

REPORT OF THE

**State Water
Commission**

**TO THE GOVERNOR AND
THE GENERAL ASSEMBLY OF VIRGINIA**



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Report of the
State Water Commission
to
The Governor and General Assembly of Virginia
Richmond, Virginia
1989

TO: Honorable Gerald L. Baliles, Governor,
and
the General Assembly of Virginia

I. INTRODUCTION

The State Water Commission is a legislatively mandated fifteen-member panel (Va. Code § 9-145.5 et seq.) which is to perform the following functions:

1. Study all aspects of water supply and allocation problems in the Commonwealth, whether these problems be of a quantitative or qualitative nature;
2. Coordinate the legislative recommendations of all other state entities having responsibilities with respect to water supply and allocation issues; and
3. Report annually its findings and recommendations to the Governor and the General Assembly.

During the course of the year the Commission experienced a change in its membership. The two citizen members, Mr. George W. Williams and Mr. Louis R. Jones who served the Commission ably for a number of years, were replaced by Dr. Sandra Batie and Mr. Aubrey Watts. The Commission also lost a legislative member when Senator Wiley Mitchell retired from the Virginia Senate. Senator Mitchell's service on the Commission was distinguished by his commitment to the development of a state water resources policy.

II. BACKGROUND

Virginia has been characterized as a "water rich" state, but unprecedented growth and the expanding number of competing interests have placed greater demands on Virginia water resources. In 1973 the General Assembly recognized the threat to Virginia's groundwater supply from large-scale industrial withdrawals in the southeast region of the state and enacted the Groundwater Act. For the first time state government played a significant role in the allocation of water resources. The Act declared as public policy:

"...that the right to reasonable control of all groundwater resources within this Commonwealth belongs to the public and that in order to conserve, protect and beneficially utilize the groundwater of this Commonwealth and to ensure the preservation of the public welfare, safety and health, it is essential that provisions be made for control of groundwater resources." (§ 62.1-44.84)

Under the law the State Water Control Board (SWCB) was authorized to establish administrative controls over groundwater use within those geographic areas which may be experiencing (i) a declining groundwater level or artesian pressure, (ii) an overdrawn groundwater supply, (iii) groundwater pollution or (iv) interference among well users. A landowner within such a designated area cannot initiate or expand his groundwater use without permission from the state in the form of a permit.

Although the legislatures authorized a measure of state control over groundwater use, the General Assembly has been reluctant to assert state control over the allocation of Virginia's surface waters. Because of the well-established doctrine of riparian rights, it has been left to the courts to define and enforce water rights.

The State Water Commission has, over the years, examined various approaches for resolving water supply and allocation problems, including the imposition of an administrative statewide permit system and the adoption of a special decision-making process for resolving questions of interbasin transfer. While many of the Commission's recommendations have resulted in the expansion of the state water supply planning activities, efforts to develop a state water supply and allocation policy have been largely unsuccessful. This year the Commission approached the water supply and allocation issue from a somewhat different perspective. Rather than attempting to formulate a comprehensive water management policy, the Commission chose to look at the narrower question of how to effectively protect Virginia instream flow levels while at the same time satisfying the needs of offstream and instream users.

III. COMMITTEE DELIBERATIONS

A. Lake Gaston and Water Allocation

The Commission began its deliberations with a two-day meeting in South Hill, Virginia. The purpose of the meeting was to review the history of the Commission since its creation in 1977 (see Appendix A) and discuss the Lake Gaston water allocation dispute. The Commission spent the first day touring Lake Gaston, Buggs Island and the Corps of Engineers' facilities at Kerr Reservoir so that Commission members could familiarize themselves with mechanics of the proposed transfer of water to Virginia Beach. The second day was devoted to examination of the issues posed by such a transfer and the various implications for state policy resulting from a federal circuit court approved allocation procedure. If authorized by the federal courts, an 84-mile pipeline would be built which would cross seven localities and carry up to 60 million gallons of water daily from the Pea Hill Creek section of Lake Gaston in Brunswick County to Hampton Roads. The Commission invited the parties involved in the case to present their views, not specifically on the merits of their position, but rather on the broader question of how future water supply and allocation disputes might be resolved without a court-imposed settlement.

Col. J. J. Thomas, District Engineer, Norfolk District, U.S. Army Corps of Engineers, briefed the Commission on his agency's perspective on water supply development. According to Col. Thomas, it is the Corps'

policy that water supply development is and should be a local and state responsibility. Occasionally, under specific congressional authorization, the Corps has conducted feasibility studies of certain water supply projects. This was the case in 1984 when the Norfolk District published a three-volume report entitled "Water Supply Study, Hampton Roads, Virginia."

The Corps has considerable interest in water supply projects through its regulatory permit program. Under Section 404 of the Clean Water Act the Corps is authorized to issue permits for most water projects. A 404 permit is required for almost any discharge of dredged or fill material into the waters of the United States. The term "waters of the United States" has been broadened to cover virtually all natural standing or flowing bodies of water as well as many manmade ones. Also covered in this term are wetland areas which may or may not be next to these bodies of water. For reservoirs this interpretation means that a dam which crosses a body of water is considered to be a "discharge" of fill material and therefore requires a Corps permit before it can be constructed. Whether or not a 404 permit is required for water intake structures depends on whether construction will require any discharge of fill material (i.e., foundation bedding or backfill). In tidal areas, and the larger freshwater rivers and streams which are defined as "navigable waters," a permit is required for all structures, regardless of any discharge of fill material. Upon determination that a Corps permit is required, the Corps then decides whether an environmental impact statement (EIS) is necessary. The Natural Environmental Policy Act (NEPA) requires an EIS whenever a project will have significant environmental impact. The most common reason why dam and reservoir permits require an EIS is the potential impact on the wetlands.

While most of the Corps permit decisions do not result in court cases, those few which do usually take a considerable amount of time. A state policy on interbasin transfer and ownership of water sources could alleviate the situation. For example the Lake Gaston case is one in which those Virginia and North Carolina counties surrounding the water feel that they own the water and that Virginia Beach has no right to it, at least without compensation. The Corps, however, does not and cannot allocate water and its permits do not convey property rights. Moreover, Congress has made it clear that water allocation is a state responsibility and not a function of the Corps permit program. Specifically 33 USCS § 1351(g) states, "It is the policy of Congress that the authority of each state to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this Act." From the Corps' point of view the most appropriate state agency to allocate water in Virginia would be the SWCB.

One aspect of water allocation is interbasin transfer. This practice has gone on in Virginia for decades, although it continues to be a source of contention in the Corps' permit program. For instance, during the permit process for James City County's Ware Creek Reservoir, the Environmental Protection Agency (EPA) and the U.S. Fish and Wildlife Service recommended building a pipeline to the James River north of Richmond. Both the City of Richmond and the Richmond Regional Planning District Commission asserted that this would be an illegal interbasin transfer of water. While the Corps later discounted this alternative, the

EPA stated its intention to veto the Corps' permit for the dam, based in part on what its staff saw as "preferable" alternatives such as this pipeline above Richmond. The impasse could have been avoided by a clear state policy on what constitutes a legal interbasin transfer. Through such new or amended policies, the permit process for water supply could operate in a more efficient, expeditious and consistent manner.

The Commission also heard from Mr. Pat McSweeney, an attorney who has represented a variety of clients in cases involving water supply and allocations including the Lake Gaston transfer and Ware's Creek case. Mr. McSweeney takes a somewhat different position than Col. Thomas on the question of ownership of water. His clients' real concern in the Roanoke Basin case is not that they own the water and someone is "stealing" it, but that "the water belongs where nature put it unless there is an overwhelming demonstration that the water should go elsewhere." He characterized the issue as a conflict between the consumptive use of water and the protection of instream needs. Until recently little consideration had been given toward establishing instream flow levels as an integral component of a comprehensive water policy. Instead, the tendency had been to think of water in a stream, aquifer or reservoir as being available for municipal consumption "down to the last drop." This is no longer considered a reasonable approach because of the recognition of the societal, economic and other interests related to instream needs. The state has begun to weigh consumptive uses against instream uses, rather than permitting diversion of water from one basin or sub-basin to another purely on historical bases.

The federal government, Mr. McSweeney continued, also shares responsibility for the confusion, for it has never articulated a clear, comprehensive policy. Because of the federal presence through the various permit programs, he, unlike Col. Thomas, sees the federal role as a significant concern in water resource planning. The federal role was institutionalized when the Supreme Court ruled that the state's right to allocate or control the distribution or use of waters was overridden by the federal interest, both through the commerce clause and the right to control impediments to navigation. The result is the "piecemeal" development of federal programs and policies which have a major effect on water resource planning which has, never been done in a comprehensive manner, e.g., EPA's veto of the proposed Ware Creek Reservoir. This decision was not only based on the question of available alternatives but on an EPA policy which says that any substantial loss of wetlands is unacceptable and cannot be mitigated. According to Mr. McSweeney, this wetlands policy, for all intent and purposes, will end reservoir development in the eastern United States.

One area where the state can and should play a role, Mr. McSweeney pointed out, is the development of a current and reliable water resources data base. Such information should be used to identify and forecast the timing, duration, and the intensity of potential water emergencies and shortages. This will enable both municipalities and industries to

anticipate such conditions and develop appropriate responses. The state should also assert a greater role in the management of its water resources which, in the absence of a clear state policy, has been assumed by the federal government. Any policy which is implemented should be flexible enough to reflect local conditions rather than imposing a uniform statewide permit system for water allocation. Before significant changes are made in the current water allocation system the state should (i) formulate policy statements which are based on clearly stated assumptions and established priorities and (ii) develop a more adequate data base. Mr. McSweeney concluded that the General Assembly should make the "value choices," such as whether to protect fisheries or recreational uses, and at what level. The actual allocation, presumably in times of scarcity, would then be overseen by the current statutorily authorized three-judge panel.

