allow the ceding insurer to recognize credit for such reinsurance;

c. Recognizes the United States state regulatory approach to group supervision and group capital by providing written confirmation by a competent regulatory authority in such qualified jurisdiction that insurers and insurance groups that are domiciled or maintain their headquarters in this Commonwealth or another jurisdiction accredited by the NAIC shall be subject only to worldwide prudential insurance group supervision, including worldwide group governance, solvency and capital, and reporting, as applicable, by the commission or the commissioner of the domiciliary state and will not be subject to group supervision at the level of the worldwide parent undertaking of the insurance or reinsurance group by the qualified jurisdiction; and

d. Provides written confirmation by a competent regulatory authority in such qualified jurisdiction that information regarding insurers and the insurers' parent, subsidiary, or affiliated entities, if applicable, shall be provided to the commission in accordance with a memorandum of understanding or similar document between the commission and such qualified jurisdiction, including to the International Association of Insurance Supervisors Multilateral Memorandum of Understanding or other multilateral memoranda of understanding coordinated by the NAIC.

C. Credit shall be allowed when the reinsurance is ceded from an insurer domiciled in this Commonwealth to an assuming insurer meeting each of the conditions set forth in this subsection.

1. The assuming insurer must be licensed to transact reinsurance by and have its head office or be domiciled in a reciprocal jurisdiction.

2. The assuming insurer must have and maintain on an ongoing basis minimum capital and surplus, or its equivalent, calculated on at least an annual basis as of the preceding December 31 or at the annual date otherwise statutorily reported to the reciprocal jurisdiction and confirmed as set forth in subdivision C 7 of this subsection according to the methodology of its domiciliary jurisdiction, in the following amounts:

a. No less than $250 million; or

b. If the assuming insurer is an association, including incorporated and individual unincorporated underwriters:

(1) Minimum capital and surplus equivalents (net of liabilities) or own funds of the equivalent of at least $250 million; and

(2) A central fund containing a balance of the equivalent of at least $250 million.

3. The assuming insurer must have and maintain on an ongoing basis a minimum solvency or capital ratio, as applicable, as follows:

a. If the assuming insurer has its head office or is domiciled in a reciprocal jurisdiction as defined in subdivision B 1 of this section, the ratio specified in the applicable covered agreement;

b. If the assuming insurer is domiciled in a reciprocal jurisdiction as defined in subdivision B 2 of this section, a risk-based capital (RBC) ratio of 300% of the authorized control level, calculated in accordance with the formula developed by the NAIC; or

c. If the assuming insurer is domiciled in a reciprocal jurisdiction as defined in subdivision B 3 of this section, after consultation with the reciprocal jurisdiction and considering any recommendations published through the NAIC Committee Process, such solvency or capital ratio as the commission determines to be an effective measure of solvency.

4. The assuming insurer must agree to and provide adequate assurance, in the form of a properly executed Certificate of Reinsurer Domiciled in Reciprocal Jurisdiction Form RJ-1 of this chapter, of its agreement to the following:

a. The assuming insurer must agree to provide prompt written notice and explanation to the commission if it falls below the minimum requirements set forth in subdivision 2 or 3 of this subsection or if any regulatory action is taken against it for serious noncompliance with applicable law.

b. The assuming insurer must consent in writing to the jurisdiction of the courts of this Commonwealth and to the appointment of the commission as agent for service of process.

(1) The commission may also require that such consent be provided and included in each reinsurance agreement under the commission's jurisdiction.

(2) Nothing in this provision shall limit or in any way alter the capacity of parties to a reinsurance agreement to agree to alternative dispute resolution mechanisms, except to the extent such agreements are unenforceable under applicable insolvency or delinquency laws.

c. The assuming insurer must consent in writing to pay all final judgments, wherever enforcement is sought, obtained by a ceding insurer that have been declared enforceable in the territory where the judgment was obtained.

d. Each reinsurance agreement must include a provision requiring the assuming insurer to provide security in an amount equal to 100% of the assuming insurer's liabilities attributable to reinsurance ceded pursuant to that agreement if the assuming insurer resists enforcement of a final judgment that is enforceable under the law of the jurisdiction in which it was obtained or a properly enforceable arbitration award, whether obtained by the ceding insurer or by its legal successor on behalf of its estate, if applicable.

e. The assuming insurer must confirm that it is not presently participating in any solvent scheme of arrangement, which involves this Commonwealth's ceding insurers, and agrees to notify the ceding insurer and the commission and to provide 100% security to the ceding insurer consistent with the terms of the scheme, should the assuming insurer enter into such a solvent scheme of arrangement. Such security shall be in a form consistent with the provisions of subsection D of § 38.2-1316.2 and subdivision 2 of § 38.2-1316.4 of the Code of Virginia and 14VAC5-300-120, 14VAC5-300-130, or 14VAC5-300-140.

f. The assuming insurer must agree in writing to meet the applicable information filing requirements as set forth in subdivision 5 of this subsection.

5. The assuming insurer or its legal successor must provide, if requested by the commission, on behalf of itself and any legal predecessors, the following documentation to the commission:

a. For the two years preceding entry into the reinsurance agreement and on an annual basis thereafter, the assuming insurer's annual audited financial statements in accordance with the applicable law of the jurisdiction of its head office or domiciliary jurisdiction, as applicable, including the external audit report;

b. For the two years preceding entry into the reinsurance agreement, the solvency and financial condition report or actuarial opinion if filed with the assuming insurer's supervisor;

c. Prior to entry into the reinsurance agreement and not more than semi-annually thereafter, an updated list of all disputed and overdue reinsurance claims outstanding for 90 days or more, regarding reinsurance assumed from ceding insurers domiciled in the United States; and

d. Prior to entry into the reinsurance agreement and not more than semi-annually thereafter, information regarding the assuming insurer's assumed reinsurance by ceding insurer, ceded reinsurance by the assuming insurer, and reinsurance recoverable on paid and unpaid

losses by the assuming insurer to allow for the evaluation of the criteria set forth in subdivision 6 of this subsection.

6. The assuming insurer must maintain a practice of prompt payment of claims under reinsurance agreements. The lack of prompt payment will be evidenced if any of the following criteria is met:

a. More than 15% of the reinsurance recoverables from the assuming insurer are overdue and in dispute as reported to the commission;

b. More than 15% of the assuming insurer's ceding insurers or reinsurers have overdue reinsurance recoverable on paid losses of 90 days or more that are not in dispute and that exceed for each ceding insurer $100,000, or as otherwise specified in a covered agreement; or

c. The aggregate amount of reinsurance recoverable on paid losses that are not in dispute, but are overdue by 90 days or more, exceeds $50 million, or as otherwise specified in a covered agreement.

7. The assuming insurer's supervisory authority must confirm to the commission on an annual basis that the assuming insurer complies with the requirements set forth in subdivisions 2 and 3 of this subsection.

8. Nothing in this provision precludes an assuming insurer from providing the commissioner with information on a voluntary basis.

D. The commissioner shall timely create and publish a list of reciprocal jurisdictions.

1. A list of reciprocal jurisdictions is published through the NAIC Committee Process. The commission's list shall include any reciprocal jurisdiction as defined under subdivisions B 1 and B 2 of this section and shall consider any other reciprocal jurisdiction included on the NAIC list. The commission may approve a jurisdiction that does not appear on the NAIC list of reciprocal jurisdictions as provided by applicable law or regulation or in accordance with criteria published through the NAIC Committee Process.

2. The commission may remove a jurisdiction from the list of reciprocal jurisdictions upon a determination that the jurisdiction no longer meets one or more of the requirements of a reciprocal jurisdiction, as provided by applicable law or regulation or in accordance with a process published through the NAIC Committee Process, except that the commission shall not remove from the list a reciprocal jurisdiction as defined under subdivisions B 1 and B 2 of this section. Upon removal of a reciprocal jurisdiction from this list credit for reinsurance ceded to an assuming insurer domiciled in that jurisdiction shall be allowed if otherwise allowed pursuant to Article 3.1 (§ 38.2-1316.1 et seq.) of Chapter 13 of Title 38.2 of the Code of Virginia or this chapter.

E. The commission shall timely create and publish a list of assuming insurers that have satisfied the conditions set forth in this section and to which cessions shall be granted credit in accordance with this section.

1. If an NAIC accredited jurisdiction has determined that the conditions set forth in subsection C of this section have been met, the commission has the discretion to defer to that jurisdiction's determination and add such assuming insurer to the list of assuming insurers to which cessions shall be granted credit in accordance with this subsection. The commission may accept financial documentation filed with another NAIC accredited jurisdiction or with the NAIC in satisfaction of the requirements of subsection C of this section.

2. When requesting that the commission defer to another NAIC accredited jurisdiction's determination, an assuming insurer must submit a properly executed Form RJ-1 and additional information as the commission may require. A state that has received such a request will notify other states through the NAIC Committee Process and provide relevant information with respect to the determination of eligibility.

F. If the commission determines that an assuming insurer no longer meets one or more of the requirements under this section, the commission may revoke or suspend the eligibility of the assuming insurer for recognition under this section.

1. While an assuming insurer's eligibility is suspended, no reinsurance agreement issued, amended, or renewed after the effective date of the suspension qualifies for credit except to the extent that the assuming insurer's obligations under the contract are secured in accordance with 14VAC5-300-110.

2. If an assuming insurer's eligibility is revoked, no credit for reinsurance may be granted after the effective date of the revocation with respect to any reinsurance agreements entered into by the assuming insurer, including reinsurance agreements entered into prior to the date of revocation, except to the extent that the assuming insurer's obligations under the contract are secured in a form acceptable to the commission and consistent with the provisions of 14VAC5-300-110.

G. Before denying statement credit or imposing a requirement to post security with respect to subsection F of this section or adopting any similar requirement that will have substantially the same regulatory impact as security, the commission shall:

1. Communicate with the ceding insurer, the assuming insurer, and the assuming insurer's supervisory authority

that the assuming insurer no longer satisfies one of the conditions listed in subsection C of this section;

2. Provide the assuming insurer with 30 days from the initial communication to submit a plan to remedy the defect and 90 days from the initial communication to remedy the defect, except in exceptional circumstances in which a shorter period is necessary for policyholder and other consumer protection;

3. After the expiration of the 90-day or shorter period to remedy the defect, as set out in subdivision 2 of this subsection, if the commission determines that no or insufficient action was taken by the assuming insurer, the commission may impose any of the requirements as set out in this subsection; and

4. Provide a written explanation to the assuming insurer of any of the requirements set out in this subsection.

H. If subject to a legal process of rehabilitation, liquidation, or conservation, as applicable, the ceding insurer or its representative may seek and, if determined appropriate by the court in which the proceedings are pending, may obtain an order requiring that the assuming insurer post security for all outstanding liabilities.

14VAC5-300-150. Reinsurance contract.

A. Credit will not be granted, nor an asset or reduction from liability allowed, to a ceding insurer for reinsurance effected with assuming insurers meeting the requirements of 14VAC5-300-60, 14VAC5-300-70, 14VAC5-300-80, 14VAC5-300-90, 14VAC5-300-95, 14VAC5-300-97, or ~~14VAC5-300-100~~ 14VAC5-300-110 or otherwise in compliance with § 38.2-1316.2 of the Act unless the reinsurance agreement:

1. Includes a proper insolvency clause that stipulates that reinsurance is payable directly to the liquidator or successor without diminution regardless of the status of the ceding company;

2. Includes a provision whereby the assuming insurer, if an unauthorized assuming insurer, has submitted to the jurisdiction of an alternative dispute resolution panel or court of competent jurisdiction within the United States, has agreed to comply with all requirements necessary to give such court or panel jurisdiction, has designated an agent upon whom service of process may be effected, and has agreed to abide by the final decisions of such court or panel; and

3. Includes a proper reinsurance intermediary clause, if applicable, that stipulates that the credit risk for the intermediary is carried by the assuming insurer.

B. If the assuming insurer is not licensed, accredited, or certified to transact insurance or reinsurance in this Commonwealth, the credit permitted pursuant to § 38.2-1316.2 C 3, C 4, and ~~G~~ H shall not be allowed unless the assuming insurer agrees in the reinsurance agreements:

1. a. That in the event of the failure of the assuming insurer to perform its obligations under the terms of the reinsurance agreement, the assuming insurer, at the request of the ceding insurer, shall submit to the jurisdiction of any court of competent jurisdiction in any state of the United States, will comply with all requirements necessary to give the court jurisdiction, and will abide by the final decision of the court or of any appellate court in the event of an appeal; and

b. To designate the commission or a designated attorney as its true and lawful attorney upon whom may be served any lawful process in any action, suit, or proceeding instituted by or on behalf of the ceding insurer.

2. This subsection is not intended to conflict with or override the obligation of the parties to a reinsurance agreement to arbitrate their disputes, if this obligation is created in the agreement.

C. If the assuming insurer does not meet the requirements of § 38.2-1316.2 C 1, 2, or 3, the credit permitted by § 38.2-1316.2 C 4 or D shall not be allowed unless the assuming insurer agrees in the trust agreements to the following conditions:

1. Notwithstanding any other provisions in the trust instrument, if the trust fund is inadequate because it contains an amount less than the amount required by § 38.2-1316.2 C 4, or if the grantor of the trust has been declared insolvent or placed into receivership, rehabilitation, liquidation, or similar proceedings under the laws of its state or country of domicile, the trustee shall comply with an order of the commissioner with regulatory oversight over the trust or with an order of a court of competent jurisdiction directing the trustee to transfer to the commissioner with regulatory oversight all of the assets of the trust fund.

2. The assets shall be distributed by and claims shall be filed with and valued by the commissioner with regulatory oversight in accordance with the laws of the state in which the trust is domiciled that are applicable to the liquidation of domestic insurance companies.

3. If the commissioner with regulatory oversight determines that the assets of the trust fund or any part thereof are not necessary to satisfy the claims of the United States ceding insurers of the grantor of the trust, the assets or part thereof shall be returned by the commissioner with regulatory oversight to the trustee for distribution in accordance with the trust agreement.

4. The grantor shall waive any right otherwise available to it under United States law that is inconsistent with this provision.

