

Certification of Non-Point Source Nutrient Credits

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9VAC25-900

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1 Part I
2 Definitions

3
4 **9VAC25-900-10. Definitions.**

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

7 "300 animal units" means the term as defined in 9VAC25-192-10.

8 "Act" means the Chesapeake Bay Watershed Nutrient Credit Program, Article 4.02 of Chapter
9 3.1 of Title 62.1 of the Code of Virginia (§ 62.1-44.19:12 et seq.).

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

11 "Animal feeding operation" means a lot or facility as defined by 9VAC25-31-10.

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

14 "Baseline" means the practices, actions, or levels of reductions that must be in place before
15 credits can be generated. The best management practices to be implemented for achieving
16 baseline are provided in 9VAC25-900-110.

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

20 "Board" means the State Water Control Board.

21 "CDA" means contributing drainage area.

22 "Certification of nutrient credits" or "nutrient credit certification" means the approval of nutrient
23 credits issued by the department as specified in 9VAC25-900-90.F.

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

27 "Concentrated animal feeding operation" means a lot or facility as defined by 9VAC25-31-10.

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

30 "DCR" means the Department of Conservation and Recreation.

31 "Delivery factor" means the estimated percentage (expressed as a ratio) of a total nitrogen or
32 total phosphorus load delivered to tidal waters as determined by the specific geographic location
33 of the nutrient source. For point source discharges the delivery factor accounts for attenuation
34 that occurs during riverine transport between the point of discharge and tidal waters. For

35 nonpoint source loads the delivery factor accounts for attenuation that occurs during riverine
36 transport as well as attenuation between the nutrient source and the edge of the nearest
37 stream. Delivery factors values shall be as specified by the department.

38 "Department" means the Department of Environmental Quality.

39 "Director" means the executive director of the Department of Environmental Quality or his
40 designee.

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

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

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

50 "Highly erodible soils" means land that is defined as highly erodible by the Sodbuster,
51 Conservation Reserve, and Conservation Compliance parts of the Food Security Act of 1985
52 (Pub. L. No. 99-198) and the Food, Agriculture, Conservation, and Trade Act of 1990 (Pub. L.
53 No. 101-624). Lists of highly erodible and potential highly erodible map units are maintained in
54 NRCS' field office technical guide.

55 "HUC" means the hydrologic unit code.

56 "Impaired waters" means those waters identified as impaired in accordance § 62.1-44.19:5.C.1
57 of the State Water Control Law.

58 "Implementation plan" means a plan that has been developed to meet the requirements of
59 9VAC25-900-130 and is submitted as part of the application.

60 "Invasive plant species" means non-native plant species that cause, or are likely to cause,
61 economic or ecological harm or harm to human health as established by Presidential Executive
62 Order 13112 (64 FR 6183, February 3, 1999) and are contained on DCR's Invasive Alien Plant
63 Species of Virginia (see 9VAC25-900-70.B.XXX).

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

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

68 "Management area" means all contiguous parcels deeded to the same landowner that includes
69 the nutrient credit-generating ~~entity within its boundaries~~ site within its boundaries. The term

70 | [contiguous means the same or adjacent parcels which may be divided by public or private right-](#)
71 | [of-way. The management area does not include publicly owned roads or rights-of-way.](#)

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

74 "MS4" means a municipal separate storm sewer system.

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

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

80 "NRCS" mean the United States Department of Agriculture's Natural Resource Conservation
81 Service.

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

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

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

91 "Observed source" means a source identified in the 2012 §305(b)/303(d) Water Quality
92 Assessment Integrated Report or a pollutant of concern identified in a TMDL approved prior to
93 July 1, 2014.

94 "O&M Plan" means the operations and maintenance plan.

95 "Owner" means the Commonwealth or any of its political subdivisions, including but not limited
96 to sanitation district commissions and authorities and any public or private institution,
97 corporation, association, firm, or company organized or existing under the laws of this or any
98 other state or country, or any officer or agency of the United States, or any person or group of
99 persons acting individually or as a group that owns, operates, charters, rents, or otherwise
100 exercises control over or is responsible for any nutrient credit-generating entity.

