

**COMMONWEALTH OF VIRGINIA  
DEPARTMENT OF ENVIRONMENTAL QUALITY  
DIVISION OF WATER QUALITY PROGRAMS  
ELLEN GILINSKY, Ph.D., DIRECTOR**

P.O. Box 1105

Richmond, VA 23218

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**SUBJECT:** Guidance Memo No. 07-2009  
VPDES Permit Applications for Discharges in Shellfish Growing Areas

**TO:** Regional Directors

**FROM:** Ellen Gilinsky, Ph.D., Director 

**DATE:** June 15, 2007

**COPIES:** Water Permit Managers

**Summary:**

The purpose of this guidance is to describe the procedures and agency coordination required when DEQ receives applications for VPDES permits with proposed discharges to shellfish growing areas, in accordance with the 2007 Memorandum of Understanding signed by the Virginia Department of Health, the Marine Resources Commission and the Department of Environmental Quality.

**Electronic Copy:**

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

**Contact information:**

Please contact Kyle Winter, Office of Water Permit Programs, (804) 698-4182 or [kiwinter@deq.virginia.gov](mailto:kiwinter@deq.virginia.gov) if there are any questions about this guidance.

**Disclaimer:**

**This document is provided as guidance and, as such, sets forth standard operating procedures for the agency. However, it does not mandate any particular method nor does it prohibit any particular method for the analysis of data, establishment of a wasteload allocation, or establishment of a permit limit. If alternative proposals are made, such proposals should be reviewed and accepted or denied based on their technical adequacy and compliance with appropriate laws and regulations.**

A Memorandum of Understanding signed by the Virginia Department of Health, the Marine Resources Commission and the Department of Environmental Quality is attached to this guidance. It contains procedures that have been agreed upon by the three agencies that interact with regard to discharges into shellfish waters. The intent of this guidance is to describe those procedures and the necessary agency coordination required when DEQ receives applications for VPDES permits with proposed discharges to shellfish growing areas.

### **Legislative/Regulatory Requirements**

9 VAC 25-260-270 (Water Quality Standards - Shellfish buffer zones; public hearing), provides:

*Before acting on any proposal for a project that, while not contravening established numeric criteria for shellfish waters, would result in condemnation by the State Health Department of shellfish beds, the [State Water Control] board shall convene a public hearing to determine the socio-economic effect of the proposal. Such proposals include discharge of treated waste or proposals to otherwise alter the biological, chemical or physical properties of state waters. If the Marine Resources Commission or the Virginia Institute of Marine Science certifies that the project would have no effect on the shellfish use now and in the foreseeable future, the board may dispense with such hearing.*

*When the board finds that the proposed project will result in shellfish bed condemnation and if the condemnation will violate the general standard, it shall disapprove the proposal.*

In order to comply with the above regulation the following procedures are necessary for review of proposed discharges to shellfish growing areas.

### **Distribution of VPDES Permit Application**

For proposed sewage discharges to or in near proximity to shellfish growing areas, DEQ must provide a copy of the VPDES permit application or registration statement containing information on the location and nature of the proposed discharge to DSS and VMRC for review and comment.

Proposed discharges will be considered to be new individual VPDES permit applications, new general permit registration statements, or modification requests or reissuance applications that propose an increase in discharge flow.

Sewage discharges will be considered to include all municipal discharges, industrial discharges containing 10% or more sewage, and discharges for which general permit coverage is being sought under the "Domestic Sewage Discharges of Less Than or Equal To 1,000 Gallons Per Day" general permit.

Waters that are in, or in near proximity to, shellfish growing areas will be considered to be Chesapeake Bay and Atlantic coastal waters and tributaries, including waters below the following locations in major Chesapeake drainage basins:

Potomac River tributaries - Mathias Point upstream of the US 301 bridge

Rappahannock River - Tappahannock Bridge (US 360)

York River - upstream border of the Town of West Point

James River - line connecting Swanns Point on the south bank to Glass House Point on the north bank (upper end of Jamestown Island)

DEQ must also provide notification to DSS and VMRC of the public comment period, and provide a copy of the final permit, if issued, to DSS so they can appropriately address new condemnation areas. Template transmittal letters from DEQ to DSS and VMRC are attached.