NOTICE: Forms used in administering the regulation have been filed by the agency. The forms are not being published; however, online users of this issue of the Virginia Register of Regulations may click on the name of a form with a hyperlink to access it. The forms are also available from the agency contact or may be viewed at the Office of the Registrar of Regulations, 900 East Main Street, 11th Floor, Richmond, Virginia 23219.

FORMS (14VAC5-300)

Certificate of Assuming Insurer - Year Ended December 31, 2017, R05 (05/18) (eff. 5/2018)

~~Certificate of Certified Reinsurer - Year Ended December 31, ____, R15 (02/14) (eff. 2/2014)~~

Certificate of Certified Reinsurer - Year Ended December 31, ____, R15 (11/19) (eff. 11/2019)

Schedule S, Part 1 - Part 7, 1994-2017 National Association of Insurance Commissioners, Annual Statement Blank, Life, Accident & Health (eff. 1/2018)

Schedule F, Part 1 - Part 9, 1994-2017 National Association of Insurance Commissioners, Annual Statement Blank, Property/Casualty (eff. 1/2018)

Form CR-F - Part 1 - Part 2, 2011 National Association of Insurance Commissioners (eff. 1/2013)

Form CR-S - Part 1 - Part 3, 2011 National Association of Insurance Commissioners (eff. 1/2013)

Certificate of Reinsurer Domiciled in Reciprocal Jurisdiction - Year Ended December 31, ____, RJ-1 (07/20) (eff. 7/2020)

VA.R. Doc. No. R20-6333; Filed June 14, 2020, 3:25 p.m.

TITLE 18. PROFESSIONAL AND OCCUPATIONAL LICENSING

BOARD OF PHARMACY

Final Regulation

REGISTRAR'S NOTICE: The Board of Pharmacy is claiming an exemption from Article 2 of the Administrative Process Act in accordance with § 2.2-4006 A 13 of the Code of Virginia, which exempts amendments to regulations of the board to schedule a substance in Schedule I or II pursuant to subsection D of § 54.1-3443 of the Code of Virginia. The board will receive, consider, and respond to petitions by any interested person at any time with respect to reconsideration or revision.

Title of Regulation: **18VAC110-20. Regulations Governing the Practice of Pharmacy (amending 18VAC110-20-322).**

Statutory Authority: §§ 54.1-2400 and 54.1-3433 of the Code of Virginia.

Effective Date: August 5, 2020.

Agency Contact: Caroline Juran, RPh, Executive Director, Board of Pharmacy, 9960 Mayland Drive, Suite 300, Richmond, VA 23233-1463, telephone (804) 367-4456, FAX (804) 527-4472, or email caroline.juran@dhp.virginia.gov.

Summary:

The amendments (i) remove from regulatory text, compounds placed in Schedule I by Chapters 101 and 229 of the 2020 Acts of Assembly, effective July 1, 2020; and (ii) add 11 compounds into Schedule I of the Drug Control Act as recommended by the Department of Forensic Science pursuant to § 54.1-3443 of the Code of Virginia. These compounds added by regulatory action will remain in effect for 18 months or until the compounds are placed in Schedule I by legislative action of the General Assembly.

18VAC110-20-322. Placement of chemicals in Schedule I.

~~A. Pursuant to subsection D of § 54.1-3443 of the Code of Virginia, the Board of Pharmacy places the following in Schedule I of the Drug Control Act:~~

~~1. Synthetic opioid: N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] benzamide (other names: Phenyl fentanyl, Benzoyl fentanyl), its isomers, esters, ethers, salts, and salts of isomers, esters, and ethers, unless specifically excepted, whenever the existence of these isomers, esters, ethers, and salts is possible within the specific chemical designation.~~

~~2. Research chemicals:~~

~~a. 4-acetyloxy-N,N-diallyltryptamine (other name: 4-AcO-DALT), its optical, position, and geometric isomers, salts, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation.~~

~~b. 4-chloro-N,N-dimethylcathinone, its optical, position, and geometric isomers, salts, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation.~~

~~c. 4-hydroxy-N,N-methylisopropyltryptamine (other name: 4-hydroxy-MiPT), its optical, position, and geometric isomers, salts, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation.~~

~~d. 3,4-Methylenedioxy alpha-pyrrolidinohexanophenone (other name: MDPHP), its optical, position, and geometric isomers, salts, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation.~~

~~3. Cannabimimetic agent: Methyl 2-[1-(5-fluoropentyl)-1H-indole-3-carboxamido] 3,3-dimethylbutanoate (other name: 5-Fluoro-MDMB-PICA), its salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation.~~

~~The placement of drugs listed in this subsection shall remain in effect until October 2, 2020, unless enacted into law in the Drug Control Act.~~

~~B. Pursuant to subsection D of § 54.1-3443 of the Code of Virginia, the Board of Pharmacy places the following in Schedule I of the Drug Control Act:~~

~~1. 3,4-dichloro-N-[2-(dimethylamino)cyclohexyl]-N-isopropyl benzamide (other name: Isopropyl U-47700), its isomers, esters, ethers, salts, and salts of isomers, esters, and ethers, unless specifically excepted, whenever the existence of these isomers, esters, ethers, and salts is possible within the specific chemical designation.~~

~~2. Alpha-pyrrolidinoisohexiophenone (other name: alpha-PiHP), its optical, position, and geometric isomers, salts, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation.~~

~~3. 1-[1-(3-hydroxyphenyl)cyclohexyl]piperidine (other name: 3-hydroxy-PCP), its optical, position, and geometric isomers, salts, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation.~~

~~The placement of drugs listed in this subsection shall remain in effect until December 25, 2020, unless enacted into law in the Drug Control Act.~~

~~C.~~ A. Pursuant to subsection D of § 54.1-3443 of the Code of Virginia, the Board of Pharmacy places the following in Schedule I of the Drug Control Act:

1. Synthetic opioids.

a. N-[2-(dimethylamino)cyclohexyl]-N-phenylfuran-2-carboxamide (other name: Furanyl UF-17), its isomers, esters, ethers, salts, and salts of isomers, esters, and ethers, unless specifically excepted, whenever the existence of these isomers, esters, ethers, and salts is possible within the specific chemical designation.

b. N-[2-(dimethylamino)cyclohexyl]-N-phenylpropionamide (other name: UF-17), its isomers, esters, ethers, salts, and salts of isomers, esters, and ethers, unless specifically excepted, whenever the existence of these isomers, esters, ethers, and salts is possible within the specific chemical designation.

2. Research chemicals.

a. 5-methoxy-N,N-dibutyltryptamine (other name: 5-methoxy-DBT), its optical, position, and geometric isomers, salts, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation.

b. 1-(1,3-benzodioxol-5-yl)-2-(ethylamino)-1-butanone (other name: Eutylone, bk-EBDB), its optical, position, and geometric isomers, salts, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation.

c. 1-(1,3-benzodioxol-5-yl)-2-(butylamino)-1-pentanone (other name: N-butylpentylone), its optical, position, and geometric isomers, salts, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation.

d. N-benzyl-3,4-dimethoxyamphetamine (other name: N-benzyl-3,4-DMA), its optical, position, and geometric isomers, salts, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation.

e. 3,4-methylenedioxy-N-benzylcathinone (other name: BMDP), its optical, position, and geometric isomers, salts, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation.

3. Cannabimimetic agents.

a. Ethyl 2-({1-[(4-fluorophenyl)methyl]-1H-indazole-3-carbonyl}amino)-3-methylbutanoate (other name: EMB-FUBINACA), its salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation.

b. Methyl 2-[1-4-fluorobutyl)-1H-indazole-3-carboxamido]-3,3-dimethylbutanoate (other name: 4-fluoro-MDMB-BUTINACA), its salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation.

The placement of drugs listed in this subsection shall remain in effect until June 10, 2021, unless enacted into law in the Drug Control Act.

B. Pursuant to subsection D of § 54.1-3443 of the Code of Virginia, the Board of Pharmacy places the following in Schedule I of the Drug Control Act:

1. Synthetic opioids.

a. N-phenyl-N-[1-(2-phenylmethyl)-4-piperidinyl]-2-furancarboxamide (other name: N-benzyl Furanyl

norfentanyl), its isomers, esters, ethers, salts, and salts of isomers, esters, and ethers, unless specifically excepted, whenever the existence of these isomers, esters, ethers, and salts is possible within the specific chemical designation.

b. 1-[2-methyl-4-(3-phenyl-2-propen-1-yl)-1-piperazinyl]-1-butanone (other name: 2-methyl AP-237), its isomers, esters, ethers, salts, and salts of isomers, esters, and ethers, unless specifically excepted, whenever the existence of these isomers, esters, ethers, and salts is possible within the specific chemical designation.

2. Research chemicals.

a. N-hexyl-3,4-dimethoxyamphetamine (other names: N-hexyl-3.4-DMA), its optical, position, and geometric isomers, salts, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation.

b. N-heptyl-3,4-dimethoxyamphetamine (other names: N-heptyl-3.4-DMA), its optical, position, and geometric isomers, salts, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation.

c. 2-(isobutylamino)-1-phenylhexan-1-one (other names: N-Isobutyl Hexedrone, α-isobutylaminohexanphenone), its optical, position, and geometric isomers, salts, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation.

d. 1-(benzo[d][1,3]dioxol-5-yl)-2-(sec-butylamino)pentan-1-one (other name: N-sec-butyl Pentylone), its optical, position, and geometric isomers, salts, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation.

e. 2-fluoro-Deschloroketamine (other name: 2-(2-fluorophenyl)-2-(methylamino)-cyclohexanone), its optical, position, and geometric isomers, salts, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation.

3. Cannabimimetic agents.

a. Methyl 2-[1-(5-fluoropentyl)-1H-indole-3-carboxamido]-3-methylbutanoate (other name: MMB 2201), its salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation.

b. Methyl 2-[1-(4-penten-1-yl)-1H-indole-3-carboxamido]-3-methylbutanoate (other names: MMB022, MMB-4en-PICA), its salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation.

c. Methyl 2-[1-(5-fluoropentyl)-1H-indole-3-carboxamido]-3-phenylpropanoate (other name: 5-fluoro-MPP-PICA), its salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation.

d. 1-(5-fluoropentyl)-N-(1-methyl-1-phenylethyl)-1H-indole-3-carboxamide (other name: 5-fluoro CUMYL-PICA), its salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation.

The placement of drugs listed in this subsection shall remain in effect until February 4, 2022, unless enacted into law in the Drug Control Act.

VA.R. Doc. No. R20-6321; Filed June 8, 2020, 3:49 p.m.

Final Regulation

REGISTRAR'S NOTICE: The Board of Pharmacy is claiming an exemption from Article 2 of the Administrative Process Act in accordance with § 2.2-4006 A 13 of the Code of Virginia, which exempts amendments to regulations of the board to schedule a substance pursuant to subsection E of § 54.1-3443 of the Code of Virginia. The board will receive, consider, and respond to petitions by any interested person at any time with respect to reconsideration or revision.

Title of Regulation: **18VAC110-20. Regulations Governing the Practice of Pharmacy (amending 18VAC110-20-323).**

Statutory Authority: §§ 54.1-2400 and 54.1-3443 of the Code of Virginia.

Effective Date: August 5, 2020.

Agency Contact: Caroline Juran, RPh, Executive Director, Board of Pharmacy, 9960 Mayland Drive, Suite 300, Richmond, VA 23233-1463, telephone (804) 367-4456, FAX (804) 527-4472, or email caroline.juran@dhp.virginia.gov.

Summary:

The amendments (i) add four compounds and add an "other name" for FUB-AKB48 in Schedule I of the Drug Control Act; (ii) add one compound to, delete two compounds from, and change the name of one compound in Schedule II; (iii) add two compounds in Schedule IV; and (iv) add one compound in Schedule V to mirror a final federal action regarding scheduling of controlled substances.

18VAC110-20-323. Scheduling for conformity with federal law or rule.

Pursuant to subsection E of § 54.1-3443 of the Code of Virginia and in order to conform the Drug Control Act to

recent scheduling changes enacted in federal law or rule, the board:

1. Adds MT-45 (1-cyclohexyl-4-(1,2-diphenylethyl)piperazine) to Schedule I;

2. Adds Dronabinol ((-)-delta-9-trans tetrahydrocannabinol) in an oral solution in a drug product approved for marketing by the U.S. Food and Drug Administration to Schedule II;

3. Deletes naldemedine from Schedule II; ~~and~~

4. Adds a drug product in finished dosage formulation that has been approved by the U.S. Food and Drug Administration that contains cannabidiol (2-[1R-3-methyl-6R-(1-methylethenyl)-2-cyclohexen-1-yl]-5-pentyl-1,3-benzenediol) derived from cannabis and no more than 0.1% (w/w) residual tetrahydrocannabinols to Schedule V;

5. Adds methyl 2-(1-(cyclohexylmethyl)-1H-indole-3-carboxamido)-3,3-dimethylbutanoate (other name: MDMB-CHMICA, MMB-CHMINACA), including its salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible, in Schedule I;

6. Adds solriamfetol (2-amino-3-phenylpropyl carbamate), including its salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible, to Schedule IV;

7. Adds noroxymorphone, including its salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible, to Schedule II;

8. Adds lasmiditan [2,4,6-trifluoro-N-(6-(1-methylpiperidine-4-carbonyl)pyridine-2-yl-benzamide], including its salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible, to Schedule V;

9. Adds brexanolone (3α-hydroxy-5α-pregnan-20-one), including its salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible, in Schedule IV;

10. Deletes naloxegol and 6β-naltrexol from Schedule II;

11. Replaces 4-anilino-N-phenethyl-4-piperidine (CASRN 21409-26-7) in Schedule II with 4-anilino-N-phenethylpiperidine (ANPP);

12. Adds ethyl 2-(1-(5-fluoropentyl)-1H-indazole-3-carboxamido)-3,3-dimethylbutanoate (other name: 5F-EDMB-PINACA), methyl 2-(1-(5-fluoropentyl)-1H-indole-3-carboxamido)-3,3-dimethylbutanoate (other name: 5F-MDMB-PICA), and 1-5-fluoropentyl)-N-(2-phenylpropan-2-yl)-1H-indazole-3-carboxamide (other name: 5F-CUMYL-PINACA), and their optical, positional, and geometric isomers, salts, and salts of isomers to Schedule I; and

13. Adds other name 5F-APINACA to N-(adamantan-1-yl)-1-(4-fluorobenzyl)-1H-indazole-3-carboxamide (other name: FUB-AKB48) which is currently placed in Schedule I.