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

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

105 "Perpetual nutrient credits" or "perpetual credits" mean credits that are certified as permanent in
106 accordance with this chapter.

107 "Person" means an individual, corporation, partnership, association, a governmental body, a
108 municipal corporation, or any other legal entity.

109 "Potential nutrient credits" means the possible credits generated by a nutrient credit-generating
110 entity as calculated pursuant to 9VAC25-900-120. These potential nutrient credits shall be
111 expressed in terms of the estimated number of phosphorus and nitrogen credits generated.

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

114 "Registry" means the online Virginia Nutrient Credit Registry established and maintained by the
115 Department in accordance with subsection C of § 10.1-603.15:2 of the Code of Virginia.

116 "Released credit" or "released nutrient credit" means credits that the department has
117 determined to be eligible for placement on the Virginia Nutrient Credit Registry.

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

120 "Site" means the physical location where the nutrient credit-generating entity and its associated
121 practices, both baseline and credit-generating, are located.

122 "Site protection instrument" means a legal mechanism approved by the department and that
123 provides assurance that the credits will be maintained for the term of the credit.

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

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

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

136 "Term nutrient credit" or "term credit" means nutrient reduction activities that generate credits for
137 a determined and finite period of at least one year.

138 "Total maximum daily load" or "TMDL" means the sum of the individual wasteload allocations
139 (WLA) for point sources, load allocations (LAs) for nonpoint sources, natural background

140 loading and a margin of safety. TMDLs can be expressed in terms of either mass per time,
141 toxicity, or other appropriate measure. The TMDL process provides for point versus nonpoint
142 source trade-offs. TMDL is not necessarily a daily load but may be expressed in other units of
143 time. For nutrient trading, yearly loads are most often utilized. [An approved TMDL is a TMDL](#)
144 [that has been approved by the board.](#)

145 "Trading" or "nutrient trading" means a market-based program where nutrient credit-generating
146 entities produce nutrient reductions beyond those required by regulatory or voluntary programs.
147 These nutrient reductions equate to nutrient credits which, when released, can be sold to other
148 person, such as VPDES permittees, in order to meet the water quality requirements or goals for
149 their activities.

150 "Tributary" means those river basins for which separate tributary strategies were prepared
151 pursuant to § 2.2-218 of the Code of Virginia and includes the Potomac, Rappahannock, York,
152 and James River Basins, and the Eastern Coastal Basin, which encompasses the creeks and
153 rivers of the Eastern Shore of Virginia that are west of Route 13 and drain into the Chesapeake
154 Bay. For areas outside of the Chesapeake Bay Watershed, "tributary" includes the following
155 watersheds: Albemarle Sound, Coastal; Atlantic Ocean, Coastal; Big Sandy; Chowan; Clinch-
156 Powell; New Holston (Upper Tennessee); New River; Roanoke; and Yadkin.

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

162 "VACS BMP Manual" means the Virginia Agricultural Cost Share BMP Manual.

163 "Virginia Chesapeake Bay TMDL Watershed Implementation Plan", "Watershed implementation
164 plan" or "WIP" means the Phase I water shed implementation plan strategy submitted by
165 Virginia and approved by EPA in December 2010 to meet the nutrient and sediment allocations
166 prescribed in the Chesapeake Bay Watershed TMDL or any subsequent revision approved of
167 EPA.

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

172 "Virginia Stormwater Management Program" or "VSMP" means the Virginia program for issuing,
173 modifying, revoking and reissuing, terminating, monitoring and enforcing permits, and imposing
174 and enforcing requirements pursuant to 9VAC25-870, 9VAC25-880, or 9VAC25-890.

175 "VPA" means Virginia Pollution Abatement.

176 "VPDES" means Virginia Pollutant Discharge Elimination System.