### **DSS Identification of Condemned Growing Areas**

DSS must respond to DEQ within 14 calendar days of receipt of the application, with a copy to VMRC, identifying the location of any shellfish growing areas that would have to be condemned as a result of the proposed discharge. For the purposes of this guidance, condemned means reclassified as restricted (from approved) or prohibited (from approved or restricted) as defined by the National Shellfish Sanitation Program. Alternatively, DSS may respond to DEQ within 14 calendar days of receipt of the application that they intend to conduct a further evaluation of the proposed discharge site. If DSS intends to conduct a further evaluation, DSS will respond to DEQ within 30 calendar days after receipt of the application, with a copy to VMRC, identifying the location of any shellfish growing areas that would have to be condemned. If DSS anticipates that, due to the complexity of a proposal or the scope of an evaluation, it will not be able to make a determination within 30 calendar days, it will, within 14 days of receipt, inform DEQ of the anticipated time required to further evaluate the application. Contact should be made with DSS if no response of any kind is received within 14 days.

### **VMRC Certification**

If DSS responds that no reclassification would be necessary as a result of the discharge, no VMRC input is required and the permit can be processed.

If DSS identifies one or more shellfish growing areas that would have to be condemned, VMRC, within 21 calendar days of notice from DSS, will provide relevant information and a certification of the effect that the proposed condemnation will have on shellfish in the areas identified for condemnation by DSS. VMRC will provide its certifications to DEQ by means of a standard form, which is provided with the DEQ transmittal letter to VMRC in Attachment B. (Note: the Virginia Institute of Marine Science may at VMRC's request also certify whether the condemnation will have any effect on shellfish use.)

Alternatively, VMRC may respond that more information is needed and that it either intends to or does not intend to perform a field evaluation. If VMRC notifies DEQ that more information is needed and that it intends to perform a field evaluation, VMRC will certify within 30 calendar days after receipt of the notice that the condemnation will or will not have an effect on shellfish use. If VMRC certifies that more information is needed and that it does not intend to perform a field evaluation, the region will have to contact the permit applicant to allow the applicant the option of obtaining a field evaluation. This evaluation must be performed according to guidance that will be provided by VMRC. Results from the evaluation must be submitted to DEQ and VMRC. Based on the evaluation results, VMRC will certify whether the project will have any effect on the shellfish within 14 days of receipt of the evaluation. If the applicant chooses not to obtain a field evaluation a hearing must be held as discussed further below.

If a registration statement for a "Domestic Sewage Discharges of Less Than or Equal To 1,000 Gallons Per Day" general permit is received for which DSS proposes a new condemnation in waters for which VMRC indicates a shellfish resource, coverage under the general permit should not be granted because the discharge does not meet the requirements of the general permit. The applicant can instead pursue coverage under an individual permit in which case the procedures described here will apply.

### **Public Hearings**

If DSS does not identify shellfish growing areas that would have to be condemned as a result of the proposed discharge, or if DSS identifies shellfish growing areas that would have to be condemned but VMRC certifies that the condemnation will have no effect on shellfish, DEQ will not be required to conduct a public hearing, and the permit can be processed.

If DSS identifies shellfish growing areas that would have to be condemned as a result of the proposed discharge and VMRC certifies that the condemnation will have an effect on shellfish use, if DSS identifies shellfish growing areas that would have to be condemned and VMRC certifies that more information is needed and no field evaluation is conducted by VMRC or another party, or if there is significant public interest based on public participation guidelines, a public hearing must be held before the permit can be processed.

If the applicant chooses to modify the project and amend the permit application so as to avoid a new condemnation (see below), it will not be necessary to hold a hearing.

All public hearings will be held in accordance with the Board's Public and Formal Hearing Procedures (9 VAC 25-230-10 *et seq.*), the Virginia Water Quality Standards (9 VAC 25-260-270), and the Board's Policy for the Protection of Water Quality in Virginia's Shellfish Growing Waters (9 VAC 25-370-10 *et seq.*). The public hearing required by 9 VAC 25-260-270 may be combined with any other hearing required by the Board's public participation guidelines or regulations necessary for processing the VPDES permit. At the hearing, the applicant and other persons may submit information and comment concerning the condemnation, the effect on shellfish use, and any other information that may impact a decision on permit issuance. All relevant information should be collected and summarized for the Board's consideration. The Board will make the final determination with regard to issuing or denying the permit.

### **Application Amendment and Additional Information**

If new shellfish areas would have to be condemned as a result of the proposed discharge and VMRC has indicated that commercial or recreational shellfish resources are present or could potentially be present, the staff should contact the permit applicant prior to a hearing and notify the applicant that a hearing will be required and that permit denial is a possibility, and determine if the applicant has an interest in modifying the project. If the applicant chooses to modify the project, the staff and the applicant can contact DSS to determine if any alternate treatment or discharge scenarios would avoid the necessity of a new condemnation. The applicant can submit an amendment to the VPDES permit application to alter the project in a manner to avoid a condemnation or an effect on shellfish use by, for example, relocation of the proposed discharge, installation of an alternative treatment system, or providing storage for increased wastewater holding time. Alternatively, the applicant can submit additional data for consideration by DEQ, DSS or VMRC. DEQ will provide copies of the amended application or additional data to DSS and VMRC for their evaluation pursuant to the procedures set out above. If the applicant chooses to pursue the permit application without making changes the Board will decide whether to issue or deny the permit after the public hearing. As always, the applicant has the option of challenging the Board decision in appeal.