VA.R. Doc. No. R20-6327; Filed June 8, 2020, 3:50 p.m.

DEPARTMENT OF PROFESSIONAL AND OCCUPATIONAL REGULATION

Final Regulation

REGISTRAR'S NOTICE: The Department of Professional and Occupational Regulation is claiming an exemption from Article 2 of the Administrative Process Act in accordance with § 2.2-4006 A 4 a of the Code of Virginia, which excludes regulations that are necessary to conform to changes in Virginia statutory law or the appropriation act where no agency discretion is involved. The Department of Professional and Occupational Regulation will receive, consider, and respond to petitions by any interested person at any time with respect to reconsideration or revision.

Title of Regulation: **18VAC120-50. Regulations Governing Natural Gas Automobile Mechanics and Technicians (repealing 18VAC120-50-10 through 18VAC120-50-230).**

Statutory Authority: §§ 54.1-201 and 54.1-2356 of the Code of Virginia.

Effective Date: August 14, 2020.

Agency Contact: Eric L. Olson, Department of Professional and Occupational Regulation, 9960 Mayland Drive, Suite 400, Richmond, VA 23233, telephone (804) 367-2785, FAX (866) 430-1033, or email cngmech@dpor.virginia.gov.

Summary:

Chapter 1168 of the 2020 Acts of Assembly repealed Chapter 23.4 (§ 54.1-2355 et seq.) of Title 54.1 of the Code of Virginia, removing the authority for the Department of Professional and Occupational Regulation to regulate natural gas automobile mechanics and technicians. Therefore, the regulations are repealed.

VA.R. Doc. No. R20-6375; Filed June 10, 2020, 12:34 p.m.

TITLE 20. PUBLIC UTILITIES AND TELECOMMUNICATIONS

STATE CORPORATION COMMISSION

Proposed Regulation

REGISTRAR'S NOTICE: The State Corporation Commission is claiming an exemption from the Administrative Process Act in accordance with § 2.2-4002 A 2 of the Code of Virginia, which exempts courts, any agency of the Supreme Court, and any agency that by the Constitution is expressly granted any of the powers of a court of record.

Title of Regulation: **20VAC5-210. Water or Wastewater Utility Applications Seeking Fair Valuation of Acquisitions of Municipal Water (adding 20VAC5-210-10, 20VAC5-210-20, 20VAC5-210-30, 20VAC5-210-40).**

Statutory Authority: §§ 12.1-13 and 56-90.2 of the Code of Virginia.

Public Hearing Information: A public hearing will be held upon request.

Public Comment Deadline: July 27, 2020.

Agency Contact: Scott Armstrong, CPA, CDP, Deputy Director, Division of Utility Accounting and Finance, State Corporation Commission, P.O. Box 1197, Richmond, VA 23218, telephone (804) 371-9535, FAX (804) 371-9549, or email scott.armstrong@scc.virginia.com.

Summary:

The proposed regulation adds a new chapter, Water or Wastewater Utility Applications Seeking Fair Valuation of Acquisitions of Municipal Water or Wastewater Systems (20VAC5-210), pursuant to Chapters 518 and 519 of the 2020 Acts of Assembly to establish minimum filing requirements related to such utility applications under Chapter 5 (§ 56-88 et seq.) of Title 56 of the Code of Virginia.

AT RICHMOND, JUNE 16, 2020

COMMONWEALTH OF VIRGINIA, ex rel.

STATE CORPORATION COMMISSION

CASE NO. PUR-2020-00116

Ex Parte: In the matter of adopting new
rules of the State Corporation Commission
governing utility applications
seeking fair valuation of acquisitions of municipal
water or wastewater systems

ORDER FOR NOTICE AND COMMENT

The Virginia General Assembly enacted legislation during its 2020 Session[1] requiring the State Corporation Commission ("Commission") to establish rules governing utility applications seeking fair valuation of acquisitions of municipal water or wastewater systems related to applications filed pursuant to Chapter 5 of Title 56 of the Code of Virginia.[2] The new rules are to be effective by January 1, 2021.

NOW THE COMMISSION, upon consideration of the foregoing, is of the opinion and finds that a proceeding should be established to promulgate rules governing water or wastewater utility applications seeking fair valuation of acquisitions of municipal water or wastewater systems. To initiate this proceeding, the Commission's Staff ("Staff") has prepared proposed rules which are appended to this Order ("Proposed Rules"). We will direct that notice of the Proposed Rules be given to the public and that interested persons be provided an opportunity to file written comments on, propose modifications or supplements to, or request a hearing on the Proposed Rules. We further find that a copy of the Proposed Rules should be sent to the Registrar of Regulations for publication in the Virginia Register of Regulations.

The Commission further takes judicial notice of the ongoing public health emergency related to the spread of the coronavirus, or COVID-19, and the declarations of emergency issued at both the state and federal levels.[3] The Commission has taken certain actions, and may take additional actions going forward, which could impact the procedures in this proceeding.[4] Consistent with these actions, in regard to the terms of the procedural framework established below, the Commission will, among other things, direct the electronic filing of comments.

Accordingly, IT IS ORDERED THAT:

(1) This matter is docketed as Case No. PUR-2020-00116.

(2) All filings in this matter should be submitted electronically to the extent authorized by Rule 5 VAC 5-20-150, Copies and Format, of the Commission's Rules of Practice and Procedure ("Rules of Practice").[5] For the duration of the COVID-19 emergency, any person seeking to hand deliver and physically file or submit any pleading or other document shall contact the Clerk's Office Document Control Center at (804) 371-9838 to arrange the delivery.[6]

(3) The Commission's Division of Information Resources shall forward a copy of this Order for Notice and Comment ("Order"), including a copy of the Proposed Rules, to the Registrar of Regulations for publication in the Virginia Register of Regulations.

(4) An electronic copy of the Proposed Rules may be obtained by submitting a request to Scott Armstrong in the Commission's Division of Utility Accounting and Finance at the following email address: scott.armstrong@scc.virginia.gov. An electronic copy of the Proposed Rules can be found at the Division of Public Utility

Regulation's website: https://scc.virginia.gov/pages/Rulemaking. Interested persons may also download unofficial copies of the Order and the Proposed Rules from the Commission's website: https://scc.virginia.gov/pages/Case-Information.

(5) On or before July 27, 2020, any interested person may file comments on the Proposed Rules by following the instructions found on the Commission's website: https://scc.virginia.gov/casecomments/Submit-Public-Comments. Such comments may also include proposed modifications and hearing requests. All comments shall refer to Case No. PUR-2020-00116. Any request for hearing shall state with specificity why the issues raised in the request for hearing cannot be adequately addressed in written comments. If a sufficient request for hearing is not received, the Commission may consider the matter and enter an order based upon the papers filed herein.

(6) On or before August 17, 2020, the Staff may file with the Clerk of the Commission a report on or a response to any comments, proposals, or requests for hearing submitted to the Commission on the Proposed Rules.

(7) This matter is continued.

A COPY hereof shall be sent electronically by the Clerk of the Commission to utilities providing water or sewer service in the Commonwealth of Virginia that are subject to regulation by the Commission as identified in the attached list; and C. Meade Browder, Jr., Senior Assistant Attorney General, Division of Consumer Counsel, Office of the Attorney General, 202 North 9th Street, 8th Floor, Richmond, Virginia 23219-3424.

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[1]Chapter 519 of the 2020 Acts of Assembly (SB 831); Chapter 518 of the 2020 Acts of Assembly (HB 835).

[2]Section 56-88 et seq.

[3]See, e.g., Executive Order No. 51, Declaration of a State of Emergency Due to Novel Coronavirus, COVID-19, issued March 12, 2020, by Gov. Ralph S. Northam. See also Executive Order No. 53, Temporary Restrictions on Restaurants, Recreational, Entertainment, Gatherings, Non-Essential Retail Businesses, and Closure of K-12 Schools Due to Novel Coronavirus (COVID-19), issued March 23, 2020, by Governor Ralph S. Northam, and Executive Order No. 55, Temporary Stay at Home Order Due to Novel Coronavirus (COVID-19), issued March 30, 2020, by Governor Ralph S. Northam. These and subsequent Executive Orders related to COVID-19 may be found at: https://www.governor.virginia.gov/executive-actions/.

[4]See, e.g., Commonwealth of Virginia, ex rel. State Corporation Commission, Ex Parte: Electronic Service of Commission Orders, Case No. CLK-2020-00004, Doc. Con. Cen. No. 200330035, Order Concerning Electronic Service of Commission Orders (Mar. 19, 2020), extended by Doc. Con. Cen. No. 200520105, Order Regarding the State Corporation Commission's Revised Operating Procedures During COVID-19 Emergency (May 11, 2020); Commonwealth of Virginia, ex rel., State Corporation Commission, Ex Parte: Revised Operating Procedures During COVID-19 Emergency, Case No. CLK-2020-00005, Doc. Con. Cen. No. 200330042, Order Regarding the State Corporation Commission's Revised Operating Procedures During COVID-19 Emergency (Mar. 19, 2020) ("Revised Operating Procedures Order"), extended by Doc. Con. Cen. No. 200520105, Order Regarding the State Corporation Commission's Revised Operating Procedures During COVID-19 Emergency (May 11, 2020); Commonwealth of Virginia, ex rel. State Corporation Commission, Ex Parte: Electronic service among parties during COVID-19emergency, Case No. CLK-2020-00007, Doc. Con. Cen. No. 200410009, Order Requiring Electronic Service (Apr. 1, 2020).

[5]5 VAC 5-20-10 et seq.

[6]As noted in the Revised Operating Procedures Order, submissions to the Commission's Clerk's Office via U.S. mail or commercial mail equivalents may not be processed for an indefinite period of time due to the COVID-19 emergency.

20VAC5-210-10. Purpose and applicability.

This chapter sets forth minimum filing requirements for Virginia's investor-owned water and wastewater utilities related to applications pursuant to Chapter 5 (§ 56-88 et seq.) of Title 56 of the Code of Virginia when electing to seek use of fair market value (i) in the acquisition of a municipal or other governmental selling entity's water or wastewater system, and (ii) for purposes of determining initial rate base in conjunction with such acquisition. The commission may waive any or all parts of this chapter for good cause shown.

20VAC5-210-20. General filing instructions.

A. An applicant shall provide a notice of intent to file an application pursuant to this chapter to the commission at least 30 days prior to the application filing date. Such notice of intent shall identify the parties involved in the proposed transaction and the specific section and subsection of the Code of Virginia pursuant to which the application will be filed.

B. Applications filed pursuant to this chapter shall include, in addition to all other filing requirements in Chapter 5 (§ 56-88 et seq.) of Title 56 of the Code of Virginia applications:

1. Testimony in support of the proposed acquisition and purchase price. Such testimony shall include a statement from each of the acquiring and selling entities concerning each entity's agreement and intent to consummate the transaction according to the terms and conditions represented in the application.

2. Complete and unredacted copies, including all supporting documentation and workpapers, of two qualified, independent, and impartial utility valuation experts' appraisals of the system assets to be acquired in compliance with the uniform standards of professional appraisal practices. The appraisals shall be submitted and treated confidentially under 5VAC5-20-170. Such appraisals shall be completed and submitted in accordance with the following requirements:

a. One appraisal shall be sponsored by the water or wastewater public utility acquiring the utility system assets, and one appraisal shall be sponsored by the government entity selling its utility system assets.

b. The qualifications of each utility valuation expert, specifically as they relate to water or wastewater utility systems, shall be clearly identified in the application.

c. The appraisals shall clearly identify whether they are based on a cost, market, income, other methodology, or a combination of such methodologies, and shall state the historical period on which they are based.

d. To the extent any assets are proposed to be acquired apart from those to be currently used and useful in utility service, the appraisals shall (i) separately identify such assets and (ii) describe the acquiring utility's intended use of such assets.

3. A complete and unredacted copy, including all supporting documentation and workpapers, of the assessment performed by an independent professional engineer licensed in Virginia, jointly retained by the acquiring and selling entities, regarding the tangible assets of the utility system to be acquired. For purposes of this section, "jointly retained" means retained collectively by the acquiring and selling entities, retained by the selling entity and adopted by the acquiring entity, or retained by the acquiring entity and adopted by the selling entity. Such assessment shall be (i) used by the utility valuation experts as a basis for their valuations in determining fair market value and (ii) submitted and treated confidentially under 5VAC5-20-170. Such assessments shall be completed and submitted in accordance with the following:

a. The qualifications of such licensed engineer, specifically as the qualifications relate to water or wastewater utility systems, shall be clearly identified in the application.

b. To the extent assets are to be acquired apart from those to be currently used and useful in utility service, such assessment shall separately quantify the assets that are to be currently used and useful in utility service.

c. An analysis of the condition of the system shall be provided, including the in-service date, if available, and an assessment of the useful life of each asset and its operating condition.

4. The following market data regarding water or wastewater utility transfers, if available, should be provided as part of the appraisals. To the extent such data is not available from the selling entity, an explanation should be provided.

a. Identification of the acquiring and selling entities.

b. A description of the assets.

c. The geographic footprint of the acquired system.

d. The number of customers.

e. The transaction amount, identification of the recorded cost of the assets, and identification of whether such transaction was based on original cost, fair value, or other basis.

f. Quantification of purchase of equity or debt, if applicable.

g. Date of the transaction.

5. The following cost data for the assets to be acquired, if available, should be included as part of the appraisals. To the extent such data is not available from the selling entity, an explanation should be provided.

a. A detail of historical cost of assets by plant account, or categories of assets if not available by account, including plant additions and retirements by vintage year.

b. A detail of the recorded reserve for depreciation by plant account or categories of assets if not available by account.

c. Existing depreciation rates by account, or categories of assets, for the system to be acquired.

