

SUBJECT: Environmental Assessment, Section 404(b)(1) Evaluation and Statement of Findings Regarding Proposed Department of the Army Virginia State Program General Permit (07-SPGP-01)

June 1, 2007

CENAO-REG
07-SPGP-01

MEMORANDUM FOR RECORD

1. The U. S. Army Corps of Engineers, Norfolk District (District) is evaluating proposals to reissue with modifications, reissue without modifications, or not to reissue the Virginia State Programmatic General Permit (SPGP). This environmental assessment (EA), 404(b)(1) analysis, and Statement of Findings (SOF) documents our evaluation process and decision.

The purpose of this analysis is to assess the manner in which the proposed Virginia State Program General Permit (07-SPGP-01) processes and procedures comply, for all covered activities, with the requirements of Section 404 of the Clean Water Act (CWA), Section 10 of the Rivers and Harbors Act (RHA), and all other applicable statutes and Federal requirements. This evaluation includes: an assessment of alternatives; an evaluation of public comments; an analysis of impacts associated with the proposal; the National Environmental Policy Act (NEPA) analysis; the Public Interest Review specified in 33 C.F.R. § 320.4(a)(1) and (2); and the impact analysis specified in Subparts C through F of the 404(b)(1) Guidelines in 40 C.F.R. § 230. These analyses include a general assessment of the foreseeable direct, indirect, and cumulative effects of the authorized activities; and the potential future impacts to waters of the United States that are estimated to occur until the expiration date of 07-SPGP-01. In the assessment of these individual and cumulative effects, the impact limits and the terms and conditions of the SPGP, including the activity-specific conditions, the notification and reporting requirements and the general conditions are considered. The document concludes with the Section 404(b)(1) analysis and Statement of Findings regarding the proposed 07-SPGP-01, which is found in section 8, Determinations.

Section 404(e) of the CWA (33 U.S.C. § 1344) and Department of the Army (DA) regulations (33 C.F.R. § 325.2(e)(2), 322.2(f), and 323.2(h)) allow the U.S. Army Corps of Engineers (Corps) to issue general permits (GPs), on a statewide basis, that authorize, for the purpose of Section 404 of the CWA and Section 10 of the RHA, certain activities that are also regulated by a state regulatory authority. This type of GP is a state program general permit (SPGP). The SPGP identifies the terms, limits, and conditions under which specific activities authorized by the state regulatory authority may also be authorized under Section 404 of the CWA and/or Section 10 of the RHA with limited case-by-case review by the Corps. The activities authorized by an SPGP must result only in minimal individual and cumulative adverse effects on the aquatic environment. The goals of SPGPs are as follows: 1) to reduce duplicative project evaluation; 2) to simplify the authorization process; 3) to provide equivalent or enhanced environmental protection for aquatic resources; and 4) to promote more effective and efficient use of Corps and state resources.

On 15 April 2002, the Norfolk District Corps (District) initially issued the Virginia State Program General Permit (SPGP-01). The SPGP-01 provided Department of the Army (DA) authorization for many activities in Section 404 waters and nontidal Section 10 waters that were

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also regulated by the Virginia Department of Environmental Quality (DEQ). After the initial issuance of the permit, minor procedural revisions were made and a modified version of SPGP-01 was issued on 3 October 2002. The modified SPGP-01 became effective on 1 November 2002. The SPGP-01 provides DA authorization for many activities in waters of the United States, including wetlands, in the Commonwealth of Virginia that were previously authorized by Nationwide Permits (NWPs) or individual permits. The current upper impact limit for the SPGP-01 for Residential, Commercial, and Institutional Development projects is one acre of nontidal wetlands and/or waters, including no more than 2,000 linear feet of stream channel. Under the current SPGP-01, Category A projects have impacts totaling up to 1/10 acre of waters and/or wetlands and up to 300 linear feet of stream, Category B projects have between 1/10 acre and 1/2 acre of impacts to waters and/or wetlands and up to 300 linear feet of stream, and Category C projects have between 1/2 to one acre of waters and/or wetlands and up to 2,000 linear feet of stream. Category A and B Residential, Commercial, and Institutional Development projects are reviewed only by DEQ, while Category C projects are reviewed by DEQ, the District, the U.S. Fish and Wildlife Service (FWS), and the U.S. Environmental Protection Agency (EPA). The current upper impacts limit for the SPGP-01 for Linear Transportation projects is 1/3 nontidal waters and/or wetlands. Under the current SPGP-01, Category A projects have impacts totaling up to 1/10 acre of waters and/or wetlands and up to 300 linear feet of stream and Category B projects impact between 1/10 and 1/3 acre of waters and/or wetlands. Category A Linear Transportation projects are reviewed only by DEQ and Category B projects are reviewed by DEQ and, in cases where individual stream impacts exceed 300 linear feet, when projects contain multiple single and complete impact areas that additively exceed 1/3 acre of impact, and/or where lateral stream encroachments of a project cumulatively impact over 300 linear feet of stream, the District, FWS, and EPA will also review the projects. In a public notice dated 4 October 2002, the District announced the suspension of all of NWP 39 and the portion of NWP 14 that covered nontidal waters within the Commonwealth of Virginia. The suspension of all or portions of these NWPs within the District's regulatory boundaries was necessary in order to reduce duplication and allow for effective implementation of SPGP-01.

SPGP-01 was reissued with additional modifications on 25 September 2003. The modifications entailed incorporating a more streamlined review for small projects, eliminating the requirement for a Corps-confirmed delineation for projects with impacts under 1/10 acre of nontidal wetlands and/or waters, including no more than 300 linear feet of stream channel. The changes also enhanced the Corps' ability to assess individual and cumulative impacts through amendments of verbiage in the permit, changed the notification requirements for projects affecting Federally listed threatened and endangered species and designated critical habitat in southwest Virginia, and amended submission requirements to allow applicants to send applications directly to the DEQ and the District, instead of through the Virginia Marine Resources Commission (VMRC) application clearinghouse.

SPGP-01 was reissued with additional modifications on 2 August 2005. The modifications entailed changes to details of the processing of SPGP-01, reinstated the requirement to obtain a Corps-confirmed delineation of all waters and wetlands to achieve a "complete application", yet no changes were made to the impact thresholds associated with SPGP-01. The August 2005 version is currently effective in the Norfolk District and expires on

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2 August 2010. In April of 2006, the DEQ indicated a desire for the District to expand SPGP-01 to allow the DEQ to provide primary regulatory review of projects between ½ and one acre. As part of the monitoring provisions of SPGP-01, the District was required to monitor and reevaluate the SPGP-01 in order to determine whether it had met its intended goals and complied with regulatory and statutory requirements by authorizing only those activities that resulted in minimal individual and cumulative adverse effects on the aquatic environment. These monitoring reports can be found on the District's website and are incorporated herein by reference. As a result of DEQ's request to modify SPGP-01, this further evaluation was conducted to determine whether the proposed changes were appropriate. This analysis requires the District to determine whether the SPGP-01 should be reissued without changes, reissued with modifications, or allowed to expire without issuing a similar SPGP for activities in the Commonwealth of Virginia.

On 12 March 2007, the 2007 NWP's were published in the Federal Register. On 26 March 2007, the District, by delegation from the Corps North Atlantic Division, issued a public notice to suspend the portion of NWP 14 (Linear Transportation Projects) covering work in nontidal waters, the portion of NWP 29 (Residential Developments) for multiple unit residential developments and residential subdivisions, and the entirety of NWP 39 (Commercial and Institutional Developments). These suspensions were undertaken since SPGP-01, which covered these activities, was still effective until 2010. It was determined that allowing the NWP's to remain in place was confusing to the regulated public and reduced the efficacy of the SPGP program.

To determine the effectiveness of the SPGP-01, the District compiled and examined DEQ's four one-year database reports for Category A and B projects for the period 01 November 2002 through 31 December 2006 (Table 1) and the District's Category C database reports for the same periods. Under the existing SPGP-01 and proposed 07-SPGP-01, there are two covered Activities, Activity 1 covers Residential, Commercial, and Institutional Development projects and Activity 2 covers Linear Transportation Projects. As mentioned earlier, SPGP-01, there are also separate impact categories that are proposed to be eliminated under 07-SPGP-01. Category A projects under both Activities authorize up to 1/10 acre of impacts to waters and/or wetlands and up to 300 linear feet of stream. Category B projects under Activity 1 cover projects impacting between 1/10 and ½ acre of waters and/or wetlands and up to 300 linear feet of stream and Category B projects under Activity 2 cover projects impacting between 1/10 and 1/3 acre of waters and/or wetlands. Category C projects apply to only Activity 1 projects, which entail impacts to between ½ and one acre of waters and/or wetlands and between 301 and 2,000 linear feet of stream.

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**TABLE 1
NONTIDAL WATERS IMPACTS 11/1/02 – 12/31/06**

	11/1/02-10/31/03	11/1/03-10/31/04	11/1/04-10/31/05	1/1/06-12/31/06	Total	Average
Acres Nontidal Wetlands Proposed	38.62	44.09	59.41	78.16	220.28	55.07
Acres Nontidal Wetlands Approved	35.89	39.95	45.09	71.63	192.56	48.14
Acres Nontidal Wetlands Mitigation Required	73.44	124.30	85.81	132.72	416.27	104.07
Trust Fund Dollars for Wetland Impacts	89,688.00	100,838.00	201,020.00	82,365.70	473,911.70	111,477.93
Linear Footage Nontidal Streams Proposed	94,353	59,084	77,517	88,811	319,765	79,941
Linear Footage Nontidal Stream Approved	91,100	51,306	74,738	79,167	296,311	74,078
Linear Footage Nontidal Stream Mitigation Required	142,130	41,093	102,301	123,706	409,233	102,308
Trust Fund Dollars for Stream Impacts	391,846.00	734,299.00	2,294,496.00	3,490,853.05	6,911,494.05	1,727,873.51

The data indicated that, over the four years monitored, an average of 55.07 acres of vegetated nontidal wetlands and 79,941 linear feet of stream were proposed to be filled. Of the proposed aquatic resources to be filled, an average of 48.14 acres of vegetated nontidal wetlands and 74,078 linear feet of stream were authorized to be filled, and an annual average of 104.07 acres and 102,308 linear feet of stream were required as compensatory mitigation to offset those authorized losses. This data demonstrates DEQ's and the District's effectiveness in requiring avoidance and minimization of impacts to nontidal waters and wetlands through the SPGP process.

In response to DEQ's current request for a SPGP modification, the District evaluated several alternatives to DEQ's proposal including, elimination of the SPGP program in Virginia altogether, reinstating NWP's while utilizing the SPGP program for projects from ½ to one acre, maintaining the status quo under SPGP-01, and expanding the scope of the SPGP to two acres:

- a. We have determined that reinstatement of NWP's with the abolition of the SPGP program would result in substantial program inefficiencies by placing a great deal of additional project review, notably labor intensive individual permit (IP) review, on the District for project proposals that result in minimal impacts to waters of the United States. Therefore this alternative was determined to be unacceptable, as the additional workload demands on the District, without the commensurate budget increases needed to hire and train more staff, would certainly result in longer permit processing times and poorer customer service for projects that qualify for general permit processing.
- b. We have determined that reinstatement of NWP's for projects under ½ acre with the SPGP program remaining in effect for projects between ½ and one acre of impact would likely create a faster permit process for some applicants and would avoid permit fees for some applicants. In this situation, applicants would need to obtain NWP's from the

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District for projects up to ½ acre, SPGPs from DEQ for projects between ½ and one acre, including up to 2,000 linear feet of stream, and IPs from the District along with either a general permit or IP from DEQ for projects over one acre or over 2,000 linear feet of stream. All of these different types of reviews entail different application requirements. The complexities of this type of system would be unnecessarily confusing for the regulated public. Allowing minimal impact projects to proceed under 07-SPGP-01 alone creates a predictable process for the regulated public. Also, this alternative would not achieve the savings in terms of manpower resources that the District expects from implementing the modified 07-SPGP-01. These resources would be more effectively redirected to achieve quicker turnaround times for confirmations of delineations and preapplication requests, and in improving enforcement and compliance.

- c. Continuing to process applications under the existing SPGP-01 thereby maintaining the status quo (the “no action alternative”). Operating in this fashion has proven to provide adequate protection of the Commonwealth’s aquatic resources, however, it does little to address reduction of regulatory duplication, nor conflicting requirements of permittees. As indicated above, it also would not achieve the savings in terms of manpower resources that the District expects from implementing 07-SPGP-01.
- d. Expansion of the scope of the SPGP to allow impacts up to two acres in size was not supported by EPA.

DEQ's current proposed modification to the SPGP, in contrast to all of the above alternatives, should result in a reduction of interagency duplication of effort and a narrower likelihood of the two agencies making conflicting demands of permit applicants. The proposal builds on DEQ's state permit processing program and should result in a streamlined, more straightforward, process for projects with minimal impacts.

The monitoring reports found that the SPGP-01 fulfilled the four goals of SPGPs stated above and complied with the statutory requirements of Section 404(e) of the CWA and DA regulations at 33 C.F.R. §§ 322.2(f) and 323.2(h), also achieving the programmatic goal of “no net loss” of wetlands. Review of the potential impacts of the proposal, alternatives considered, comments from the public, and the findings of the monitoring reports, all indicate that modification of the SPGP permit program in Virginia is appropriate. These issues will be addressed in more detail later in this document.

It should be noted that the state and Federal regulatory programs, working in concert, provide a greater level of protection for aquatic resources because the state program regulates certain activities and areas that the Federal program does not, including regulation of hydrologically isolated wetlands and excavation in wetlands. Conversely, the Federal program provides more flexibility to impose project specific conditions, including the ability to require financial assurances for mitigation for projects, when state regulations do not allow for such conditions. Consequently, the two programs serve to complement one another when working together in partnership under the SPGP.

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2. Project Description and Changes to Project:

a. Project Description:

The District proposes to reissue the SPGP-01 with modifications as 07-SPGP-01, for a five-year period. Processing changes to SPGP-01 have been proposed. The 07-SPGP-01 provides authorization for construction of certain structures in, over, and under certain nontidal navigable waters of the United States within the Commonwealth of Virginia, and/or the accomplishment of certain work which entails the discharge of dredged or fill material into nontidal waters of the United States, including nontidal navigable waters and/or wetlands, provided that full and appropriate related state authorization is obtained and that the public strictly adheres to the terms and conditions of the 07-SPGP-01 and the applicable Virginia Water Protection (VWP) Permit. GPs, including SPGPs, may be issued under authority of Section 404(e) of the CWA and Section 10 of the RHA of 1899.

Since 1975 the Corps has used GPs to regulate activities in the nation's waters. SPGPs authorize activities that (a) are substantially similar in nature; (b) cause only minimal adverse environmental effects when performed separately; and (c) have minimal cumulative adverse effects on the environment. The District has written the 07-SPGP-01, in conjunction with existing state regulations, to minimize duplication, needless paperwork, and delays; to simplify the authorization process; and to provide equivalent or enhanced protection for aquatic resources in the review of permit applications.