The City of Virginia Beach's perspective regarding water allocation and specifically interbasin transfer was presented by Mr. Tom Leahy, city water resources engineer and manager of the Lake Gaston project, and Mr. Jim Ryan, an attorney representing the city in the Lake Gaston case. Mr. Leahy discussed the historical circumstances which led the city to seek additional water supplies in attempt to meet its needs through the year 2030. The land in Hampton Roads, because of its flat terrain and poor drainage, contains few reservoir sites to meet the growing demand for water. As early as 1970 the Southeast Planning District Commission projected a water shortage by the end of the decade. The localities responded to this potential threat by forming the Southeastern Water Authority of Virginia (later to become the Southeast Public Service Authority) which studied a number of alternatives, and in 1975 recommended Lake Gaston as the water source to meet future demand. In 1976, at the direction of Congress, the Corps began a nine-year study of water supply for the region. A year later the area experienced a drought. In response, for the first time Norfolk and Virginia Beach began to restrict water use. Conservation ordinances were enacted by Virginia Beach requiring that all new plumbing, or retrofitted plumbing, use water saving devices.

By 1978 the Corps had completed its preliminary supply study and after considering 36 alternatives recommended the Lake Gaston option. Initially Chesapeake, Virginia Beach and Suffolk did not support the Corps preliminary recommendation and began to look at other alternatives, emphasizing first those options available within their own jurisdictions. In 1980 a second more serious drought struck the area. Norfolk and Portsmouth's water systems were stressed. Portsmouth, Chesapeake, and Suffolk restricted water. Norfolk and Virginia Beach began to ration water. The water situation become so critical that Virginia Beach drilled five emergency wells.

After five years of study, in 1982 Virginia Beach selected Lake Gaston as the most feasible water supply option. The following year the city began negotiations with North Carolina and, at the same time, applied to the Corps for a permit to withdraw water from the lake. The project was endorsed by the Governor and various state and federal agencies but opposed by the State of North Carolina. In 1984 the Corps issued the Lake Gaston permit, which was quickly followed by the filing of the initial lawsuit. With the issuance of the permit Virginia Beach initiated an engineering study for the withdrawal project.

By 1985 Suffolk and Chesapeake began having problems with their water systems. Suffolk's water system had a much lower safe yield than planned and Chesapeake's water became unsuitable for drinking because of salt water intrusion. Virginia Beach also began experiencing groundwater problems as wells failed because of low water levels and intrusion. To remedy this situation the city embarked upon a \$20 million project to provide connections to a central water supply system.

Drought conditions in 1986 led all five Hampton Roads localities to curtail usage. The subsequent two years have been characterized by the acquisition of property along the pipeline route, completion of the preliminary engineering assessment and the development of the final engineering plans.

Mr. Leahy emphasized the time and expense the city has invested in attempting to resolve its water supply problems. The city has spent \$3 million in attempting to select the most cost-effective and least environmentally damaging option from among twenty-four alternatives. Because of the lack of drainage basin and the expense of developing "high tech" or "unorthodox solutions," such as desalination, the only viable option was to bring water from other regions into Virginia Beach. Lake Gaston was selected rather than the James River, Lake Genito, or the Chowan River because it represented the option with the smallest environmental impact.

Questions have been raised as to the effect on the flow of the Roanoke River from such a transfer. The average yearly flow of the river is 5.2 billion gallons per day (BGD), and a minimum average yearly flow of 2.1 BGD. According to U.S. Geological Survey data the current amount of water supplied from the river for industrial, commercial, municipal and domestic use totaled 600 million gallons per day (MGD) for Virginia and 570 MGD for North Carolina. The proposed transfer of 60 MGD for Virginia Beach would represent about 1.2% of the average flow and approximately 3-4% of the minimum yearly flow. While the costs and constitutional/legal issues are significant, the City of Virginia Beach has taken the position that Lake Gaston is the most appropriate alternative in meeting Hampton Roads' need for additional water supply.

Mr. Ryan highlighted some of the legal issues and discussed the procedural aspects of the Lake Gaston case. Virginia Beach filed a permit application with the Corps to implement the project in 1983 and received a permit from the Norfolk District in January 1984. Litigation ensued immediately with a filing by Virginia Beach and Norfolk for a declaration that the permit was valid. This was followed several days later by a suit in the Eastern District of North Carolina on behalf of the State of North Carolina, and that litigation is still pending. On July 7, 1987, U. S. District Judge Britt of the Eastern District issued a decision on the 40 issues involved in the complaints of the State of North Carolina and the Roanoke River Basin Association. Fifteen issues were waived in argument. Of the remaining 25, 23 were decided by Judge Britt in favor of Virginia Beach. The two issues which remained unresolved and which were sent back to the Corps for reconsideration are (1) the effects on striped bass below the Roanoke Rapids Dam and (2) the extent of Virginia Beach's water needs. On June 6, 1988, the Corps issued its supplemental environmental assessment which indicated there was no effect on the striped bass and that the water is needed in the quantity authorized by the permit. The record, after public participation and circulation of the supplemental environmental

assessment, was closed on August 8, 1988. It is expected that the District Engineer will make a final decision within six weeks which will then be forwarded to Judge Britt for the final ruling.

With regard to whether the situation could have been resolved more expediently had there existed specific state statutes authorizing interbasin transfer, Mr. Ryan suggested that such legislation was neither needed or helpful and only duplicative; Virginia Beach, in his opinion, already had the authority to develop the project. Riparian rights would not be affected since the City of Virginia Beach has received approval from Virginia Power and the federal government (the riparian owners) to withdraw water from Lake Gaston and Kerr Reservoir respectively. He contended downstream riparians would not be affected by the small withdrawal. Any state legislation would only duplicate existing federal regulatory requirements. The review of the project by the court and the Corps (which has been termed a "public interest review") included the assessment of the following issues:

1. The relative extent of the public and private need for such a project;
2. Whether unresolved conflicts exist, as to resource use and, where conflicts do exist, the practicability of using alternative locations and methods of accomplishing the objectives of the project; and
3. The extent and permanence of the beneficial and/or detrimental effects of the proposed project on the public and private uses to which the area is suited.

In addition, all factors which may be relevant to the proposal must be considered, including conservation, economics, aesthetics, general environmental concerns, wetlands, cultural values, fish and wildlife values, flood hazards, land use, navigation, shore erosion, water supply and conservation, water quality, and the needs and welfare of the people. It is Mr. Ryan's opinion that the extensive review performed by the Corps as part of its permit-issuing authority satisfies the public interest and concern which might be addressed under state statutory authority.

B. Instream Flow Policy

Instream flow refers to the amount of water left flowing in a stream to satisfy such values as fish and wildlife, recreation, aesthetics, navigation, waste assimilation, and hydroelectric power. The Commission sought to develop an instream flow policy which would protect Virginia rivers and streams while recognizing the needs of both instream and offstream users. The Commission was assisted in its review of the various policy options by the Institute for Environmental Negotiation of the University of Virginia. Dr. Rich Collins, Director of the Institute, convened a panel of 24 persons representing such interests as land development, real estate, hydropower, recreation, environment, farming, and local, state and the federal government. The purpose of the advisory group was to agree "on the role the Commonwealth should take in order to further define and articulate the instream values to be protected in Virginia's streams, rivers, and other water bodies." The panel deliberated for two months and reported its findings and recommendations to a joint meeting of the State Water Control Board and the State Water Commission on December 13-14, 1988, in Williamsburg, Virginia.

1. Advisory Group's Recommendations On Instream Flow

The joint meeting began with testimony from Rich Collins, who described the basic principles formulated by the advisory group. He described a six-part strategy to protect instream values (see Appendix B for Concept Paper).

Part I - Beneficial Use Statement

The most important and fundamental principle is that instream values such as navigation, protection of fish and wildlife, and recreation are as important as such offstream uses as agricultural irrigation or commercial/industrial uses. These instream values deserve equal consideration in the allocation of scarce water supplies as those offstream uses which have been traditionally protected under the riparian doctrine. The State should assert, by statute, the legitimacy of both offstream and instream values.

Part II - Creation of a Virginia Water Quality Permit

A concurrent state permit requirement should be established statutorily for those water activities requiring a federal 401 permit. This would not expand the current procedure or create a new administrative process but would allow the State to play a role in the management of its waters equal to that of the federal government. The strengthened State control will indicate to state agencies, such as the SWCB, the importance placed on the protection of instream flow beyond simply the assimilation of waste. While it may not add to the authority of the SWCB, since it may already have been delegated such authority under federal law, it does clarify the state legislature's emphasis on protecting a range of instream values. Moreover, a state permit requirement would give Virginia a higher profile in the regulatory process and would bring those state agencies with jurisdiction over water use into a cooperative relationship. Ultimately, the new requirement would enable both local and state government to address emerging water supply issues and would reduce cumbersome, conflicting, and duplicative processes.

Part III - Inventory

The State should build upon previous efforts of the State Water Commission to improve water supply planning by performing an inventory of Virginia's water resources to determine the various qualities and uses of each river. For instance, one river might exhibit special scenic qualities, another might have a productive fishery, and a third might be characterized by low flow conditions where allocation problems might be expected. This type of information would be useful for water supply planning purposes and would enable state agencies to better understand the dynamics of Virginia's rivers and streams.