6. The following income data, if available, should be included as part of the appraisals. To the extent such data is not available from the selling entity, an explanation should be provided.

a. Any impairment tests performed for the system to be acquired as performed internally by the selling entity or its external auditors for the five prior years.

b. Annual financial forecasts prepared by management of the selling entity for the three prior years.

c. An analysis of the following for the acquired system by rate class and meter or service line size for the three most recent years:

(1) Number of customers.

(2) Usage data.

(3) Billed revenues.

(4) Net charge-offs.

7. Other required information pertaining to the acquired system to include:

a. An unredacted copy of the purchase agreement.

b. A map of the service area of the acquired system.

c. A detailed description of all assets of the acquired system, with identification of any assets that were not used and useful at the time of the appraisals.

d. A statement of any obsolescence considered (e.g., physical, functional, and economic) and supporting documentation and calculations for any obsolescence quantified.

e. The comprehensive annual financial report for the municipality or other selling governmental entity for the three prior years.

f. Any presentations made by investment advisors or senior management of either the acquiring or selling entity regarding the potential sale.

g. A detailed analysis of any rehabilitations or improvements the acquiring utility plans to make to the acquired system to address any known deficiencies of the acquired system.

8. To the extent the proposed purchase price is different than that provided in the filed appraisals, the application shall identify the proposed purchase price.

9. The acquiring utility's proposed journal entries anticipated to result from the proposed acquisition, including tax entries and account numbers recognized by the National Association of Regulatory Utility Commissioners.

10. An analysis identifying the qualitative and quantitative benefits and estimated customer rate impacts for the next five years as a result of the proposed acquisition for each of (i) the customers of the acquired system and (ii) the legacy customers of the acquiring utility. Such analysis shall clearly identify all assumptions relied upon.

11. Documentation of (i) incurred and additional estimated costs and fees of the utility valuation experts in the fair market value determination and (ii) incurred and additional estimated transaction and closing costs.

C. An application filed pursuant to this chapter shall not be deemed filed pursuant to Chapter 5 (§ 56-88 et seq.) of Title 56 of the Code of Virginia unless it is in full compliance with this chapter.

20VAC5-210-30. Commission determination of rate base.

A. An average of the three appraisals, which includes one sponsored by commission staff, shall be deemed the fair market value for purposes of the proceeding.

B. The rate base value of the acquired system for purposes of subsequent rate filings made pursuant to Chapter 10 (§ 56-232 et seq.) of Title 56 of the Code of Virginia shall be the following: the fees and costs of the utility valuation experts authorized by the acquiring and selling entities, transaction costs, and other closing costs found by the commission to be reasonable and prudently incurred, plus the lesser of (i) the purchase price negotiated between the acquiring utility and selling entity as the result of a voluntary arm's-length transaction and (ii) the fair market value. The rate base value shall incorporate the provisions for depreciation as identified in this chapter.

20VAC5-210-40. Miscellaneous general provisions.

A. Nothing in this chapter shall be construed to relieve the applicant from its duty to demonstrate that "…adequate service to the public at just and reasonable rates will not be impaired or jeopardized by granting the prayer of the petition…" as provided in § 56-90 of the Code of Virginia.

B. Any information deemed confidential by the applicant may be submitted and treated confidentially under 5VAC5-20-170.

C. This chapter does not limit the commission staff or parties from raising issues related to the proposed acquisition for commission consideration that have not been addressed in the applicant's filing before the commission.

D. Commission staff and parties may seek discovery to confirm the reasonableness of, and provide testimony and recommendations regarding, the appraisals and engineering assessment sponsored by the acquiring and selling entities. The applicant may seek discovery as permitted of commission staff pursuant to 5VAC5-20-260 to confirm the reasonableness of the appraisal sponsored by commission staff and may provide rebuttal testimony or response and recommendations regarding such.

E. If the depreciation rates for the acquired system are not based on a depreciation study:

1. The acquiring utility may apply a 3.0% composite depreciation rate to the fair market value of the utility system assets acquired; and

2. A depreciation study on the acquired system shall be performed within five years of acquisition and provided for review by the commission staff. Upon acceptance of the depreciation rates by commission staff for booking purposes, such rates shall be utilized for the system effective as of the date of the study. However, if the acquired system is of a size that would qualify under the Small Water or Sewer Public Utility Act (Chapter 10.2:1 (§ 56-265.13:1 et seq.) of Title 56 of the Code of Virginia), such assets may be exempted from the requirement of performing a depreciation study.

VA.R. Doc. No. R20-6354; Filed June 17, 2020, 10:52 a.m.

TITLE 22. SOCIAL SERVICES

STATE BOARD OF SOCIAL SERVICES

Notice of Extension of Emergency Regulation

Title of Regulation: **22VAC40-677. State Oversight of a Local Social Services Department that Fails to Provide Services (adding 22VAC40-677-10).**

Statutory Authority: §§ 63.2-217 and 63.2-408 of the Code of Virginia.

Effective Date Extended Through: December 15, 2020.

The Governor approved the request of the State Board of Social Services to extend the June 16, 2020, expiration date of the emergency regulation for six months as provided by § 2.2-4011 D of the Code of Virginia. Therefore, the emergency regulation will continue in effect through December 15, 2020. The emergency regulation authorizes the Commissioner of the Department of Social Services to provide immediate direction and oversight to a local department of social services in the event the locality fails, refuses, or is unable to provide core services and with appropriate State Board of Social Services proceedings. The emergency regulation was published in 35:10 VA.R. 1328-1329 January 7, 2019. The permanent replacement regulation will not become effective before the emergency regulation expires.

Agency Contact: Karin Clark, Regulatory Coordinator, Department of Social Services, 801 East Main Street, Richmond, VA 23219, telephone (804) 726-7017, FAX (804) 726-7015, or email karin.clark@dss.virginia.gov.

VA.R. Doc. No. R19-5464; Filed June 15, 2020, 10:47 a.m.

AMENDED EXECUTIVE ORDER NUMBER SIXTY-FIVE (2020) AND AMENDED ORDER OF PUBLIC HEALTH EMERGENCY SIX

Phase Two Easing of Certain Temporary Restrictions Due to Novel Coronavirus (COVID-19)

Importance of the Issue

On May 8, 2020, Executive Order 61 and Order of Public Health Emergency Three began easing business, gathering, and traveling restrictions originally imposed by Executive Order 53 and Executive Order 55 issued in March of 2020. We did this because our health data metrics showed that we were increasing testing availability, we have adequate supply of personal protective equipment and hospital bed supply, the percentage of positive tests, hospitalizations, and positive tests were trending downward. The health data metrics for some jurisdictions, however, still presented sharper challenges. Therefore, pursuant to Executive Order 62 and Order of Public Health Emergency Four (2020), later amended, the Northern Virginia Region (as defined by that Order), the County of Accomack, and the City of Richmond remained in Phase Zero. On May 29, 2020, those jurisdictions moved into Phase One.

During the weeks that the majority of Virginia has been in Phase One, the public health metrics have continued to show the same trends. Our testing is increasing, our supply of personal protective equipment is steady, our hospital bed capacity remains steady, our hospitalizations statewide have a slight downward trend, and the percentage of positive tests continue to trend downward.

Now under this Order, the majority of the Commonwealth will move into Phase Two. The Northern Virginia Region and the City of Richmond will remain in Phase One under Third Amended Executive Order 61 and Third Amended Order of Public Health Emergency Three (2020). We have made remarkable progress over the past several weeks. As we move forward, we will remain vigilant, cautious, and measured. We will continue teleworking, whenever possible, to wash our hands frequently, to not touch our faces, and to wear face coverings. Through these efforts, we will continue to protect ourselves, our families, and our fellow Virginians as we respond to this emergency.

Effective Friday, 12:00 a.m., June 12, 2020, the Northern Virginia Region and the City of Richmond shall enter into Phase Two.

Directive

Therefore, by virtue of the authority vested in me by Article V of the Constitution of Virginia, by § 44-146.17 of the Code of Virginia, by any other applicable law, and in furtherance of Amended Executive Order 51 (2020), and by virtue of the authority vested in the State Health Commissioner pursuant to §§ 32.1-13, 32.1-20, and 35.1-10 of the Code of Virginia, the following is ordered:

A. EASING OF BUSINESS RESTRICTIONS

1. All Businesses

Any businesses, not listed in this section, should adhere to the Guidelines for All Business Sectors expressly incorporated by reference herein as best practices. This guidance is located here.

2. Restaurants, Dining Establishments, Food Courts, Breweries, Microbreweries, Distilleries, Wineries, and Tasting Rooms

Restaurants, dining establishments, food courts, breweries, microbreweries, distilleries, wineries, and tasting rooms may operate delivery, take-out, and indoor and outdoor dining and beverage services, provided such businesses comply with the Guidelines for All Business Sectors, and sector-specific guidance for restaurant and beverage services incorporated by reference herein. Such guidance includes, but is not limited to, the following requirements:

a. Occupancy may not exceed the 50% of the lowest occupancy load on the certificate of occupancy, if applicable.

b. All parties, whether seated together or across multiple tables, must be limited to 50 patrons or less.

c. Tables at which dining parties are seated must be positioned six feet apart from other tables. If tables are not movable, parties must be seated at least six feet apart.

d. No self-service of food (except beverages), including condiments. Condiments should be removed from tables and dispensed by employees upon the request of a customer. Buffets must be staffed by servers. For self-service beverage areas, use beverage equipment designed to dispense by a contamination-free method.

e. Bar seats and congregating areas of restaurants must be closed to patrons except for through-traffic. Non-bar seating in a bar area may be used for customer seating as long as a minimum of six feet is provided between parties at tables.

f. Employees working in customer-facing areas must wear face coverings over their nose and mouth at all times.

g. A thorough cleaning and disinfection of frequently-contacted surfaces must be conducted every 60 minutes during operation. Tabletops, chairs, and credit card/bill folders must be cleaned in between patrons.

h. If any such business cannot adhere to these requirements, it must close.

3. Farmers Markets

Farmers markets may continue to operate, provided such businesses comply with the Guidelines for All Business

Sectors and the sector-specific guidelines for farmers markets incorporated by reference herein. Such guidance includes, but is not limited to, the following requirements:

a. On-site shopping is allowed, as long as physical distancing guidelines are followed. Configure operations to avoid congestion or congregation points.

b. Employees and vendors in customer-facing areas must wear face coverings over their nose and mouth at all times.

c. Vendors must supply hand sanitizer stations or hand washing stations for patrons and employees.

d. A thorough cleaning and disinfection of frequently-contacted surfaces must be conducted.

e. If any such business cannot adhere to these requirements, it must close.

4. Brick and Mortar Retail Businesses Not Listed In Section C, Paragraph 1 (Non- Essential Retail)

Any brick and mortar retail business not listed in section C, paragraph 1 may continue to operate, provided such business complies with the Guidelines for All Business Sectors and the sector-specific guidance for brick and mortar retail expressly incorporated by reference herein. Such guidance includes, but is not limited to, the following requirements:

a. Occupancy must be limited to no more than 50% of the lowest occupancy load on the certificate of occupancy.

b. Employees working in customer-facing areas must wear face coverings over their nose and mouth at all times.

c. If any such business cannot adhere to these requirements, it must close.

5. Fitness and Exercise Facilities

Fitness centers, gymnasiums, recreation centers, sports facilities, and exercise facilities may reopen for indoor and outdoor activities, provided such businesses comply with the Guidelines for All Business Sectors and the sector-specific guidelines for fitness and exercise facilities expressly incorporated by reference herein. Such guidance includes, but is not limited to, the following requirements:

a. Patrons, members, and guests must remain at least ten feet apart during all activities.

b. Instructors and all participants of group exercise and fitness classes must maintain at least ten feet of physical distancing between each other at all times.

c. The total number of attendees (including both participants and instructors) in all group exercise and fitness classes cannot exceed the lesser of 30% of the minimum occupancy load on the certificate of occupancy or 50 patrons, members, and guests.

d. Hot tubs, spas, splash pads, spray pools, and interactive play features must be closed.

e. Outdoor and indoor swimming pools may be open for lap swimming, diving, exercise, and instruction only and must be limited to no more than three persons per lane with ten feet of physical distance per swimmer.

f. Employees working in customer-facing areas are required to wear face coverings over their nose and mouth at all times.

g. Employers must ensure cleaning and disinfection of shared equipment after each use.

h. Facilities shall prohibit the use of any equipment that cannot be thoroughly disinfected between uses (e.g., climbing rope, exercise bands, etc.).

i. Businesses must supply hand sanitizer stations or hand washing stations for patrons, members, and guests.

j. If any such business cannot adhere to these requirements, it must close.

6. Personal Care and Personal Grooming Services

Beauty salons, barbershops, spas, massage centers, tanning salons, tattoo shops, and any other location where personal care or personal grooming services are performed may continue to operate, provided such businesses comply with the Guidelines for All Business Sectors and the sector-specific guidelines for personal care and personal grooming services expressly incorporated by reference herein. Such guidance includes, but is not limited to, the following requirements:

a. Occupancy may not exceed 50% of the lowest occupancy load on the certificate of occupancy with at least six feet of physical distancing between work stations and no more than two appointments per service provider at a time.

b. Service providers and employees working in customer-facing areas must wear face coverings over their nose and mouth at all times.

c. Provide face coverings for clients or ask that clients bring a face covering with them, which they must wear during the service. Limit services to only those that can be completed without clients removing their face covering.

d. A thorough cleaning and disinfection of frequently-contacted surfaces must be conducted every 60 minutes in operations, while cleaning and disinfecting all personal care and personal grooming tools after each use. If that is not possible, such items must be discarded.

e. If any such business cannot adhere to these requirements, it must close.

7. Campgrounds

Privately-owned campgrounds as defined in § 35.1-1 of the Code of Virginia may continue to operate, provided they

comply with the Guidelines for All Business Sectors and the sector-specific guidelines for campgrounds, which are expressly incorporated by reference herein. Such guidance includes, but is not limited to, the following requirements:

a. A minimum of 20 feet must be maintained between units for all lots rented for short-term stays of less than 14 nights (and not owned by individuals).

b. Employees working in public-facing areas are required to wear face coverings over their nose and mouth at all times.

c. It is recommended that campgrounds must strongly encourage customers to wear face coverings over their nose and mouth.

d. The provision of hand washing in bath houses and sanitizing stations for guests and employees.

e. If any such business cannot adhere to these requirements, it must close.