The proposed 07-SPGP-01 applies to certain activities currently regulated by both the Corps and the DEQ, described in more detail below. Work covered under 07-SPGP-01 is activity-specific to ensure that projects authorized under each category will have no more than minimal individual and cumulative environmental impacts. If projects do not meet the terms and conditions of 07-SPGP-01 or the DEQ's VWP permit regulations, these projects will be reviewed under alternate Corps permit processes.

When a proposed activity may result in more than minimal individual or cumulative adverse environmental effects, interfere with navigation, or may be contrary to the public interest, the District retains authority, at its discretion, to review the application using the IP or other existing Corps permitting procedures. 07-SPGP-01 contains provisions for the U.S. Environmental Protection Agency (EPA) and the U.S. Fish and Wildlife Service (FWS) to review certain applications and to require that the District process the projects under the IP process if all of the agencies' project-specific recommendations are not incorporated by the applicants.

b. Changes to current SPGP-01: The existing SPGP-01 allows a maximum of one acre of impacts to nontidal waters and/or wetlands, with stream impacts not exceeding 2,000 linear feet for residential, commercial, and institutional development projects. The existing SPGP-01 also allows for impacts of up to 1/3 acre of nontidal waters and/or wetlands for linear transportation projects. The 07-SPGP-01 retains these same impact thresholds. The changes in 07-SPGP-01 include the following:

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All project types:

The VMRC will only distribute Joint Permit Applications for authorizations under 07-SPGP-01 to the DEQ. The District will no longer receive copies of all applications. If the DEQ needs to coordinate a particular project with the District, DEQ will provide the District a copy of the subject application.

As proposed, the DEQ would undertake all screening for historic properties through the Virginia Department of Historic Resources (VDHR) Data Sharing System (DSS). If it is determined that a proposed project is located on or near previously identified archaeological sites, or within viewshed of previously identified architectural sites eligible for listing on the National Register of Historic Places (Register), the DEQ will inform the applicant as such and will forward the project to the District for consultation with VDHR, as required by 36 C.F.R. § 800 and 33 C.F.R. § 325, Appendix C. At the time of issuance of 07-SPGP-01, the Programmatic Agreement (PA) to enable this delegation of Section 106 screening authority to DEQ had not been finalized by the District, the VDHR, the DEQ, and the Advisory Council on Historic Preservation (ACHP). Until such a time as the PA is finalized, the process for screening of historic resources will remain the responsibility of the District and will continue as previously approved under the current SPGP-01. For these reasons, the VMRC will continue to send applications to both the DEQ and the District until the PA has been finalized.

The DEQ will undertake all screening for Federally listed threatened or endangered species by performing searches of both the Virginia Department of Game and Inland Fisheries (DGIF) and the Virginia Department of Conservation and Recreation, Natural Heritage Division (DNH) databases. If it is determined that a proposed project is located within a two mile radius of a known occurrence of a Federally listed species or Federally-designated critical habitat, or is located in an area known to contain appropriate habitat for a listed species, the DEQ will inform the applicant as such and will request surveys for listed species as necessary, based on known occurrences of the species in the area and/or the presence of appropriate habitat for the species on the project site. DEQ will coordinate with the Corps to determine the appropriate scope of analysis in requesting these surveys. After the applicant completes the surveys, the DEQ will informally consult with the FWS, as required by 50 C.F.R. § 402 *et seq.* If FWS suggests that a proposal may affect Federally listed threatened or endangered species or critical habitat, the project will be forwarded to the District so that they may make an effect determination and continue Section 7 consultation with the FWS.

07-SPGP-01 will allow channelization of streams where there is a discharge of dredged or fill material in waters of the United States, whereas SPGP-01 did not allow these activities. In cases where channelization takes place, the linear footage of the channelized area will be counted additively with other discharges of dredged or fill material as a loss of waters for threshold purposes.

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Residential, Commercial, and Institutional Development: The DEQ will undertake all avoidance and minimization analyses on development projects meeting the terms of 07-SPGP-01. On projects with impacts over ½ acre of wetlands and/or waters or projects impacting over 300 linear feet of stream, the Corps will perform independent review of avoidance and minimization and mitigation plans. If the Corps determines that project impacts are more than minimal on either an individual or cumulative basis, the District Commander will exert his/her discretionary authority to require processing under an IP. If the District and DEQ project managers have differing assessments of whether the applicant has adequately avoided and minimized impacts to waters and wetlands or whether the mitigation plan is sufficient to compensate for the unavoidable losses, the agencies will have discussions in an attempt to resolve these differences. The DEQ will issue the permit authorization when they determine that an applicant has adequately avoided and minimized impacts to the maximum extent practicable unless discretionary authority has been exerted. If the ultimately determined level of avoidance and minimization undertaken on these projects is still less than the Corps project manager recommends, the DEQ and Corps will enter into a formalized dispute resolution process. The purpose of the dispute resolution process is to foster interagency discussion, bringing project managers and varying levels of supervisors together to determine if there are fundamental differences in application processing that need to be addressed. The dispute resolution process may not be completed until after the disputed projects are authorized, though. The appropriate and practicable amount of avoidance and minimization is, in many cases, a matter of professional judgment. The dispute resolution process is intended to quickly bring both agencies into alignment so as to minimize or eliminate the same issue(s) being disputed in the future.

07-SPGP-01 will cover the construction of extended-detention basins and enhanced extended-detention basins for stormwater management when these activities are regulated as well by the DEQ. In certain instances, the DEQ's regulations do not consider that construction of these types of stormwater management facilities impact state waters and therefore some of these projects are not regulated by DEQ. In those instances, DEQ will forward the applications to the District for processing under a different type of Corps authorization.

07-SPGP-01 will not cover the placement of septic tanks, construction of septic drain fields, and the construction of any associated perimeter ditches in nontidal wetlands and/or waters. These types of activities are exempt from DEQ's regulations and will be evaluated under a different type of Corps authorization. In the instances where DEQ receives 07-SPGP-01 applications for work meeting these criteria, DEQ will forward the applications to the District for processing under a different type of Corps authorization.

07-SPGP-01 will not cover Corps-regulated normal residential gardening, lawn, and landscape maintenance in nontidal wetlands and/or waters. These types of activities are exempt from DEQ's regulations and will be evaluated under a different type of Corps authorization. In the instances where DEQ receives 07-SPGP-01 applications for work

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meeting these criteria, DEQ will forward the applications to the District for processing under a different type of Corps authorization.

Linear Transportation: On linear transportation projects with impacts to over 300 linear feet of stream, when projects contain multiple single and complete impact areas on the same project that additively impact over 1/3 acre of wetlands and/or waters, and/or when lateral stream encroachments of a project cumulatively exceed 1/3 acre of wetlands and/or waters, the District will be involved in independent review of avoidance and minimization and mitigation/stream relocation plans. If the District and the DEQ project managers have differing assessments of whether the applicant has adequately avoided and minimized impacts to waters and wetlands or whether the mitigation/relocation plan is sufficient to compensate for the unavoidable losses, the agencies will have discussions in an attempt to resolve these differences. The DEQ will issue the permit authorization when they determine that an applicant has adequately avoided and minimized impacts to the maximum extent practicable unless discretionary authority has been exerted. If the ultimately determined level of avoidance and minimization undertaken on any given project is still less than the District project manager recommends, the DEQ and District will enter into a formalized dispute resolution process, as discussed above under Residential, Commercial, and Institutional Development projects.

3. Project Purpose: The purpose of 07-SPGP-01 is to provide a mechanism whereby specific activities with minimal individual and cumulative impacts that are authorized by the state regulatory program may also be authorized under the Corps regulatory program with limited review by the District. In its implementation, 07-SPGP-01 will meet the goals of an SPGP which are to reduce duplication of Federal/state project evaluation; to simplify the authorization process; to provide equivalent or enhanced environmental protection for aquatic resources; and to promote more effective and efficient use of the District's and DEQ's resources.

4. Statutory Authority: Section 10 of the RHA of 1899 and Section 404 of the CWA.

5. Other Federal, State, and Local Authorizations:

a. State Water Quality Certification (WQC): Projects authorized by 07-SPGP-01 will be required to obtain separate VWP permits from the DEQ. These DEQ permits will constitute § 401 certification on a project specific basis. For that reason, DEQ was not asked to issue blanket WQC for 07-SPGP-01. All conditions of the DEQ WQC become conditions of the 07-SPGP-01 authorization.

b. Coastal Zone Management (CZM) consistency determination: On 26 April 2007, DEQ's Office of Environmental Impact Review issued a determination that all activities authorized by 07-SPGP-01 will be carried out in a manner consistent with the Virginia Coastal Zone Management Program (VCP) as required by Section 307 of the Federal Coastal Zone Management Act of 1972, as amended. The DEQ concurred with the District's consistency determination with the inclusion of several conditions:

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Authorizations under 07-SPGP-01 require that applicants obtain a VWP permit from the DEQ.

Authorizations under 07-SPGP-01 require that applicants obtain a permit from the VMRC, if one is required.

Authorizations under 07-SPGP-01 also require that permittees ensure that their projects are designed and constructed in a manner consistent with all state local requirements pursuant to the Chesapeake Bay Preservation Act (*Virginia Code* sections 10.1-2100 *et seq.*) and the Chesapeake Bay Preservation Area Designation and Management Regulations (9 VAC 10-20-10 *et seq.*). Authorizations under 07-SPGP-01 do not supersede state or local government authority or responsibilities pursuant to the Act.

When local zoning ordinances provide for riparian and floodplain protection pursuant to the Chesapeake Bay Preservation Act (*Virginia Code* sections 10.1-2100 *et seq.*) and the Chesapeake Bay Preservation Area Designation and Management Regulations (9 VAC 10-20-10 *et seq.*), the use of buffers as a form of mitigation shall be allowed only (1) where the extent of the buffers exceeds the lateral extent already required by local ordinances pursuant to the Act and the Regulations, or (2) where the quality of the existing protected buffer area is enhanced to provide great water quality protection benefits.

All of these conditions were incorporated as special conditions of 07-SPGP-01.

c. Other authorizations: Applicants under 07-SPGP-01 are required to either obtain permits from, or comply with the state authorities discussed in section 6(b), above.

6. Date of Public Notice, Summaries of Comments, and Responses to Comments:

a. Public notices: The District issued a public notice on 15 December 2006 requesting public comments on a proposal to reissue SPGP-01 with modifications. This notice was sent to all interested parties, including appropriate state and Federal agencies. The deadline for the receipt of comments was 15 February 2007. After detecting an error regarding the upper threshold for Linear Transportation Projects in the first notice, an additional notice was sent out on 26 January 2007 to clarify the error. The comment period was not extended as a result of this error.

b. Public notice comments: The District has reviewed all of the comments submitted in response to the public notice. The comments are outlined and addressed below:

(1) Environmental Protection Agency (EPA):

EPA made six suggestions regarding the proposed changes to SPGP-01. Their recommendations with responses are listed below:

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Compensatory mitigation should be required for all impacts that exceed one-tenth of an acre of wetlands and/or 300 linear feet of stream. Any conversion of one wetland type to another causes loss of function and/or service and should be compensated.

District response: The 07-SPGP-01 general permit condition for mitigation standards details that compensatory mitigation will be required of these impacts, including 1:1 mitigation for conversion of forested wetlands to emergent wetlands, such as typically seen with the installation of buried utility lines.

The upper impact limits for streams should be reduced from 2000 linear feet to 300 linear feet of streambed.

District response: The upper impact limits for streams remains at 2,000 linear feet since the District recognizes that projects may have the need to impact over 300 linear feet of stream and that a linear footage does not necessarily correspond to the degree of impacts. Both EPA and FWS are involved in the review of all projects that entail impacts to streams totaling over 300 linear feet. The agencies have the ability to make project-specific suggestions regarding the avoidance and minimization of these impacts. If applicants do not modify their proposals to address comments made by either agency, the projects will not qualify for 07-SPGP-01 and will be processed under the Corps IP process (the “kickout” mechanism). In addition to the additional review by EPA and FWS, the Corps will independently review projects with stream impacts over 300 linear feet to determine if avoidance and minimization of impacts has been adequately performed. Lastly, all projects impacting over 300 linear feet of stream will be required to provide stream mitigation based on ratios associated with the currently sanctioned stream assessment methodology in use within the District.

EPA does not support permitting construction of stormwater management facilities in waters of the United States. Projects that include these elements should be evaluated under an individual permit rather than through the SPGP-01 regardless of wetland acreage and stream impact thresholds. EPA believes that the direct, indirect, secondary and cumulative impacts to waters of the United States can be significant. EPA is making this recommendation based on the tenet of the Clean Water Act (CWA) which is to protect water quality. The goal of the CWA is restoring and maintaining the chemical, physical, and biological integrity of the nation’s water so that they can support “the protection and propagation of fish, shellfish, and wildlife and recreation in and on the water.”

District response: Categorically disallowing the placement of stormwater management facilities in waters of the United States under 07-SPGP-01 is

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not considered appropriate since there are circumstances when placing these facilities in waters of the United States constitutes both the least environmentally damaging practicable alternative and a minimal impact. On a national basis, Corps Headquarters issues NWP's that allow for the placement of stormwater management facilities in nontidal waters and wetlands, some in a non-reporting capacity. Activities covered under these NWP's have been determined to be minimal in nature.

Under 07-SPGP-01, the DEQ will conduct project reviews with the intent of avoiding and minimizing impacts to waters and wetlands to the maximum extent practicable prior to finally approving a proposal to place these facilities in waters and/or wetlands. The Corps, EPA, and FWS will review projects with impacts to over ½ acre of waters and/or wetlands or over 300 linear feet of stream. If either EPA or FWS is dissatisfied with the environmental impacts of a project, they will have the ability to make project-specific suggestions to further minimize the project's impacts and to require IP processing if the applicant does not incorporate their suggestions into the project plans. Mitigation will be required for all wetland impacts over 1/10 acre and for all stream impacts over 300 linear feet.

A formalized procedure for annual reporting should be established. At a minimum, this report should track impacts and compensatory mitigation activities. In the past informal reports on the impact of the SPGP were sent to us, however we feel that VADEQ should develop a regular reporting process which is submitted to all of the resource agencies.

District response: The District currently performs formal annual reviews tracking both impacts and compensatory mitigation associated with authorizations under SPGP-01. Development of annual reports will continue under 07-SPGP-01 with compilation of all of the information previously included in the reports along with tracking of permit processing times. DEQ will provide the data so that the District will be able to compile the reports and publish them on the District's website, issuing a public notice to indicate when the reports are published. Currently, all Federal resource agencies are represented on the District's public notice distribution list.