Part IV - Initiation of Surface
Water Management Areas

To protect instream flow levels without developing an entirely new institutional structure that would be unfamiliar to those responsible for enforcement, the advisory group sought to adopt existing procedures which have proven to be effective, e.g., establishing surface water management areas, a concept similar to that of the existing groundwater management areas. The approach is not to establish a statewide permit system but to acknowledge both the differing values of the various rivers and streams and the varying stream flow conditions. This would mean the creation of districts, where they are appropriate, based on certain criteria. Once an area is created and after a public review process, instream thresholds would be established. When water fell below the specified level a procedure would be triggered for managing the withdrawal of water for both instream and offstream users during periods defined as low flow.

The management scheme would be limited in time, occurring only during these low flow conditions. This would result in a modest change in the riparian doctrine in as much as the SWCB, during the low flow period, would attempt to have the users voluntarily agree on a pattern of use. In the absence of voluntary cutbacks the SWCB would be authorized to allocate among users by stipulating a level of withdrawal which would protect instream and offstream values.

Part V - Intervention of Commonwealth
in Surface Water Disputes

Under Virginia's doctrine of riparian rights, conflicts among water users are resolved by the courts, with judges allocating water use on the basis of a lawsuit. Because the public interest in protecting instream values should be represented in such lawsuits and because there is a question as to whether the Attorney General currently has standing in a lawsuit between two riparian owners, the state's authority to intervene on behalf of the citizens of Virginia should be made clear and authorized by statute.

Part VI - Exemption to Reporting
Requirement of Surface Water

The unpredictability and variability in rainfall and the resulting stream flow, require that certain data be available. Without such information it is difficult to determine the severity of a problem or how various property rights might be affected. A change in reporting the use of surface water could remedy these problems. Agricultural crop irrigators should be required to report the amounts of their withdrawals when such withdrawals exceed one million gallons a day in any single month.

2. Impact of Panel's Recommendations

In an effort to determine the potential impact of these measures on Virginia's existing water management system, the Commission sought the testimony of Dr. William Cox, professor of civil engineering at VPI-SU. Dr. Cox, who has served as a consultant to the Commission on water management issues, reviewed the advisory group's proposals. With respect to the beneficial use statement to include instream values, Dr. Cox noted that this expansion would not require any new administrative measures, programs or activities. In that sense it is compatible with existing water management institutions. This does not mean, however, that such a change is not significant. Expanding the range of values to be considered in the decision-making process can have major effects even though the processes remain unchanged. While the importance of considering instream values has always been implied, it has been left unstated. An explicit statement in the statute would provide a measure of clarification but would not be a radical departure in current procedures.

The creation of a Virginia water quality permit is essentially formalizing what is now occurring. Through the 401 certification process the State does have the authority to veto certain permits which involve the discharge of materials into State waters. This proposal makes it clear that in the certification process the State may consider instream values other than the assimilation capacity of a particular body of water to handle wastewater.

While Dr. Cox sees low flow conditions as isolated occurrences and not statewide problems, others see potential low flow conditions as more extensive. Because of such disagreement the development of an inventory would be useful in documenting those areas where potential conflicts over water might occur. A related proposal would require the collection and reporting of agricultural irrigation data. Both of these data gathering efforts are important for water supply planning purposes but neither would disrupt the current management framework.

Perhaps the proposal which represents the most significant change in current management systems is the establishment of surface water management areas. This measure would replace the riparian doctrine within designated management areas. Dr. Cox suggested that any proposed legislation contain language specifying that the limitations placed on the riparian doctrine are in force only in designated management areas, since the simultaneous operation of dual systems (permits vs. riparian rights), both attempting to achieve the same goal, is not a desirable situation. But with the adoption of the management area approach the riparian doctrine would not be replaced on a statewide basis, rather only in instances of demonstrated need. This feature makes it less disruptive and more desirable than several prior proposals which authorized a statewide permit program.

In his testimony Dr. Cox did raise the issue of how this new management approach might affect interbasin transfer. He envisioned a sequence of events which might occur in response to a proposal for interbasin transfer. If the area from which the water was to be transferred was not within a designated management area, the opponents of the transfer might initiate proceedings to have it so designated as a strategy to avoid the transfer. Conversely, the designation of such an area would not automatically foreclose the possibility of such a transfer. Since the designation of a management area will be based on a scientific assessment of water availability, the assessment may identify a surplus supply which could be transferred without affecting the flow conditions or causing conflicts among the offstream users.

On the question of state representation in court, Dr. Cox acknowledged that to some extent state agencies do have a right to go to court as representatives of the people. In some instances under existing procedures the agency can become a party in a matter before the court as well as a friend of the court. Therefore, this measure does not represent any significant departure from the role currently played by state agencies. Of all the measures, Dr. Cox concluded, the surface water management areas proposal represents a significant departure from the existing management system while the others are basically compatible and do not change the current decision-making process.

3. Water Management in the Eastern States

Although the proposals before the Commission would represent a change in the water management system in Virginia, the Commission received testimony which indicated many of the states east of the Mississippi River have begun to move away from a water allocation system based on the riparian doctrine. Mr. Jerry Sherk, a trial attorney with the Natural Resources Division of the United States Department of Justice who has written extensively on eastern water law, testified before the Commission on the trends in water management among the eastern states of the United States. He noted that beginning in the mid 1970's there emerged a growing interest in moving away from the riparian doctrine. This led, in 1983, to the convening of a conference by the American Society of Civil Engineers to evaluate various alternatives for managing water supplies. The specific question of managing water supplies while still providing some certainty of future supplies under the riparian system was raised. A year later the American Water Resources Association sponsored a conference which also examined the issues that states confront when they move from a riparian doctrine to some other management institution. Those attending the conference agreed that the riparian doctrine needed to be modified, but they did not determine which changes should be implemented or how to minimize the impact of those changes on existing property rights.

That same year (1984) the American Bar Association and the University of Baltimore sponsored a workshop on eastern water law. The participants looked at four issues:

1. How do you preserve riparian rights?
2. Is there a threshold use level?

3. What, if any water uses should have preference?
4. Since under common law domestic municipal water supplies have a priority, are there other uses which should also have a priority?
5. When does restriction of a riparians right to use water become a "taking"?

With respect to the last issue, Mr. Sherk noted that the courts have twice ruled that riparian rights can be restricted in the same way that a particular land use can be restricted under a zoning provision: it is not a "taking" unless the restriction is so extreme that there is no "viable" use.

Currently, sixteen of the twenty-six eastern states have moved away from the riparian doctrine. With respect to minimum instream flow requirements, seven have addressed the issue by statute (Connecticut, Florida, Indiana, Massachusetts, Mississippi, New Jersey, and Wisconsin). The preferred legislative approach authorizes an executive agency to establish threshold flow levels. The statutes authorizing such a policy set out varying methods, either establishing a specific method (i.e. 7Q10, Tennant Method) to be applied to a river, or the preferred approach of defining a list of impacts to be avoided or benefits to be achieved or both. Florida used the latter approach when it gave the various water management districts authority to develop such criteria. In Mississippi, the Commission on Natural Resources was given such authority. The West Virginia Water Resources Board has authority to establish a minimum flow which is defined as the "natural stream flow." South Carolina has a statutory mandate to prevent withdrawals that would be harmful to water resources; however, the South Carolina General Assembly recognizes that future legislation will be needed to define drought flows and to require an assessment of the impacts of interbasin transfers.

Similar approaches have been undertaken under more general statutory authority in a number of other eastern states. In states such as Maine, Michigan, Pennsylvania and Wisconsin minimum flow requirements have been established by either regulation or executive order. Ohio recently enacted instream flow legislation in part to fulfill its commitments under the Great Lakes Charter. Delaware, in response to drought conditions, has instituted an instream flow policy which requires an upstream reservoir to release a specific quantity of water in order to maintain downstream flow. New York, New Jersey and Pennsylvania have adopted similar provisions.

Upcoming state legislative sessions are expected to continue to consider measures to protect instream flows. Maine, Illinois, New Hampshire and Indiana will probably consider legislation which requires permits for uses above a

certain withdrawal level. Mr. Sherk concluded that state action in the management of water supplies is based on the realization that the riparian doctrine is not an effective way to allocate water supply.

IV. FINDINGS AND RECOMMENDATIONS

Virginia's system of water or stream flow allocation is guided by the common law doctrine of riparian rights, which gives those individuals whose property adjoins a watercourse the right of reasonable use of the water. By allowing reasonable use by every riparian owner there is no assurance that adequate consideration and protection will be given to instream uses during the water allocation process. Faced with the prospect of increased conflict over water allocation and use, the Commission recognized the need to develop institutional alternatives which provide a timely resolution in a manner which protects the public interest while equitable to those most directly affected.

The Commission sought to formulate an instream flow policy which:

1. Would not significantly disrupt the current system, preserving, to the extent feasible, the riparian doctrine;
2. Asserts the public interest in maintaining water quality and avoiding long-term damage to aquatic life;
3. Ensures that a sufficient supply of water is available for a variety of beneficial uses, especially during times of scarcity or under drought conditions ("sharing of pain");
4. Establishes priorities for types of water uses;
5. Establishes an appropriate balance between consumption and conservation.

The Commission finds that the concept paper offered by the instream flow advisory group reflects these principles and represents a balanced approach for the protection of important instream values.

The Commission has attempted to craft its legislative proposals so as to provide the statutory authority for protecting Virginia's rivers and streams. While the Commission acknowledges that its instream flow proposals do not constitute a comprehensive water policy they do provide a foundation upon which such a policy can be developed. Therefore, the Commission recommends the following:

Recommendation 1: That the 1989 Session of the General Assembly enact legislation (HB 1837, 1838, 1839, 1840, 1841) to protect the instream flow needs of Virginia's waters (Appendix C).