8. Indoor Shooting Ranges

Indoor shooting ranges may operate, provided they comply with the following requirements:

a. Occupancy must be limited to 50% of the lowest occupancy load on the certificate of occupancy with at least six feet of physical distancing between individuals at all times. Use every other lane to achieve six feet of physical distancing.

b. Employees working in customer-facing areas are required to wear face coverings over their nose and mouth at all times.

c. Perform thorough cleaning and disinfection of frequently-contacted surfaces every 60 minutes in operation, while disinfecting all equipment between each customer use and prohibiting the use of equipment that cannot be thoroughly disinfected.

d. Either thoroughly clean shared or borrowed equipment in between uses, or only allow the use of personal equipment at the range.

e. If any such indoor shooting range cannot adhere to these requirements, it must close.

9. Public Beaches

All public beaches as defined in § 10.1-705 of the Code of Virginia may remain open to individual and family recreational activity, in addition to exercise and fishing. All such public beaches, with the exception of the beaches in the City of Virginia Beach, must comply with the requirements below.

a. Require beachgoers to practice physical distancing of at least six feet between each person unless they are with members of the same household.

b. Prohibit gatherings of more than 50 people.

c. Prohibit group sports, alcohol, tents, groupings of umbrellas, and other activities and items that attract gatherings.

d. Prohibit entertainment and programming that generate gatherings.

e. All common areas that encourage gatherings, such as pavilions, gazebos, playsets, and picnic areas must remain closed. This does not apply to fishing piers.

f. Implement a cleaning schedule for all high-touch surfaces made of plastic or metal such as benches and railings that includes cleaning at least every two hours between the hours of 9 a.m. and 6 p.m.

g. Establish, train, and deploy a team to educate and promote compliance with beach rules and refer cases of noncompliance to public safety personnel, if appropriate.

h. Establish procedures for temporary beach closure or access limitations in the event of overcrowding.

i. Ensure adequate personal protective equipment for all lifeguards.

j. Perform a disinfectant-level cleaning of all public restrooms every two hours with an EPA-approved disinfectant by staff or volunteers trained to follow Centers for Disease Control and Prevention (CDC) guidance on cleaning and disinfecting.

k. For chair and umbrella rental companies, require vendors to set up chairs and umbrellas for customers, maintaining at least six feet of distance between groups, and to clean equipment between rentals following Environmental Protection Agency and CDC guidelines on cleaning and disinfecting.

l. Post signage at all public access points to the beaches and other "cluster prone" areas providing health reminders regarding physical distancing, gathering prohibitions, options for high risk individuals, and staying home if sick. Messaging must be specific to location.

m. Locality shall provide daily metrics to its local health department to include beach closures, complaint incidents, police reports of violence related to enforcement, and number of reports of noncompliance to be submitted each Monday.

n. All employees and contract workers must wear a cloth face covering when not able to practice physical distancing following CDC Use of Face Cloth Coverings guidance.

o. Employees and contract workers must have access to soap and water or hand sanitizer containing at least 60% alcohol, and locality should provide best hygiene practices to employees on a regular basis, including washing hands often with soap and water for at least 20 seconds and practicing respiratory etiquette protocols.

p. Locality shall require all employees and contract workers to take their temperature before reporting to work and direct

such employees not to report to work if they have a fever of over 100.4 degrees, have experienced chills, or have been feverish in the last 72 hours.

q. Follow enhanced workplace safety best practices outlined in the Guidelines for All Business Sectors.

Public beaches in the City of Virginia Beach may continue to operate provided activities on the public beaches are conducted in compliance with the requirements linked here and here.

10. Racetracks

Outdoor racetracks may remain open for racing events, provided such businesses comply with the Guidelines for All Business Sectors and the sector-specific guidelines for racetracks expressly incorporated by reference herein and linked here and here. Such guidance includes, but is not limited to, the following requirements:

a. The event must be held at locations with the ability to restrict access (i.e. barriers and gating that would preclude the general public from accessing the event).

b. No tailgating and camping is allowed during these events, including staff or race participants.

c. Entrances and exits must be staffed.

d. No spectators or members of the public are permitted to attend the event. This includes owners, family (unless the guardian of a minor child), as well as outside vendors. Only individuals essential to the operation of the event are permitted to attend.

e. All individuals must maintain at least six feet of physical distancing between themselves and other participants.

f. Prior to each race event, participants must self-monitor their symptoms by taking their temperature to check for fever.

g. No public-facing amenities will be provided, including concessions, food sales, merchandise sales, hospitality, or loitering on the property, or fan experiences.

11. Recreational and Entertainment Businesses

Outdoor performing arts venues, outdoor concert venues, outdoor sports venues, outdoor movie theaters, museums, aquariums, zoos, and botanical gardens may reopen, provided such businesses comply with the Guidelines for All Business Sectors and the sector-specific guidelines, which are expressly incorporated by reference herein. Such guidance includes, but is not limited to, the following requirement:

a. The total number of attendees (including both participants and spectators) cannot exceed the lesser of 50% of the occupancy load of the venue, if applicable, or 50 persons.

b. Install visible markers for queue lines that separate people by six feet of physical distance.

c. Create a guest flow plan of modified queue lines into and within the facility. Determine areas likely to become bottlenecks or pinch points and adjust guest flow accordingly.

d. Perform thorough cleaning and disinfection of frequently-contacted surfaces including digital ordering devices, check presenters, self-service areas, tabletops, bathroom surfaces, and other common touch areas every 60 minutes during operation.

e. Where possible, install sneeze guards in front of commonly used point-of-sale or guest service stations.

f. Employees working in customer-facing areas are required to wear face coverings over their nose and mouth.

g. Provide hand washing or sanitizing stations for guests and employees.

h. If any such business cannot adhere to these requirements, it must close.

12. Public and private social clubs

Public and private social clubs may reopen, provided such establishments abide by the gathering ban in section B, paragraph 2 of this Order and comply with the Guidelines for All Business Sectors and the sector-specific guidelines for public and private social clubs expressly incorporated by reference herein.

13. Recreational Sports

Indoor and outdoor recreational sports activities are permitted, provided participants and organizers of recreational sports activities comply with the Guidelines for All Business Sectors and the sector-specific guidelines for recreational sports expressly incorporated by reference herein. Such guidance includes, but is not limited to, the following requirements:

a. Ten feet of physical distance must be maintained by all instructors, participants, and spectators, with the exception of incidental contact or contact between members of the same household. This applies during instruction and practice and during competitive events. Competition that involves close contact with other athletes must be avoided.

The total number of attendees (including both participants and spectators) of outdoor recreational sports cannot exceed the lesser of 50% of the occupancy load of the venue, if applicable, or 50 persons. For sports played on a field, attendees are limited to 50 persons per field. For outdoor youth recreational sports, spectators may not be present with the following exceptions: parents, guardians, and caretakers who are supervising children playing in the sports event, and other children in the parent's, guardian's or caretaker's care. Participants in outdoor youth recreational sports are not limited to 50% of the occupancy load of the venue or the 50 persons limit.

b. The total number of attendees for indoor recreational sports cannot exceed the lesser of 30% of the lowest occupancy load on the certificate of occupancy or 50 persons. For sports played on a field, attendees are limited to 50 persons per field.

c. For indoor recreational sports, spectators may not be present except parents, guardians, or caretakers who are supervising children.

14. Enforcement

Guidelines for All Business Sectors and the sector-specific guidelines appear here. The Virginia Department of Health shall have authority to enforce section A of this Order. Any willful violation or refusal, failure, or neglect to comply with this Order, issued pursuant to § 32.1-13 of the Code of Virginia, is punishable as a Class 1 misdemeanor pursuant to § 32.1-27 of the Code of Virginia. The State Health Commissioner may also seek injunctive relief in circuit court for violation of this Order, pursuant to § 32.1-27 of the Code of Virginia. In addition, any agency with regulatory authority over a business listed in section A may enforce this Order as to that business to the extent permitted by law.

B. CONTINUED RESTRICTIONS

1. Certain Recreational and Entertainment Businesses

All public access to recreational and entertainment businesses set forth below shall remain closed:

a. Indoor theaters, indoor performing arts centers, indoor concert venues, and other indoor entertainment centers;

b. Historic horse racing facilities; and

c. Bowling alleys, skating rinks, arcades, amusement parks, trampoline parks, fairs, carnivals, arts and craft facilities, escape rooms, and other places of indoor public amusement.

2. All Public and Private In-Person Gatherings

All public and private in-person gatherings of more than 50 individuals are prohibited. The presence of more than 50 individuals performing functions of their employment is not a "gathering." A "gathering" includes, but is not limited to, parties, celebrations, or other social events, whether they occur indoors or outdoors.

This restriction does not apply to the gathering of family members living in the same residence. "Family members" include blood relations, adopted, step, and foster relations, as well as all individuals residing in the same household. Family members are not required to maintain physical distancing while in their homes.

a. Individuals may attend religious services subject to the following requirements:

i. Religious services must be limited to no more than 50% of the lowest occupancy load on the certificate of occupancy of the room or facility in which the religious services are conducted.

ii. Individuals attending religious services must be at least six feet apart when seated and must practice proper physical distancing at all times. Family members, as defined above, may be seated together.

iii. Mark seating in six-foot increments and in common areas where attendees may congregate.

iv. Attendees shall not pass items to other attendees, who are not family members, as defined above.

v. Any items used to distribute food or beverages must be disposable, used only once, and discarded.

vi. A thorough cleaning and disinfection of frequently-contacted surfaces must be conducted prior to and following any religious service.

vii. Post signage at the entrance that states that no one with a fever or symptoms of COVID-19 is permitted in the establishment.

viii. Post signage to provide public health reminders regarding social distancing, gatherings, options for high risk individuals, and staying home if sick.

ix. If religious services cannot be conducted in compliance with the above requirements, they must not be held in-person.

Further, any social gathering held in connection with a religious service is subject to the public and private in-person gatherings restriction in section B, paragraph 2. Additional suggested guidance can be found here.

3. Institutions of Higher Education

Institutions of higher education are encouraged to continue remote learning where practical. However, such institutions may offer in-person classes and instruction, including labs and related practical training, provided they comply with all applicable requirements under the "Guidelines for All Business Sectors." No institutions of higher education shall hold or host gatherings of more than 50 individuals. Any postsecondary provider offering vocational training in a profession regulated by a Virginia state agency/board must also comply with any sector-specific guidelines relevant to that profession to the extent possible under the regulatory training requirements. Such professions may include, but are not necessarily limited to: aesthetician, barber, cosmetologist, massage therapist, nail technician, and practical nurse

4. Overnight Summer Camps

Overnight services of summer camps, as defined in § 35.1-1 of the Code of Virginia, must remain closed.

5. Enforcement

Violations of section B paragraphs 1, 2, 3, and 4 of this Order shall be a Class 1 misdemeanor pursuant to § 44-146.17 of the Code of Virginia.

C. CONTINUED GUIDANCE AND DIRECTION

1. Essential Retail Businesses

Essential retail businesses as set out below may remain open during their normal business hours. They should comply with the Guidelines for All Business Sectors expressly incorporated by reference and linked here, as best practices. Employers are required to provide face coverings to employees.

a. Grocery stores, pharmacies, and other retailers that sell food and beverage products or pharmacy products, including dollar stores, and department stores with grocery or pharmacy operations;

b. Medical, laboratory, and vision supply retailers;

c. Electronic retailers that sell or service cell phones, computers, tablets, and other communications technology;

d. Automotive parts, accessories, and tire retailers as well as automotive repair facilities;

e. Home improvement, hardware, building material, and building supply retailers;

f. Lawn and garden equipment retailers;

g. Beer, wine, and liquor stores;

h. Retail functions of gas stations and convenience stores;

i. Retail located within healthcare facilities;

j. Banks and other financial institutions with retail functions;

k. Pet and feed stores;

l. Printing and office supply stores; and

m. Laundromats and dry cleaners.

2. State Agencies

All relevant state agencies shall continue to work with all housing partners to execute strategies to protect the health, safety, and well-being of Virginians experiencing homelessness during this pandemic and to assist Virginians in avoiding evictions or foreclosures.

3. Face Coverings

The waiver of § 18.2-422 of the Code of Virginia is continued, so as to allow the wearing of a medical mask, respirator, or any other protective face covering for the purpose of facilitating the protection of one's personal health in response to the COVID-19 public health emergency declared by the State Health Commissioner on February 7, 2020, and reflected in Amended Executive Order 51 (2020) declaring a state of emergency in the Commonwealth. Amended Executive Order 51 (2020) remains so amended. This waiver is effective as of March 12, 2020, and will remain in effect until 11:59 p.m. on September 8, 2020, unless amended or rescinded by further executive order.

Further, where a mandatory business sector requirement in this Order conflicts with a requirement to wear a face covering in Executive Order 63 and Order of Public Health Emergency Five (2020), the business sector-specific requirement governs.

4. State Travel

Continued cessation of all official travel outside of Virginia by state employees, with increased flexibility for inter-state commuters and essential personnel.

5. Exceptions

Nothing in the Order shall limit: (a) the provision of health care or medical services; (b) access to essential services for low-income residents, such as food banks; (c) the operations of the media; (d) law enforcement agencies; or (e) the operation of government.

6. Expiration of Order

Executive Order 55 (2020) shall expire at 11:59 p.m., June 4, 2020.

Second Amended 53, Third Amended Number 61 and Third Amended Order of Public Health Emergency Three (2020) shall expire Friday, 12:00 a.m., June 12, 2020.

Effective Date of the Executive Order

This Order shall be effective 12:00 a.m., Friday, June 5, 2020. This Executive Order shall remain in full force and effect until amended or rescinded by further executive order.

Given under my hand and under the Seal of the Commonwealth of Virginia and the Seal of the Office of the State Health Commissioner of the Commonwealth of Virginia, this 9th day of June, 2020.