The issue of permit modification to the resource agencies was not addressed in the public notice. It is our understanding that these procedures will remain the same with the exception that VADEQ will be providing the agency with project proposals in-lieu of the Corps. Notification of proposed SPGP projects along with IP elevation provisions are key to maintaining EPA's role in the Section 404 process.

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District response: EPA is correct in assuming that DEQ will provide both EPA and FWS with the permit applications for reviews of projects over ½ acre of waters/wetlands or over 300 linear feet of stream. Other than this minor change, the “kickout” mechanism remains intact.

EPA concurs with the supplemental public notice dated January 26, 2007 that the SPGP should remain unchanged for linear transportation projects.

District response: Comment noted.

(2) U.S. Fish and Wildlife Service (FWS):

FWS recommended that the District execute a Memorandum of Agreement (MOA) between the Virginia Field Office-FWS, District, and DEQ to address coordination procedures on project review to ensure compliance with Section 7 of the Endangered Species Act (ESA) in the implementation of Section 404 of the CWA and for commenting under the Fish and Wildlife Coordination Act.

District response: A meeting was held between these parties on May 3, 2007 at the DEQ office in Glen Allen, Virginia. After discussion, it was determined that a MOA was unnecessary and that an acceptable process for delegation of these responsibilities would be spelled out in the District/DEQ Standard Operating Procedure (SOP). At a later date, a SOP was drafted and provided to FWS for review and approval. FWS made several suggestions for improvement and these suggestions were incorporated into the final SOP.

(3) National Marine Fisheries Service (NMFS):

NMFS did not comment on the proposed modifications.

(4) Advisory Council on Historic Preservation (ACHP):

ACHP has determined that the issuance or modification of an SPGP constitutes a Federal undertaking pursuant to 800.16(y) of Section 106 of the National Historic Preservation Act (NHPA) and its implementing regulations, “Protection of Historic Properties” (36 C.F.R. § 800). Due to the inherent difficulties in foreseeing the future effects of 07-SPGP-01’s use on historic properties, ACHP recommended that the District fulfill its Federal compliance responsibilities through the execution of a PA.

District response: The District has entered into the consultation process and has drafted a PA. The details of the PA are still being discussed through the consultation process. Until such a time as the current PA is finalized, the District will continue to perform all facets of Section 106

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review for 07-SPGP-01 projects under processes outlined in the PA between the District, VDHR, and the ACHP entitled “Programmatic Agreement Among U.S. Army Corps of Engineers Norfolk District Regulatory Branch, the Advisory Council on Historic Preservation, and the Virginia State Historic Preservation Office Regarding Implementation of the Norfolk District Regulatory Program,” dated February 5, 1996 and subsequent SOPs between the District and VDHR.

(5) Commonwealth agencies:

DEQ made numerous recommendations to add/delete/revise language in 07-SPGP-01 and the SOP for clarification and efficiency purposes and to gain benefits for the regulated public throughout the evaluation process.

District response: As 07-SPGP-01 is intended to build upon and complement the Commonwealth’s permit process, a collaborative effort to craft a workable SPGP was necessary. Documentation of this coordination with DEQ is contained in the administrative record that forms the basis of this permit decision.

The Virginia Department of Conservation and Recreation (DCR), in a letter dated 14 February 2007, commented that they did not support the elimination of the categories that currently exist under SPGP-01 due to a perception that applicants will not have an incentive to avoid and minimize impacts. DCR also supported the development of a MOA between the District, DEQ, and FWS regarding the proposed delegation of threatened and endangered species screening and informal consultation with FWS to DEQ. In a subsequent letter, dated 6 March 2007, DCR asked for their previous comments regarding the elimination of categories to be retracted and then stated that they recommended that the 07-SPGP-01 be implemented to encourage avoidance and minimization of wetland impacts through expedited processing for projects with impacts under ½ acre and under 300 linear feet of stream, such as under the current category A and B projects.

District response: All applicants under 07-SPGP-01 will be expected to avoid and minimize impacts to waters of the United States to the maximum extent practicable. Although the current category designations will be formally removed in 07-SPGP-01 the same levels of review will take place at each impact level. Furthermore, it was determined that development of an MOA to delegate the ESA responsibilities to DEQ was unnecessary. This is discussed in further detail above.

The Virginia Department of Transportation (VDOT), in a letter dated 15 February 2007, commented that they preferred the use of NWP 14 to SPGP-01 due to the ease of application and processing that NWP 14 provided. If the District did not reinstate NWP 14, VDOT recommended that, under 07-SPGP-01, the District

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only require wetland mitigation for linear transportation projects impacting over 1/10 acre, the District allow VDOT to continue internal processing of Section 106 and Section 7 (ESA) on projects, the District incorporate language from a FWS letter dated 2 November 2005 regarding the “VDOT Endangered Species Review Process – Standard Operating Procedures” specifically related to maintenance dredging, the District include language that adopts commitments from future FWS Letters of Agreement with VDOT regarding threatened and endangered species, the District include language that references VDOT’s memorandum of understanding with DGIF for trout and DEQ for streamlining the VWP permit program, the District allow multiple crossing associated with a linear transportation project to be covered by one permit authorization provided the impacts associated with each individual crossing are under the established limits and the crossings qualify as single and complete projects by Corps definition, the District add a statement to the countersinking provisions that countersinking does not apply to temporary pipes or culverts that are in place for less than 30 days, and the District maintain the 33 C.F.R. § 323.4(a)(2) exemption for maintenance. In addition, VDOT requests consulting party status in the development of the PA to transfer Section 106 screening responsibilities to DEQ. In a subsequent letter, dated 16 May 2007, VDOT retracted the request for the District to reinstate NWP 14, indicating support for the use of 07-SPGP-01 for linear transportation projects.

District response: DEQ requested the modifications contained 07-SPGP-01 on behalf of the Commonwealth of Virginia. They did not request VDOT’s recommended changes to the mitigation requirements and so they were not proposed in the 15 December 2006 public notice. DEQ or VDOT may ask for this change in a future modification request, but the District would have to advertise it in a public notice. Such a change would obviously reduce the amount of mitigation required by the SPGP, and those effects would have to be evaluated.

The District will only allow for VDOT to continue internal processing of Section 106 on projects until such a point as the Section 106 PA for 07-SPGP-01 is finalized. At that time, DEQ would be required to undertake all screening of historic properties by agreement with the District, VDHR, and ACHP. Since VDOT, the District, the Federal Highway Administration, and the Tennessee Valley Authority are currently undertaking the development of a separate PA for the delegation of certain Section 106 responsibilities for Virginia road projects, the District urges VDOT to finalize that agreement in a timely fashion and to include DEQ in the negotiations as it relates to 07-SPGP-01 authorizations.

VDOT may continue to perform internal processing under Section 7 of the ESA as long as VDOT obtains written documentation of determinations of “no effect” on threatened or endangered species from FWS and provides

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that documentation in their permit application packages to DEQ. In addition, VDOT may continue to work under the provisions of FWS' letter dated 2 November 2005 regarding maintenance dredging of existing ditches and culverts.

The District can not categorically adopt provisions of future "Letters of Agreement" from FWS, although the letters will be reviewed and provisions approved on a case-by-case basis.

VDOT may continue to follow their procedures regarding trout. 07-SPGP-01's general condition on native trout and anadromous fishes requires time of year restrictions on instream work within timeframes recommended by DGIF. The District is unaware of the memoranda of understanding discussed in VDOT's comments.

07-SPGP-01 allows for multiple wetland/waters crossings to fall under the same permit authorization provided each crossing meets the criteria of single and complete. In those circumstances, mitigation for streams would not be required unless stream impacts were over 300 linear feet at a single and complete crossing.

The countersinking requirements have not been substantively changed from those required under SPGP-01. All projects involving the placement of temporary pipes or culverts will be reviewed in regards to countersinking on a case-by-case basis.

The District's interpretation of Federal regulations and policies regarding maintenance has not changed.

The District has granted VDOT consulting party status in regard to Section 106 consultation.

(6) Local agencies: No comments were submitted.

(7) Interested organizations:

Virginia Transportation Construction Alliance (VTCA) indicated a concern that DEQ lacked sufficient resources to perform additional duties under the SPGP program. VTCA believes that this perceived lack of resources could affect the efficiency and timeliness of permit processing.

District response: During the 2007 Virginia General Assembly session, DEQ was granted funding for six positions to conduct the additional work to be delegated to them under the proposed modifications to SPGP-01. One of these positions was granted in order for DEQ to hire a cultural

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resources expert to handle the proposed delegation of screening for historic resources. Two of the positions were for additional VWP permit writers and the remainder of the positions was for VWP enforcement and compliance personnel.

DEQ currently processes VWP permits for all projects subject to SPGP-01 with their current staff. The additional responsibilities that DEQ would assume as a result of this proposal would include screening for historic properties, screening and informal consultation for threatened and endangered species, and coordination of projects with impacts over ½ acre of waters and/or wetlands and/or over 300 linear feet of stream with FWS and EPA. All historic resources screening would be performed by the newly hired cultural resources expert. The DEQ currently performs screening and consultation for state listed threatened and endangered species with DGIF and DCR-DNH, so there will be little difference in workload associated with sending these cases to FWS as well as the appropriate state agencies. Coordination of the higher impact level projects with FWS and EPA will be done by e-mail after the DEQ project manager scans the pertinent parts of the application to send to the agencies. This procedure is not expected to create a great burden on DEQ's workload.

Lastly, the District will continue to compile annual monitoring reports of the performance under 07-SPGP-01. These reports will include figures detailing processing times so that the District will be able to determine if there are statistically significant increases in processing times for applications. If processing times are determined to be problematic, a reexamination of 07-SPGP-01 will be undertaken.

The Richmond Green Party (RGP) stated concern over what they perceived as limiting independent oversight under SPGP projects and political pressures placed on DEQ. Furthermore, RGP indicated concern regarding delegation of responsibilities under ESA and NHPA to DEQ.

District response: There is no proposed decrease in District oversight under 07-SPGP-01. The District will still be involved in the review of development projects with impacts totaling over ½ acre of waters and/or wetlands and/or over 300 linear feet of stream and for certain linear transportation projects. To reiterate a portion of the response to the last comment, DEQ is currently undertaking screening and consultation on state threatened and endangered species. The District does not see the delegation of screening of threatened and endangered species and informal consultation with FWS on certain projects to be much different than what is undertaken in the state process that they are currently working under. Furthermore, the District is not proposing to delegate formal Section 7

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consultation to DEQ, as the ESA does not allow for delegation of formal consultation. In regard to historic resources, the District proposes to allow delegation of only screening of historic properties to DEQ. All Section 106 consultation with VDHR will occur with the District, so the Section 106 process will likely appear almost identical to the regulated public.

Northern Virginia Conservation Trust (NVCT) indicated support for delegation of Federal programs to state and local organizations when there is adequate staffing and funding. NVCT also indicated that the District should evaluate whether or not DEQ has the resources to adequately implement the regulatory responsibilities being transferred to them.

District response: These comments have already been addressed above.

The Stafford County Historical Commission (SCHC) expressed concern regarding the delegation of Section 106 responsibilities to DEQ. SCHC indicated that DEQ does not currently have any experience in evaluating historic properties and that DEQ would not be able to handle the additional responsibilities with the addition of one archaeologist to their staff.

District response: These comments have, for the most part, been addressed above. In addition, DEQ has indicated that they will closely monitor the need for additional cultural resource experts as they begin implementation of the new duties. There will be a provision in the PA on the historic resources screening delegation that allows the agreement to be terminated if DEQ ever is unable to perform its official duties in regard to screening for historic properties.

The Nature Conservancy of Virginia (TNC) and the Chesapeake Bay Foundation (CBF) commented jointly on the public notice. TNC/CBF expressed concerns regarding DEQ's staffing needs associated with the additional responsibilities under the SPGP program. Additionally, TNC/CBF expressed a desire for the District to continue performing preapplication consultations, delineation confirmations, and cumulative impact determinations. TNC/CBF would like for DEQ to provide the public annual reviews of its general permits similar to the ones performed by the District under SPGP-01. Lastly, TNC/CBF requested that the District provide another opportunity for public comment on any MOA that might be drafted with the FWS or the VDHR.

District response: The comment regarding DEQ's staffing needs has been addressed above. In addition, the District will continue to perform the lead role in preapplication consultations and confirmations of delineations of waters and wetlands. DEQ and, on certain projects, the District will conduct reviews of projects to determine if cumulative impacts associated with a proposal are more than minimal. If they are determined to be more

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than minimal, 07-SPGP-01 will not be applicable and the project will be reviewed under an alternate Corps permit process, such as the IP process.

Annual reviews of performance under 07-SPGP-01 will continue to be compiled by the District using data provided by DEQ and placed on the District website. The data will include all data compiled in past annual reports along with data regarding permit processing times. A public notice will be sent out to interested parties to announce when the reports have been published.

The District will not be developing an MOA to delegate screening and informal consultation responsibilities to DEQ under Section 7 of the ESA. However, the District is in the midst of development of a PA with DEQ, VDHR, and the ACHP regarding the delegation of Section 106 screening responsibilities to DEQ. It is, at this time, still unclear whether there will be another opportunity for public comment on that document prior to its finalization.

Wetlands Watch (WW) indicated that there were no obvious deficiencies in the existing SPGP-01 to warrant the modifications to SPGP-01 proposed by the District. WW supposed that recent discussions regarding DEQ's assumption of the Section 404 regulatory program in Virginia might have prompted the proposal to modify SPGP-01. If the proposed changes were implemented, WW advised that stringent publicized annual reviews of performance under 07-SPGP-01 be undertaken and that those reviews be expanded to include the performance of DEQ in undertaking the additional responsibilities. WW feels that the elimination of categories that currently exist under SPGP-01 will serve to remove the incentive for applicants to further avoid or minimize impacts. WW requested clarification on how the transfer of Section 106 and Section 7 responsibilities to DEQ would be undertaken and what would happen if the transfer of the responsibilities could not be undertaken in a timely manner. WW pointed out the differences in cumulative impact assessment that exist between DEQ's regulatory authority at Section 62.1-44.15:5 D of the Code of Virginia and the Corps' Federal standard at 40 C.F.R. § 1508.7. WW expressed concerns regarding activities exempted from coverage under state wetland law and how those activities would be treated under 07-SPGP-01.

District response: DEQ, acting on behalf of the Commonwealth of Virginia, formally requested a modification to the original SPGP-01 and the District is obliged to decide whether to grant that request, deny that request, or grant it with modifications. The original SPGP-01 was not 'deficient,' but it did involve duplication of effort by the District and DEQ that this modification will reduce, allowing the District to free up staff resources for productive uses elsewhere.

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DEQ has publicly announced that they are considering whether or not to apply to EPA for assumption of the Section 404 regulatory program in Virginia. Section 404 assumption and the delegation of certain permitting responsibilities under an SPGP are two entirely different scenarios and the District recognizes that. The District did not consider implementation of changes to SPGP-01 based on the possibility that the state might assume the entirety of the program otherwise. It was determined that the proposed 07-SPGP-01 would improve permitting timeliness and efficiency in Virginia and further reduce duplicative permit processing.