Guidance Memo No. 07-2009  
VPDES Permit Applications for Discharges in Shellfish Growing Areas  
Attachment A

Transmittal Letter to DSS from DEQ

Date

Division of Shellfish Sanitation  
Virginia Department of Health  
109 Governor Street, Room 614B  
Richmond, VA 23219

RE: Issuance/ Modification/ Reissuance of VPDES Permit No. VA00

Dear Sir or Madam:

Enclosed is a copy of a VPDES permit application for your review. A copy has also been sent to the Virginia Marine Resources Commission. Please review this application and provide your comments within 14 calendar days to DEQ identifying the location of any shellfish growing areas that would have to be condemned pursuant to Va. Code § 28.2-807 (i.e., reclassified as restricted or prohibited as defined by the National Shellfish Sanitation Program) as a result of the proposed discharge of pollutants described in the application. Alternatively, you may respond to DEQ within 14 calendar days of receipt of the application that DSS intends to conduct a further evaluation of the proposed discharge site. If DSS intends to conduct a further evaluation, please provide your comments to DEQ within 30 calendar days after receipt of the application. In the event that DSS anticipates that, due to the complexity of a proposal or the scope of an evaluation, it will not be able to make a determination within 30 calendar days after receipt of the application, please, within 14 days of receipt, inform DEQ of the anticipated time required to further evaluate the application. These deadlines are specified in the agreement between the Director of DEQ and the Commissioner of the Virginia Department of Health to ensure that DEQ can process the permit in a timely manner.

Please also provide a copy of any correspondence relative to this application to the Virginia Marine Resources Commission at the following address:

Virginia Marine Resources Commission  
2600 Washington Avenue, 3<sup>rd</sup> Floor  
Newport News, VA 23607

If you have any questions, please do not hesitate to contact me at \_\_\_\_\_.

Sincerely,

Enclosure: VPDES Permit Application  
cc: Virginia Marine Resource Commission

Guidance Memo No. 07-2009  
VPDES Permit Applications for Discharges in Shellfish Growing Areas  
Attachment B

Transmittal Letter to VMRC from DEQ

Date

Virginia Marine Resources Commission  
2600 Washington Avenue, 3<sup>rd</sup> Floor  
Newport News, VA 23607

RE: Issuance/ Modification/ Reissuance of VPDES Permit No. VA00

Dear Sir or Madam:

Enclosed for your review is a copy of a VPDES permit application for a proposed discharge of pollutants from a point source to state waters adjacent to, or in near proximity to, shellfish growing areas. A copy of this application has also been sent to the Virginia Department of Health Division of Shellfish Sanitation (DSS), and DSS has been requested to copy VMRC on correspondence relative to this application.

Please review the application and DSS correspondence. If DSS notifies you that no condemnation of shellfish growing areas would be necessary as a result of the proposed discharge, then VMRC is not required to take any further action.

If DSS indicates in its correspondence that shellfish growing areas will have to be condemned (i.e., reclassified as restricted or prohibited as defined by the National Shellfish Sanitation Program) as a result of the proposed discharge, please fill out the attached certification form and send it to DEQ within 21 days of receipt of the DSS comments.

Alternatively, VMRC may respond to DEQ that more information is needed and that VMRC either intends to or does not intend to perform a field evaluation. If VMRC notifies DEQ that more information is needed and that it intends to perform a field evaluation, VMRC agrees to certify to DEQ within 30 calendar days after receipt of the notice that the condemnation will or will not have an effect on shellfish use now and in the foreseeable future. If VMRC certifies to DEQ that more information is needed and that it does not intend to perform a field evaluation, DEQ will contact the permit applicant to allow the applicant the option of obtaining a field evaluation of the areas proposed for condemnation. If VMRC receives a field evaluation from the applicant, please review the evaluation and fill out the attached certification form and send it to DEQ within 21 days of receipt of the evaluation.

These deadlines are specified in an agreement between the Director of DEQ and the Commissioner of VMRC to ensure that DEQ can process the permit in a timely manner. If you have any questions, please do not hesitate to contact me at \_\_\_\_\_.

