



VIRGINIA DEPARTMENT OF ENVIRONMENTAL QUALITY

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July 3, 2019

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Ms. Karen Johnson
Manager, Virginia Aquatic Resources Trust Fund
The Nature Conservancy
530 East Main Street, Suite 800
Richmond, Virginia 23219

**RE: State Water Control Board Authorization
Virginia Aquatic Resources Trust Fund - In-Lieu Fee Mitigation Program**

Dear Ms. Johnson:

Please accept this letter as documentation of the State Water Control Board's (Board) authorization, through the Virginia Department of Environmental Quality (DEQ), for the Virginia Aquatic Resources Trust Fund (VARTF) in-lieu fee compensatory mitigation program to continue operation under Section 62.1-44.15:20-23 of the Code of Virginia (law) and 9 VAC 25-210-116D of the Administrative Code of Virginia (regulations).

Executive Summary

The purpose of this authorization is to maintain and update guidelines, responsibilities, and standards set forth for the establishment, use, operation, and maintenance of the VARTF in-lieu fee compensatory mitigation program as an acceptable form of compensatory mitigation for permanent impacts to state waters, including streams and wetlands, in compliance with state law and regulations. In support of this determination, DEQ reviewed the 2016 DEQ Authorization Letter, the draft amended and restated 2019 Program Instrument (2019 Instrument) developed by The Nature Conservancy (TNC), U.S. Army Corps of Engineers – Norfolk District (Corps), and DEQ, and other relevant documentation; issued a public comment notice; and considered all subsequent public comments. In conclusion, TNC has worked continuously to collaborate with the Corps and DEQ on VARTF program improvements, culminating in the 2019 Instrument, and to follow the Board's recommendations listed in the 2016 DEQ Authorization Letter. DEQ concludes that the VARTF program is compliant with state law and regulations for in-lieu fee program approval. **DEQ authorizes VARTF to operate under state law and regulations as an approved in-lieu fee mitigation program for a period of ten (10) years from the effective date of this letter, expiring on July 13, 2029.**

Background & Methods

VARTF is an existing in-lieu fee compensatory mitigation program, which has been in operation in the Commonwealth of Virginia since 1995, in accordance with a Memorandum of Understanding between TNC and the Corps, as amended in 2003. In 2011, the DEQ participated on a work group with the Corps, TNC, the Environmental Protection Agency (EPA), the U.S. Fish & Wildlife Service (USFWS), and the National Oceanic & Atmospheric Administration (NOAA) to develop the 2011 Program Instrument, bringing VARTF into compliance with the Corps and EPA “Compensatory Mitigation for Losses of Aquatic Resources; Final Rule” 33 CFR Part 332 (Final Rule), which governs compensatory mitigation for activities authorized by Corps permits, as well as compliance with Virginia State Water Control Law and DEQ’s Virginia Water Protection Permit program. With the approval of the 2011 Program Instrument, DEQ became a regulatory co-chair for the VARTF program on the Interagency Review Team (IRT), which reviews proposed compensatory mitigation projects, and a signatory to the VARTF Program Instrument and all individual Site Development Plans.

As required by the 2011 Program Instrument, TNC completed an independent programmatic and financial audit (2016 Audit Report), which was contracted with the Environmental Law Institute and Hantzmon Wiebel LLP. Overall, the 2016 Audit Report showed that the VARTF program was in substantial compliance with the 2011 Program Instrument and standard financial accounting practices, but observed noncompliance with the Final Rule requirement to implement mitigation projects by the third growing season after advance credit sale, and outlined other recommendations for improvement of the VARTF program. As a result, the Corps, DEQ, and the IRT mandated program improvements, and the 2016 DEQ Authorization Letter outlined the recommendations for the VARTF program relevant to state law and regulations. Since the audit, the Corps, DEQ, IRT and TNC have been working on both specific audit recommendations and general VARTF in-lieu fee program updates.

According to state regulations section 9 VAC 25-210-116D (as updated on August 2, 2016), an in-lieu fee program shall demonstrate the following goals and objectives to be eligible as an acceptable form of compensatory mitigation in the Commonwealth of Virginia:

- 1) Demonstration of a no net loss policy in terms of wetland acreage and functions or stream functions and water quality benefits by adoption of operational goals or objectives for restoration, creation, enhancement, or preservation;***
- 2) DEQ approval of each site for inclusion in the program;***
- 3) A commitment to provide annual reports to the board detailing contributions received and acreage and type of wetlands or streams preserved, created or restored in each watershed with those contributions, as well as the compensatory mitigation credits contributed for each watershed of project impact;***
- 4) A mechanism to establish fee amounts that will ensure each contribution will be adequate to compensate for the wetland acreage and functions or stream functions and water quality benefits lost in the impacted watershed; and***
- 5) Such terms and conditions as the board deems necessary to ensure a no net loss of wetland acreage and functions or stream functions and water quality benefits from permitted projects providing compensatory mitigation.***