The concerns regarding the compilation and distribution of annual reports, the elimination of categories, and for the transfer of Section 106 and Section 7 responsibilities for 07-SPGP-01 have already been addressed above.

The District has analyzed the Federal and state cumulative impact assessment standards and has determined that the standards are substantively similar. The District reserves the right to exert discretionary authority to require an IP for any project where it is determined that the individual or cumulative impacts are more than minimal.

07-SPGP-01 will not allow coverage for activities that are exempt from VWP regulation. Applications containing those types of projects will be processed under a separate Corps permit process.

The National Trust for Historic Preservation (NTHP) questioned whether the existing delegation of responsibilities to DEQ under SPGP-01 complies with Section 106 of the NHPA. NTHP indicated that the proposed modifications to SPGP-01 constitute a Federal “undertaking” in regard to Section 106 and that the District’s responsibilities under the NHPA would be best satisfied through the development of a PA pursuant to 36 C.F.R. § 800.14(b). NTHP asked to be designated a consulting party in the development of such a PA. NTHP expressed concerns regarding the workload increase for DEQ if such Section 106 responsibilities were delegated to the agency.

District response: The existing SPGP-01 was public noticed when it was first implemented and then again at the time of each modification. The District incorporated comments made by VDHR at the time. Furthermore, District project managers have been performing Section 106 project reviews in accordance with a PA for execution of the Section 106 program in the District’s Regulatory Office (discussed above) since the initial implementation of SPGP-01. The remaining concerns NTHP expressed have already been addressed above.

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The District granted NTHP consulting party status in regard to Section 106.

Central Virginia Battlefields Trust (CVBT) expressed concerns regarding the delegation of Section 106 responsibilities to DEQ. Delegations of these sorts, according to CVBT, would undermine the current cooperative processes that currently exist between District project managers, VDHR, and the National Park Service (NPS). CVBT expressed general concerns over delegation of Section 106 authorities and indicated that these sorts of arrangements tend to compromise the “integrity of this review process.”

District response: These comments have already been addressed above.

Southern Environmental Law Center (SELC) expressed concerns regarding the delegation of Section 7 and Section 106 responsibilities to DEQ. SELC expressed concerns regarding DEQ’s evaluation of cumulative impacts. SELC believes that elimination of the categories (A, B, and C) as they currently exist will eliminate incentive for applicants to further avoid and minimize impacts. Furthermore, SELC believes that DEQ should allow the “improvements” related to their recent hires to take hold prior to venturing to undertake additional regulatory responsibilities. SELC believes that, if the District chooses to move forward with the proposed modifications, DEQ should provide quarterly and annual reviews of the SPGP program and that such reviews should indicate the level of avoidance and minimization that is to be attributed to DEQ’s efforts in addition to the avoidance and minimization achieved through the District’s participation in preapplication meetings.

District response: SELC’s concerns regarding delegation of Section 106 and Section 7 responsibilities, evaluation of cumulative impacts, DEQ’s recent staff hires, and elimination of categories have already been addressed above. The District has chosen to continue compiling annual reviews of 07-SPGP-01. The specific items to be addressed in these reviews have already been addressed above. While avoidance and minimization can be relatively easily tracked from the point of permit application to issuance, quantifying avoidance and minimization obtained through preapplication consultations is more problematic. The District will attempt to manually log initial proposed impacts (at the point of preapplication) if at all possible to further calculate the value of these meetings on overall avoidance and minimization.

Lakepointe Homeowners Association, Inc. indicated concern over perceived political pressures on the DEQ and over the delegation of Section 106 and Section 7 responsibilities to DEQ.

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District response: The concerns regarding the delegation of Section 106 and Section 7 responsibilities to DEQ have already been addressed above. Furthermore, the District does not believe that perceived political pressures on DEQ will affect the administration of 07-SPGP-01. In order to be authorized under 07-SPGP-01, a project must meet all terms and conditions of the permit, set by the District. In addition, the District Commander retains the ability to exert his/her discretionary authority to require a project to be processed under the IP process if it is determined that a project's impacts will be more than minimal on an individual or cumulative basis.

Sundays Restaurant indicated the need for independent oversight for projects with impacts over ½ acre of over 300 linear feet of stream in addition to the concern regarding delegation of Section 106 and Section 7 responsibilities to DEQ.

District response: These concerns have already been addressed above.

Brandermill Community Association opposed giving DEQ sole authority to regulate what are currently Category C projects (projects over ½ acre of wetlands/waters and/or over 300 linear feet of stream).

District response: DEQ will not be given "sole" review responsibility under 07-SPGP-01. The District, FWS, and EPA will still be given opportunities to review projects at the same thresholds that they currently do under SPGP-01.

Vulcan Material Company (VMC) indicated concerns regarding DEQ's ability to retain staff and their ability to undertake the additional responsibilities to be delegated to them under 07-SPGP-01. VMC fears these additional responsibilities will further affect DEQ's timeliness in permit processing. VMC is concerned that increases in the DEQ workforce necessary to undertake the proposed changes will drive up state permit fees. VMC is, however, very supportive of reduction of duplication between the Corps and DEQ programs.

District response: The concerns regarding staff retention and DEQ's additional responsibilities have already been addressed above. The District is unable to say whether the additional workload strains on DEQ might drive up the prices of VWP permits. The Commonwealth's fiscal matters are outside of the purview of the District. The comment regarding support of reduction in duplication has been noted.

Home Builders of Virginia endorsed the proposed modifications, provided that DEQ has sufficient staff and training to undertake the additional responsibilities.

District response: This concern has already been addressed above.

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Sigma Environmental Services, Inc. (SES) indicated concerns regarding the additional workload to be undertaken by DEQ and the subsequent increase in DEQ budget necessary to carry this workload. This budgetary increase would be felt by Virginia taxpayers. SES indicated that if the budget was not increased, DEQ would be forced to attend to the additional responsibilities without adequate staff. This type of scenario, in the opinion of SES, would be irresponsible delegation. SES pointed out the level of experience with District staff and the high staff turnover at DEQ. SES recommended abandoning the proposal to modify the SPGP.

District response: These concerns have already been addressed above. To further elaborate, if DEQ ever was unable to effectively administer the 07-SPGP-01 program due to funding shortfalls, the District would likely suspend the permit or, at a minimum, convert the permit to a conventional general permit.

William B. Ellen, Inc. Environmental and Regulatory Consultants (WBE) indicated that DEQ's level of regulatory participation is directly related to the political administration at the time. WBE discusses DEQ's high staff turnover rate and later indicates the desire to leave Section 106 responsibilities with the District.

District response: These concerns have already been addressed above.

(8) Individuals:

A number of commenters indicated concerns regarding delegation of "sole authority" of category C permit reviews to DEQ.

District response: This concern has already been addressed above.

Several individuals indicated concerns regarding DEQ taking on responsibility of handling aspects of wetlands and waters permitting that are already being handled adequately by a Federal agency. Some commenters added that these issues were further compounded when one considers the Commonwealth's perceived financial burdens. One commenter indicated that Virginians would be better served spending state funds on programs that did not have Federal counterparts.

District response: SPGPs are nationally utilized Corps regulatory tools for decreasing duplicative permit reviews and to allow Federal and state programs to build on each other's strengths, ultimately providing equal, if not expanded, protection of aquatic resources over the Federal program alone. The decision of a particular state to request responsibilities under a

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Corps SPGP is the state's decision to make. Matters such as this are state fiscal policy issues outside of the purview of the Corps of Engineers.

Several commenters discussed concerns regarding high turnover rates for DEQ personnel and their ability to effectively perform their assigned duties despite the turnover.

District response: These concerns have already been addressed above.

One commenter was concerned that DEQ's perceived lack of field expertise, "relationships," and "connections" would affect good public outreach and citizen engagement.

District response: The District recognizes that DEQ staff members typically have less field experience than District staff. For that reason, District personnel will be inviting DEQ project managers to attend preapplication site visits with them, so that they can gain experience in the field. If DEQ staff members have questions regarding project-related details or field matters, they have been urged to contact the District for assistance.

Relationships and "connections" with members of the regulated community will be built as DEQ staff members begin to work more closely with the community.

One commenter indicated a desire for the District to continue the lead in preapplication consultations.

District response: The District will continue to lead preapplication consultations.

A number of commenters indicated concerns regarding DEQ's lack of expertise in regard to evaluation of both historic properties and threatened and endangered species consultations.

District response: These concerns have already been addressed above.

One commenter indicated that DEQ was unsuccessful in dealing with enforcement and compliance matters.

District response: DEQ has dedicated enforcement and compliance staff which the District lacks. Furthermore, DEQ has the ability to assess penalties for unauthorized activities in a much more expeditious fashion than the Corps does. The District will allow DEQ to perform the lead role in inspecting and attaining compliance with projects authorized under 07-

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SPGP-01, but the District retains authority to be involved with enforcement and compliance under 07-SPGP-01 as it is a Corps permit.

One commenter indicated concerns regarding the public notice and the lack of alternative actions described in it. Specifically, the commenter believed that the reinstatement of the suspended NWP in Virginia would contribute to a “faster, better, and cheaper” regulatory program. The commenter recommended that SPGP-01 be retooled to allow for impacts from ½ to one acre while keeping NWPs intact.

District response: While alternatives were not discussed in the public notice, several alternatives, described in the alternatives analysis on pages four and five of this document, were reviewed, including the one suggested by this commenter. The District’s determination regarding this alternative was discussed in the alternatives analysis.

One commenter indicated concerns that recent Federal court decisions (specifically Rapanos/Carabell and Tulloch II) may have the effect of decreasing Federal regulatory jurisdiction and, therefore, potentially increasing DEQ’s workload. The commenter thought it prudent to wait until the forthcoming Corps guidance on Rapanos/Carabell is released and interpreted to determine what workload ramifications might occur as a result.

District response: At this time, the Corps has not received formal guidance on Rapanos/Carabell. It would be speculative, at best, to predict what, if any, effect this forthcoming guidance will have on DEQ’s workload. If it is determined that the workload ramifications of any future guidance negatively affect 07-SPGP-01, the District reserves the right to modify or revoke the permit.

One commenter recommended making DEQ require “clean” § 401 certifications for the 2007 NWPs prior to the District enacting the proposals for the modifications to SPGP-01.

District response: It is DEQ’s responsibility under Section 401 of the CWA to ensure compliance with water quality standards and to condition permits however needed to ensure compliance with those standards.

One commenter recommended excluding from coverage under 07-SPGP-01 subdivision and single family home projects on lots platted prior to 1984 and impacts associated with septic systems, as the placement of septic systems is exempt from regulation under Virginia’s VWP program.

District response: 07-SPGP-01 will be applicable to all residential developments, regardless of when the lots are platted. The District and

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DEQ are jointly developing guidance for the review of subdivisions that deal with issues related to cumulative impact analysis, etc. 07-SPGP-01 defers to the requirements of the latest approved District subdivision guidance for review of development projects. 07-SPGP-01 will not allow the placement of septic tanks, the construction of septic drain fields, or the construction of associated perimeter ditches in waters of the United States.

One commenter recommended that the District require that all residual aquatic resources be deed-restricted as a condition of 07-SPGP-01.

District response: 07-SPGP-01 does not require the deed restriction of residual aquatic resources. An across-the-board requirement such as this does not take into account the condition of aquatic resources at each project impact site. Furthermore, the joint District/DEQ subdivision guidance will lay out options to developers regarding how impacts will be assessed in association with development projects. The use of deed restrictions will be one of several options available to developers.

One commenter recommended that 07-SPGP-01 require that all wetlands/streams in the vicinity of the proposed work that are not permitted to be impacted be clearly marked in the field with highly visible silt fencing or construction fencing.

District response: 07-SPGP-01 will not require marking of all wetlands/streams not proposed to be impacted as DEQ's VWP permits require marking for all wetlands and waters located within 50 feet of any land disturbance associated with a particular construction plan.

One commenter recommended that the District require DEQ to issue 07-SPGP-01 authorizations within 45 days of receipt of a complete application, despite of whether or not the DEQ is ready to issue a VWP permit for the same work.

District response: 07-SPGP-01 will have virtually the same application completeness requirements as DEQ's VWP permits. The VWP permit review process will constitute the 07-SPGP-01 review process by DEQ. Under no circumstances would 07-SPGP-01 be "ready" for authorization prior to a VWP permit. In fact, Federal reviews under Section 7 and Section 106 may actually be the delaying factor affecting the issuance of both authorizations when consultation is ongoing.

One commenter recommended that applicants under 07-SPGP-01 be required to provide proof of preapplication consultation with the District, such as a completed preapplication consultation form, at the time of application for 07-SPGP-01 authorization.

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District response: District staff members are already required to provide a copy of the District's Supplemental Preapplication Information form along with letters confirming the accuracy of delineations of wetlands and waters. The District staff may include on this form any factors they deem important to avoidance and minimization on each project.

One commenter recommended that 07-SPGP-01 should consider areas filled, flooded (including temporary or periodic flooding), drained, or converted (e.g. from forested wetlands to emergent wetlands) to be impacted.

District response: 07-SPGP-01 considers all work described in these scenarios to be impacts to waters of the United States.

One commenter recommended that the District prohibit the use of 07-SPGP-01 for areas comprised of at least 10% cover in any stratum of bald cypress, water tupelo, and/or overcup oak.

District response: 07-SPGP-01 does not apply for work in areas containing at least 10% of the referenced vegetation.

One commenter recommended that the District prohibit the use of 07-SPGP-01 for areas underlain by organic hydric soils (histosols).

District response: 07-SPGP-01 does not apply for work in areas underlain by histosols.

One commenter recommended that the District reserve the right to exert discretionary authority on projects determined to have more than minimal impacts to require that those projects be processed as IPs.

District response: Under 07-SPGP-01, the District Commander reserves the right to exert his/her discretionary authority to require a project to be processed under the Corps' IP process if it is determined that a proposal contains impacts deemed to be more than minimal in nature on an individual or cumulative basis.

One commenter recommended that the District reserve the right to undertake evaluations of compliance with 07-SPGP-01 either individually or cumulatively.

District response: While DEQ will have the "lead" role in monitoring compliance associated with individual authorizations under 07-SPGP-01, the District has the ultimate authority to enforce the conditions of its permit. Furthermore, if the District, at any time, determines that the 07-SPGP-01 program is not being correctly administered by DEQ or impacts associated with its continued use are more than minimal, the District

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Commander has the authority to revoke, suspend, or modify the permit or any individual authorization under the permit.

One commenter recommended that the District reevaluate the issuance of 07-SPGP-01 annually, following each compilation of annual reports.

District response: Trends in annual reporting will be closely scrutinized to determine the success of the 07-SPGP-01 program.