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

181 Part II
182 General Information
183

184 **9VAC25-900-20. Authority and delegation of authority.**

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

186 B. The director may perform any act of the board provided under this regulation except as
187 limited by § 62.1-44.14 of the Code of Virginia.
188

189 **9VAC25-900-30. Purpose and applicability.**

190 A. The purpose of this chapter is to establish standards and procedures pertaining to the
191 certification of nutrient credits.

192 B. This chapter applies to all persons who submit an application for and to all persons that
193 receive a certification of nutrient credits from the department in accordance with the Act and this
194 chapter. Additionally, those acquiring or purchasing nutrient credits shall comply with the
195 applicable provisions of sections 40, 60 and 70 of this chapter.

196 C. Nutrient credits from stormwater nonpoint nutrient credit-generating entities in receipt of a
197 Nonpoint Nutrient Offset Authorization for Transfer letter from the department prior to ~~July 1,~~
198 [2012, \[the effective date of this chapter\]](#) shall be considered certified nutrient credits and shall
199 not be subject to further certification requirements or to the credit retirement requirements of this
200 chapter. However, such entities shall be subject to all other provisions of this chapter, including
201 registration under 9VAC25-900-100 and the requirements of Part IV including inspection,
202 reporting, and enforcement.
203

204 **9VAC25-900-40. Relationship to other laws and regulations.**

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

207 1. Virginia Stormwater Management Program (VSMP) Permit Regulations (9VAC25-
208 870).

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

214 b. VSMP Individual Permits for Municipal Storm Sewer Systems. As specified in
215 § 62.1-44.19:21.A of the Act, an MS4 permittee may acquire, use, and transfer
216 nutrient credits for purposes of compliance with any waste load allocations
217 established as effluent limitations in an MS4 individual permit issued pursuant to
218 9VAC25-870. Such method of compliance may be approved by the department
219 following review of a compliance plan submitted by the permittee that includes the
220 use of nutrient credits and is in accordance with the provisions of § 62.1-44.19:21.A.

221 2. General VSMP Permit for Discharges of Stormwater from Construction Activities
222 (9VAC25-880). As specified in § 62.1-44.19:21.B of the Act, those applicants required to
223 comply with water quality requirements for land-disturbing activities operating under a
224 general VSMP permit for discharges of stormwater from construction activities issued
225 pursuant to 9VAC50-880 may acquire and use perpetual nutrient credits placed on the
226 registry for exchange.

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

235 4. Virginia Pollutant Discharge Elimination System (VPDES) Permit Regulation
236 (9VAC25-31). As specified in § 62.1-44.19:21.C of the Act, owners of confined or
237 concentrated animal feeding operations issued individual permits pursuant to 9VAC25-
238 31 may acquire, use and transfer credits for compliance with any waste load allocations
239 contained in the provisions of a VPDES permit. Such method of compliance may be
240 approved by the department following review of a compliance plan submitted by the
241 permittee that includes the use of nutrient credits.

242 5. General VPDES Permit for Discharges of Stormwater Associated with Industrial
243 Activity (9VAC25-151). As specified in § 62.1-44.19:21.D of the Act, owners of facilities
244 registered for coverage under 9VAC25-151 for the general VPDES permit may acquire,
245 use, and transfer credits for compliance with any waste load allocations established as
246 effluent limitations in a VPDES permit. Such method of compliance may be approved by
247 the department following review of a compliance plan submitted by the permittee that
248 includes the use of nutrient credits.

249 6. General Virginia Pollutant Discharge Elimination System (VPDES) Watershed Permit
250 Regulation for Total Nitrogen and Total Phosphorus Discharges and Nutrient Trading in
251 the Chesapeake Bay Watershed in Virginia (9VAC25-820). Nutrient credits certified
252 pursuant to this chapter may be acquired to offset mass loads of total nitrogen or total
253 phosphorus discharged by new or expanded facilities regulated by 9 VAC 25-820.

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

259

260 **9VAC25-900-50. Appeal process.**

261 Any person applying to establish a nutrient credit-generating entity or an owner of a nutrient
262 credit-generating entity aggrieved by any action of the Department taken in accordance with this
263 chapter, or by inaction of the Department, shall have the right to review in accordance with the
264 provisions of the Administrative Process Act (§ 2.2-4000 et seq.).