In support of this determination, DEQ reviewed and analyzed the following documents to assess the VARTF program's compliance with state regulations: the 2016 DEQ Authorization Letter written by DEQ (dated July 14, 2016); the draft amended and restated 2019 Program Instrument (2019 Instrument) developed by TNC, the Corps, and DEQ; annual VARTF Progress Update letters written by TNC (August 9, 2017; September 28, 2018; & February 5, 2019); and the 2018 Annual Report written by TNC (dated February 5, 2019). TNC also made several presentations to the IRT during the past three years regarding development of the 2019 Instrument. DEQ also issued a public comment notice regarding authorization to the Virginia Regulatory Town Hall, the Virginia Register of Regulations, and published on the DEQ Wetlands and Streams Public Notice Webpage. This public notice included a 30-day public comment period, and required DEQ to consider public comments for no less than a 45-day period prior to issuing a final determination. DEQ received one set of comments as a result of the public notice, from the Virginia Mitigation Banking Association. DEQ considered and applied the public comments to the authorization, where appropriate.

We appreciate the efforts that TNC has made to provide timely, clear, and detailed reports and updates to give the IRT and the public an accurate and current representation of VARTF's operations. We also appreciate the open collaboration with the Corps, IRT, and TNC which led to the 2019 Instrument. Lastly, we would like to thank the participants in the public comment process, who serve as an important check to the regulatory agencies and programs.

Conclusions

Based on the documents, presentations, and public comments, DEQ has the following conclusions for the VARTF program, with regard to the achievement of state regulations:

- 1) Demonstration of a no net loss policy in terms of wetland acreage and functions or stream functions and water quality benefits by adoption of operational goals or objectives for restoration, creation, enhancement, or preservation;***

Demonstration of a no net loss policy is provided in the 2019 Instrument, where two of the key purposes of the VARTF program are "to achieve no net loss of existing wetland acreage and functions and no net loss of stream functions pursuant to Va. Code § 62.1- 44.15:21(B), and to accomplish mitigation projects in Virginia efficiently and at beneficial economies of scale to provide for a significant net gain of aquatic resource functions and values where possible."

In 2016, DEQ recommended that TNC develop and propose mitigation options for liabilities older than three years in basins where no projects are currently proposed and in basins where the total potential credit fails to meet the existing credit liability for a given resource type.

The table below shows implemented or proposed mitigation activities that have occurred since 2016 that meet the state's recommendation. A letter-number combination indicates a proposed VARTF mitigation site. These proposals have been or will be public noticed by the Corps, and are publically available through the Corps' Regulatory In-Lieu Fee and Bank Information

Tracking System (RIBITS). Remaining liability is noted by the entire amount of remaining liability, as well as the amount of liability that is over two years old. Based on the 2019 Instrument, the two year mark symbolizes a new requirement that triggers TNC to issue a Request for Proposals (“RFP”) for mitigation projects or available mitigation credits if they do not locate a suitable mitigation site for proposal by the time the liability has reached two years old.

2016 to 2019 Progress Update & Projected Remaining Liability¹

Basin	Non-Tidal Wetland	Tidal Wetland	USM Stream	Pre-USM Stream
Atlantic Ocean	AO-6*	Remaining 1.12 (1.08 >2YO ²)	-	-
Big Sandy River	Credit Purchase	-	Credit Purchase	Existing Sites
Chesapeake Bay	CB-17*	CB-17*	Remaining 1,122 (312 >2YO)	-
Chowan River	CH-18^	Credits from Existing Site ³	Remaining 1,532 >2YO	-
Lower James River	-	Credits from Existing Site	Credits from Existing Site; Credit Purchase; Remaining 29	-
Middle James River	Credits from Existing Site; Remaining 2.21	-	Credit Purchase	-
Upper James River	UJ-4^	-	-	-
New River	NW-3*	-	NW-3*	-
Potomac River	Remaining 2.54	Credits from Existing Site; Remaining 1.70	PO-8*	-
Rappahannock River	-	Credits from Existing Site	RP-15^	-
Roanoke River	RO-9^; Remaining 5.44 (5.2 >2YO)	-	RO-9^	-
Shenandoah River	SH-6*	-	SH-6*	-
Tennessee River	Remaining 6.02 (5.73 >2YO)	-	Credits from Existing Sites	-
York River	-	-	Credit Purchase	-
Total	16.21 (10.93 >2YO)	2.82 (1.08 >2YO)	2,683 (1,844 >2YO)	-

¹ Actions meeting the 2016 DEQ recommendation, based on VARTF 2018 Annual Report & VARTF Progress Update Letters.