House Bill No. 1837 - Beneficial Uses of Water (Part I)

This bill amends the state water policy by redefining the beneficial use of state water to include instream uses such as the protection of fish and wildlife habitat, navigation, assimilation capacity, recreation, and cultural and aesthetic values. Public water supply is specified as a domestic use, and there is a requirement that domestic and existing uses be considered the highest priority offstream uses. The legislation recognizes the relationship between water quality and water quantity and asserts that it is the intent of the Commonwealth, to the extent practicable, to maintain flows so as to protect instream beneficial uses.

House Bill No. 1838 - State Intervention in Surface Water Disputes (Part V)

This bill would give the State Water Control Board the authority to intervene as an interested party in civil actions involving the withdrawal of surface water. This authority will enable the SWCB to represent the public's interest in ensuring that sufficient water flow exists in a stream or river.

House Bill No. 1839 - Virginia Water Protection Permit (Part II)

This bill seeks to prevent future problems by creating a Virginia water quality permit which will be required for any activity requiring Section 401 certification for federal purposes. A permit will be approved for a proposed activity only if it is consistent with the provisions of the Clean Water Act and if instream beneficial uses will be protected. No permit will be required for any activity which received Section 401 certification before the effective date of regulations governing the Virginia water quality permit, or for any withdrawal which was begun prior to July 1, 1989. The legislation also requires that the SWCB, prior to issuing a permit, consult with those state agencies which have regulatory responsibilities in water related matters.

House Bill No. 1840 - Registration For the Withdrawal of Water (Part VI)

In the past the voluntary reporting of information on the amount of water being withdrawn by those who irrigate their crops has been unsuccessful. Such data is important for water supply planning purposes. This bill would require annual reporting of agricultural water use exceeding 1 million gallons during any single month.

House Bill No. 1841 - Establishment of Surface Water Management Areas (Part IV)

Where HB 1839 attempts through a new state withdrawal permit to prevent problems in the future, this bill applies to those areas where problems are already present among existing users. The bill, which is patterned after the Groundwater Act, creates a regulatory program to designate surface water management areas where drought or low flow conditions might threaten instream uses. All nonexempt withdrawers in a designated management area will be required to obtain a surface water management permit. Permits will not be

required for (i) withdrawals for nonconsumptive uses and wastewater systems, (ii) withdrawals of less than 300,000 gallons during any month or (iii) local government withdrawals which were in existence or had a 401 permit on July 1, 1989, provided that the local government has a water conservation program approved by the SWCB. The legislation describes what should be included in such a conservation program. A permit will be required of those local governments which increase their daily withdrawals and the maximum daily withdrawals made before July 1, 1989, or which exceed their 401 certification levels.

Voluntary agreements among withdrawers in management areas are encouraged, and where they met and continue to meet the purposes, intent and requirements of the legislation, approved agreements would substitute for permits. The Commission believes that approval by the SWCB is important to protect the public interest and prevent large riparian users from entering agreements which would significantly affect the rights of other instream or offstream users.

The legislation details the process for designation of a management area, including the initiation of a surface water management area study, conditions under which designation shall take place, standards for determining the level of flow in need of protection, and criteria for issuing, modifying, revoking or denying a permit. The designation of a management area will allow the State to have a management structure in place which would be invoked when a low flow or drought condition exists. During this period riparian rights would be replaced by the state-administered permit system. When flow conditions return to acceptable levels permits will no longer be required and the rights of riparian owners to reasonable use will be restored. It is the responsibility of the SWCB to provide public notice when designating a surface water management area and when permit conditions exist within such an area.

Recommendation 2: That the General Assembly appropriate for the first year approximately \$200,000 and authorize three FTE's to inventory and classify Virginia's streams and rivers as to the offstream and instream beneficial uses. The development of such a classification system will serve to guide the SWCB in its designation of surface water management areas.

APPENDIX A

HISTORY OF THE STATE WATER COMMISSION

Presentation by
Martin Farber

What I hope to do with this presentation is to describe the evolution of the State Water Commission, and highlight those issues, some successfully resolved through legislative initiatives, and some which are still with us today.

From its inception the State Water Commission has focused on the dual issues of water supply and allocation. It has been involved over the years in an attempt to document the quality and quantity of Virginia's surface and groundwater resources as well as proposed various alternatives for the allocation of the water supply.

This effort began in 1977 with the passage of House Joint Resolution 236 which called for a study of the water supply and allocation problems of Northern and Southeastern Virginia.

Earlier studies by JLARC, the Council on the Environment, the SWCB and the Water Resources Research Center had identified the prospect of potentially severe water shortages by 1980.

The SWCB had previously been directed by the General Assembly to present recommendations which would address the surface and groundwater supply and allocations problems on a statewide basis.

The State Water Study Commission was created to provide legislative guidance to the Board on any recommended legislation and to assist the Board in holding public hearings throughout the state on these issues.

The Water Study Commission was originally comprised of 9 members (3 each from the House and Senate and 3 appointed by the Governor, one to be a member of the SWCB).

During its first year, 1977, the Commission attempted to identify and evaluate possible alternatives for resolving the water supply problems in Northern and Southeastern Virginia. After holding a series of public hearings, the Commission realized it had embarked on a "formidable and complex task."

It concluded that any alternative for resolving this question would require the export of water for use outside the river basin from which water would be withdrawn. It suggested that in order to protect the riparian rights a water withdrawal permit system was needed in order to equitably allocate water used in the Potomac River and its tributaries.

This resulted in the introduction of the Potomac River Permit Act of 1978 patroned by Senator Rawls, Chairman of the Commission, Senator Mitchell, Delegates Baliles and McClanan. The bill required a

certificate of surface water rights from the SWCB for the use or withdrawal of any surface water from the Potomac. It sought to define the riparian land owners water rights in specific terms:

(1 - right to have the stream at a minimum flow so as to preserve fish, wildlife, recreation or aesthetic values for maintaining a proper salinity regime.

The SWCB was to determine what constituted an environmentally required flow for the Basin by July 1, 1979.

2 - right to withdraw up to 1,000 gallons a day for consumptive use.

3 - right to nonconsumptive use so long as a similar quantity and quality is retained.)

It included the right to withdraw for agricultural and livestock purposes. It also established a system of priority use.

The legislation gave those seeking a permit one year to assert their right to use the surface water and contained a provision which allowed this right of use to be transferred.

This bill was carried over. During the year the Commission had also evaluated the potential of various water conservation measures and recommended two pieces of enabling legislation. Patroned by members of the Commission the first bill authorized local governments to enact water saving ordinances. During the session the provisions of the bill were narrowed somewhat to allow a local government to require by ordinance the installation of water conservation devices in the case of retrofitting a building constructed prior to July 1, 1978. The second bill provides that after a water supply emergency has been declared by the local government, the owner of a water supply system serving the locality may apply to the SWCB for assistance in the purchase of water from neighboring jurisdictions. (If the SWCB determines that the locality is applying all feasible water conservation measures and that water is available in neighboring jurisdictions where interconnections exist the Governor may appoint a committee from affected jurisdictions to negotiate the allocation and sale.)

These two laws remain on the books today.

Much of the Commission's 1978 agenda was established as a result of the passage of SJR 1 and HJR 88. Senate Resolution No. 1 called on the Commission to continue its study of the water supply and allocation problems of the entire Commonwealth and enlarged the Commission to 12 members (Senate-3, House 5, Gov.-4 at large). The House Resolution requested the Commission along with the SWCB to study the feasibility of a state grant program for certain water impoundment construction.

The Commission held another series of public hearings and established three subcommittees, one to look at the water supply in Northern Virginia, one for Southeastern Virginia, and a third to assess the related legal issues.

The Commission studied the possibility of interconnecting major systems supplying water to Northern Virginia. But was not ready to make any recommendations at least until 1979. In 1979 the Northern Virginia area expanded its water interconnections to the extent that Fairfax County Water Authority users, had available, additional supplies from Falls Church and Arlington County.

The Southeastern Virginia subcommittee in its report noted that the Norfolk District Engineer of the Army Corps of Engineers evaluated 36 potential solutions to alleviate projected water supply difficulties in the region. Subsequently the number of alternatives was narrowed to three and finally in August 1978 the District Engineer announced his recommendation that Lake Gaston should be the future site of water supply for Hampton Roads.

The Commission after receiving the subcommittees reports found that in such areas as S.E. Virginia and Northern Virginia, communities had outgrown readily available water supplies in the immediate area and planning was needed to bring water from other areas. In order to delineate the constitutional, legal and practical problems which might be associated with interbasin transfer the Commission along with the Virginia Environmental Endowment funded a study by VPI-SU (the Cox Report). The study was to focus on water use conflicts in Virginia and the likely effects of interbasin transfer on the constitutional and legal problems needing resolution before such transfer could take place.

In response to the House resolution to study the funding needs of localities in the construction, modification or enlargement of water impoundments the Commission concluded that the financing was primarily the responsibility of the users.

But, should future federal or state regulations cause undue hardship beyond the locality's financial ability, a statewide mechanism should be developed to make funds available in the form of loans or grants. In fact, the following year the Commission endorsed the concept of monies for "hardship communities".

During 1979 the Commission continued its deliberation on water supply and allocation problems and the various related legal issues. Researchers from the VPI-SU's Department of Agricultural Economics (Cox Report) began their analysis of the extent to which private interests in ground water and surface water are subject to regulation by the State. Such an analysis was to include an assessment of economic issues associated with alternative water allocation institutions.

That same year the Commission also contracted with the Water Resources Research Center at VPI to develop a water code for Virginia which would provide a mechanism for dealing with water quality and quantity in a comprehensive manner including an allocation system which promotes efficient use and equity among all users. The results of both studies were to be presented to the Commission by mid 1980.

The Commission in its report to the General Assembly noted that great concern had been expressed throughout the State for the need to define a policy with respect to the transfer of water from one

geographical area to another. It concluded again that communities in Northern Virginia and Southeastern Virginia had outgrown readily available water supply sources and there was a need to consider the transport of water from other jurisdictions.