One commenter indicated that 07-SPGP-01 would not meet the 404(b)(1) Guidelines due to the fact that DEQ does not have staff with field experience nor an adequate vehicle fleet to make site visits to determine the level of avoidance and minimization undertaken for proposed projects.

District response: The concern regarding DEQ staff's field experience has already been addressed above. Furthermore, DEQ upper management has not expressed any concerns to the District regarding the number of government vehicles available to them for site visits, etc. The District believes that much avoidance and minimization occurs during preapplication review and some can also occur without visiting the site.

One commenter indicated that the District can only issue an SPGP if the Commonwealth's regulatory program provides a similar level of review as the Corps program.

District response: The VWP program administered by the state offers very similar protections as the Federal regulatory program. As discussed in pages four and five of this document, the Corps and DEQ programs are not expected to be completely identical and that the differences in the two programs actually serve to frame the importance of SPGPs. Under SPGPs, state and Federal programs actually complement each other.

One commenter stated that DEQ has few employees with more than three years' experience, indicating that DEQ staff members are inexperienced regulators.

District response: The concerns regarding DEQ staff turnover have already been addressed above. Also, DEQ and District staff members have both committed to providing joint training, committed to discussing project reviews more, and the District has committed to invite DEQ staff to attend preapplication site visits. All of these commitments describe actions that will help improve inexperienced regulators.

One commenter stated concerns regarding a perception that District staff would not be notified of permit issuances under 07-SPGP-01 and that compliance monitoring of sites would suffer as a result.

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District response: DEQ will provide the District with copies of every authorization made under 07-SPGP-01. Furthermore, DEQ will provide the District with information regarding project sites visited for compliance, so that there is not duplication in effort with the District (who reserves the right to perform their own compliance investigations). As stated earlier, DEQ has dedicated enforcement and compliance staff, whereas the District does not.

One commenter expressed concerns regarding DEQ's inability to place special conditions on the use of their general permits.

District response: While DEQ's regulations do not allow them the flexibility to place certain types of special conditions on permits, the District can condition 07-SPGP-01 authorizations however needed to ensure that impacts associated with a particular proposal are minimal at an individual and cumulative level. This will be done through the use of a special conditions form that the District project manager will provide the DEQ to attach to the 07-SPGP-01 authorization package.

One commenter indicated concerns regarding perceived unnecessarily "burdensome" VWP permit application completeness requirements.

District response: The District has adopted DEQ's permit application completeness requirements for 07-SPGP-01. Regulation citations regarding the criteria used to determine completeness for purposes of VWP are found in the JPA and in the permit document itself. The District feels that the public is being provided the tools necessary to compile a complete application.

One commenter expressed concerns that DEQ general permits require permit fees, whereas NWPs do not.

District response: The alternatives reviewed by the District, including the reinstatement of NWPs, are discussed on pages four and five of this document. As the analysis indicates, factors in addition to cost to the regulated public were considered prior to deciding that issuing 07-SPGP-01 was appropriate. The District determined that issuance of a revised SPGP best met the objectives and needs of the agencies and the regulated public for projects with minimal impact.

One commenter expressed concerns regarding differences in determinations of what constitutes a "single and complete project" and how this will affect the calculation of impacts.

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District response: The DEQ will utilize the definition of “single and complete project” contained within 07-SPGP-01.

One commenter expressed concerns that the District violated provisions of the Administrative Procedure Act (5 U.S.C. Subchapter II) in the process of modification of SPGP-01. The commenter alleged that District staff members negotiated with DEQ and made decisions prior to releasing a public notice soliciting comments on the proposal.

District response: District staff members met with DEQ staff members beginning November of 2006 to discuss duplication of effort between the two programs and to discuss scenarios under which some of the duplication of effort could be eliminated. The purpose of these meetings was to find ways to streamline nontidal waters and wetlands permitting in Virginia. After discussion of several possible regulatory scenarios, as outlined in the alternatives analysis on pages four and five of this document, the District chose to public notice the state’s preferred alternative, the modification of SPGP-01. Since SPGPs are, by definition, permits that build upon the permitting authorities of states, it is necessary and appropriate to have discussed details regarding potential changes and procedures prior to putting a proposal out on public notice.

Several commenters expressed concern about the fact that the joint District/DEQ Unified Stream Methodology (USM) had not been field tested and how the uncertainties associated with that assessment method might affect mitigation required for impacts to streams.

District response: The USM is in the process of being field tested. The District will continue to monitor statistics associated with the use of 07-SPGP-01 related to impacts to streams and mitigation required to compensate for those impacts. If it is determined that sufficient mitigation is not being provided, the District will investigate the matter.

One commenter indicated concerns that the modifications to SPGP-01 might affect the ability for the Virginia Aquatic Resources Trust Fund (VARTF) to continue functioning as an effective in-lieu fee program in Virginia.

District response: There is nothing in the terms and conditions of 07-SPGP-01 that would affect the use of the VARTF from its historic use in Virginia. Permittees may utilize the VARTF to provide compensatory migration to both streams and wetlands when commercial mitigation banks are not available to provide credits within a particular watershed.

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Several commenters indicated concerns regarding a statement in the initial public notice (dated 15 December 2006) that indicated that the District proposed to increase the threshold under the Linear Transportation Activity to one acre.

District response: The referenced public notice contained an error that was clarified in a later public notice dated 26 January 2007. The correct upper limit for impacts on linear transportation projects is 1/3 acre of nontidal waters and/or wetlands.

One commenter indicated concerns regarding a state legislative proposal that would eliminate DEQ's citizen Air, Water, and Waste Boards and the effect that this might have on the administration of responsibilities under 07-SPGP-01.

District response: Hearings before the State Water Control Board are not required for VWP general permits, the majority of the permits issued in conjunction with SPGPs. The DEQ will continue to public notice their draft IPs, which are used in conjunction with SPGPs when impacts exceed 1,500 linear feet of stream. Furthermore, Federal regulations do not require any sort of public notice or hearing prior to authorizing activities under a general permit.

One commenter suggested that any proposed changes in SPGP-01 should not be implemented until Corps Headquarters issue the 2007 NWP, to see what effect, if any, the changes in NWPs would have on the SPGP program.

District response: The 2007 NWPs were published in the Federal Register on 12 March 2007. The changes to NWPs 14, 29, and 39 were taken into consideration and the District proceeded to suspend the portion of NWP 14 for work in nontidal waters and wetlands, the portion of NWP 29 dealing with multiple family developments and residential subdivision, and all of NWP 39. These NWPs were suspended in order to eliminate confusion for the regulated public since the existing SPGP-01 already covered these activities.

Several commenters expressed concerns that the full proposed 07-SPGP-01 was not included along with the public notice and that the public was not fully aware of the proposed changes.

District response: The District public noticed the changes to be made to SPGP-01 within the public notice itself. Since SPGP-01 had been used for over four years, it was not necessary to send out a full text version of 07-SPGP-01 when relatively few changes were proposed. Furthermore, the bulk of changes associated with 07-SPGP-01 are related to the internal processing and administrative tasks associated with the permit. These

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changes do not alter the language of 07-SPGP-01 itself, rather they are reflected in the SOP.

7. Impact Assessment

a. General

This section contains an assessment of the direct and indirect effects of the individual activities authorized by 07-SPGP-01, the anticipated cumulative effects of those activities, and the potential future losses of waters of the United States, including wetlands and navigable and non-navigable waters, that are estimated to occur until the expiration date of the 07-SPGP-01. The terms and conditions of 07-SPGP-01, notification and application requirements, activity-specific conditions and the general conditions are considered in the assessment of these individual and cumulative effects.

07-SPGP-01 authorizes the discharge of dredged or fill materials into nontidal waters of the United States, including jurisdictional wetlands, for specific categories of activities as regulated pursuant to Section 404 of the CWA (33 U.S.C. § 1344), and certain structures or work in or affecting nontidal navigable waters of the United States for specific categories of activities as regulated pursuant to Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. § 403).

Issuance or modification of an SPGP is based on an assessment of the effects on the public interest and environmental factors that are likely to occur as a result of using this 07-SPGP-01 to authorize activities in nontidal waters of the United States, including nontidal navigable waters and wetlands. Since 07-SPGP-01 authorizes activities on a statewide basis, projects eligible for 07-SPGP-01 authorization may be constructed in a wide variety of environmental settings. Therefore, it is difficult to precisely predict all of the indirect and cumulative impacts that may be associated with each activity authorized by the 07-SPGP-01. However, the potential adverse effects of 07-SPGP-01 will be controlled by the terms and conditions of the 07-SPGP-01, as well as the impact limits described in the 07-SPGP-01. These terms and conditions have been established to ensure that the impacts, both individually and cumulatively, of proposed activities are minimal. 07-SPGP-01 provides for case-by-case review by the District for residential, commercial, or institutional development projects with impacts to over ½ acre of wetlands and/or waters or impacts to over 300 linear feet of stream and for case-by-case review of linear transportation projects with impacts to over 300 linear feet of stream at any single impact area, projects containing multiple single and complete impact areas on the same project that additively exceed 1/3 acre of impact, or where lateral stream encroachments of a project cumulative impact over 300 linear feet of stream. In addition, projects meeting the aforementioned thresholds will be reviewed by the FWS and the EPA. Finally, the District Commander retains the authority to 1) assert discretionary authority and require an individual permit for a specific project; 2) require project specific special conditions to 07-SPGP-01 on a case-by-case basis; and 3) take action to suspend or revoke the 07-SPGP-01 in whole or in part, as well as individual project verifications made under 07-SPGP-01. These provisions, in addition to the terms, conditions, and impact limits of 07-SPGP-01 ensure that work authorized

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by 07-SPGP-01 will have no more than minimal individual and cumulative adverse effects on the environment.

The evaluation criteria that are relevant to 07-SPGP-01 are identified in matrix form for the activities that are included for each Activity of work eligible for authorization by 07-SPGP-01. The determination that a particular factor is or is not relevant is based upon consideration of the direct, indirect, and cumulative impacts that can be reasonably attributed to the authorized activity. Some factors may be relevant, but the adverse effects on the aquatic environment may be negligible. Only the reasonably foreseeable direct, indirect, and cumulative effects are included in the environmental assessment of the activities. The specific potential for any adverse effects associated with any particular authorized activity will be controlled by the terms and conditions of 07-SPGP-01 and any project-specific conditions that may be required.

The evaluation of 07-SPGP-01 included an analysis of alternatives based on the requirements of NEPA and the 404(b)(1) Guidelines as contained in EPA's Guidelines for Specification of Disposal Sites for Dredged or Fill Material (40 C.F.R. § 230). The alternatives analyzed are discussed in Section 1 of this document, and included elimination of the SPGP program in Virginia altogether, reinstating NWP's while utilizing the SPGP program for projects from ½ to one acre, and maintaining the status quo under SPGP-01. The 404 (b)(1) Guidelines in 40 C.F.R. § 230.7(a) state that the issuance of GPs for a category of activities involving the discharge of dredged or fill material complies with the Guidelines if it meets the applicable restrictions on the discharge of 40 C.F.R. § 230.10, and the permitting authority determines that:

- (1) The activities in such category are similar in nature and similar in their impact upon water quality and the aquatic environment;
- (2) The activities in such category will have only minimal adverse effects when performed separately; and
- (3) The activities in such category will have only minimal cumulative adverse effects on water quality and the aquatic environment.

To reach these determinations, an evaluation of the potential individual and cumulative impacts of each type of activity to be regulated under 07-SPGP-01 is included in this section. This evaluation is based upon consideration of the prohibitions listed in Section 230.10(b), the factors listed in Section 230.10(c), and the factual determination in Section 230.11 (based upon Subparts C through F of the Guidelines). The 404(b)(1) Guidelines (at 40 C.F.R. § 230.7(b)(1)) state that consideration of alternatives is not directly applicable to GPs. Since 07-SPGP-01 authorizes a number of activities that would previously have been covered under NWP's, it is appropriate to mention that General Condition 20 of the NWP's states "The activity must be designed and constructed to avoid and minimize adverse effects, both temporary and permanent, to waters of the United States to the maximum extent practicable at the project site (i.e., on site)." In order for any project specific activity to be in full compliance with the 404(b)(1) Guidelines, and thus eligible for authorization by 07-SPGP-01, the activity must meet the applicable restriction in Section 230.10(d) which requires appropriate and practicable steps to

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minimize potential adverse impacts of the discharge on the aquatic ecosystem. This applicable restriction is further emphasized in the 07-SPGP-01 general conditions for avoidance and minimization and mitigation standards, which require that discharges of dredged or fill material or placement of structures into waters of the United States, including wetlands and nontidal navigable waters, must be avoided or minimized to the maximum extent practicable at the project site (i.e., onsite).

For all projects under 07-SPGP-01 where it is determined by the District that special conditions for protection of historic properties (including special conditions to require compliance with the terms of project-specific memoranda of agreement or programmatic agreements), for the protection of threatened or endangered species or critical habitat, to require financial assurances for compensatory mitigation, or other conditions as deemed necessary or appropriate, the District will send the 07-SPGP-01 Special Conditions Form to DEQ for attachment to the 07-SPGP-01 permit authorization letter. This Special Conditions Form allows the District to ensure that appropriate verbiage is used in creating special permit conditions and stresses that certain conditions are only requirements of the Corps authorization.

Those applications for projects that do not qualify for authorization under 07-SPGP-01 because they do not comply with the impact limits, terms, or conditions of 07-SPGP-01 will be forwarded to the District and reviewed under the an alternate Corps permit process. An alternate Corps permit process could be a standard permit such as an IP or letter of permission (LOP), one of the NWP's that have not been suspended in the Commonwealth of Virginia, or some other DA permit that may be appropriate. Where the District Commander determines that any proposed work under 07-SPGP-01 will result in more than minimal adverse effects on the aquatic ecosystem, either individually or cumulatively, discretionary authority will be exercised to require a Corps IP. Discretionary authority to require Federal review may also be asserted for any proposed specific activity where there are concerns for high quality aquatic resources, other environmental concerns under the 404(b)(1) Guidelines, or where the project may otherwise be contrary to the public interest.

The effects of both types of activities authorized under 07-SPGP-01 will be discussed below.

b. Activity 1 (Residential, Commercial, and Institutional Development):

This Activity authorizes discharges of up to one acre of dredged or fill material in nontidal waters of the United States, including nontidal wetlands and nontidal navigable waters, but no more than 2,000 linear feet of stream. These discharges must be in association with the construction of residential, commercial, or institutional developments. Discharges that do not meet the impact limits and/or conditions do not qualify for authorization under 07-SPGP-01 and will be reviewed under an alternate Corps permit process. The statutory authorities for this Activity are Section 10 of the RHA and Section 404 of the CWA.