² “>2YO” – Signifies amount of remaining liability greater than two years old, after taking into account implemented and proposed VARTF mitigation sites in a given river basin.

³ “Credits from Existing Site” – Signifies credits that have been or will be released from a constructed VARTF mitigation site.

* Proposed mitigation site with a Site Development Plan submitted to the IRT.

^ Proposed mitigation site with an initial site proposal submitted to the IRT.

TNC has demonstrated a significant effort to reduce existing wetland and stream liabilities held in the VARTF program by issuing Requests for Proposals (RFPs), submitting project proposals, obtaining released credits for performance from existing VARTF mitigation sites, withdrawing proposed projects that were not moving forward, and/or purchasing available mitigation bank credits.

- In 6 of the 14 river basins, implemented or proposed mitigation activities will satisfy all existing liabilities;
- Lower James River, Middle James River, and Potomac River - Remaining liabilities are all under two years old;
- Atlantic Ocean - TNC continues to search for a tidal wetland mitigation site for the remaining 1.12 tidal wetland credits;
- Chesapeake Bay - An RFP has been issued for the remaining 1,122 stream credits;
- Chowan River - An RFP has been issued for the remaining 1,532 stream credits, and a proposal has been submitted to the IRT since the 2018 Annual Report;
- Roanoke River – An RFP has been issued for the remaining 5.44 wetland credits; and
- Tennessee River - An RFP has been issued for the remaining 6.02 wetland credits, and a proposal has been submitted to the IRT since the 2018 Annual Report.

2) *DEQ approval of each site for inclusion in the program;*

TNC continues to seek consultation and approval from DEQ on programmatic and site-specific requirements, including documentation of site selection. This documentation has included completion of the Virginia Off-site Mitigation Location Guidelines Checklist, and with the 2019 Instrument will include the 2018 Site Selection Criteria developed by the Corps and DEQ. DEQ appreciates the opportunity to collaborate with TNC, the Corps, and IRT on site selection for the VARTF program.

In 2016, DEQ strongly advised TNC to prioritize site selection to pursue wetland restoration/creation and stream restoration/enhancement projects to satisfy NNL liabilities, and that future site selection be more directly correlated to the locations of existing liabilities. The VARTF program has shown substantial compliance with these recommendations, as demonstrated by the ability of the proposed mitigation projects in #1 above to satisfy existing NNL liabilities.

One public comment suggested that RFPs for potential VARTF mitigation site selection not be restricted by certain aspects of the Compensation Planning Framework. A Compensation Planning Framework is a requirement of the EPA and Corps' Final Rule for all in-lieu fee mitigation programs, and "must support a watershed approach to compensatory mitigation" by including all of the following within a given river basin when considering selection of sites for an in-lieu fee program:

- Descriptions of threats to aquatic resources, analysis of historic aquatic resource loss, and current aquatic resource conditions for all service areas;
- Goals and objectives for the in-lieu fee program in each service area;
- A site prioritization strategy;

- A description of anticipated public/private stakeholder involvement;
- Proposed long-term protection and management strategies; and
- Periodic evaluation and reporting of progress toward goals and objectives of the in-lieu fee program.

As such, DEQ observes that the requirement for a Compensation Planning Framework may strengthen an in-lieu fee program's ability to provide compensatory mitigation that adheres to the Code of Virginia requirements for replacement of wetland acreage and functions or stream functions and water quality benefits, and greatest likelihood of success. The primary concern of the public comment appears to be historic attainment of no net loss and the Final Rule requirement of addressing existing liabilities by the third growing season after advance credit sale. DEQ believes that revisions reflected in the 2019 Instrument will ensure that no net loss continues to be achieved and temporal loss is minimized within the VARTF program.

- 3) A commitment to provide annual reports to the Board detailing contributions received and acreage and type of wetlands or streams preserved, created or restored in each watershed with those contributions, as well as the compensatory mitigation credits contributed for each watershed of project impact;***

TNC continues to submit annual reports, detailing projects and contributions by river basin for the entire VARTF program, as well as monitoring reports to demonstrate the success of each individual project compared to project-specific performance standards. These deliverables meet the requirement for provision of annual reports.

In 2016, DEQ recommended that the age of liabilities be clearly visible and listed by river basin, in order to inform decisions on mitigation projects and track progress toward the achievement of mitigation goals. In addition, one public comment stated that DEQ should require enhanced annual monitoring, including listing the age and location of each liability, in order to track satisfaction of specific liabilities, conformance to the geographic service area requirements for each liability, and conformance to the new requirement in the 2019 Instrument for issuing an RFP if an existing liability is two years old.