/s/ Ralph S. Northam
Governor

EXECUTIVE ORDER NUMBER SIXTY-SIX (2020)

Establishment of Juneteenth as a State Holiday

Importance of the Issue

Since 1619, when both representative democracy and enslaved Africans arrived in Virginia, we have struggled to live up to our proclaimed ideals of freedom and justice for all. We have failed time and again to guarantee to all Americans the unalienable rights of life, liberty, and the pursuit of happiness. We have said one thing but consistently done another.

The year 2020 has cast fear, violence, and tragedy upon our nation and our Commonwealth. We have persevered through a world-wide pandemic, wept over the senseless loss of lives, and lifted voices in protest while confronting the elusiveness of justice.

This Friday, June 19, 2020, "Juneteenth" as it is also known, marks the anniversary of the day in 1865 when news of the Emancipation Proclamation reached Texas, the last of the former Confederate states to abolish slavery. This was a pivotal moment in American history when all enslaved black people finally learned they were free people. It was a moment of celebration and joy. It was a moment when America finally took a step closer to its promise of freedom, equality, and justice for all.

But we know that there is much more to be done, and many, many more steps to be taken.

On Juneteenths past, we have acknowledged the date with written proclamations, most often shared with smaller community groups. These proclamations, while important, do not do enough. We must amplify the message. It must be heard by all who call Virginia home. The commemoration of Juneteenth is a reminder that liberty and justice must never again be reserved for the few.

It will be on this day going forward that we mark a holiday of education, reflection, and celebration. On this day, we will educate ourselves on our history—all of our history. We will reflect on how our nation and our Commonwealth failed to recognize the humanity of all people, and we will celebrate the end of enslavement and redouble our efforts to rid our society of its shameful legacy of racism, discrimination, and inequity.

I encourage all Virginians to think about the significance of this day. It was significant in 1865 because it marked the end of human bondage for African Americans in the United States. But our recognition of Juneteenth now signifies that we understand its importance to all Americans. Juneteenth is not African American history. It is American history. It is as woven into the fabric of our great country as is the celebration of independence on July 4th. And it should be so celebrated.

Directive

Therefore, by the authority vested in me as Governor under Article V of the Constitution of Virginia and under the laws of the Commonwealth, including but not limited to §§ 2.2-103, 2.2-3300, and 2.2-3322 of the Code of Virginia, I hereby declare June 19 (Juneteenth) a permanent state holiday for all executive branch agencies and institutions of higher education. I further direct the Secretary of Administration in conjunction with the Department of Human Resource Management to oversee the administration of this policy.

It is my hope that Juneteenth will subsequently be celebrated by the public and private sectors as well as localities all across the Commonwealth.

Effective Date of the Executive Order

This Executive Order shall remain in full force and effect until amended or rescinded by further executive order.

Given under my hand and under the Seal of the Commonwealth of Virginia on this 17th day of June, 2020.

/s/ Ralph S. Northam
Governor

GUIDANCE DOCUMENTS

PUBLIC COMMENT OPPORTUNITY

Pursuant to § 2.2-4002.1 of the Code of Virginia, a certified guidance document is subject to a 30-day public comment period after publication in the Virginia Register of Regulations and prior to the guidance document's effective date. During the public comment period, comments may be made through the Virginia Regulatory Town Hall website (http://www.townhall.virginia.gov) or sent to the agency contact. Under subsection C of § 2.2-4002.1, the effective date of the guidance document may be delayed for an additional period. The guidance document may also be withdrawn.

The following guidance documents have been submitted for publication by the listed agencies for a public comment period. Online users of this issue of the Virginia Register of Regulations may click on the name of a guidance document to access it. Guidance documents are also available on the Virginia Regulatory Town Hall (http://www.townhall.virginia.gov) or from the agency contact or may be viewed at the Office of the Registrar of Regulations, 900 East Main Street, Richmond, Virginia 23219.

STATE BOARD OF EDUCATION

Title of Document: Eating Disorders Awareness in the Public School Setting.

Public Comment Deadline: August 5, 2020.

Effective Date: August 6, 2020.

Agency Contact: Tracy White, School Health Nurse Specialist, Department of Education, 101 North 14th Street, Richmond, VA 23219, telephone (804) 786-8671, or email tracy.white@doe.virginia.gov.

DEPARTMENT OF HEALTH PROFESSIONS

Title of Document: Prescriptive Authority in Virginia.

Public Comment Deadline: August 5, 2020.

Effective Date: August 6, 2020.

Agency Contact: Elaine J. Yeatts, Agency Regulatory Coordinator, Department of Health Professions, Perimeter Center, 9960 Mayland Drive, Suite 300, Richmond, VA 23233, telephone (804) 367-4688, or email elaine.yeatts@dhp.virginia.gov.

DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT

Title of Document: 2021 Virginia Telecommunication Initiative (VATI) Program Guidelines and Criteria.

Public Comment Deadline: August 5, 2020.

Effective Date: August 6, 2020.

Agency Contact: Kyle Flanders, Senior Policy Analyst, Department of Housing and Community Development, Main Street Centre, 600 East Main Street, Suite 300, Richmond, VA 23219, telephone (804) 786-6761, or email kyle.flanders@dhcd.virginia.gov.

DEPARTMENT OF MOTOR VEHICLES

Titles of Documents:

Infracciones de la Circulación y Cálculo de Puntos, Programa de mejoramiento para conductores de Virginia.

Obtención de una licencia de conducción de Virginia o una tarjeta de identificación (ID).

Public Comment Deadline: August 5, 2020.

Effective Date: August 6, 2020.

Agency Contact: Melissa K. Velazquez, Legislative Manager, Department of Motor Vehicles, 2300 West Broad Street, Richmond, VA 23220, telephone (804) 367-1844, or email melissa.velazquez@dmv.virginia.gov.

BOARD OF PHARMACY

Titles of Documents:

Guide to Continuing Pharmacy Education Requirements.

Credentials for Nonresident Pharmacy Dispensing only for Animals.

Use of Dispensing Records to Identify Pharmacist Responsible for Dispensing Error.

Performing Inventories.

Pharmacist-in-Charge Responsibilities.

Pharmacy Inspection Deficiency Monetary Penalty Guide.

Practice by a Pharmacy Technician Trainee.

Guidance on Virginia Prescription Requirements.

Use of Telemedicine by Registered Practitioners of Cannabis Oil.

Verification Sources for a Pharmaceutical Processor.

Public Comment Deadline: August 5, 2020.

Effective Date: August 6, 2020.

Agency Contact: Elaine J. Yeatts, Agency Regulatory Coordinator, Perimeter Center, 9960 Mayland Drive, Suite 300, Richmond, VA 23233, telephone (804) 367-4688, or email elaine.yeatts@dhp.virginia.gov.

STATE BOARD OF SOCIAL SERVICES

Title of Document: Temporary Assistance for Needy Families Manual.

Public Comment Deadline: August 5, 2020.

Effective Date: August 6, 2020.

Agency Contact: Mark Golden, TANF Program Manager, Department of Social Services, 801 East Main Street, Richmond, VA 23219, telephone (804) 726-7385, or email mark.golden@dss.virginia.gov.

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Title of Document: Supplemental Nutrition Assistance Program Manual - Volume V.

Public Comment Deadline: August 5, 2020.

Effective Date: August 6, 2020.

Agency Contact: Karin Clark, Regulatory Coordinator, Department of Social Services, 801 East Main Street, Room 1507, Richmond, VA 23219, telephone (804) 726-7017, or email karin.clark@dss.virginia.gov.

STATE CORPORATION COMMISSION

AT RICHMOND, JUNE 11, 2020

COMMONWEALTH OF VIRGINIA, ex rel.

STATE CORPORATION COMMISSION

CASE NO. PUR-2020-00109

Ex Parte: Establishing the rates, terms and conditions of a universal fee to be paid by the retail customers of the Virginia Electric and Power Company.

ORDER ESTABLISHING PROCEEDING

During its 2020 Session, the Virginia General Assembly enacted Chapters 1193 (HB 1526) and 1194 (SB 851) of the 2020 Virginia Acts of Assembly. These duplicate Acts of Assembly, known as the Virginia Clean Economy Act (VCEA or Act), will become effective on July 1, 2020. The VCEA, inter alia, establishes the Percentage of Income Payment Program (Program or PIPP), which is designed to limit the electric utility payments of persons or households participating in certain, specified public assistance programs, based upon a percentage of their income, for customers of the Virginia Electric and Power Company (Dominion Energy Virginia or Dominion) and Appalachian Power Company (APCo).

The Act directs the State Corporation Commission (Commission), after notice and opportunity for hearing, to initiate a proceeding to establish the rates, terms and conditions of a "non-bypassable universal service fee" to fund the Program. This service fee will be paid by the customers of Dominion Energy Virginia and APCo.

The VCEA directs that the fee

> shall be allocated to retail electric customers of a Phase I and Phase II Utility on the basis of the amount of kilowatt-hours used and be established at such level to adequately address the PIPP's objectives to (i) reduce the energy burden of eligible participants by limiting electric bill payments directly to no more than six percent of the eligible participant's annual household income if the household's heating source is anything other than electricity, and to no more than 10 percent of an eligible participant's annual household income on electricity costs if the household's heating source is electricity, and (ii) reduce the amount of electricity used by the eligible participant's household through participation in weatherization or energy efficiency programs and energy conservation education programs.[1]

The Act also requires the Commission to determine reasonable administrative costs investor-owned utilities may recover associated with the PIPP, and the mechanism by which utilities may recover those costs. The Act requires the Commission to issue a Final Order concerning this proceeding by December 31, 2020.[2]

The Act also directs two executive branch agencies-the Department of Housing and Community Development and the Department of Social Services (Agencies)-to convene a stakeholder working group and develop recommendations regarding the implementation of the PIPP.[3] The Agencies' recommendations are required to be submitted to certain legislative committees by December 1, 2020. The Commission encourages these Agencies to also participate in the Commission proceeding established herein.

NOW THE COMMISSION, upon consideration of the foregoing and pursuant to the Act's requirements, hereby initiates this docket to establish the rates, terms and conditions of a non-bypassable universal service fee to fund the PIPP, to be paid by the retail customers of Dominion Energy Virginia. Dominion is directed herein to propose such rates, terms and conditions, and in so doing shall, at a minimum, address the following issues:

- The number of eligible customers assumed and the basis for that assumption, including data sources used to develop customer eligibility levels;
- How heating sources were determined for eligible customers;
- A calculation of the dollars assumed not to be recovered as a result of the program being implemented for eligible customers heating with electricity;
- A calculation of the dollars assumed not to be recovered as a result of the program being implemented for customers heating with other sources;
- Costs proposed to be recovered related to arrearages and administrative costs incurred by Dominion and by state agencies involved in the program;
- How the objective of reducing usage through participation in weatherization, energy efficiency, and conservation will be accomplished; identify any costs associated with these programs that are proposed to be collected by the fee.
- Total costs proposed to be recovered by the universal service fee detailing the components previously identified and other costs proposed to be recovered;
- The billing determinants used and a calculation of the proposed fee;
- How customer eligibility will be monitored and the frequency of monitoring;
- Whether program participants are statutorily exempted from being assessed the fee and, if they are, how such will be accomplished; and

• The amount of uncollectible expense in base rates associated with eligible customers. Include a credit in the calculation of the proposed fee to avoid double-recovery of this expense.

All information necessary to support the proposed fee should be provided.

The Commission will, by separate Order, establish a docket in which APCo will propose its own rates, terms and conditions of its universal service fee to fund the PIPP.

The Commission further takes judicial notice of the ongoing public health emergency related to the spread of the coronavirus, or COVID-19, and the declarations of emergency issued at both the state and federal levels.[4] The Commission has taken certain actions, and may take additional actions going forward, which could impact the procedures in this proceeding.[5] Consistent with these actions, in regard to the terms of the procedural framework established below, the Commission will, among other things, direct the electronic filing of testimony and pleadings unless it contains confidential information, and require electronic service of pleadings on parties to this proceeding.

Accordingly, IT IS ORDERED THAT:

(1) The Commission initiates this Case No. PUR-2020-00109 for purposes of establishing the rates, terms and conditions of a non-bypassable universal service fee to be paid by Dominion's retail customers to fund the PIPP.

(2) All pleadings in this matter should be submitted electronically to the extent authorized by Rule 5 VAC 5-20-150, Copies and Format, of the Commission's Rules of Practice and Procedure (Rules of Practice).[6] Confidential and Extraordinarily Sensitive Information shall not be submitted electronically and should comply with Rule 5 VAC 5-20-170, Confidential information. For the duration of the COVID-19 emergency, any person seeking to hand deliver and physically file or submit any pleading or other document shall contact the Clerk's Office Document Control Center at (804) 371-9838 to arrange the delivery.[7]

(3) Pursuant to 5 VAC 5-20-140, Filing and Service, of the Commission's Rules of Practice, the Commission directs that service on parties and the Commission Staff (Staff) in this matter shall be accomplished by electronic means. Concerning Confidential or Extraordinarily Sensitive Information, parties and the Staff are instructed to work together to agree upon the manner in which documents containing such information shall be served upon one another, to the extent practicable, in an electronically protected manner, even if such information is unable to be filed in the Office of the Clerk, so that no party or the Staff is impeded from preparing its case.

(4) As provided by § 12.1-31 of the Code and 5 VAC 5-20-120, Procedure before Hearing Examiners, of the Commission's Rules of Practice, a Hearing Examiner is appointed to rule on any discovery matters that may arise during the course of this proceeding, including any motion for protective order.

(5) On or before July 21, 2020, Dominion shall file an original and fifteen (15) copies of its PIPP filing together with any testimony and exhibits in support thereof; each witness's testimony shall include a summary not to exceed one page and shall specify those portions of the PIPP filing that the witness will sponsor at the hearing. Alternatively, in lieu of prefiled testimony and exhibits, Dominion may file, on or before July 21, 2020, a document in which Dominion: (a) identifies witnesses who will appear and offer testimony in support of Dominion's PIPP filing at the hearing; (b) specifies those portions of the filing that such witnesses will adopt and support as their testimony at the hearing; and (c) includes a summary not to exceed one page of each such witness's testimony. Dominion shall serve copies thereof on counsel for all respondents and the Staff.