265

266 **9VAC25-900-60. Limitations, liability, and prohibitions.**

267 A. The department shall not have responsibility or liability for the performance of practices at
268 a nutrient credit-generating entity evaluated using the procedures established in this chapter.

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

272 C. For the purposes of this chapter, the certification of nutrient credits which are generated
273 from practices funded in part or in whole by federal or state water quality grant funds is

274 prohibited other than controls and practices under § 62.1-44.19:20 B 1 a; however, establishing
275 baseline as specified in 9VAC25-900-110 may be achieved through the use of such grants.

276 D. The option to acquire nutrient credits for compliance purposes shall not eliminate any
277 requirement to comply with local water quality requirements.

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

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

283 G. Nutrient credit certifications are not transferable except after notice to the department in
284 accordance with 9VAC25-900-190. The department may require modification or revocation and
285 reissuance of certifications to change the name of the owner of the nutrient credit-generating
286 entity and incorporate such other requirements as may be necessary under the law or the Clean
287 Water Act.

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

290

291 **9VAC25-900-70. Adoption by reference and internet accessible resources.**

292 [Editorial Note – the concept is that we will include DIBRs similar to the way that we include CFR with a separate
293 section and then just update the dates in this section as needed (conforming change) in lieu of having to modify every
294 reference and date in the chapter].

295 A. This chapter refers to document to be used by applicants in gathering information to be
296 submitted to the department. These documents, as listed in this subsection and wherein they
297 relate to the nutrient certification program, are hereby incorporated by reference as part of this
298 chapter. The documents referenced in this chapter are as follows:

299 1. start listing documents

300 B. This chapter refers to resources to be used by applicants in gathering information to be
301 submitted to the department. These resources are available through the Internet; therefore, in
302 order to assist the applicants, the uniform resource locator or Internet address is provided for
303 each of the references listed in this section. The internet available resources used in the chapter
304 are as follows:

305 1. list all internet available resources.

306

307 **9VAC25-900-80. Local water quality.**

308 A. Persons purchasing nutrient credits for use by an activity located within either the
309 Chesapeake Bay Watershed or the Southern Rivers watersheds shall acquire credits pursuant
310 to the provisions of this section.

311 B. Chesapeake Bay Watershed. Persons purchasing nutrient credits for use by an activity
312 located within the Chesapeake Bay Watershed shall acquire nutrient credits as follows:

313 1. For activities directly discharging to a watershed water segment subject to an
314 approved local TMDL for total phosphorus or total nitrogen with allocations more
315 stringent than the Chesapeake Bay Watershed TMDL, credits shall only be acquired
316 from nutrient credit-generating entities located within upstream of the same local TMDL
317 watershed-impaired waters.

318 | 2. For activities directly discharging to waters impaired for dissolved oxygen, benthics, or
319 | nutrients but with no approved local TMDL, credits shall be acquired from nutrient credit-
320 | generating entities located in accordance with the following hierarchy:

- 321 | a. Upstream of the impaired waters, if credits are available;
- 322 | b. Within the same 12-digit HUC, if credits are available;
- 323 | c. Within the same 810-digit HUC, if credits are available;
- 324 | d. Within the same 8-digit HUC, if credits are available;
- 325 | e. Within an adjacent 8-digit HUC within the same basintributary, if credits are
- 326 | available; or, lastly,
- 327 | ef. Within the same basintributary.

328 | For waters impaired for dissolved oxygen or benthics, the above hierarchy may be
329 | waived by the permitting authority if the applicant demonstrates that the water quality
330 | impairment is not likely caused by nutrients. When the hierarchy is waived, then the
331 | credits may be acquired in accordance with subdivision 3 of this subsection.

332 | 3. For other activities not subject to subdivisions 1 or 2 of this subsection, credits may be
333 | acquired from nutrient credit-generating entities as provided in § 62.1-44.15:35 or §
334 | 62.1-44.19:18 of the Code of Virginia.