In June and July 1980 the Commission received the results of the two contracted studies. The first of these entitled "Special Report to the Virginia Water Study Commission on Water Supply Management in the Commonwealth of Virginia" confirmed what the Commission had earlier documented. There was a need to:

- First, develop more complete data on water use and water availability
- Second, remove the existing and potential legal obstacles to the use of water away from the source sites
- Third, coordinate groundwater and surface water laws and policies
- Fourth, revise the Groundwater Act to ensure its effectiveness as a management tool.

The second study, "A Water Code for Virginia" (Walker study) suggested specifically how the Commission might proceed should it decide to replace the riparian doctrine with an administrative permit system. The draft was divided into 4 sections:

1. general administrative structure and operations of a water permit system
2. regulation of permitted uses
3. construction, operation and regulation of water wells
4. protection of water quality, most of which is existing Water Control Law

Many of the recommendations of the two studies were then fashioned into three legislative proposals by the Commission. Alternative A sought to remedy the situation with respect to the lack of data gathering. Under it the SWCB would be directed to gather information on water withdrawal and use in the state. The data was then to be used in preparing a state water plan and devise and define "in stream flow standards."

The other two alternatives (B&C) attempted to deal with interbasin transfer. One would modify the riparian doctrine by allowing the diversion of water so long as it causes no harm. Harm would occur when such use interferes with existing uses or decreases the market value of riparian land. The other alternative was based on the philosophy that the water resources belong to all citizens and the maximum beneficial use of water is a public trust to be administered by the state. After having statewide hearings on the three proposals the Commission recommended only alternative A which amended § 62.1-44.38. The Commission felt this legislation was essential if Virginia was to develop long term solutions to the state's water supply problems. The bill passed and was enacted into law July 1, 1981.

In 1981 membership of the Commission increased from 12 to 15. The newly enlarged Commission continued to look at the concept of interbasin transfer of water. In addition two new issues were considered: the need to further regulate the drilling of water wells and possible deficiencies in the Groundwater Act of 1973.

The proposed interbasin statute (HB 503) would have authorized the SWCB to issue permits for the transfer of water from one basin to another when it determined that the issuance of such a permit would be in the public interest. Criteria for determining what was in the public interest was included in the legislation. (such as the impact on uses of the streams and areas affected, benefits accruing to the state and its localities, and the likelihood that the transfer will cause the State to exceed its equitable share of the waters of river flowing into another state). It required the payment of compensation by the permittee to be divided among the Board and the affected localities.

The proposed draft on the licensure of well drillers had been introduced several years prior and then referred to Commission for further study. State agencies and industry representatives testified before the Commission in favor of the bill as a public health measure. The bill would have established a new five member regulatory Board to regulate the well drilling profession and the licensure of its members.

The concern with tightening the Groundwater Act surfaced as a result of Cox Report and testimony by the SWCB, and others which indicated a number of deficiencies in the existing law. The exemption of municipalities from the provisions of the law was judged to be its most serious defect. Another proposed change was the lowering of the amount of groundwater withdrawal that would bring someone under the provisions of the Act from 50,000 gal/day to 10,000 gals/day. While all these pieces of legislation were introduced during the 1982 Session they were withdrawn in the face of opposition to be studied further.

During that year the Commission held a number of meetings and public hearings to review the three proposals. Based on testimony it received, the Commission recommended the enactment of legislation providing for the licensure and regulation of well drilling.

But rather than establishing a new regulatory board the revised bill placed the licensure responsibility with the Board of Contractors within the Department of Commerce. The bill was introduced but later stricken from the docket with the understanding that the Department of Commerce would study how best to protect water quality in private wells and would report within one year.

In 1983 the Commission again considered these three issues as well as the financing of capital projects for water supply and wastewater treatment needs.

The Department of Commerce in response to the previous years commitment to look at how best to protect water quality in private wells acknowledged the hazard to aquifers from improper drilling procedures but did not recommend a new licensing board for well drillers. The Commission did recommended two pieces of legislation in this area. The first called the Private Well Construction Act was to be administered by the Department of Health for the purpose of protecting aquifers. The Department's regulatory authority would be restricted to the location and construction of wells. This bill was stricken from the docket during the 1983 Session. The second proposal required all individuals who construct

wells for a fee to register as Class B contractors. This legislation passed.

With respect to interbasin transfer, the City of Virginia Beach had made application to the U.S. Army Corps for a permit to build a pipeline. As the Commission report noted, by the end of 1983 threats of litigation on Virginia Beach's proposed transfer were being made on a regular basis. Because of the potential litigation the Commission recommended no interbasin transfer legislation be introduced during the 1984 Session.

The Commission had also been requested to evaluate means of financing needed wastewater treatment and water supply projects. Various methods of financing were investigated. The Commission recommended that a Water and Sewer Assistance Authority be established to help local governments finance their supply and treatment needs. (created 9 member Board, moral obligation of State to fund any shortfalls of Authority, permissive language allowing Authority to make grants to local governments). The legislation was enacted. The Water and Sewer Assistance Authority was to later become the Virginia Resources Authority.

During 1984 the Commission worked closely with the SWCB and that agency's State Water Plan Advisory Committee in identifying those water issues which should be considered in developing a comprehensive state water policy. It was suggested that such a policy include clarification of riparian rights, groundwater permitting, interbasin transfer, and delineation of the roles of the Health Department and State Water Control Board.

1984 was also marked by a change in the status of the State Water Study Commission. No longer would its existence depend on the passage of year to year joint resolutions. The 1984 Session enacted legislation which changed the status of the State Water Study Commission to the statutory State Water Commission. The new legislation, enacted July 1, 1984 established a 15 member commission, which included two citizen members (Chairman of House Conservation +7 and Chairman of Senate Agriculture +4). It was given the responsibility of studying all aspects of water supply and allocation problems in the Commonwealth and to coordinate the legislative recommendations of all those state entities having responsibility with respect to water allocation and supply. The Commission was sunsetted for January 1, 1990.

Having operated for six months under its new legislative mandate the Commission in 1985 was requested by the General Assembly (HJR 338) to work with the State Water Plan Advisory Committee and the SWCB to prepare recommendations to address the Commonwealth's water supply and water quality needs. The Commission reviewed the recommendations submitted by the Advisory Committee and proposed that five bills be drafted for public comment.

Bill #1 - The Water Withdrawal Act would establish a system to regulate all withdrawals of water in excess of 300,000 gallons per month. (The only exemption from permit requirements would be for agricultural irrigators using a pond of 30 acre-feet or less and withdrawals approved for the Lake Gaston Project).

Bill #2 - Dealt with amendments to the Water Use Reporting Exemption for Crop Irrigation.

The SWCB had been authorized to collect information on the amount of water use in excess of 10,000 gals per day. However the Board could not require crop irrigators to report their consumption. This bill would have rescinded the crop irrigation reporting exemption thus giving the Board a more complete data base.

Bill #3 - Concerned amendments to the Groundwater Act.

This bill would have rescinded the exemptions for agricultural and municipal uses and set the threshold for regulation at 10,000 gals/day.

Bill #4 - was draft legislation designed to protect the quality of groundwater by establishing minimum statewide standards for the construction of all water wells. The bill directed the Board of Housing and Community Development to adopt uniform standards for the construction of water wells which were to be incorporated into the Uniform Statewide Building Code.

Bill #5 - Sought to clarify the authority of local governments and water and sewer authorities to acquire land for future reservoir sites using the power of eminent domain.

After completing a series of eight public hearings the Commission recommended that Bill #3 amending the Groundwater Act and Bill #4 requiring minimum standards for the construction of water wells be introduced. In place of Bill #2 requiring the reporting of crop irrigators, the Commission recommended a resolution requesting voluntary reporting.

The two bills and one resolution were introduced and passed by the 1986 General Assembly with minor changes. The General Assembly accepted the Commission's recommendation to lower the threshold for water withdrawal to 10,000 gals/day in groundwater management areas and rescinded all exemptions except for agriculture. The General Assembly did add a provision which authorized the Board to require persons in a groundwater management area who withdraw more than 300,000 gal/per month for agricultural and livestock purposes to report such withdrawal.

The last two years have been ones in which the Commission chose not to introduce any new legislation but rather to review the status of state and local efforts to protect groundwater as well as receive a briefing on the SWCB's water supply plans for Virginia's river basins.

In 1984 the EPA had adopted a national groundwater protection strategy. Under the strategy states now would have primary responsibility for groundwater protection. Virginia had received a grant from EPA to prepare a state strategy and the SWCB was designated as the lead agency. The final report which detailed the state's approach made fifty recommendations which pointed to the need to coordinate the regulatory functions of those agencies having responsibility for groundwater protection and better educate public officials and citizens on this issue. The strategy emphasized prevention rather than remediation.

One of the specific recommendations was the establishment of a underground storage tank program. Legislation was introduced during the 1986 Session to establish a regulatory program and a fund for administering the program. The legislation was carried over until 1987 by the House General Laws Committee and referred to the Water Commission for review. The SWCB appeared before the Commission in 1986 making its case for the necessity of such legislation. Without proposing the adoption of a particular piece of legislation the Commission endorsed the concept and intent of the legislation.

The proposed state groundwater strategy also contained a recommendation that groundwater protection should be a goal of local land use planning and decision making.