Sincerely,

Enclosure: VPDES Permit Application

Guidance Memo No. 07-2009  
VPDES Permit Applications for Discharges in Shellfish Growing Areas  
Attachment B

<b>Virginia Marine Resources Commission Evaluation and Certification on the Effects of Proposed Shellfish Condemnation</b>
<b>VPDES Permit Number:</b> <b>Facility Name:</b> <b>Facility Location:</b>  <b>Description of the designated area:</b>
<b>Presence or Absence of Shellfish; Identification of Species; Results of Survey:</b>
<b>Commercial Harvest Rates:</b>
<b>Private Oyster Ground Leases/Public Ground Designations:</b>
<b>Physical Parameters:</b>
<b>In accordance with 9 VAC 25-260-270, MRC has reviewed the above information for the VPDES application referenced above, and DSS information on shellfish growing areas that will be condemned (i.e. reclassified as restricted or prohibited as defined by the National Shellfish Sanitation Program) if the VPDES permit is issued for this discharge, and concludes the proposed condemnation will have the following effects on the shellfish use now and in the foreseeable future:</b>
<b>Signed:</b> _____ <b>Title:</b> _____ <b>Date:</b> _____
<i>This certification is intended to provide factual information to DEQ required by 9 VAC 25-260-270. This is not a final determination or case decision under the Virginia Administrative Process Act applicable to the above-mentioned facility or VPDES permit application. The final decision to issue or deny the VPDES permit application is within the discretion of the State Water Control Board.</i>

**MEMORANDUM OF UNDERSTANDING AMONG THE VIRGINIA DEPARTMENT  
OF ENVIRONMENTAL QUALITY, THE VIRGINIA DEPARTMENT OF HEALTH  
DIVISION OF SHELLFISH SANITATION, AND THE VIRGINIA MARINE  
RESOURCES COMMISSION CONCERNING APPLICATIONS FOR VIRGINIA  
POLLUTANT DISCHARGE ELIMINATION SYSTEM PERMITS AUTHORIZING  
DISCHARGES TO SHELLFISH GROWING AREAS**

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The intent of this Memorandum of Understanding (MOU) is to describe the individual responsibilities as well as the coordination between the Virginia Department of Environmental Quality (DEQ), the Virginia Department of Health Division of Shellfish Sanitation (DSS) and the Virginia Marine Resources Commission (VMRC) in the determination of whether, pursuant to 9 VAC 25-260-270, the State Water Control Board (Board) must conduct public hearings concerning applications for Virginia Pollutant Discharge Elimination System (VPDES) permits authorizing discharges to, or in near proximity to, shellfish growing areas. All information collected pursuant to this MOU will be considered by the Board in its determination to issue or deny such VPDES permits.

This MOU is a statement of the intentions of the signatory agencies to coordinate their efforts in order to carry out their statutory duties and does not purport to modify the statutory duty of any signatory agency. This MOU is not a contract enforceable in any judicial or administrative forum and does not create any rights or duties of any party that is not a signatory.

**Applicable Law**

9 VAC 25-260-270 (Shellfish buffer zones; public hearing), provides:

Before acting on any proposal for a project that, while not contravening established numeric criteria for shellfish waters, would result in condemnation by the State Health Department of shellfish beds, the [State Water Control] board shall convene a public hearing to determine the socio-economic effect of the proposal. Such proposals include discharge of treated waste or proposals to otherwise alter the biological, chemical or physical properties of state waters. If the Marine Resources Commission or the Virginia Institute of Marine Science certifies that the project would have no effect on the shellfish use now and in the foreseeable future, the board may dispense with such hearing.

When the board finds that the proposed project will result in shellfish bed condemnation and if the condemnation will violate the general standard,<sup>1</sup> it shall disapprove the proposal.

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<sup>1</sup> The general standard is set out in 9VAC25-260-20.A which provides in part:

State waters, including wetlands, shall be free from substances attributable to sewage, industrial waste, or other waste in concentrations, amounts, or combinations which contravene established standards or interfere directly or indirectly with designated uses of such water or which are inimical or harmful to human, animal, plant, or aquatic life.

Designated uses are set out in 9VAC25-260-10.A which provides:

All state waters, including wetlands, are designated for the following uses: recreational uses, e.g., swimming and boating; the propagation and growth of a balanced, indigenous population of aquatic life,

In order to determine whether the Board must convene a public hearing required by 9 VAC 25-260-270, DEQ, DSS and VMRC agree that the following actions will take place in connection with the review of VPDES applications for proposed discharges of pollutants that may impact shellfish growing areas. The timelines set out in this MOU are designed to ensure that DEQ may process permits in a timely manner.

### **Distribution of VPDES Permit Application**

For proposed discharges to, or in near proximity to, shellfish growing areas, DEQ agrees to provide a copy of the VPDES permit application or registration statement containing information on the location and nature of the proposed discharge to DSS and VMRC for review and comment. DEQ will also provide notification to DSS and VMRC of the public comment period, and will provide a copy of the final permit, if issued, to DSS. Template transmittal letters from DEQ to DSS and VMRC are attached to this MOU as Attachments A and B.