For any proposal under this Activity, if the sum of all regulated activities onsite exceeds ½ acre of waters and/or wetlands or 300 linear feet of stream, but the total impacts are less than

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or equal to 1 acre of waters and/or wetlands and 2,000 linear feet of stream, the project will be referred to EPA, FWS, and the District for review. EPA or FWS can require the project to be processed as an IP if either agency is concerned with the environmental merits of a particular project and the applicant is unwilling to modify their proposal to satisfy the project-specific recommendations of one or both agencies. Furthermore, the District may choose to exert discretionary authority to require processing as an IP if it is determined that impacts associated with any particular project are more than minimal on an individual or cumulative basis. Compensatory wetland mitigation will be required for all permanent unavoidable wetland impacts and wetland conversions in cover type over 1/10 acre and compensatory mitigation for streams will be required for all stream impacts over 300 linear feet. Mitigation for impacts to open waters will be determined on a case-by-case basis.

The evaluation of public interest review factors and the 404(b)(1) analysis for this Activity are described below (factors considered in the 404(b)(1) analysis are listed in matrix form). The determination whether a particular public interest review factor is relevant or not is based upon consideration of the direct, indirect, and cumulative impacts that can reasonably be attributed to the authorized activity.

Public Interest Review:

- Conservation: The losses of nontidal wetlands and waters associated with Residential, Commercial, and Institutional Development projects under 07-SPGP-01 will not be authorized until avoidance and minimization of impacts is undertaken to the maximum extent practicable. Mitigation will be required for impacts over 1/10 acre of wetlands and for impacts to over 300 linear feet of stream to ensure that there is no loss of wetland and riparian habitat within each watershed. In addition, authorization of the permit will not occur until applicants have been found to be in compliance with the ESA. Minimal adverse effects are anticipated.
- Economics: The local economy will benefit from the construction of residential, commercial, and institutional developments, through the use of local contractors to perform the construction of the facilities, local banks to lend money to fund the construction, and through years of property and other tax revenues. No adverse effects to economics are anticipated.
- Aesthetics: While aesthetic impacts vary with individual tastes, the impacts associated with these types of residential, commercial, and institutional development projects are expected to be minimal from a national perspective. No adverse effects to aesthetics are anticipated.
- General Environmental Concerns: No adverse effects are anticipated.
- Wetlands: Individual projects authorized under this Activity will affect up to one acre of nontidal wetlands. Authorizations of 07-SPGP-01 will not be made until applicants have avoided and minimized impacts to wetlands to the maximum extent practicable. Compensatory mitigation will be required to offset unavoidable losses over 1/10 acre. Mitigation for wetland impacts under 07-

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SPGP-01 may entail wetland creation, restoration, or enhancement (site-specific mitigation areas), preservation of wetlands and/or upland buffers, purchase of commercial mitigation bank credits, and/or contributions to the VARTF.

- **Historic Properties:** The District proposes to allow DEQ to screen 07-SPGP-01 proposals for the presence of historic properties in the vicinity by reviewing the VDHR Data Sharing System (DSS), contacting the National Park Service (NPS) to determine if they have concerns regarding historic properties located near NPS properties, etc. If DEQ determines that a site contains historic properties, is located within viewshed of a known historic property, or has a high likelihood of containing historic properties (based on landscape position, the use of predictive models, etc.), projects will be returned to the District for consultation with VDHR. In order to fulfill Federal requirements for the evaluation and treatment of historic properties pursuant to 36 C.F.R. § 800, 16 U.S.C. § 470f, and 33 C.F.R. § 325, Appendix C, the District, VDHR, DEQ, and ACHP are developing a PA to delegate this screening authority to DEQ. At this time, though, the development of the PA has not been completed. Until such a time as the PA is finalized, the District will continue to process applications under 07-SPGP-01 as they are currently processed, with District staff performing all aspects of screening and consultation on historic properties. The District will operate in accordance with the current PA between the District, VDHR, and the ACHP, entitled “Programmatic Agreement Among U.S. Army Corps of Engineers Norfolk District Regulatory Branch, the Advisory Council on Historic Preservation, and the Virginia State Historic Preservation Office Regarding Implementation of the Norfolk District Regulatory Program,” dated 5 February 1996, and subsequent SOPs between the District and VDHR.
- **Fish and Wildlife Values:** Projects authorized under this Activity will adversely affect both nontidal wetlands and other nontidal waters of the United States. Wetlands and waters both provide habitat for a number of animals such as mammals, reptiles, amphibians, and birds, although the habitat available at each project site will be variable in quality. These permit authorizations will not be made until applicants have demonstrated that they have avoided and minimized impacts to jurisdictional areas to the maximum extent practicable. Projects proposing unavoidable impacts to wetlands over 1/10 acre and streams over 300 linear feet will be required to provide compensatory mitigation.

In order to ensure compliance with ESA, the District intends to delegate to DEQ the ability to screen proposals for the presence of Federally listed threatened or endangered species or critical habitat. In order to adequately screen projects, DEQ will check the DGIF Virginia Fish and Wildlife Information Service and DCR DNH Biotics databases using two mile radius searches in addition to reviewing delineation data sheets to determine if appropriate habitat exists on a particular site to support listed species. If a project is located within the vicinity of a documented occurrence of a listed species or critical habitat, or it is determined that appropriate habitat for such species might exist onsite, DEQ will request surveys of applicants and perform informal Section 7 consultation with

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FWS. If FWS determines that a particular project may affect a Federally listed species or critical habitat, DEQ will return the project to the District for an effect determination and formal consultation with FWS, as appropriate. The District, DEQ, and FWS agreed not to develop a memorandum of agreement regarding this delegation of responsibilities, however the agreed-upon processes regarding the treatment of threatened or endangered species and critical habitat under 07-SPGP-01 are detailed in the 07-SPGP-01 SOP.

- Flood Hazards: Although 07-SPGP-01 may authorize work in floodplains, it is not anticipated that these authorized fills will constitute flood hazards. Local government authorities will require development of the properties with consideration of Federal Emergency Management Agency (FEMA) floodplains, requiring floodplain mitigation if it is deemed necessary.
- Floodplain Values: Although 07-SPGP-01 may authorize work in floodplains, no adverse effects are anticipated. Local ordinances will require development of the properties with consideration of floodplains, requiring their own floodplain mitigation if it is deemed necessary.
- Land Use: While this Activity will authorize new residential, commercial, and institutional developments in areas where they currently don't exist, the local governments will retain the responsibility for determining land use. No adverse effects to land use are anticipated.
- Navigation: No adverse effects are anticipated.
- Shore Erosion and Accretion: No adverse effects are anticipated.
- Recreation: This Activity will authorize recreation facilities. For that reason, the District expects recreation to potentially benefit from 07-SPGP-01.
- Water Supply and Conservation: No adverse effects are anticipated.
- Water Quality: While there will be temporal decreases in downstream water quality due to earthwork associated with the construction of the developments, the permittee must obtain a VWP permit from the DEQ, which serves as certification under Section 401 of the CWA. All conditions of the VWP permit become conditions of the 07-SPGP-01 authorization. In addition, permittees must also comply with Virginia erosion and sediment control law. Minimal adverse effects to water quality are anticipated.
- Energy Needs: No adverse effects are anticipated.
- Safety: No adverse effects are anticipated.
- Food and Fiber Production: No adverse effects are anticipated.
- Mineral Needs: No adverse effects are anticipated.
- Consideration of Property Ownership: Work authorized under this Activity will occur on private property. No adverse effects are anticipated.
- Needs and Welfare of the People: 07-SPGP-01 provides an efficient vehicle for permitting residential, commercial, and institutional development projects in nontidal waters and wetlands, ultimately improving the public's access to housing, routes of public transportation.

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Impact Analysis (Subparts C-F):

<u>RELEVANT TO THIS ACTION</u>		
FACTORS:	YES	NO
Substrate	X	
Suspended particulates/turbidity	X	
Water	X	
Current patterns/water circulation		X
Normal water level fluctuations		X
Salinity gradients		X
Threatened and endangered species	X	
Aquatic food web	X	
Wildlife	X	
Special aquatic sites	X	
Municipal and private water supplies		X
Water related recreation		X
Aesthetics	X	
Parks, national and historical monuments, national seashores, wilderness areas, research sites, and similar areas	X	

Potential Impacts:

(i) General:

As specified by the description of this authorization, this authorization applies to the placement of dredged or fill material in nontidal wetlands and/or waters for the purposes of construction or maintenance of residential, commercial, or institutional developments. For this Activity, a JPA must be submitted to VMRC for distribution to DEQ along with a confirmed delineation of waters of the United States.

(ii) Physical, Chemical and Biological Characteristics of the Aquatic Ecosystem:

The discharge of dredged, excavated or fill material into nontidal waters and wetlands will result in the destruction of existing nontidal waters and wetlands. Wetlands typically act as natural filters where excessive nutrients, sediment and a myriad of other pollutants from upland disturbances are trapped and assimilated. Wetlands can also serve to replenish aquifers, store and attenuate flood waters and control erosion. In addition, wetlands provide important food and shelter for a variety of wildlife. This Activity will result in the destruction of nontidal water and/or wetlands and therefore a reduction in these systems' abilities to provide water quality and wildlife benefits. However, the unavoidable losses of nontidal waters and wetlands as a result of this activity shall be offset by the creation of wetlands and restoration of streams by applicants, commercial mitigation bankers, and/or the VARTF.

The loss of wetlands may result in the fragmentation of large contiguous wetlands that may be present on a project site. Fragmentation of wetland systems may reduce contiguous habitat and potentially alter species composition. The likelihood of fragmentation will be reduced by the existing impact thresholds.

During construction, small amounts of oil and grease may be discharged into waters of the United States from construction equipment. Because the construction activity in most cases

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is short termed, the frequency and concentration of these discharges are not expected to have more than minimal adverse impacts on overall water quality.

(iii) Effects on Human Use Characteristics:

The discharge of dredged or fill material may alter the visual character of some areas. The extent and perception of the alteration will vary depending upon the nature of the surrounding area and the values of the public using or viewing the area.

The use of heavy machinery and construction techniques may cause temporary impact on some individuals located close to the construction site. Most machinery is equipped with standard acceptable noise muffling devices which should minimize these potential impacts. Further, the normal operating hours for this type of construction work is typically limited to daylight working hours. Disruptions associated with temporary construction noise impacts should minimal in nature.

The authorization of this activity may change local land use from natural to developed. The construction of one development may also induce further development on nearby parcels of land. However, land use decisions are primarily the responsibility of state and local governments and will be controlled by those entities, consistent with plans for local growth.

The authorization of these activities may have a positive impact on the local economy. Activities may generate jobs and revenue for the local area by being associated with the construction or maintenance of residential, commercial, or institutional facilities. Use of 07-SPGP-01 could be associated with the construction of recreation facilities. 07-SPGP-01 will also provide the public with a form of authorization that can be obtained with little delay and paperwork.

(iv) Cumulative Impacts:

Cumulative impacts of the use of 07-SPGP-01 for this Activity will depend on the number of times the permit is used. Past monitoring of SPGP-01 revealed that this Activity was used 918 times from 01 November 2002 to 31 December 2006. Based on this, we project that this Activity would be authorized approximately 1,100 times over the five year life of 07-SPGP-01. Compensatory mitigation offset the authorized losses by maintaining a no-net-loss of wetland acreage and stream mitigation at a minimum 1:1 ratio, and the District expects that trend to continue. Because of the impact limits, restrictions of types of authorized work, and the mitigation conditions, we do not expect that this Activity will result in more than minimal adverse environmental effects.

c. Activity 2 (Linear Transportation Projects):

This activity authorizes discharges of dredged or fill material associated with new construction of linear transportation projects, as well as the maintenance of existing linear transportation projects impacting nontidal waters of the United States, including streams, wetlands, and navigable nontidal waters. Impacts must be avoided and minimized to the

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maximum extent practicable on-site. All work authorized by this Activity must comply with all impact limits, terms, and conditions of 07-SPGP-01. All proposed work that does not meet the impact limits and/or terms and conditions does not qualify for authorization under 07-SPGP-01 and will be reviewed under an alternate Corps permit process. The statutory authorities for this activity are Section 10 of the RHA and Section 404 of CWA.

The evaluation of public interest review factors and the 404(b)(1) analysis for this Activity are described below (factors considered in the 404(b)(1) analysis are listed in matrix form). The determination whether a particular public interest review factor is relevant or not is based upon consideration of the direct, indirect, and cumulative impacts that can reasonably be attributed to the authorized activity.

Public Interest Review:

- Conservation: The losses of nontidal wetlands and waters associated with Linear Transportation projects under 07-SPGP-01 will not be authorized until avoidance and minimization of impacts is undertaken to the maximum extent practicable. Mitigation will be required for all impacts to wetlands and for impacts to over 300 linear feet of stream to ensure that there is no loss of wetland and riparian habitat within each watershed. In addition, authorization of the permit will not occur until applicants have been found to be in compliance with the ESA. Minimal adverse effects to conservation are anticipated.
- Economics: The local economy will benefit from the construction of linear transportation features, such as roadways, through the use of local contractors to perform the construction of the transportation features, local banks to lend money to fund the construction, and due to the fact that roadways allow access to previously undeveloped areas. No adverse effects to economics are anticipated.
- Aesthetics: While aesthetic impacts vary with individual tastes, the impacts associated with linear transportation projects are expected to be minimal from a national perspective. No adverse effects to aesthetics are anticipated.
- General Environmental Concerns: No adverse effects are anticipated.
- Wetlands: Individual projects authorized under this Activity will affect up to 1/3 acre of nontidal wetlands. Authorizations of 07-SPGP-01 will not be made until applicants have avoided and minimized impacts to wetlands to the maximum extent practicable. Compensatory mitigation will be required to offset all unavoidable wetlands losses. Mitigation for wetland impacts under 07-SPGP-01 may entail wetland creation, restoration, or enhancement (site-specific mitigation areas), preservation of wetlands and/or upland buffers, purchase of commercial mitigation bank credits, and/or contributions to the VARTF.
- Historic Properties: The District proposes to allow DEQ to screen 07-SPGP-01 proposals for the presence of historic properties in the vicinity by reviewing the VDHR Data Sharing System (DSS), contacting the National Park Service (NPS) to determine if they have concerns regarding historic properties located near NPS properties, etc. If DEQ determines that a site contains historic properties, is located within viewshed of a known historic property, or has a high likelihood

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of containing historic properties (based on landscape position, the use of predictive models, etc.), projects will be returned to the District for consultation with VDHR. In order to fulfill Federal requirements for the evaluation and treatment of historic properties pursuant to 36 C.F.R. § 800, 16 U.S.C. § 470f, and 33 C.F.R. § 325, Appendix C, the District, VDHR, DEQ, and ACHP are developing a PA to delegate this screening authority to DEQ. At this time, though, the development of the PA has not been completed. Until such a time as the PA is finalized, the District will continue to process applications under 07-SPGP-01 as they are currently processed, with District staff performing all aspects of screening and consultation on historic properties. The District will operate in accordance with the current PA between the District, VDHR, and the ACHP, entitled “Programmatic Agreement Among U.S. Army Corps of Engineers Norfolk District Regulatory Branch, the Advisory Council on Historic Preservation, and the Virginia State Historic Preservation Office Regarding Implementation of the Norfolk District Regulatory Program,” dated 5 February 1996, and subsequent SOPs between the District and VDHR.