(6) An electronic copy of the public version of Dominion's PIPP filing once filed, may be obtained by downloading unofficial copies of the public version of the PIPP filing and other documents filed in this case from the Commission's website: https://scc.virginia.gov/pages/Case-Information.

(7) A hearing shall be convened at 9:30 a.m. on October 14, 2020, in the Commission's second floor courtroom located in the Tyler Building, 1300 East Main Street, Richmond, Virginia 23219, to receive opening statements, testimony, and evidence offered by Dominion, respondents, and the Staff on Dominion's PIPP filing.

(8) A hearing for the receipt of testimony from public witnesses on Dominion's PIPP filing shall be convened telephonically at 9:30 a.m. on October 13, 2020, with no witness present in the Commission's courtroom.[8] The hearing will be conducted according to the following procedures:

a) To promote fairness for all public witnesses, each witness will be allotted five minutes to provide testimony.

b) On or before October 8, 2020, any person desiring to offer testimony as a public witness shall provide to the Commission (a) your name, and (b) the telephone number that you wish the Commission to call during the hearing to receive your testimony. This information may be provided to the Commission in three ways: (i) by filling out a form on the Commission's website at https://scc.virginia.gov/pages/webcasting; (ii) by completing and emailing the PDF version of this form to

sccinfo@scc.virginia.gov; or (iii) by calling (804) 371-9141.

c) Beginning at 9:30 a.m. on October 13, 2020, the Commission will telephone sequentially each person who has signed up to testify as provided above. This hearing will not be convened, and the parties will be notified of such, if no person signs up to testify as a public witness.

d) This public witness hearing will be webcast at: https://scc.virginia.gov/pages/webcasting.

(9) On or before October 7, 2020, any interested person may file comments on the PIPP filing by following the instructions found on the Commission's website: https://scc.virginia.gov/pages/case-information. All comments shall refer to Case No. PUR-2020-00109.

(10) On or before August 18, 2020, any person or entity wishing to participate as a respondent in this proceeding may do so by filing a notice of participation. Such notice of participation shall include the email addresses of such parties or their counsel. The respondent simultaneously shall serve a copy of the notice of participation on counsel to Dominion. Pursuant to Rule 5 VAC 5-20-80 B, Participation as a respondent, of the Commission's Rules of Practice, any notice of participation shall set forth: (i) a precise statement of the interest of the respondent; (ii) a statement of the specific action sought to the extent then known; and (iii) the factual and legal basis for the action. Any organization, corporation, or government body participating as a respondent must be represented by counsel as required by 5 VAC 5-20-30, Counsel, of the Rules of Practice. All filings shall refer to Case No. PUR-2020-00109.

(11) Within five (5) business days of receipt of a notice of participation as a respondent, Dominion shall serve a copy of the public version of PIPP filing on the respondent.

(12) On or before September 3, 2020, each respondent may file with the Clerk of the Commission and serve on the Staff, Dominion, and all other respondents, any testimony and exhibits by which the respondent expects to establish its case, and each witness's testimony shall include a summary not to exceed one page. In all filings, respondents shall comply with the Commission's Rules of Practice, including, but not limited to: 5 VAC 5-20-140, Filing and service, and 5 VAC 5-20-240, Prepared testimony and exhibits. All filings shall refer to Case No. PUR-2020-00109.

(13) On or before September 17, 2020, the Staff shall investigate the PIPP filing and shall file with the Clerk of the Commission an original and fifteen (15) copies of its testimony and exhibits concerning the PIPP filing, and each Staff witness's testimony shall include a summary not to exceed one page. The Staff shall serve a copy thereof on counsel to Dominion and all respondents.

(14) On or before October 1, 2020, Dominion shall file with the Clerk of the Commission any rebuttal testimony and exhibits that it expects to offer, and each rebuttal witness's testimony shall include a summary not to exceed one page. Dominion shall serve a copy of its rebuttal testimony and exhibits on the Staff and all respondents.

(15) Any documents filed in paper form with the Office of the Clerk of the Commission in this docket may use both sides of the paper. In all other respects, all filings shall comply fully with the requirements of 5 VAC 5-20-150, Copies and format, of the Commission's Rules of Practice.

(16) The Commission's Rule of Practice 5 VAC 5-20-260, Interrogatories to parties or requests for production of documents and things, shall be modified for this proceeding as follows: responses and objections to written interrogatories and requests for production of documents shall be served within seven (7) calendar days after receipt of the same. In addition to the service requirements of 5 VAC 5-20-260 of the Rules of Practice, on the day that copies are filed with the Clerk of the Commission, a copy of the interrogatory or request for production shall be served electronically on the party to whom the interrogatory or request for production is directed or the assigned Staff attorney, if the interrogatory or request for production is directed to the Staff.[9] Except as modified above, discovery shall be in accordance with Part IV of the Commission's Rules of Practice, 5 VAC 5-20-240 et seq.

(17) This matter is continued.

A COPY hereof shall be sent electronically by the Clerk of the Commission to all persons on the official Service List in this matter. The Service List is available from the Clerk of the Commission.

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[1]§ 56-585.6 [effective July 1, 2020]. Universal service fee; Percentage of Income Payment Program. APCo is a Phase I Utility, and Dominion Energy Virginia is a Phase II Utility. See § 56-585.1 A 1 of the Code of Virginia.

[2]Act's 12th Enactment: "12. That the State Corporation Commission shall issue its final order in the Percentage of Income Payment Program (PIPP) proceeding established pursuant to § 56-585.6 of the Code of Virginia, as created by this act, by December 31, 2020, provided that the non-bypassable universal service fee shall not be collected from customers of a Phase I or a Phase II Utility, as those terms are defined in subdivision A 1 of § 56-585.1 of the Code of Virginia, as amended by this act, until such time as the PIPP is established. The Department of Housing and Community Development and the Department of Social Services shall convene a stakeholder working group and develop recommendations regarding the implementation of PIPP. Such recommendations shall allow for a utility to reimburse the administrative costs of the PIPP, not to exceed $3 million, and shall be submitted to the Chairs of the House Committee on Labor and Commerce and the Senate Committee on Commerce and Labor by December 1, 2020."

[3]Id.

[4]See, e.g., Executive Order No. 51, Declaration of a State of Emergency Due to Novel Coronavirus, COVID-19, issued March 12, 2020, by Gov. Ralph S. Northam. See also, Executive Order No. 53, Temporary Restrictions on Restaurants, Recreational, Entertainment, Gatherings, Non-Essential Retail

Businesses, and Closure of K-12 Schools Due to Novel Coronavirus (COVID-19), issued March 23, 2020, by Governor Ralph S. Northam, and Executive Order No. 55, Temporary Stay At Home Order Due to Novel Coronavirus (COVID-19), issued March 30, 2020, by Governor Ralph S. Northam. These and subsequent Executive Orders related to COVID-19 may be found at: https://www.governor.virginia.gov/executive-actions/.

[5]See, e.g., Commonwealth of Virginia, ex rel. State Corporation Commission, Ex Parte: Electronic Service of Commission Orders, Case No. CLK-2020-00004, Doc. Con. Cen. No. 200330035, Order Concerning Electronic Service of Commission Orders (Mar. 19, 2020), extended by Doc. Con. Cen. No. 200520105, Order Regarding the State Corporation Commission's Revised Operating Procedures During COVID-19 Emergency (May 11, 2020); Commonwealth of Virginia, ex rel., State Corporation Commission, Ex Parte: Revised Operating Procedures During COVID-19 Emergency, Case No. CLK-2020-00005, Doc. Con. Cen. No. 200330042, Order Regarding the State Corporation Commission's Revised Operating Procedures During COVID-19 Emergency (Mar. 19, 2020) (Revised Operating Procedures Order), extended by Doc. Con. Cen. No. 200520105, Order Regarding the State Corporation Commission's Revised Operating Procedures During COVID-19 Emergency (May 11, 2020); Commonwealth of Virginia, ex rel. State Corporation Commission, Ex Parte: Electronic service among parties during COVID-19 emergency, Case No. CLK-2020-00007, Doc. Con. Cen. No. 200410009, Order Requiring Electronic Service (Apr. 1, 2020).

[6]5 VAC 5-20-10 et seq.

[7]As noted in the Commission's Revised Operating Procedures Order, submissions to the Commission's Clerk's Office via U.S. mail or commercial mail equivalents may not be processed for an indefinite period of time due to the COVID-19 emergency.

[8]The Commission will convene counsel of record in this proceeding to attend the public witness hearing via Skype for Business.

[9]The assigned Staff attorney is identified on the Commission's website, https://scc.virginia.gov/pages/Case-Information, by clicking "Docket Search," then clicking "Search by Case Information," and entering the case number, PUR-2020-00109 in the appropriate box.

* * *

AT RICHMOND, JUNE 12, 2020

COMMONWEALTH OF VIRGINIA, ex rel.

STATE CORPORATION COMMISSION

CASE NO. PUR-2020-00117

Ex Parte: Establishing the rates, terms and conditions of a universal fee to be paid by the retail customers of Appalachian Power Company.

ORDER ESTABLISHING PROCEEDING

During its 2020 Session, the Virginia General Assembly enacted Chapters 1193 (HB 1526) and 1194 (SB 851) of the 2020 Virginia Acts of Assembly. These duplicate Acts of Assembly, known as the Virginia Clean Economy Act (VCEA or Act), will become effective on July 1, 2020. The VCEA, inter alia, establishes the Percentage of Income Payment Program (Program or PIPP), which is designed to limit the electric utility payments of persons or households participating in certain, specified public assistance programs, based upon a percentage of their income, for customers of Appalachian Power Company (APCo) and Virginia Electric and Power Company (Dominion).

The Act directs the State Corporation Commission (Commission), after notice and opportunity for hearing, to initiate a proceeding to establish the rates, terms and conditions of a "non-bypassable universal service fee" to fund the Program. This service fee will be paid by the customers of APCo and Dominion.

> The VCEA directs that the feeshall be allocated to retail electric customers of a Phase I and Phase II Utility on the basis of the amount of kilowatt-hours used and be established at such level to adequately address the PIPP's objectives to (i) reduce the energy burden of eligible participants by limiting electric bill payments directly to no more than six percent of the eligible participant's annual household income if the household's heating source is anything other than electricity, and to no more than 10 percent of an eligible participant's annual household income on electricity costs if the household's heating source is electricity, and (ii) reduce the amount of electricity used by the eligible participant's household through participation in weatherization or energy efficiency programs and energy conservation education programs.[1]

The Act also requires the Commission to determine reasonable administrative costs investor-owned utilities may recover associated with the PIPP, and the mechanism by which utilities may recover those costs. The Act requires the Commission to issue a Final Order concerning this proceeding by December 31, 2020.[2]

The Act also directs two executive branch agencies-the Department of Housing and Community Development and the Department of Social Services (Agencies)-to convene a stakeholder working group and develop recommendations regarding the implementation of the PIPP.[3] The Agencies' recommendations are required to be submitted to certain legislative committees by December 1, 2020. The Commission encourages these Agencies to also participate in the Commission proceeding established herein.

NOW THE COMMISSION, upon consideration of the foregoing and pursuant to the Act's requirements, hereby initiates this docket to establish the rates, terms and conditions of a non-bypassable universal service fee to fund the PIPP, to be paid by the retail customers of APCo. APCo is directed herein to propose such rates, terms and conditions, and in so doing shall, at a minimum, address the following issues:

- The number of eligible customers assumed and the basis for that assumption, including data sources used to develop customer eligibility levels;
- How heating sources were determined for eligible customers;
- A calculation of the dollars assumed not to be recovered as a result of the program being implemented for eligible customers heating with electricity;

• A calculation of the dollars assumed not to be recovered as a result of the program being implemented for customers heating with other sources;

• Costs proposed to be recovered related to arrearages and administrative costs incurred by APCo and by state agencies involved in the program;

• How the objective of reducing usage through participation in weatherization, energy efficiency, and conservation will be accomplished; identify any costs associated with these programs that are proposed to be collected by the fee;

• Total costs proposed to be recovered by the universal service fee detailing the components previously identified and other costs proposed to be recovered;

• The billing determinants used and a calculation of the proposed fee;

• How customer eligibility will be monitored and the frequency of monitoring;

• Whether program participants are statutorily exempted from being assessed the fee and, if they are, how such will be accomplished; and

• The amount of uncollectible expense in base rates associated with eligible customers. Include a credit in the calculation of the proposed fee to avoid double-recovery of this expense.

All information necessary to support the proposed fee should be provided.

The Commission will, by separate Order, establish a docket in which Dominion will propose its own rates, terms and conditions of its universal service fee to fund the PIPP.

The Commission further takes judicial notice of the ongoing public health emergency related to the spread of the coronavirus, or COVID-19, and the declarations of emergency issued at both the state and federal levels.[4] The Commission has taken certain actions, and may take additional actions going forward, which could impact the procedures in this proceeding.[5] Consistent with these actions, in regard to the terms of the procedural framework established below, the Commission will, among other things, direct the electronic filing of testimony and pleadings unless it contains confidential information, and require electronic service of pleadings on parties to this proceeding.

Accordingly, IT IS ORDERED THAT:

(1) The Commission initiates this Case No. PUR-2020-00117 for purposes of establishing the rates, terms and conditions of a non-bypassable universal service fee to be paid by APCo's retail customers to fund the PIPP.

(2) All pleadings in this matter should be submitted electronically to the extent authorized by Rule 5 VAC 5-20-150, Copies and Format, of the Commission's Rules of Practice and Procedure (Rules of Practice).[6] Confidential and Extraordinarily Sensitive Information shall not be submitted electronically and should comply with Rule 5 VAC 5-20-170, Confidential information. For the duration of the COVID-19 emergency, any person seeking to hand deliver and physically file or submit any pleading or other document shall contact the Clerk's Office Document Control Center at (804) 371-9838 to arrange the delivery.[7]

(3) Pursuant to 5 VAC 5-20-140, Filing and Service, of the Commission's Rules of Practice, the Commission directs that service on parties and the Commission Staff (Staff) in this matter shall be accomplished by electronic means. Concerning Confidential or Extraordinarily Sensitive Information, parties and the Staff are instructed to work together to agree upon the manner in which documents containing such information shall be served upon one another, to the extent practicable, in an electronically protected manner, even if such information is unable to be filed in the Office of the Clerk, so that no party or the Staff is impeded from preparing its case.