In response to this recommendation and a General Assembly study resolution the Commission held hearings during 1987 to consider ways to protect the quality of private drinking water supplies. Testimony documented incidents of contamination of private wells from sources such as landfills, failed septic systems, underground storage tanks, chemicals and pesticides and salt water intrusion. The Commission reviewed specific proposals requiring the testing for the full range of chemicals of all private wells. While it chose not to endorse this approach it did recognize the fact that what is done on the land ultimately affects the quality of groundwater. Therefore the Commission recommended placing groundwater protection on an equal footing with surface water, storm water and flood water and supported legislation which amended current law to enable local governments to include the protection of both groundwater and surface water in their comprehensive plan and zoning ordinances.

Finally, during 1987 officials of the SWCB presented a summary of their efforts to develop Basin plans for the state's eleven planning areas. These basin plans examine the capability of the 542 largest public water supply systems (greater than 10,000 gals/day) to meet the demands that will be placed on them by the year 2030. Their analysis of these water supply systems indicated that 25% will experience problems between now and the year 2030 industry (inadequate water sources transmission problems, deficiencies in water treatment plants, and inadequate storage). They suggest a number of solutions such as the development of alternative sources including new intake points, additional well capacity, and construction of new reservoirs.

Beyond these available solutions they note other outstanding issues which represent possible obstacles to the provision of adequate water supply, one of which I am reluctant to mention, that being how do we supply water to "water short areas" and a second related concern the lack of a policy with request to minimum in stream flow (how do we allocate use).

INSTREAM FLOW ADVISORY GROUP CONCEPT PAPER

Part I - Beneficial Use Statement

Navigation, maintenance of waste assimilation capacity, hydropower, protection of fish and wildlife resources, aquatic habitat, recreation, cultural and aesthetic values are beneficial instream uses of Virginia's waters.

The quality of State waters is affected by the quantity of water and it is the State's intent, to the extent practicable, that flow conditions be maintained to protect instream beneficial uses.

Part II - Creation of Virginia Water Quality Permit

Concurrent with the issuance of any Virginia water quality certificate under Section 401 of the Clean Water Act for any federally permitted or licensed activity in state waters, a Virginia Water Quality Permit will be granted. Before any VWQP is issued the Board shall determine that the project or activity is consistent with all of the water quality standards of the State including those aimed at protecting instream beneficial uses.

Before issuing a VWQP, the VWCB shall consult and cooperate with the Department of Game and Inland Fisheries, the Virginia Marine Resources Commission, the Department of Conservation and Historic Resources, the Department of Health, and Council on the Environment and other effected agencies and give full consideration to their views on appropriate stream flows for balancing instream with offstream uses.

In determining the flow regime deemed necessary to protect instream uses, the VWCB shall consider navigation needs, maintenance of waste assimilation capacity, hydropower, protection of fish and wildlife resources, aquatic habitat, recreation, cultural and aesthetic values.

Part III - Inventory

The VWCB shall, with the assistance of other state and federal agencies and other appropriate parties, undertake to inventory and classify Virginia's streams and rivers in terms of their potential to realize beneficial uses offstream and instream. The Board should take maximum advantage of the expertise of other agencies in terms of gathering information, assessing the values of the various streams and lakes, and providing a classification system which will serve to guide decision making by agencies with jurisdiction over these streams or rivers.

Part IV: - Initiation of Surface Water Management Area Proceeding.

The Board upon its own motion or, in its discretion, upon receipt of a petition therefore by any county, city, or town within the area in question or another state agency, may initiate a Surface Water Management Area proceeding whenever in its judgement there is evidence that:

1. A stream has substantial instream values as indicated by evidence of fishery, recreation, habitat, cultural, or aesthetic properties; and
2. Historical records and from current conditions indicate that a low flow condition could occur which would threaten important instream uses; or
3. Offstream uses contribute to or are likely to exacerbate natural low flow conditions to the detriment of instream values; or
4. Competition or conflict exists between instream and offstream uses among riparian owners and other uses.

If, after public hearing, the Board finds that the conditions set forth above are true and further finds that the public welfare, health and safety require that any one or more corrective controls be adopted, the Board

shall, within a time to be specified by regulation, declare the area in question to be a Surface Water Management Area. The Board shall mail a copy of such order to the mayor or chairman of the governing body of each county, city, or town within which any part of the area lies. The Board shall include in its action a definition of the boundaries of the management area.

Board may require information from persons withdrawing surface water. The Board may require any person withdrawing surface water for any purpose in any Surface Water Management Area to furnish information with regard to such surface water withdrawal and the use thereof.

Agreements among persons withdrawing surface water. In the administration of this chapter, the Board shall encourage, promote and recognize voluntary agreements among persons withdrawing surface water in the same Surface Water Management Area. When the Board finds that any such agreement, executed in writing and filed with the Board is consistent with the intent, purposes and requirements of this chapter, the Board shall approve the agreement. The agreement, until terminated, shall control in lieu for a formal order, rule or regulation of the Board under the provisions of this chapter.

Any agreement approved by the Board shall be subject to termination by the Board if the Board finds that it or its effect is inconsistent with the intent, purposes, and requirements of this chapter

Certificates. -- The Board shall issue Surface Water Withdrawal Certificates after consultation with the Department of Game and Inland Fisheries, the Virginia Marine Resources Commission, the Department of Conservation and Historic Resources, the Department of Health, the Council on the Environment, and other state agencies it deems appropriate. Such consultation shall include the need for development of a standard in the Surface Water Management Area for balancing instream uses with offstream uses. A certificate must include a flow requirement appropriate for the protection of beneficial instream uses. In determining the level of flow in need of protection, the Board shall consider, among

other things, navigation, maintenance of waste assimilation capacity, hydropower, protection of fish and wildlife resources, aquatic habitat, recreation, cultural, and aesthetic values. Should this determination indicate a need

to restrict water withdrawal, the Board shall consider, among other things, the availability of alternative water supplies, the feasibility of water storage or other mitigation measures, and the socioeconomic impacts of such restrictions on the proposed water user and on the citizens of the Commonwealth in general.

In its decision, the Board shall attempt to balance offstream and instream water uses such that the welfare of the citizens of the Commonwealth is maximized without imposing unreasonable burdens on any individual water user or water-using group. The decision to implement this balance may consist of approval of withdrawal without restriction, approval subject to conditions designed to protect instream uses from unacceptable adverse effects, or disapproval of the withdrawal.

Part V - Intervention of Commonwealth in Surface Water Disputes

The Board, on behalf of the citizens of the Commonwealth, shall have authority to intervene as an interested party in any civil action regarding uses of the surface waters of the Commonwealth.

Part VI - Exemption to Reporting Requirement of Surface Water

Except as stated in this section, this regulation applies to every user withdrawing surface water whose daily average withdrawal during any single month exceeds 10,000 gallons per day, and to users who use the water for crop irrigation that exceeds one million gallons during any single month.

12/8/88

APPENDIX C
1989 SESSION

LD6626540

HOUSE BILL NO. 1837
Offered January 24, 1989

A BILL to amend and reenact §§ 62.1-10 and 62.1-11 of the Code of Virginia, relating to beneficial uses of water.

Patrons—Parker, Abbitt, Thomas, Council, Robinson, Woodrum and McClanan; Senators: Walker, Colgan, Anderson and Macfarlane

Referred to the Committee on Conservation and Natural Resources

Be it enacted by the General Assembly of Virginia:

1. That § 62.1-10 and 62.1-11 of the Code of Virginia are amended and reenacted as follows:

§ 62.1-10. Definitions.—As used in this chapter, the following terms shall have the meanings respectively ascribed to them:

(a) "Water" includes all waters, on the surface and under the ground, wholly or partially within or bordering the Commonwealth or within its jurisdiction and which affect the public welfare.

(b) "Beneficial use" means both instream and offstream uses. Instream beneficial uses include, but are not limited to, the protection of fish and wildlife habitat, maintenance of waste assimilation, recreation, navigation, and cultural and aesthetic values. Offstream beneficial uses include, but are not limited to, domestic (including public water supply), agricultural, recreational and hydropower, commercial and industrial uses. Domestic and existing uses shall be considered the highest priority offstream uses.

§ 62.1-11. Waters declared natural resource; state regulation and conservation; limitations upon right to use.— (a) A. Such waters are a natural resource which should be regulated by the Commonwealth.

(b) B. The regulation, control, development and use of waters for all purposes beneficial to the public are within the jurisdiction of the Commonwealth which in the exercise of its police powers may establish measures to effectuate the proper and comprehensive utilization and protection of such waters.

(c) C. The changing wants and needs of the people of the Commonwealth may require the water resources of the Commonwealth to be put to uses beneficial to the public to the extent of which they are reasonably capable; the waste or unreasonable use or unreasonable method of use of water should be prevented; and the conservation of such water is to be exercised with a view to the welfare of the people of the Commonwealth and their interest in the reasonable and beneficial use thereof.

(d) D. The public welfare and interest of the people of the Commonwealth require the proper development, wise use, conservation and protection of water resources together with protection of land resources, as affected thereby.

(e) E. The right to the use of water or to the flow of water in or from any natural stream, lake or other watercourse in this Commonwealth is and shall be limited to such water as may reasonably be required for the beneficial use of the public to be served; such right shall not extend to the waste or unreasonable use or unreasonable method of use of such water.

F. The quality of state waters is affected by the quantity of water and it is the intent of the Commonwealth, to the extent practicable, to maintain flow conditions to protect instream beneficial uses.

1989 SESSION

LD6625540

HOUSE BILL NO. 1838

Offered January 24, 1989

A BILL to amend the Code of Virginia by adding a section numbered 62.1-44.23:1 of the Code of Virginia, relating to state intervention in surface water disputes.