- **Fish and Wildlife Values:** Projects authorized under this Activity will adversely affect both nontidal wetlands and other nontidal waters of the United States. Wetlands and waters both provide habitat for a number of animals such as mammals, reptiles, amphibians, and birds, although the habitat available at each project site will be variable in quality. These permit authorizations will not be made until applicants have demonstrated that they have avoided and minimized impacts to jurisdictional areas to the maximum extent practicable. Projects proposing unavoidable impacts to wetlands over 1/10 acre and streams over 300 linear feet will be required to provide compensatory mitigation.

The District will delegate to DEQ the ability to screen proposals for the presence of Federally listed threatened or endangered species or critical habitat. In order to adequately screen projects, DEQ will check the DGIF Virginia Fish and Wildlife Information Service and DCR DNH Biotics databases using two mile radius searches in addition to reviewing delineation data sheets to determine if appropriate habitat exists on a particular site to support listed species. If a project is located within the vicinity of a documented occurrence of a listed species or critical habitat, or it is determined that appropriate habitat for such species might exist onsite, DEQ will request surveys of applicants and perform informal Section 7 consultation with FWS. If FWS determines that a particular project may affect a Federally listed species or critical habitat, DEQ will return the project to the District for an effect determination and formal consultation with FWS, as appropriate. The District, DEQ, and FWS agreed not to develop a memorandum of agreement regarding this delegation of responsibilities, however the agreed-upon processes regarding the treatment of threatened or endangered species and critical habitat under 07-SPGP-01 are detailed in the 07-SPGP-01 SOP.

- **Flood Hazards:** Although 07-SPGP-01 may authorize work in floodplains, it is not anticipated that these authorized fills will constitute flood hazards. Local government authorities will require development of the properties with

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consideration of FEMA floodplains, requiring floodplain mitigation if it is deemed necessary.

- Floodplain Values: Although 07-SPGP-01 may authorize work in floodplains, no adverse effects are anticipated. Local ordinances will require consideration of floodplains, requiring their own floodplain mitigation if it is deemed necessary.
- Land Use: The construction of linear transportation projects, such as roadways, may open up undeveloped areas to new development. However, the primary responsibility for determining land use lies with the local government officials. Minimal adverse effects to land use are anticipated.
- Navigation: No adverse effects are anticipated.
- Shore Erosion and Accretion: No adverse effects are anticipated.
- Recreation: This Activity will authorize recreation facilities such as bike paths. For that reason, the District expects recreation to benefit from 07-SPGP-01.
- Water Supply and Conservation: No adverse effects are anticipated.
- Water Quality: While there will be temporal decreases in downstream water quality due to earthwork associated with the construction of the linear transportation projects, the permittee must obtain a VWP permit from the DEQ, which serves as certification under Section 401 of the CWA. All conditions of the VWP permit become conditions of the 07-SPGP-01 authorization. In addition, permittees must also comply with Virginia erosion and sediment control law. Minimal adverse effects to water quality are anticipated.
- Energy Needs: No adverse effects are anticipated.
- Safety: When linear transportation projects are constructed under this Activity, those projects will be required by state and local entities to place signage for safety along roads, bike paths, etc. No adverse effects are anticipated.
- Food and Fiber Production: No adverse effects are anticipated.
- Mineral Needs: No adverse effects are anticipated.
- Consideration of Property Ownership: Work authorized under this Activity will occur either on public or private property. There is a potential that local governments and VDOT would need to condemn land from private property owners in order to construct roadways, but the decision to undertake any condemnations would not be directly related to the 07-SPGP-01 authorization. Minimal adverse effects are anticipated.
- Needs and Welfare of the People: 07-SPGP-01 provides an efficient vehicle for permitting linear transportation projects in nontidal waters and wetlands, ultimately improving routes of public transportation.

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Impact Analysis (Subparts C-F):

RELEVANT TO THIS ACTION		
FACTORS:	YES	NO
Substrate	X	
Suspended particulates/turbidity	X	
Water	X	
Current patterns/water circulation	X	
Normal water level fluctuations	X	
Salinity gradients	X	
Threatened and endangered species	X	
Aquatic food web	X	
Wildlife	X	
Special aquatic sites	X	
Municipal and private water supplies	X	
Water related recreation	X	
Aesthetics	X	
Parks, national and historical monuments, national seashores, wilderness areas, research sites, and similar areas	X	

Potential Impacts:

(i) General:

As specified by the description of this authorization, this Activity authorizes the discharges of dredged or fill material associated with new construction of temporary and permanent linear transportation projects, as well as maintenance or modification of existing linear transportation projects which impact nontidal waters of the United States, including streams and wetlands and nontidal navigable waters. Under this Activity, each crossing of a water of the United States is generally considered a single and complete project. However, in cases where linear transportation projects contain multiple crossings in close proximity or numerous crossings of the same waterbody, the District and/or DEQ has the discretion to consider all of the crossings cumulatively as one single and complete project. Each single and complete project under this Activity may not exceed 1/3 acre of impact to nontidal waters and/or wetlands. To assure minimal impacts associated with this Activity, compensatory mitigation will be required for all permanent wetland impacts and stream impacts over 300 linear feet. The need for mitigation for impacts to open waters will be determined on a project specific basis. Additionally, all streams relocated under this Activity will be required to utilize natural channel design in the relocations.

For this Activity, an application must be submitted to VMRC for distribution to DEQ along with a confirmed delineation of waters of the United States. For permanent culverted transportation crossings, culverts must be countersunk in accordance with the recommendations of the Virginia Department of Game and Inland Fisheries (DGIF), which have been adopted as general conditions in 07-SPGP-01. Any waters of the United States temporarily impacted must be returned to pre-construction conditions, which includes contours, elevations, stream substrate, and revegetated with native, wetland species.

(ii) Physical, Chemical and Biological Characteristics of the Aquatic Ecosystem:

The discharge of dredged or fill material into waters of the U.S. for linear transportation projects may result in the destruction of nontidal waters and/wetlands. In most cases, the

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affected nontidal waters and/or wetlands will be permanently filled, resulting in permanent impacts to aquatic resource functions and values. Some nontidal waters and/or wetlands may be temporarily impacted through the use of temporary staging areas, access roads, etc. These nontidal waters and/or wetlands will be restored to pre-construction conditions, but the plant community after restoration may be different, particularly if the site was originally forested. Compensatory mitigation will, at a minimum, be required for all projects impacting wetlands and for stream impacts greater than 300 linear feet, or at any other level of impact as appropriate under Federal guidance and to the extent necessary to insure that the impacts are minimal.

The construction of linear transportation projects in wetlands and streams may result in the destruction of riparian vegetation. Some vegetation may be crushed as a result of various construction activities or smothered by the placement of excavated or fill material. Overhanging riparian vegetation provides shelter, shade, breeding and rearing areas for various fish and other aquatic organisms, as well as terrestrial wildlife such as birds and small mammals. It also serves an important role in minimizing impacts to water quality by shading the water from the heat of the sun, and decreasing soil erosion and the resulting discharges into the water. Emergent vegetation also provides habitat and food for a wide variety of terrestrial and aquatic organisms. Because of the limited size of the area impacted, the adverse impacts of removing or covering the riparian or emergent vegetation are expected to be minimal on both an individual and cumulative basis, as emergent vegetation quickly regenerates.

The construction of a linear transportation project may also result in the filling of a floodplain. As a result, the stream's ability to transport sediment and clear its water column of contaminants via the normal mechanism of flooding will be decreased. In addition, the transportation project may result in fragmentation of contiguous habitat, and modifying or eliminating areas used for nesting, foraging, resting, and reproduction. The discontinuous smaller blocks of habitat not only reduce the total area of habitat available to a particular species, but also cause decreases in organismal distribution from one block to another by virtue of having to cross inhospitable terrain.

During the discharge of dredged or fill material fish and other motile organisms are most likely to avoid the construction area. Benthic, sessile or slow moving organisms in the path of equipment and building materials will be destroyed. Some organisms will be smothered by the placement of fill material or when suspended material settles to the bottom. In addition, the creation of transportation projects may fragment habitat that is currently continuous. Limiting the area that may be impacted through the requirement of avoidance and minimization is expected to minimize the adverse impacts of the activity.

During construction, small amounts of oil and grease may be discharged into waters of the United States from construction equipment. Because the construction, in most cases, is short term, the frequency and concentration of these discharges are not expected to have more than minimal adverse impacts on overall water quality.

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(iii) Effects on Human Use Characteristics:

The discharge of dredged or fill material may alter the visual character of some areas. The extent and perception of the alteration will vary depending upon the nature of the surrounding area and the values of the public using or viewing the area.

The use of heavy machinery and construction techniques may cause temporary impact on some individuals located close to the construction site. Most machinery is equipped with standard acceptable noise muffling devices, which should minimize these potential impacts. Further, the normal operating hours for this type of construction work is typically limited to daylight working hours. Disruptions associated with temporary construction noise impacts should be minimal in nature.

The authorization of this activity may change local land use from natural to developed, especially when the transportation projects provide access to previously undeveloped areas. Transportation projects may also induce further development on nearby parcels of land. However, land use decisions are primarily the responsibility of state and local governments and will be controlled by those entities, consistent with plans for local growth.

The authorization of these activities may have a positive impact on the local economy. Projects may generate jobs and revenue for the local area by allowing access for the development of upland property. 07-SPGP-01 will also provide the public with a form of authorization that can be obtained with little delay and paperwork.

(iv) Cumulative Impacts:

Cumulative impacts of the use of 07-SPGP-01 for this Activity will depend on the number of times the permit is used. Past monitoring of SPGP-01 revealed that this Activity was used 759 times from 01 November 2002 to 31 December 2006. Based on this, we project that this Activity would be authorized approximately 900 times over the five year life of 07-SPGP-01. Because of the impact limits and restrictions of types of work and the mitigation conditions, we do not expect that this activity will result in more than minimal adverse environmental effects.

d. Overall Cumulative Impacts Assessment

Based upon the District's review of the impacts authorized by the existing SPGP-01, it has been determined that individual and cumulative impacts authorized under the proposed 07-SPGP-01 will be minimal. Issuance of this general permit would not be contrary to the public interest and complies with the Section 404(b)(1) Guidelines. Support for reaching these conclusions can be summarized as follows:

- The activities previously authorized by SPGP-01 are similar in nature and similar in their impact upon the water quality and the aquatic environment. This is also true for 07-SPGP-01, as the same types of projects are covered by the new permit.

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- The activities authorized under 07-SPGP-01 will have only minimal adverse effects when viewed separately or cumulatively. Of the total verifications under SPGP-01, including Category A, B, and C activities, 71% were Category A verifications with impacts totaling up to 1/10 acre of waters and/or wetlands and up to 300 linear feet of stream. While formal designation of these categories is being eliminated in 07-SPGP-01, the same types of reviews and compensatory mitigation requirements will exist at each particular impact level.
- Pre-application consultations between applicants and District personnel often result in reductions of impact to levels that qualify for verification under Category A of SPGP-01. In addition, those projects proposing permanent impacts to nontidal waters and/or wetlands of less than 1/10 acre or up to 300 linear feet of stream may qualify for a DEQ Reporting Only General Permit, requiring little to no review by DEQ staff. The success of the current Category A process is borne out by the fact that verifications for projects impacting less than 1/10 of waters and/or wetlands and no greater than 300 linear feet of stream made up the vast majority, 71%, of the total SPGP-01 actions. This trend is expected to continue under 07-SPGP-01.
- The DEQ permit program provides an appropriate framework for compliance with the Section 404(b)(1) Guidelines by requiring an avoidance and minimization process equivalent to the Federal requirements. Each activity under 07-SPGP-01 contains general conditions and activity-specific conditions that meet the Section 404(b)(1) Guidelines. Consequently, 07-SPGP-01 is effective in authorizing only projects with minimal individual and cumulative adverse effects on the aquatic environment. DEQ's regulatory program in conjunction with the Corps regulatory program provides a greater level of protection for aquatic resources than each agency's regulations provide on their own. This is because the state program regulates certain activities and areas that the Federal program does not and the Corps is able to further condition permits with special conditions when state regulations do not allow (such as conditions to require financial assurances for mitigation sites). Historically under SPGP-01, reductions to proposed impacts of approximately 11% were achieved by DEQ and District reviewers. It is expected that this level of avoidance and minimization will remain consistent, if not increase due to the District/DEQ commitment to cross-train staff on avoidance and minimization techniques.
- Furthermore, SPGP-01 annual reports demonstrate that unavoidable impacts authorized under SPGP-01 have been mitigated through individual compensatory mitigation sites, payments to the VARTF, and commercial mitigation banks credit purchases. A total of 192.56 acres of wetlands were approved to be impacted and a total of 416.27 acres of wetlands mitigation was required to compensate for those impacts during the period of November 2002 – December 2006 under SPGP-01. A total of 296,311 linear feet of stream were approved to be impacted and a total of 409,233 linear feet of stream mitigation was required to compensate for those impacts during the same period. It is anticipated that this level of impact will continue or fall through the implementation of 07-SPGP-01, especially due to the rising costs of stream mitigation in the area.

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Pursuant to Section 404(e) of the CWA and Section 10 of the RHA, the Corps has the authority to issue general permits that authorize certain activities that are also regulated by a state regulatory authority. This 07-SPGP-01 developed in cooperation with DEQ, is designed to improve the regulatory process for applicants, reduce unnecessary duplicative project evaluations, and promote more effective monitoring and compliance, while providing equivalent protection for aquatic resources. The Virginia Nontidal Wetlands Resources Act of 2000 (VAC 62.1-44.5) and the implementing regulations of the Virginia Water Protection Permit Program (9 VAC 25-210 *et seq.*) establish procedures for the granting of permits that require DEQ to apply evaluation criteria that consist of alternatives analyses, avoidance techniques, the minimization of impacts, and if a permit is granted, compensatory mitigation. The evaluative criteria within Virginia's programs are similar to Federal criteria under Section 404(b)(1) of the CWA.

07-SPGP-01 only authorizes specific activities in waters of the United States within the Commonwealth of Virginia that would cause no more than minimal adverse environmental effects, individually and cumulatively, subject to the terms and conditions of this general permit. To determine the potential effectiveness of 07-SPGP-01 to accomplish the aforementioned requirements, the District examined annual monitoring reports of the previous state programmatic general permit, SPGP-01. As required in the 07-SPGP-01, the previous SPGP-01 required annual monitoring reports to determine if the general permit met its intended goals and whether it complied with regulatory and statutory requirements by authorizing only those activities with minimal impacts, both individually and cumulatively. SPGP-01 became effective on 1 November 2002. Four one-year annual monitoring reports between 1 November 2002 and 31 December 2006 were examined. The four annual reports were compiled from data provided by DEQ and the District's Tracker and OMBIL Regulatory Module (ORM) databases. These reports can be found on the District's website and are incorporated herein by reference.