TNC lists the specific impact, liability, and location of each liability in the Annual Report of the year in which the liability is initiated. In addition, once a site has been approved for the VARTF program, all liabilities satisfied by that mitigation site are listed on the site's public credit ledger in RIBITS. Each mitigation site also has a geographic service area that was developed using the same process as mitigation banks in a given river basin. Lastly, TNC has added a summary table to the Annual Report of remaining liabilities and age per river basin, to track conformance to the requirement to issue an RFP once the liability is two years old, if no site has been found.

- 4) A mechanism to establish fee amounts that will ensure each contribution will be adequate to compensate for the wetland acreage and functions or stream functions and water quality benefits lost in the impacted watershed; and***

The proposed credit fee schedule is outlined in the "VARTF Mitigation Prices for Advanced Credits" table (Exhibit C of the 2019 Instrument). In 2016, DEQ recommended that VARTF fee

schedules be reviewed and revised annually, in consultation with the IRT. Additionally, DEQ strongly suggested that VARTF credit prices be based on the price needed to secure alternative mitigation in each basin, in order to stay consistent with the average cost of mitigation activities, program requirements, adaptive management, and material and labor costs.

Accordingly, TNC agreed to review the VARTF advanced credit fee schedule annually. As a result of these recommendations, TNC has proposed, and the IRT has approved, several increases to the VARTF advanced credit fee schedule that took effect in January 2018, including in the Atlantic Ocean, Chowan River, Upper James River, New River, Roanoke River, and Shenandoah River basins. Additionally, TNC proposed an increase to the advance credit fee schedule in the Potomac River basin, which was approved in May 2019. TNC will continue to review the VARTF advanced credit fee schedule annually.

- 5) ***Such terms and conditions as the board deems necessary to ensure a no net loss of wetland acreage and functions or stream functions and water quality benefits from permitted projects providing compensatory mitigation.***

In 2016, DEQ identified two river basins that were determined to be a priority for the Board, and recommended that TNC prioritize the satisfaction of existing liabilities within these river basins. Within the Atlantic Ocean, a Site Development Plan has been submitted for a mitigation site known as AO-6, which, if approved, would satisfy the existing NNL liability for non-tidal wetlands. TNC presented one potential tidal wetland mitigation site to the IRT, but it did not move forward. TNC continues to search for a tidal wetland mitigation site in the Atlantic Ocean basin, in the absence of mitigation bank credits in that basin. Within the Big Sandy River basin, TNC issued an RFP for mitigation projects or credits, and subsequently proposed a credit purchase from an approved mitigation bank for the remaining liability for wetland and stream credits in this river basin.

Other comments and recommendations

In 2016, DEQ mandated that the VARTF program remain in compliance with any state regulations that were revised in August 2016. TNC has collaborated with Corps and DEQ staff to include thoughtful revisions to the 2019 Instrument, which include reference state law and regulations both in general and specific context. DEQ believes that this strengthens the program's adherence to the law and regulations of the Commonwealth of Virginia.

DEQ also joined the Corps and IRT in supporting the recommendations of the 2016 Audit Report, and encouraging TNC to collaborate with the IRT, as necessary, to implement the recommendations. TNC has added requirements and procedures into the 2019 Instrument intended to assist in implementation of the audit recommendations, including recommendations to initiate mitigation projects by the third growing season after advance credit sale, satisfy pre-Instrument liabilities, and provide clear presentation of remaining liabilities. DEQ encourages TNC to update the VARTF standard operating procedures according to the 2019 Instrument.

Summary

DEQ appreciates the substantial efforts that have been made by TNC since the 2016 DEQ Authorization Letter. TNC has worked continuously to collaborate with the Corps and DEQ on VARTF program improvements, culminating in the 2019 Instrument, and to follow the Board's recommendations listed in the 2016 DEQ Authorization Letter. DEQ concludes that the VARTF program is compliant with state law and regulations for in-lieu fee program approval. **DEQ authorizes VARTF to operate under state law and regulations as an approved in-lieu fee mitigation program for a period of ten (10) years from the effective date of this letter, expiring on July 13, 2029.** If, during this authorization period, noncompliance issues arise that cannot be resolved by the noncompliance procedures outlined in the 2019 Instrument, DEQ reserves the right to suspend or withdraw this authorization.

TNC may use the 2019 Instrument, once fully signed and approved by the regulatory agencies. Any revisions to the VARTF Program Instrument are approved by DEQ via signature of a revised Program Instrument, and do not constitute the need for an authorization.

We look forward to continued collaboration with your staff, the Corps, and the IRT on existing VARTF projects, review of new compensatory mitigation sites, and the continued operation and improvement of the efficiency of the VARTF program.

Sincerely,



David L. Davis, CPWD, PWS
Director, Office of Wetlands and Stream Protection

cc: Mr. Tom Walker – Regulatory Branch, Norfolk District - U.S. Army Corps of Engineers