### **DSS Identification of Condemned Growing Areas**

DSS agrees to respond to DEQ within 14 calendar days of receipt of the application, with a copy to VMRC, identifying the location of any shellfish growing areas that would have to be condemned pursuant to Va. Code § 28.2-807<sup>2</sup> as a result of the proposed discharge (i.e., reclassified as restricted or prohibited as defined by the National Shellfish Sanitation Program). Alternatively, DSS may respond to DEQ within 14 calendar days of receipt of the application that DSS intends to conduct a further evaluation of the proposed discharge site. If DSS intends to conduct a further evaluation, DSS agrees to respond to DEQ within 30 calendar days after receipt of the application, with a copy to VMRC, identifying the location of any shellfish growing areas that would have to be condemned pursuant to Va. Code § 28.2-807. DSS anticipates that, due to the complexity of a proposal or the scope of an evaluation, it will not be able to make a determination within 30 calendar days after receipt of some VPDES applications. In these cases, DSS will, within 14 days of receipt, inform DEQ of the anticipated time required to further evaluate the application.

### **VMRC Certification**

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including game fish, which might reasonably be expected to inhabit them; wildlife; and the production of edible and marketable natural resources, e.g., fish and shellfish.

<sup>2</sup> Code § 28.2-807 *Condemnation of polluted growing area; procedure*, provides:

If, after examination of the crustacea, finfish or shellfish in a growing area, or the bottom in or adjacent to such area, or the water over such area, or the sanitary or pollution conditions adjacent to or in near proximity to a growing area, the State Health Commissioner determines that the crustacea, finfish or shellfish are unfit for market, he shall, after notifying the Commissioner of Marine Resources, establish boundaries of the area in which the crustacea, finfish or shellfish are located or planted. This area shall be condemned and remain so until the Health Commissioner finds such crustacea, finfish or shellfish, or area, sanitary and not polluted. The Commissioner of Marine Resources, with instructions from the State Health Commissioner, shall erect markers or signs designating condemned areas. The necessary markers or signs shall be supplied to the Commissioner of Marine Resources by the State Health Commissioner.

If DSS responds that no reclassification would be necessary as a result of the discharge, VMRC will have no further duties.

If DSS identifies one or more shellfish growing areas that would have to be condemned, VMRC, within 21 calendar days of notice from DSS, will provide to DEQ relevant information and a certification of the effect that the proposed condemnation will have on shellfish use now and in the foreseeable future in the areas identified for condemnation by DSS. **The parties agree that “effect on shellfish use now and in the foreseeable future” means an immediate and continuing detrimental effect on commercial or recreational shellfish propagation, growth or harvesting.** VMRC agrees to provide its certifications to DEQ by means of a standard form, which is provided with the DEQ transmittal letter to VMRC in Attachment B to this MOU. (Note: the Virginia Institute of Marine Science, while not a party to this MOU, may at VMRC’s request also certify whether the condemnation will have any effect on shellfish use now or in the foreseeable future in accordance with these guidelines.)

Alternatively, VMRC may respond to DEQ that more information is needed and that it either intends to or does not intend to perform a field evaluation. If VMRC notifies DEQ that more information is needed and that it intends to perform a field evaluation, VMRC agrees to certify to DEQ within 30 calendar days after receipt of the notice that the condemnation will or will not have an effect on shellfish use now and in the foreseeable future. If VMRC certifies to DEQ that more information is needed and that it does not intend to perform a field evaluation, DEQ will contact the permit applicant to allow the applicant the option of obtaining a field evaluation of the areas proposed for condemnation. This evaluation shall be performed according to the guidance established by VMRC. Results from the evaluation will be submitted to DEQ and VMRC. Based on the evaluation results, VMRC will certify whether the project will have any effect on the shellfish use now and in the foreseeable future within 14 days of receipt of the evaluation.

### **Public Hearings**

If DSS does not identify shellfish growing areas that would have to be condemned as a result of the proposed discharge, the Board will not be required to conduct a public hearing.

If DSS identifies shellfish growing areas that would have to be condemned as a result of the proposed discharge and VMRC certifies that the condemnation will have no effect on shellfish use now and in the foreseeable future, the Board will not be required to conduct a public hearing.

If DSS identifies shellfish growing areas that would have to be condemned as a result of the proposed discharge and VMRC certifies that the condemnation will have an effect on shellfish use now and in the foreseeable future, the Board will be required to conduct a public hearing.