(4) As provided by § 12.1-31 of the Code and 5 VAC 5-20-120, Procedure before Hearing Examiners, of the Commission's Rules of Practice, a Hearing Examiner is appointed to rule on any discovery matters that may arise during the course of this proceeding, including any motion for protective order.

(5) On or before July 21, 2020, APCo shall file an original and fifteen (15) copies of its PIPP filing together with any testimony and exhibits in support thereof; each witness's testimony shall include a summary not to exceed one page and shall specify those portions of the PIPP filing that the witness will sponsor at the hearing. Alternatively, in lieu of prefiled testimony and exhibits, APCo may file, on or before July 21, 2020, a document in which APCo: (a) identifies witnesses who will appear and offer testimony in support of APCo's PIPP filing at the hearing; (b) specifies those portions of the filing that such witnesses will adopt and support as their testimony at the hearing; and (c) includes a summary not to exceed one page of each such witness's testimony. APCo shall serve copies thereof on counsel for all respondents and the Staff.

(6) An electronic copy of the public version of APCo's PIPP filing, once filed, may be obtained by downloading unofficial copies of the public version of the PIPP filing and other documents filed in this case from the Commission's website: https://scc.virginia.gov/pages/Case-Information.

(7) A public hearing shall be convened at 9:30 a.m. on October 15, 2020, in the Commission's second floor courtroom located in the Tyler Building, 1300 East Main Street, Richmond, Virginia 23219, to receive opening

statements, testimony, and evidence offered by APCo, respondents, and the Staff on APCo's PIPP filing.

(8) A hearing for the receipt of testimony from public witnesses on APCo's PIPP filing shall be convened telephonically at 9:30 a.m. on October 13, 2020, with no witness present in the Commission's courtroom.[8] The hearing will be conducted according to the following procedures:

a) To promote fairness for all public witnesses, each witness will be allotted five minutes to provide testimony.

b) On or before October 8, 2020, any person desiring to offer testimony as a public witness shall provide to the Commission (a) your name, and (b) the telephone number that you wish the Commission to call during the hearing to receive your testimony. This information may be provided to the Commission in three ways: (i) by filling out a form on the Commission's website at https://scc.virginia.gov/pages/webcasting; (ii) by completing and emailing the PDF version of this form to sccinfo@scc.virginia.gov; or (iii) by calling (804) 371-9141.

c) Beginning at 9:30 a.m. on October 13, 2020, the Commission will telephone sequentially each person who has signed up to testify as provided above. This hearing will not be convened, and the parties will be notified of such, if no person signs up to testify as a public witness.

d) This public witness hearing will be webcast at: https://scc.virginia.gov/pages/webcasting.

(9) On or before October 7, 2020, any interested person may file comments on the PIPP filing by following the instructions found on the Commission's website: https://scc.virginia.gov/pages/case-information. All comments shall refer to Case No. PUR-2020-00117.

(10) On or before August 18, 2020, any person or entity wishing to participate as a respondent in this proceeding may do so by filing a notice of participation. Such notice of participation shall include the email addresses of such parties or their counsel. The respondent simultaneously shall serve a copy of the notice of participation on counsel to APCo. Pursuant to Rule 5 VAC 5-20-80 B, Participation as a respondent, of the Commission's Rules of Practice, any notice of participation shall set forth: (i) a precise statement of the interest of the respondent; (ii) a statement of the specific action sought to the extent then known; and (iii) the factual and legal basis for the action. Any organization, corporation, or government body participating as a respondent must be represented by counsel as required by 5 VAC 5-20-30, Counsel, of the Rules of Practice. All filings shall refer to Case No. PUR-2020-00117.

(11) Within five (5) business days of receipt of a notice of participation as a respondent, APCo shall serve a copy of the public version of PIPP filing on the respondent.

(12) On or before September 3, 2020, each respondent may file with the Clerk of the Commission and serve on the Staff, APCo, and all other respondents, any testimony and exhibits by which the respondent expects to establish its case, and each witness's testimony shall include a summary not to exceed one page. In all filings, respondents shall comply with the Commission's Rules of Practice, including, but not limited to: 5 VAC 5-20-140, Filing and service, and 5 VAC 5-20-240, Prepared testimony and exhibits. All filings shall refer to Case No. PUR-2020-00117.

(13) On or before September 17, 2020, the Staff shall investigate the PIPP filing and shall file with the Clerk of the Commission an original and fifteen (15) copies of its testimony and exhibits concerning the PIPP filing, and each Staff witness's testimony shall include a summary not to exceed one page. The Staff shall serve a copy thereof on counsel to APCo and all respondents.

(14) On or before October 1, 2020, APCo shall file with the Clerk of the Commission any rebuttal testimony and exhibits that it expects to offer, and each rebuttal witness's testimony shall include a summary not to exceed one page. APCo shall serve a copy of its rebuttal testimony and exhibits on the Staff and all respondents.

(15) Any documents filed in paper form with the Office of the Clerk of the Commission in this docket may use both sides of the paper. In all other respects, all filings shall comply fully with the requirements of 5 VAC 5-20-150, Copies and format, of the Commission's Rules of Practice.

(16) The Commission's Rule of Practice 5 VAC 5-20-260, Interrogatories to parties or requests for production of documents and things, shall be modified for this proceeding as follows: responses and objections to written interrogatories and requests for production of documents shall be served within seven (7) calendar days after receipt of the same. In addition to the service requirements of 5 VAC 5-20-260 of the Rules of Practice, on the day that copies are filed with the Clerk of the Commission, a copy of the interrogatory or request for production shall be served electronically on the party to whom the interrogatory or request for production is directed or the assigned Staff attorney, if the interrogatory or request for production is directed to the Staff.[9] Except as modified above, discovery shall be in accordance with Part IV of the Commission's Rules of Practice, 5 VAC 5-20-240 et seq.

(17) This matter is continued.

A COPY hereof shall be sent electronically by the Clerk of the Commission to all persons on the official Service List in

this matter. The Service List is available from the Clerk of the Commission.

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[1]§ 56-585.6 [effective July 1, 2020]. Universal service fee; Percentage of Income Payment Program. APCo is a Phase I Utility, and Dominion is a Phase II Utility. See § 56-585.1 A 1 of the Code of Virginia.

[2]Act's 12th Enactment: "12. That the State Corporation Commission shall issue its final order in the Percentage of Income Payment Program (PIPP) proceeding established pursuant to § 56-585.6 of the Code of Virginia, as created by this act, by December 31, 2020, provided that the non-bypassable universal service fee shall not be collected from customers of a Phase I or a Phase II Utility, as those terms are defined in subdivision A 1 of § 56-585.1 of the Code of Virginia, as amended by this act, until such time as the PIPP is established. The Department of Housing and Community Development and the Department of Social Services shall convene a stakeholder working group and develop recommendations regarding the implementation of PIPP. Such recommendations shall allow for a utility to reimburse the administrative costs of the PIPP, not to exceed $3 million, and shall be submitted to the Chairs of the House Committee on Labor and Commerce and the Senate Committee on Commerce and Labor by December 1, 2020."

[3]Id.

[4]See, e.g., Executive Order No. 51, Declaration of a State of Emergency Due to Novel Coronavirus, COVID-19, issued March 12, 2020, by Gov. Ralph S. Northam. See also, Executive Order No. 53, Temporary Restrictions on Restaurants, Recreational, Entertainment, Gatherings, Non-Essential Retail Businesses, and Closure of K-12 Schools Due to Novel Coronavirus (COVID-19), issued March 23, 2020, by Governor Ralph S. Northam, and Executive Order No. 55, Temporary Stay At Home Order Due to Novel Coronavirus (COVID-19), issued March 30, 2020, by Governor Ralph S. Northam. These and subsequent Executive Orders related to COVID-19 may be found at: https://www.governor.virginia.gov/executive-actions/.

[5]See, e.g., Commonwealth of Virginia, ex rel. State Corporation Commission, Ex Parte: Electronic Service of Commission Orders, Case No. CLK-2020-00004, Doc. Con. Cen. No. 200330035, Order Concerning Electronic Service of Commission Orders (Mar. 19, 2020), extended by Doc. Con. Cen. No. 200520105, Order Regarding the State Corporation Commission's Revised Operating Procedures During COVID-19 Emergency (May 11, 2020); Commonwealth of Virginia, ex rel., State Corporation Commission, Ex Parte: Revised Operating Procedures During COVID-19 Emergency, Case No. CLK-2020-00005, Doc. Con. Cen. No. 200330042, Order Regarding the State Corporation Commission's Revised Operating Procedures During COVID-19 Emergency (Mar. 19, 2020) (Revised Operating Procedures Order), extended by Doc. Con. Cen. No. 200520105, Order Regarding the State Corporation Commission's Revised Operating Procedures During COVID-19 Emergency (May 11, 2020); Commonwealth of Virginia, ex rel. State Corporation Commission, Ex Parte: Electronic service among parties during COVID-19 emergency, Case No. CLK-2020-00007, Doc. Con. Cen. No. 200410009, Order Requiring Electronic Service (Apr. 1, 2020).

[6]5 VAC 5-20-10 et seq.

[7]As noted in the Commission's Revised Operating Procedures Order, submissions to the Commission's Clerk's Office via U.S. mail or commercial mail equivalents may not be processed for an indefinite period of time due to the COVID-19 emergency.

[8]The Commission will convene counsel of record in this proceeding to attend the public witness hearing via Skype for Business.

[9]The assigned Staff attorney is identified on the Commission's website, https://scc.virginia.gov/pages/Case-Information, by clicking "Docket Search," then clicking "Search by Case Information," and entering the case number, PUR-2020-00117, in the appropriate box.

STATE WATER CONTROL BOARD

Proposed Consent Special Order for the Children's Home of the Virginia Baptists

The State Water Control Board proposes to issue a consent special order to the Children's Home of the Virginia Baptists for alleged violation of the State Water Control Law at the facility located at 6900 Hickory Road, Petersburg, Virginia. A description of the proposed action is available at the Department of Environmental Quality office listed or online at www.deq.virginia.gov. Jeff Reynolds will accept comments by email at jefferson.reynolds@deq.virginia.gov, FAX at (804) 527-5106, or postal mail at Department of Environmental Quality, Piedmont Regional Office (Enforcement), 4949-A Cox Road, Glen Allen, VA 23060, until August 6, 2020.

Proposed Enforcement Action for Le Suraj Inc.

An enforcement action has been proposed for Le Suraj Inc. for violations of the State Water Control Law in Belle Haven, Virginia. A description of the proposed action is available at the Department of Environmental Quality office listed or online at www.deq.virginia.gov. Russell Deppe will accept comments by email at russell.deppe@deq.virginia.gov, FAX at (757) 518-2009, or postal mail at Department of Environmental Quality, Tidewater Regional Office, 5636 Southern Boulevard, Virginia Beach, VA 23462, from July 6, 2020, to August 6, 2020.

Proposed Enforcement Action for Riggins Company L.C. Hampton

An enforcement action has been proposed for Riggins Company L.C. Hampton, for violations of State Water Control Law. A description of the proposed action is available at the Department of Environmental Quality office listed or online at www.deq.virginia.gov. John Brandt will accept comments by email at john.brandt@deq.virginia.gov, FAX at (757) 518-2009, or postal mail at Department of Environmental Quality, Tidewater Regional Office, 5636 Southern Boulevard, Virginia Beach, VA 23462, from July 6, 2020, to August 5, 2020.

Proposed Consent Special Order for San-J International Inc.

The State Water Control Board proposes to issue a consent special order to San-J International Inc. for alleged violation of the State Water Control Law at 2880 Sprouse Drive, Henrico, Virginia 23231. A description of the proposed action is available at the Department of Environmental Quality office listed or online at www.deq.virginia.gov. Aree Reinhardt will accept comments by email at aree.reinhardt@deq.virginia.gov, FAX at (804) 527-5106, or postal mail at Department of Environmental Quality, Piedmont Regional Office (Enforcement), 4949-A Cox Road, Glen Allen, VA 23060, from July 6, 2020, to August 7, 2020.

Proposed Enforcement Action for Titan Virginia Ready-Mix LLC

An enforcement action has been proposed for Titan Virginia Ready-Mix LLC for violations of the State Water Control Law at the Titan Sterling Ready-Mix Concrete Plant facility located in Loudoun County, Virginia. A description of the proposed action is available at the Department of Environmental Quality office listed or online at http://www.deq.virginia.gov/Programs/Enforcement/PublicNotices. Jim Datko will accept comments by email at james.datko@deq.virginia.gov or postal mail at Department of Environmental Quality, Northern Regional Office, 13901 Crown Court, Woodbridge, VA 22193, from July 7, 2020, through August 6, 2020.

VIRGINIA CODE COMMISSION

Notice to State Agencies

Contact Information: *Mailing Address:* Virginia Code Commission, Pocahontas Building, 900 East Main Street, 8th Floor, Richmond, VA 23219; *Telephone:* (804) 698-1810; *Email:* varegs@dls.virginia.gov.

Meeting Notices: Section 2.2-3707 C of the Code of Virginia requires state agencies to post meeting notices on their websites and on the Commonwealth Calendar at https://commonwealthcalendar.virginia.gov.

Cumulative Table of Virginia Administrative Code Sections Adopted, Amended, or Repealed: A table listing regulation sections that have been amended, added, or repealed in the *Virginia Register of Regulations* since the regulations were originally published or last supplemented in the print version of the Virginia Administrative Code is available at http://register.dls.virginia.gov/documents/cumultab.pdf.

Filing Material for Publication in the *Virginia Register of Regulations*: Agencies use the Regulation Information System (RIS) to file regulations and related items for publication in the *Virginia Register of Regulations*. The Registrar's office works closely with the Department of Planning and Budget (DPB) to coordinate the system with the Virginia Regulatory Town Hall. RIS and Town Hall complement and enhance one another by sharing pertinent regulatory information.