Patrons—Parker, Abbitt, Thomas, Dillard, Councill, Robinson and McClanan; Senators: Walker, Colgan, Anderson and Macfarlane

Referred to the Committee on Conservation and Natural Resources

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia is amended by adding a section numbered 62.1-44.23:1 as follows:

§ 62.1-44.23:1. Intervention of Commonwealth in actions involving surface water withdrawals.—The Board, in representing the public's interest, shall have the authority and standing to intervene as an interested party in any civil action, including actions both within and without the Commonwealth, pertaining to the withdrawal of any of the surface waters of the Commonwealth.

Official Use By Clerks

Passed By The House of Delegates without amendment [] with amendment [] substitute [] substitute w/amdt []

Passed By The Senate without amendment [] with amendment [] substitute [] substitute w/amdt []

Date: _____

Date: _____

Clerk of the House of Delegates

Clerk of the Senate

1989 SESSION

LD6622540

HOUSE BILL NO. 1839

Offered January 24, 1989

A BILL to amend the Code of Virginia by adding in Article 3 of Chapter 3.1 of Title 62.1 a section numbered 62.1-44.15:5, relating to the Virginia Water Protection Permit.

Patrons—Parker, Abbitt, Thomas, Dillard, Council, Robinson, Woodrum and McClanan;
Senators: Walker, Colgan, Anderson and Macfarlane

Referred to the Committee on Conservation and Natural Resources

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia is amended by adding in Article 3 of Chapter 3.1 of Title 62.1 a section numbered 62.1-44.15:5 as follows:

§ 62.1-44.15:5. Virginia Water Protection Permit.—A. After the effective date of regulations adopted by the Board pursuant to this section, issuance of a Virginia Water Protection Permit shall constitute the certification required under § 401 of the Clean Water Act.

B. The Board shall issue a Virginia Water Protection Permit for an activity requiring §401 certification if it has determined that the proposed activity is consistent with the provisions of the Clean Water Act and will protect instream beneficial uses. The preservation of instream flows for purposes of the protection of navigation, maintenance of waste assimilation capacity, hydropower, the protection of fish and wildlife resources and habitat, recreation, cultural, and aesthetic values is a beneficial use of Virginia's waters. Conditions contained in a Virginia water protection permit may include, but are not limited to, the volume of water which may be withdrawn as a part of the permitted activity. Domestic and existing uses shall be considered the highest priority beneficial offstream uses.

C. Prior to the issuance of a Virginia Water Protection Permit, the Board shall consult with, and give full consideration to the written recommendations of, the following agencies: the Department of Game and Inland Fisheries, the Department of Conservation and Historic Resources, the Virginia Marine Resources Commission, the Department of Health, and any other interested and affected agencies. Such consultation shall include the need for balancing instream uses with offstream uses. Agencies may submit written comments on proposed permits within forty-five days after notification by the Board. The Board shall assume that if written comments are not submitted by an agency within this time period, the agency has no comments on the proposed permit.

D. No Virginia Water Protection Permit shall be required for any water withdrawal in existence on July 1, 1989; however, a permit shall be required before the daily rate of any such existing withdrawal is increased beyond the maximum daily withdrawal made before July 1, 1989.

No Virginia Water Protection Permit shall be required for any water withdrawal not in existence on July 1, 1989, if the person proposing to make the withdrawal has received a § 401 certification before January 1, 1989, with respect to installation of any necessary withdrawal structures to make such withdrawal; however, a permit shall be required before any such withdrawal is increased beyond the amount authorized by the permit.

1989 SESSION

LD6624540

HOUSE BILL NO. 1840

Offered January 24, 1989

A BILL to amend and reenact § 62.1-44.38 of the Code of Virginia, relating to registration for the withdrawal of water.

Patrons—Parker, Abbitt, Thomas, Dillard, Councill, Robinson, Woodrum and McClanan;
Senators: Walker, Colgan, Anderson and Macfarlane

Referred to the Committee on Conservation and Natural Resources

Be it enacted by the General Assembly of Virginia:

1. That § 62.1-44.38 of the Code of Virginia is amended and reenacted as follows:

§ 62.1-44.38. Plans and programs; registration of certain data by water users; advisory committees; committee membership for federal, state, and local agencies; water supply planning assistance.— A. The Board shall prepare plans and programs for the management of the water resources of this Commonwealth in such a manner as to encourage, promote and secure the maximum beneficial use and control thereof. These plans and programs shall be prepared for each major river basin of this Commonwealth, and appropriate subbasins therein, including specifically the Potomac-Shenandoah River Basin, the Rappahannock River Basin, the York River Basin, the James River Basin, the Chowan River Basin, the Roanoke River Basin, the New River Basin, the Tennessee-Big Sandy River Basin, and for those areas in the Tidewater and elsewhere in the Commonwealth not within these major river basins. Reports for each basin shall be published by the Board.

B. In preparing river basin plan and program reports enumerated in subsection A of this section, the Board shall (i) estimate current water withdrawals and use for agriculture, industry, domestic use, and other significant categories of water users; (ii) project water withdrawals and use by agriculture, industry, domestic water use, and other significant categories of water users; (iii) estimate, for each major river and stream, the minimum instream flows necessary during drought conditions to maintain water quality and avoid permanent damage to aquatic life in streams, bays, and estuaries; (iv) evaluate, to the extent practicable, the ability of existing subsurface and surface waters to meet current and future water uses, including minimum instream flows, during drought conditions; (v) evaluate, in cooperation with the Virginia Department of Health and local water supply managers, the current and future capability of public water systems to provide adequate quantity and quality of water; (vi) identify water management problems and alternative water management plans to address such problems; and (vii) evaluate hydrologic, environmental, economic, social, legal, jurisdictional, and other aspects of each alternative management strategy identified.

C. The Board may, by regulation, require each water user withdrawing surface or subsurface water or both during each year to register, by a date to be established by the Board, water withdrawal and use data for the previous year including the estimated average daily withdrawal, maximum daily withdrawal, sources of water withdrawn, and volume of wastewater discharge, provided that the *withdrawal exceeds one million gallons in any single month for use for crop irrigation, or that the daily average during any single month exceeds 10,000 gallons per day for all other users*. ~~Provided, however, the Board shall not, by regulation, require registration by users of water for crop irrigation, but may solicit and collect such information and data on a voluntary basis.~~

D. The Board shall establish advisory committees to assist it in the formulation of such plans or programs and in formulating recommendations called for in subsection E of this section. In this connection, the Board may include committee membership for branches or agencies of the federal government, branches or agencies of the Commonwealth, branches or agencies of the government of any state in a river basin located within that state and Virginia, the political subdivisions of the Commonwealth, and all persons and corporations interested in or directly affected by any proposed or existing plan or program.

1 E. The Board shall prepare plans or programs and shall include in reports prepared
 2 under subsection A of this section recommended actions to be considered by the General
 3 Assembly, the agencies of the Commonwealth and local political subdivisions, the agencies
 4 of the federal government, or any other persons that the Board may deem necessary or
 5 desirable for the accomplishment of plans or programs prepared under subsection B of this
 6 section.

7 F. In addition to the preparation of plans called for in subsection A of this section, the
 8 Board, upon written request of a political subdivision of the Commonwealth, shall provide
 9 water supply planning assistance to such political subdivision; to include assistance in
 10 preparing drought management strategies, water conservation programs, evaluation of
 11 alternative water sources, state enabling legislation to facilitate a specific situation,
 12 applications for federal grants or permits, or other such planning activities to facilitate
 13 intergovernmental cooperation and coordination.

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Official Use By Clerks	
<p style="text-align: center;">Passed By</p> <p>The House of Delegates</p> <p>without amendment <input type="checkbox"/></p> <p>with amendment <input type="checkbox"/></p> <p>substitute <input type="checkbox"/></p> <p>substitute w/amdt <input type="checkbox"/></p>	<p style="text-align: center;">Passed By The Senate</p> <p>without amendment <input type="checkbox"/></p> <p>with amendment <input type="checkbox"/></p> <p>substitute <input type="checkbox"/></p> <p>substitute w/amdt <input type="checkbox"/></p>
Date: _____	Date: _____
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1989 SESSION

LD6623540

HOUSE BILL NO. 1841

Offered January 24, 1989

A BILL to amend the Code of Virginia by adding in Title 10.1 a Chapter numbered 24, consisting of sections numbered 62.1-242 through 62.1-253, relating to the establishment of surface water management areas.

Patrons—Parker, Abbitt, Thomas, Dillard, Councill, Robinson, Woodrum and McClanan; Senators: Walker, Colgan, Anderson and Macfarlane

Referred to the Committee on Conservation and Natural Resources

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia is amended by adding in Title 10.1 a chapter numbered 24, consisting of sections numbered 62.1-242 through 62.1-253, as follows:

CHAPTER 24.

SURFACE WATER MANAGEMENT AREAS.

§ 62.1-242. Definitions.—As used in this chapter, unless the context requires otherwise:

“Beneficial use” means both instream and offstream uses. Instream beneficial uses include but are not limited to protection of fish and wildlife habitat, maintenance of waste assimilation, recreation, navigation, and cultural and aesthetic values. Offstream beneficial uses include but are not limited to domestic (including public water supply), agricultural, hydropower, commercial, and industrial uses. Domestic and existing uses shall be considered the highest priority offstream beneficial uses.

“Board” means the State Water Control Board.

“Nonconsumptive use” means the use of water withdrawn from a stream in such a manner that it is returned to the stream without substantial diminution in quantity at or near the point from which it was taken and would not result in or exacerbate low flow conditions.

“Surface water withdrawal permit” means a document issued by the Board evidencing the right to withdraw surface water.

“Surface water management area” means a geographically defined surface water area in which the Board has deemed the levels or supply of surface water to be potentially adverse to public welfare, health and safety.

“Surface water” means any water in the Commonwealth, except groundwater, as defined in § 62.1-44.85.