If DSS identifies shellfish growing areas that would have to be condemned as a result of the proposed discharge and VMRC certifies that more information is needed and no field evaluation is conducted by VMRC or another party, the Board will be required to conduct a public hearing.

This MOU does not limit the discretion of the Board to conduct a public hearing if there is significant public interest based on public participation guidelines. If requested by the public, the Board will conduct a public hearing. The Board may delay conducting a public hearing until

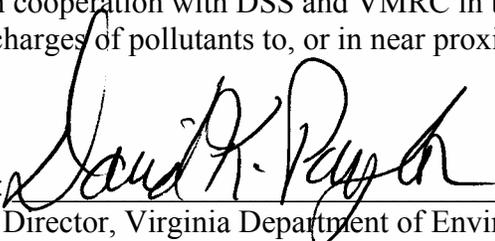
DSS or VMRC (or the applicant if applicable) provides the information required above. The Board will conduct all public hearings in accordance with the Board's Public and Formal Hearing Procedures (9 VAC 25-230-10 *et seq.*), the Virginia Water Quality Standards (9 VAC 25-260-270), and the Board's Policy for the Protection of Water Quality in Virginia's Shellfish Growing Waters (9 VAC 25-370-10 *et seq.*). The Board may combine the public hearing required by 9 VAC 25-260-270 with any other hearing required by the Board's public participation guidelines or regulations necessary for processing the VPDES permit. At the hearing, the applicant and other persons may submit information and comment concerning the condemnation, the effect on shellfish use now and in the foreseeable future, and any other information requested by the Board. All relevant information collected will be considered by the Board in its determination to issue or deny the VPDES permit.

**Application Amendment and Additional Information**

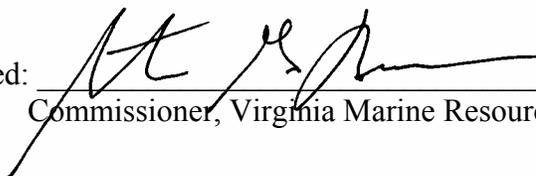
Nothing in this MOU shall preclude an applicant from submitting an amendment to the VPDES permit application to alter the project in a manner to avoid a condemnation or an effect on shellfish use now or in the foreseeable future by, for example, relocation of the proposed discharge, installation of an alternative treatment system, or redesign of the treatment works. Alternatively, the applicant may submit additional data for consideration by DEQ and DSS. DEQ will provide copies of the amended application or additional data to DSS and VMRC for their evaluation pursuant to the procedures set out above.

**Signatures**

Until otherwise modified or terminated, the undersigned, representing their respective agencies, agree that, while this is a non-binding MOU, the above described procedures will be used by DEQ in cooperation with DSS and VMRC in the review and evaluation of VPDES applications for discharges of pollutants to, or in near proximity to, shellfish growing areas.

Signed:  \_\_\_\_\_ Date: 1/25/2007  
Director, Virginia Department of Environmental Quality

Signed:  \_\_\_\_\_ Date: 02/28/2007  
Commissioner, Virginia Department of Health

Signed:  \_\_\_\_\_ Date: 2/23/07  
Commissioner, Virginia Marine Resources Commission

ATTACHMENT A  
Transmittal Letter to DSS from DEQ

Date

Division of Shellfish Sanitation  
Virginia Department of Health  
109 Governor Street, Room 614B  
Richmond, VA 23219

RE: Issuance/ Modification/ Reissuance of VPDES Permit No. VA00

Dear Sir or Madam:

Enclosed is a copy of a VPDES permit application for your review. A copy has also been sent to the Virginia Marine Resources Commission. Please review this application and provide your comments within 14 calendar days to DEQ identifying the location of any shellfish growing areas that would have to be condemned pursuant to Va. Code § 28.2-807 (i.e., reclassified as restricted or prohibited as defined by the National Shellfish Sanitation Program) as a result of the proposed discharge of pollutants described in the application. Alternatively, you may respond to DEQ within 14 calendar days of receipt of the application that DSS intends to conduct a further evaluation of the proposed discharge site. If DSS intends to conduct a further evaluation, please provide your comments to DEQ within 30 calendar days after receipt of the application. In the event that DSS anticipates that, due to the complexity of a proposal or the scope of an evaluation, it will not be able to make a determination within 30 calendar days after receipt of the application, please, within 14 days of receipt, inform DEQ of the anticipated time required to further evaluate the application. These deadlines are specified in the agreement between the Director of DEQ and the Commissioner of the Virginia Department of Health to ensure that DEQ can process the permit in a timely manner.

Please also provide a copy of any correspondence relative to this application to the Virginia Marine Resources Commission at the following address:

Virginia Marine Resources Commission  
2600 Washington Avenue, 3<sup>rd</sup> Floor  
Newport News, VA 23607

If you have any questions, please do not hesitate to contact me at \_\_\_\_\_.