Substantive modifications to SPGP-01 are to formally eliminate the Categories that exist in SPGP-01 (although no modification to the level of scrutiny at each impact level is proposed); to allow DEQ to act as the sole correspondent with applicants on environmental reviews; to delegate to DEQ responsibilities regarding screening of projects for Federally-protected threatened and endangered species and informal consultation with FWS on proposals that might impact these species; and to delegate to DEQ responsibilities regarding screening of projects for historic resources to ensure compliance with Section 106 of the NHPA.

The Environmental Protection Agency's (EPA) Section 404 (b)(1) Guidelines require a proposed general permit to predict the cumulative effects through an evaluation of the number of individual discharge activities likely to be regulated under the general permit until its expiration. Based upon our review of this data for the existing SPGP-01 over the four monitoring years, the number of the authorized impacts exceeding the ½ acre impact limit, including projects with stream impacts of over 300 linear feet, are relatively few (17%). The data in these reports also supports that the activities under each Activity will have only minimal adverse effects when preformed separately.

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To determine whether the proposed 07-SPGP-01 will authorize activities that will have only minimal cumulative adverse effects on water quality and the aquatic environment, we also examined the four annual SPGP-01 monitoring reports to determine cumulative impact in terms of acreage as well as effectiveness of the regulatory program to minimize individual and cumulative impacts. Our review led us to the following conclusions:

- Under SPGP-01, a total of 220.28 acres of nontidal wetland impacts were requested from the period of 1 November 2002 through 31 December 2006 while only a total of 192.56 acres were approved during the same time period, a 13% reduction of impacts. The approved wetland impacts were offset by the 416.27 acres of wetland mitigation required. The District expects this level of impact to remain consistent or decrease while mitigation ratios are expected to remain substantively similar through the implementation of 07-SPGP-01.
- Under SPGP-01, a total of 319,765 linear feet of stream impacts were requested from the period of 1 November 2002 through 31 December 2006 while only a total of 296,311 linear feet were approved for the same time period, a 9% reduction of impacts. The approved stream impacts were offset by the 409,233 linear feet of stream mitigation required. The District expects this level of impact to remain consistent or decrease while mitigation ratios are expected to remain substantively similar through the implementation of 07-SPGP-01.

Based upon our analysis of the data concerning the use of SPGP-01, we conclude that 07-SPGP-01 will comply with the statutory requirements of Section 404(e) of the CWA and the DA regulations at 33 C.F.R. §§ 322.2(f) and 323.2(h). 07-SPGP-01 authorizes only those activities with minimal individual and cumulative adverse effects on the aquatic environment. The established operating procedures for 07-SPGP-01 provide the District, FWS, and EPA with the opportunity to review those activities that may have more than minimal individual and cumulative adverse effects on the aquatic environment. 07-SPGP-01 also provides the regulated public with a more efficient permit process, since all communication with the applicant will come from DEQ unless there is needed District coordination for NHPA and/or ESA. As a result of this streamlining, the District can focus its resources on case-by-case evaluation of proposed projects with greater potential for adverse effects on the aquatic environment and enforcement and compliance.

8. Determinations (Statement of Findings):

a. National Environmental Policy Act (NEPA) Compliance and Finding of No Significant Impact (FONSI): As required by NEPA, an EA has been prepared for this 07-SPGP-01. The general permit conditions and exclusions, Corps discretionary authority, and the Federal screening process will assure that the individual and cumulative impacts are minimal for each individual action contemplated under 07-SPGP-01. Having reviewed the information provided by all interested parties and an assessment of the environmental impacts, the District finds that

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issuance of 07-SPGP-01 will not have a significant impact on the quality of the human environment. Accordingly, an Environmental Impact Statement will not be required.

b. Compliance with 404(b)(1) Guidelines: The guidelines set forth in 40 C.F.R. § 230 involving the discharge of dredged or fill material have been applied and discussed in the review of this proposed action. 07-SPGP-01, as specified, is in compliance with the 404(b)(1) Guidelines with the inclusion of the following conditions:

Minimal effects. Projects authorized shall have no more than minimal individual or cumulative adverse environmental impacts, as determined by the Corps.

Avoidance and minimization. Discharges of dredged or fill material into waters of the United States shall be avoided and impacts minimized to the maximum extent practicable.

Mitigation standards.

- *Wetland mitigation* will generally be required for all impacts over 1/10 acre on residential, commercial, and institutional development projects and for all impacts on linear transportation projects. Generally, the minimum required wetland mitigation ratios will be as follows: 2:1 for forested wetlands, 1.5:1 for scrub-shrub wetlands, 1:1 for herbaceous emergent wetlands, and 1:1 for conversion of forested wetlands to herbaceous emergent wetlands. Wetland mitigation can include wetland preservation, creation, restoration or enhancement (including restoration or enhancement of upland forested buffers), purchase of commercial wetland mitigation bank credits, and/or contributions to the Virginia Aquatic Resources Trust Fund.
- *Stream mitigation* will generally be required for any project that involves more than 300 linear feet of stream impact. Minimum stream mitigation requirements will be determined using the current Corps and DEQ endorsed assessment methodology. Stream mitigation can include preservation of existing stream channels and riparian (wetland or upland) buffers, enhancement or restoration of existing stream channels, purchase of commercial stream mitigation bank credits, and/or contributions to the Virginia Aquatic Resources Trust Fund.
- The need to require mitigation for impacts to open waters will be determined on a case-by-case basis.
- Where local zoning ordinances provide for riparian and floodplain protection pursuant to the Chesapeake Bay Preservation Act (Virginia Code 10.1-2100 *et seq.*) and the Chesapeake Bay Preservation Area Designation and Management Regulations (9 VAC 1-20 *et seq.*), the use of buffers as a form of compensatory mitigation shall be allowed only (a) where the extent of the buffer exceeds the lateral extent already required by local ordinances pursuant to the Act and the regulations or (b) where the quality of the existing protected buffer area is enhanced to provide greater water quality protection benefits.

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Heavy equipment in wetlands. Heavy equipment working in wetlands must be placed on mats or other measures must be taken to minimize soil disturbance.

Temporary fills. All temporarily disturbed waters and wetlands must be restored to their pre-construction contours as soon as they are no longer needed. Once restored to their natural contours, their soil must be mechanically loosened to a depth of 12 inches and wetland areas must be seeded or sprigged with appropriate native vegetation.

Sedimentation and erosion control. Appropriate erosion and sediment controls must be employed and maintained in effective operating condition during construction, and all exposed soil and other fills, as well as any work below the ordinary high water mark, must be permanently stabilized at the earliest practicable date.

Aquatic life movements. No authorized activities may substantially disrupt the movement of aquatic life indigenous to the waterbody, including those species which normally migrate through the area, unless the activity's primary purpose is to impound water. The Corps has determined that fish and wildlife are most often present in any stream being crossed, in the absence of evidence to the contrary.

All pipes and culverts placed in streams must be countersunk at both the inlet and outlet ends, unless indicated otherwise by the DEQ on a case-by-case basis (see below). Pipes that are 24" or less in diameter shall be countersunk 3" below the natural stream bottom. Pipes that are greater than 24" in diameter shall be countersunk 6" below the natural stream bottom. All single pipes or culverts (with bottoms) shall be depressed (countersunk) below the natural streambed at both the inlet and outlet of the structure. In sets of multiple pipes or culverts, at least one pipe or culvert shall be countersunk at both the inlet and outlet to convey low flows.

- Exemptions: Countersinking requirements do not apply to:
 - Extensions of existing pipes or culverts that are not countersunk
 - Maintenance to pipes/culverts that does not involve replacing the pipe/culvert
 - Pipes that are placed above ordinary high water, such as those placed to allow for floodplain flows
 - Bottomless culverts or pipe arches

- Hydraulic capacity: Pipes should be adequately sized to allow for the passage of ordinary high water with the countersinking and invert restrictions taken into account.

- Pipes on bedrock:
 - Replacement of an existing pipe culvert: Countersinking is not required provided the elevations of the inlet and outlet ends of the replacement pipe/culvert are no higher above the stream bottom than those of the existing pipe/culvert. Documentation (photographic or other evidence)

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must be maintained in the permittee's records showing the bedrock condition and the existing inlet and outlet elevations.

- Pipes in new locations: If the prospective permittee determines that bedrock prevents countersinking, they should evaluate the use of a bottomless pipe/culvert, bottomless utility vault, span (bridge), or other bottomless structure to cross the waterway, and also evaluate alternative locations for the new pipe/culvert that will allow for countersinking. If the permittee determines that countersinking is not practicable, they must include the documentation required below along with their application package.
- Problems encountered during construction: When a pipe/culvert is being replaced and, during construction, it is found that the streambed/banks are on bedrock, then the permittee must stop work and contact the DEQ. The permittee must provide specific information concerning site conditions and limitations on countersinking. The permittee should recognize that the DEQ could determine that the work will not qualify for 07-SPGP-01.
- Emergency situations: A permittee is encouraged to countersink emergency pipe replacements at the time of the replacement, in accordance with the conditions above. However, if conditions or timeframes do not allow for countersinking, then the pipe can be replaced as it was before the washout, but the permittee will have to come back and replace the pipe/culvert and countersink it in accordance with the conditions above. The replacement of the washed out pipe is viewed as a temporary repair, and a countersunk replacement should be made at the earliest possible date. The permittee must notify the DEQ of all pipes/culverts that are replaced without countersinking at the time that the work occurs, even if the work constitutes an otherwise non-reporting activity, and must provide the planned schedule for installing a countersunk replacement (it is acceptable to submit such notification by e-mail).
- Submittal requirements: If a prospective permittee determines that countersinking is not practicable, then they must submit a narrative, along with their application, documenting measures evaluated to minimize disruption of the movement of aquatic life as well as documentation of the cost, engineering factors, and site conditions that prohibit countersinking the pipe/culvert. Options that must be considered include use of a bottomless pipe, partial countersinking (such as less than 3" of countersinking, or countersinking of one end of the pipe), and constructing stone step pools, low rock weirs downstream, or other measures to provide for the movement of aquatic organisms. The narrative must also include photographs documenting site conditions. The prospective permittee may find it helpful to contact their regional fishery biologist for the Virginia Department of Game and Inland Fisheries (DGIF) for recommendations about the measures to be taken to allow for fish movement.

Discharge of pollutants. All authorized activities involving any discharge of pollutants into waters of the United States shall be consistent with applicable water quality standards, effluent limitations, standards of performance, prohibitions, and

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pretreatment standards and management practices established pursuant to the CWA (33 U.S.C. § 1251 *et seq.*) and applicable state and local laws. No discharge of dredged or fill material in association with this authorization may consist of unsuitable material such as trash, debris, car bodies, asphalt, etc.

Obstruction of high flows. Discharges of dredged or fill material must not permanently restrict or impede the passage of normal or expected high flows.

Waterbird breeding areas. Discharges of dredged or fill material into breeding areas for migratory waterfowl must be avoided to the maximum extent practicable.

Native trout and anadromous fishes. Authorizations for discharges of dredged or fill material into native trout waters or anadromous fish spawning areas are conditioned to limit in-stream work within the timeframes recommended by the DGIF.

Water supply intakes. No discharge of dredged or fill material may occur in proximity of a public water supply intake.

c. Section 176(c) of the Clean Air Act General Conformity Rule Review: The proposed permit action has been analyzed for conformity applicability pursuant to regulations implementing Section 176(c) of the Clean Air Act. It has been determined that the activities proposed under this permit will not exceed *de minimis* levels of direct emissions of a criteria pollutant or its precursors and are exempted by 40 C.F.R. Part 93.153. Any later indirect emissions are generally not within the Corps' continuing program responsibility and generally cannot be practicably controlled by the Corps. For these reasons a conformity determination is not required for issuance of 07-SPGP-01.

d. 07-SPGP-01 is in compliance with the Regulatory Flexibility Act, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. § 601 *et seq.* 07-SPGP-01 will not have a significant impact on a substantial number of small entities. In fact, 07-SPGP-01 will streamline the process for small businesses and provide one stop shopping for both the DEQ permit and a DA permit pursuant to Section 404 of the CWA and/or Section 10 of the RHA.

e. Public Interest Determination: All factors affecting the public interest have been considered. These factors include conservation, economics, aesthetics, general environmental concerns, wetlands, cultural values, fish and wildlife values, flood plain values, land use, navigation, shoreline erosion and accretion, recreation, water supply and conservation, water quality, safety, energy needs, food production, and in general, the needs and welfare of the people. After weighing the relative extent of the public and private need for the proposed work and the extent and permanence of the beneficial and/or detrimental effects as discussed in this document, I find that the proposed work is not contrary to the public interest and issuance of the DA permit is warranted.

f. Public Hearing Request: No requests were made for a public hearing.

SUBJECT: Environmental Assessment, Section 404(b)(1) Evaluation and Statement of Findings Regarding Proposed Department of the Army Virginia State Program General Permit (07-SPGP-01)

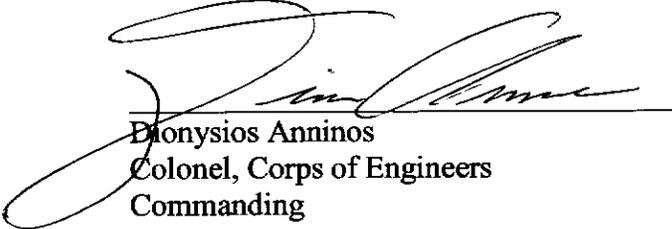
g. 07-SPGP-01 meets the goals of SPGPs as follows: 1) it reduces duplicative project evaluation; 2) it simplifies the authorization process; 3) it provides equivalent or enhanced environmental protection for aquatic resources; and 4) it promotes more effective and efficient use of Corps and state resources.

h. In accordance with Title III of the Civil Rights Act of 1964 and Executive Order 12898, it has been determined that 07-SPGP-01 would not directly or through contractual or other arrangements, use criteria, methods, or practices that discriminate on the basis of race, color, or national origin, nor would it have a disproportionate effect on minority or low-income communities.

i. The EA, public comments, and other considerations addressed in this document have clearly demonstrated that the proposed 07-SPGP-01 complies with all relevant environmental laws and regulations, produces no more than minimal impacts to aquatic or other resources, and is not contrary to the public interest. As a result, the District finds that 07-SPGP-01 should be issued, with an effective date of 1 June 2007 for an effective period of five years.

6/01/07

Date



Dionysios Anninos
Colonel, Corps of Engineers
Commanding