§ 62.1-243. Withdrawals for which surface water withdrawal permit not required.—A. No surface water withdrawal permit shall be required for any nonconsumptive use, any water withdrawal of less than 300,000 gallons in any single month, any withdrawal in any area which has not been declared a surface water management area, or any withdrawal from a wastewater treatment system permitted by the State Water Control Board or the Department of Mines, Minerals and Energy.

B. No political subdivision shall be required to obtain a surface water withdrawal permit for:

1. Any withdrawal in existence on July 1, 1989; however, a permit shall be required in a declared surface water management area before the daily rate of any such existing withdrawal is increased beyond the maximum daily withdrawal made before July 1, 1989.

2. Any withdrawal not in existence on July 1, 1989, if the person proposing to make the withdrawal has received a § 401 certification from the State Water Control Board pursuant to the requirements of the Clean Water Act to install any necessary withdrawal structures and make such withdrawal; however, a permit shall be required in any surface water management area before any such withdrawal is increased beyond the amount authorized by the said permit.

To qualify for either exemption in subsection B of this section, the political subdivision making the withdrawal shall have instituted a water conservation program approved by

1 *the Board which includes, but is not limited to, (i) use of water saving plumbing fixtures*
2 *in new and renovated plumbing as provided under the BOCA code; (ii) a water loss*
3 *reduction program; (iii) a water use education program; and (iv) ordinances prohibiting*
4 *waste of water generally and providing for mandatory water use restrictions, with*
5 *penalties, during water shortage emergencies. The Board may review and require*
6 *amendments to such program elements periodically.*

7 *§ 62.1-244. Board may require information from persons withdrawing surface water.—*
8 *The Board may require any person withdrawing surface water for any purpose in any*
9 *surface water management area to furnish information with regard to such surface water*
10 *withdrawal and the use thereof.*

11 *§ 62.1-245. Agreements among persons withdrawing surface water.—In the*
12 *administration of this chapter, the Board shall encourage, promote and recognize voluntary*
13 *agreements among persons withdrawing surface water in the same surface water*
14 *management area. When the Board finds that any such agreement, executed in writing*
15 *and filed with the Board is consistent with the intent, purposes and requirements of this*
16 *chapter, the Board shall approve the agreement. The agreement, until terminated, shall*
17 *control in lieu of a formal order, rule or regulation of the Board under the provisions of*
18 *this chapter.*

19 *Any agreement approved by the Board may include conditions which can result in its*
20 *amendment or termination by the Board, following a public hearing pursuant to §*
21 *9-6.14:7.1, if the Board finds that it or its effect is inconsistent with the intent, purposes*
22 *and requirements of this chapter. Such conditions may include (i) a determination by the*
23 *Board that the agreement originally approved by the Board will not further the purposes*
24 *of this chapter, or (ii) a determination by the Board that circumstances have changed such*
25 *that the agreement originally approved by the Board will no longer further the purposes*
26 *by this chapter, or (iii) one or more parties to the agreement is not fulfilling its*
27 *commitments under the agreement.*

28 *§ 62.1-246. When Board may initiate a surface water management area study*
29 *proceeding; hearing required.—A. The Board upon its own motion or, in its discretion, upon*
30 *receipt of a petition therefor by any county, city or town within the surface water*
31 *management area in question, or any state agency, may initiate a surface water*
32 *management area proceeding whenever in its judgment there is evidence to indicate that:*

33 *1. A stream has substantial instream values as indicated by evidence or fishery,*
34 *recreation, habitat, cultural or aesthetic properties;*

35 *2. Historical records or current conditions indicate that a low flow condition could*
36 *occur which would threaten important instream uses; and*

37 *3. Current or potential offstream uses contribute to or are likely to exacerbate natural*
38 *low flow conditions to the detriment of instream values.*

39 *B. If, after public hearing pursuant to § 9-6.14:7.1, the Board finds that the conditions*
40 *required above exists and further finds that the public welfare, health and safety require*
41 *that regulatory efforts be initiated, the Board shall declare the area in question to be a*
42 *surface water management area. The Board shall cause notice of the surface water*
43 *management area to be published in a newspaper or general circulation throughout the*
44 *area, and shall mail a copy of its decision to the mayor or chairman of the governing*
45 *body of each county, city or town within which any part of the area lies, or which is*
46 *known by the Board to make offstream use of water from the area, and to the chief*
47 *administrative officer of any federal facility known by the Board to be using water from*
48 *within the area. The Board shall include in its decision a definition of the boundaries of*
49 *the water management area.*

50 *§ 62.1-247. Use of surface water in surface water management area.—After an area has*
51 *been declared a surface water management area by an order of the Board, no person shall*
52 *withdraw or attempt to withdraw any surface water, except for withdrawals exempted*
53 *under § 62.1-243, without a surface water withdrawal permit issued by the Board.*

54 *§ 62.1-248. Permits.—A. Any permit issued by the Board shall include a flow*

1 requirement appropriate for the protection of beneficial instream uses. In determining the
2 level of flow in need of protection, the Board shall consider, among other things,
3 recreational and aesthetic factors and the potential for substantial and long-term adverse
4 impact on fish and wildlife found in that particular surface water management area.
5 Should this determination indicate a need to restrict water withdrawal, the Board shall
6 consider, among other things, the availability of alternative water supplies, the feasibility
7 of water storage or other mitigation measures, and the socioeconomic impacts of such
8 restrictions on the potentially affected water user and on the citizens of the
9 Commonwealth in general.

10 In its permit decision, the Board shall attempt to balance offstream and instream
11 water uses so that the welfare of the citizens of the Commonwealth is maximized without
12 imposing unreasonable burdens on any individual water user or water-using group. The
13 decision to implement this balance may consist of approval of withdrawal without
14 restriction, approval subject to conditions designed to protect instream uses from
15 unacceptable adverse effects, or disapproval of the withdrawal.

16 Permit conditions may include, but are not limited to, the following: (i) maximum
17 amounts which may be withdrawn, (ii) times of the day during which withdrawals may
18 occur, and (iii) requirements for voluntary and mandatory conservation measures.

19 B. In considering whether to issue, modify, revoke, or deny a permit under this section,
20 the Board shall consider:

21 1. The number of persons using a stream and the object, extent and necessity of their
22 respective withdrawals or uses;

23 2. The nature and size of the stream;

24 3. The types of businesses or activities to which the various uses are related;

25 4. The importance and necessity of the uses claimed by permit applicants, or of the
26 water uses of the area and the extent of any injury or detriment caused or expected to
27 be caused to instream or offstream water uses;

28 5. The effects on beneficial uses; and

29 6. Any other relevant factors.

30 C. Permits shall be transferable among users, subject to approval by the Board.

31 D. In developing regulations governing the issuance of permits, the Board shall
32 prioritize among types of users. Domestic and existing uses shall be given the highest
33 priority in the issuance of permits for offstream beneficial uses.

34 § 62.1-249. Applicability of permit conditions.—A. The Board by regulation shall
35 determine when the level of flow is such that permit conditions in a surface water
36 management area are in force. As a part of this regulation, the Board shall adopt a
37 reasonable system of water-use classification according to classes of beneficial uses. The
38 Board may include provisions for variances and alternative measures to prevent undue
39 hardship and ensure equitable distribution of water resources.

40 B. The regulations may provide that the Board, or the Board's Executive Director, by
41 order may declare that the level of flow is such that permit conditions are applicable for
42 all or part of a surface water management area.

43 C. The Board may impose such restrictions on one or more classes of water uses as
44 may be necessary to protect the surface water resources of the area from serious harm.

45 D. Regulations shall provide for the means for a declaration of water shortage to be
46 rescinded.

47 E. When permit conditions become applicable in a surface water management area, the
48 Board shall notify each permittee by mail or cause notice thereof to be published in a
49 newspaper of general circulation throughout the area. Publication of such notice will serve
50 as notice to all permit holders in the area.

51 § 62.1-250. State agency review.—Prior to the creation of a surface water management
52 area, or the issuance of a permit within one, the Board shall consult and cooperate with,
53 and give full consideration to the written recommendations of, the following agencies: the
54 Department of Game and Inland Fisheries, the Department of Conservation and Historic

1 Resources, the Virginia Marine Resources Commission, the Department of Health, and any
2 other interested and affected agencies. Such consultation shall include the need for
3 development of a means in the surface water management area for balancing instream
4 uses with offstream uses. Agencies may submit written comments on proposed permits
5 within forty-five days after notification by the Board. The Board shall assume that if
6 written comments are not submitted by an agency, within the time period, the agency has
7 no comments on the proposed permits.

8 § 62.1-251. Cancellation or suspension of permit.—Whenever, after public hearing
9 pursuant to § 9-6.14:11, the Board finds that the holder of a permit is willfully violating
10 any provision of such permit or any other provision of this chapter, the Board may cancel
11 or suspend the permit or impose conditions on its future use in order to prevent future
12 violations.

13 § 62.1-252. Penalties; injunctions.—A. Any person who violates any provision of this
14 chapter shall be subject to a civil penalty not to exceed \$1,000 for each violation. Each
15 day of violation shall constitute a separate offense.

16 B. With the consent of any person in violation of this chapter, the Board may provide,
17 in an order issued by the Board against the person, for the payment of civil charges.
18 These charges shall be in lieu of civil charges imposed by the court.

19 C. In order to protect the public interest of the Commonwealth, the Board may seek
20 injunctive relief against any person violating any provision of this chapter.

21 § 62.1-253. Riparian rights.—Nothing in this chapter shall be construed as altering, or
22 authorizing any alteration of, any existing riparian rights except as set forth in permits
23 issued pursuant to this chapter. The conditions in such permits shall be in force only in
24 those times when low stream flows, or the potential therefor, result in a declaration as
25 provided for in § 62.1-249 A.

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