Sincerely,

Enclosure: VPDES Permit Application  
cc: Virginia Marine Resource Commission

ATTACHMENT B  
Transmittal Letter to VMRC from DEQ

Date

Virginia Marine Resources Commission  
2600 Washington Avenue, 3<sup>rd</sup> Floor  
Newport News, VA 23607

RE: Issuance/ Modification/ Reissuance of VPDES Permit No. VA00

Dear Sir or Madam:

Enclosed for your review is a copy of a VPDES permit application for a proposed discharge of pollutants from a point source to state waters adjacent to, or in near proximity to, shellfish growing areas. A copy of this application has also been sent to the Virginia Department of Health Division of Shellfish Sanitation (DSS), and DSS has been requested to copy VMRC on correspondence relative to this application.

Please review the application and DSS correspondence. If DSS notifies you that no condemnation of shellfish growing areas would be necessary as a result of the proposed discharge, then VMRC is not required to take any further action.

If DSS indicates in its correspondence that shellfish growing areas will have to be condemned (i.e., reclassified as restricted or prohibited as defined by the National Shellfish Sanitation Program) as a result of the proposed discharge, please fill out the attached certification form and send it to DEQ within 21 days of receipt of the DSS comments.

Alternatively, VMRC may respond to DEQ that more information is needed and that VMRC either intends to or does not intend to perform a field evaluation. If VMRC notifies DEQ that more information is needed and that it intends to perform a field evaluation, VMRC agrees to certify to DEQ within 30 calendar days after receipt of the notice that the condemnation will or will not have an effect on shellfish use now and in the foreseeable future. If VMRC certifies to DEQ that more information is needed and that it does not intend to perform a field evaluation, DEQ will contact the permit applicant to allow the applicant the option of obtaining a field evaluation of the areas proposed for condemnation. If VMRC receives a field evaluation from the applicant, please review the evaluation and fill out the attached certification form and send it to DEQ within 21 days of receipt of the evaluation.

These deadlines are specified in an agreement between the Director of DEQ and the Commissioner of VMRC to ensure that DEQ can process the permit in a timely manner. If you have any questions, please do not hesitate to contact me at \_\_\_\_\_.

Sincerely,

Enclosure: VPDES Permit Application

**Virginia Marine Resources Commission**

**Evaluation and Certification on the Effects of Proposed Shellfish Condemnation**

**VPDES Permit Number:**

**Facility Name:**

**Facility Location:**

**Description of the designated area:**

**Presence or Absence of Shellfish; Identification of Species; Results of Survey:**

**Commercial Harvest Rates:**

**Private Oyster Ground Leases/Public Ground Designations:**

**Physical Parameters:**

**In accordance with 9 VAC 25-260-270, MRC has reviewed the above information for the VPDES application referenced above, and DSS information on shellfish growing areas that will be condemned (i.e. reclassified as restricted or prohibited as defined by the National Shellfish Sanitation Program) if the VPDES permit is issued for this discharge, and concludes the proposed condemnation will have the following effects on the shellfish use now and in the foreseeable future:**

**Signed:** \_\_\_\_\_  
**Title:** \_\_\_\_\_  
**Date:** \_\_\_\_\_

*This certification is intended to provide factual information to DEQ required by 9 VAC 25-260-270. This is not a final determination or case decision under the Virginia Administrative Process Act applicable to the above-mentioned facility or VPDES permit application. The final decision to issue or deny the VPDES permit application is within the discretion of the State Water Control Board.*

**Virginia Marine Resources Commission**  
**Protocol for Determination of Shellfish Use**

The following describes the protocol that shall be used by the Marine Resources Commission (MRC), or other party, to collect information to support MRC's certification to the Department of Environmental Quality (DEQ) whether a condemnation by the Department of Health Division of Shellfish Sanitation (DSS) will have an effect on shellfish use now and in the foreseeable future. "Effect on shellfish use now and in the foreseeable future" means an immediate and continuing detrimental effect on commercial or recreational shellfish propagation, growth or harvesting. This guidance is established in accordance with the Memorandum of Understanding among the DEQ, DSS, and the MRC regarding the determination of whether to conduct a public hearing concerning applications for Virginia Pollutant Discharge Elimination System (VPDES) permits authorizing discharges to shellfish growing areas.

**Data Collection**

The following data shall be collected and reviewed, for each proposed shellfish condemnation area:

- 1) Presence or absence of shellfish; Identification of species:

A determination of the presence or absence of shellfish and the identification of species shall be based upon data contained in the MRC Fall Shellfish Survey, visual observations by MRC personnel of harvesting or shellfish propagation activity, anecdotal reports of individuals familiar with the local area and its commercial or recreational use or potential, or specifically designed surveys. When anecdotal reports

represent the only available information for a specific site, the MRC will, when practicable, conduct a field survey of the site to verify the anecdotal reports. Except for the MRC Shellfish Survey, which targets discrete, active grow-out or harvested areas, other methods of characterizing species distributions are not quantitative. However, more qualitative determinations of the presence, absence or composition of species can provide critical supportive information to help determine the suitability or potential of a site, for commercial or recreational shellfish propagation, growth or harvesting. When designed surveys are used, sampling plans to determine wild shellfish resources will necessarily be site-specific, but they should include, at a minimum, the following components:

- a) A commercial fishing vessel, or appropriate research vessel, outfitted with harvesting or sampling gear similar to that used in the region for commercial purposes shall be used. Appropriate sampling gear include patent tong, hydraulic patent tong, hydraulic escalator dredge, or with quadrates, by hand, in intertidal habitats.
- b) Sampling shall be at randomly selected sites within the designated area. In certain areas, a stratified random sampling design may be required, if there is a significant change in bottom types or depth. The number of samples shall be sufficient to adequately describe the shellfish species and densities in the designated area, whether these distributions of species are mostly homogeneous or aggregated. The minimum number of collected samples will be based upon the relationship between the standard error of the mean

and the number of samples, by verifying, that the standard error remains relatively constant when additional samples are collected.

- c) The latitude and longitude of each sample shall be recorded.
- d) Salinity, bottom depth, bottom type, number of live clams and oysters, number of dead clams and oysters, number of other shellfish species, and shell length of live and dead shellfish (grouped by 5 mm categories) shall be recorded for each sample.
- e) When intertidal surveys are necessary, such sampling shall be by hand, and in a random nature. Samples shall be collected by excavating or counting live mollusks, by species, within a quadrat of at least 0.1 m<sup>2</sup>.

2) Commercial harvest rates:

The MRC Mandatory Commercial Harvest Reporting database shall be examined for evidence of commercial shellfish propagation, growth or harvesting within the designed site or within the water body containing the designated site. Total annual shellfish harvest, by species, for the water body containing the designated site for the prior three years will be listed. Additionally, average daily rates of shellfish harvest and the range of daily harvest rates will be calculated, when possible, for the designated site and the regional water body. The rates of shellfish harvest from the designated site will be compared to the range of harvest rates for the region. Harvest rates, at the designated site, that approximate those of the region will be indicative of an area that can support a viable commercial harvest.

In considering applications for VPDES permits for sites along the Seaside of Eastern Shore, the MRC Winter Dredge Aerial Survey database will be examined. The weekly or biweekly survey produces counts of commercial shellfish vessels, solely for areas of the Seaside of Eastern Shore. The presence of dredge vessels, within the designated site, shall be an indication of its commercial shellfish usage and will help to substantiate commercial harvest data that are not specific to the site under application but pertain to a broader, adjacent area.

3) Private Oyster Ground Leases/Public Ground Designations:

The MRC Oyster Ground Lease and Map database will be examined to determine the presence or absence, within the designated area, of private oyster ground leases, public ground designations, oyster/clam shell plants, oyster seed transplants, shellfish sanctuaries, riparian leases, non-commercial oyster gardening, and permitted aquaculture sites. This database also provides lease holder evidence of annual usage, since 1993, of oyster ground leases that typically include descriptions of cultch plantings, harvested quantities, shell turnings or cleanings, disease presence, and shellfish death rates. In many cases, this information would be reviewed in combination with the physical parameters (see below) or results from a designed survey to quantify the use of the designated area.

4) Physical Parameters

The range and average in salinity, for the designated site, will be determined by direct test or from historical records. When available, dissolved oxygen levels, water clarity, and current patterns will be recorded. Should physical and chemical characteristics of the designated area typify the range of tolerance for shellfish species,

the site may be designated as potentially suitable for aquaculture purposes. The presence of aquaculture facilities nearby the designated area may be indicative of the potential for aquaculture use. The MRC, when practicable, will verify this potential use through a visit to the aquaculture facility.

**Submission of Data and Information From Independent Surveys**

Should survey data or information that pertain to protocols 1), 2) or 4), defined above, be collected by an entity other than the Marine Resources Commission, any results of that survey should be submitted for consideration to:

Dr. James A. Wesson

Marine Resources Commission

2600 Washington Avenue, 3<sup>rd</sup> Floor

Newport News, Virginia 23607-4333

All data and information should be submitted in a Microsoft Office format (e.g. EXCEL, ACCESS, WORD).