335 | C. Southern Rivers watersheds. Persons purchasing nutrient credits for use by an activity
336 | located within the Southern Rivers watersheds shall acquire nutrient credits as follows:

337 | 1. For activities directly discharging to a watershedwater segment subject to an
338 | approved local TMDL for total phosphorus or total nitrogen, credits shall only be
339 | acquired from nutrient credit-generating entities located withinupstream of the same
340 | local TMDL watershed-impaired waters.

341 | 2. For activities directly discharging to waters impaired for dissolved oxygen, benthics, or
342 | nutrients but with no approved local TMDL, credits shall be acquired from nutrient credit-
343 | generating entities located in accordance with the following hierarchy:

- 344 | a. Upstream of the impaired waters, if credits are available;
- 345 | b. Within the same 12-digit HUC, if credits are available;
- 346 | c. Within the same 810-digit HUC, if credits are available;
- 347 | d. Within the same 8-digit HUC, if credits are available;
- 348 | e. Within an adjacent 8-digit HUC within the same basintributary, if credits are
- 349 | available; or, lastly,
- 350 | ef. Within the same basintributary.

351 | For waters impaired for dissolved oxygen or benthics, the above hierarchy may be
352 | waived by the permitting authority if the applicant demonstrates that the water quality
353 | impairment is not likely caused by nutrients. When the hierarchy is waived, then the
354 | credits may be acquired in accordance with subdivision 3 of this subsection.

355 | 3. For other activities not subject to subdivisions 1 or 2 of this subsection, credits may be
356 | acquired from nutrient credit-generating entities as provided in § 62.1-44.15:35 or §
357 | 62.1-44.19:18 of the Code of Virginia.

358 |
359 |

Part III
Administrative and Technical Criteria

9VAC25-900-90. Procedure for application for certification of nutrient credits.

A. Application submittal. An applicant requesting certification of nutrient credits shall submit an application to the department. The application shall be in the form required by the department including signature in accordance with 9VAC25-900-140 and shall include the following elements:

1. A brief narrative description of the nutrient credit-generating entity.
2. Contact information for the applicant including name, address, and telephone number.
3. Contact information for the nutrient credit-generating entity, including the entity's mailing address, street address, telephone number, the contact person's name and email address.
4. Status of the applicant as owner, co-owner, operator or lessee of the nutrient credit-generating entity or the site on which the entity is located. The applicant shall provide documentation of the applicant's right to exercise control of the nutrient credit-generating entity or the site on which it is located for the purposes of generating and maintaining the proposed nutrient credit-generating entity. If the applicant cannot demonstrate control, those parties who singly or in conjunction with the applicant exercise control over the nutrient credit-generating entity or the site on which it is located may be required to jointly apply for nutrient credit certification with the applicant.
5. The name, mailing address, telephone number, and responsibilities of all known contractors responsible for any operational or maintenance aspects of the nutrient credit-generating entity.
6. The number of potential nutrient credits to be generated and supporting information including: (i) a description of the baseline practices in place within the management area and the nutrient credit-generating entity's practices that may result in generation of nutrient credits beyond baseline requirements; (ii) the potential nutrient credit calculation including the efficiencies and factors used; and, (iii) the associated documentation supporting the potential nutrient credits calculation. Baseline shall be determined in accordance with the requirements of 9VAC25-900-110. The number of potential nutrient credits shall be as calculated in accordance with 9VAC25-900-120
7. A topographic map or another type of map deemed acceptable by the department which delineates the property boundary of the management area and clearly shows the location of the nutrient credit-generating entity and baseline practices.
8. A description of current site conditions with photos.
9. The 8-digit, 10-digit, and 12-digit HUC in which the nutrient credit-generating entity is located.
10. For land use conversion projects, provide documentation of the condition of the land and land use controls in place as of the date specified in 9VAC25-900-110.E noting any changes in the condition of the land or land use controls since that date.
11. An implementation plan which meets the requirements of 9VAC25-900-130.
12. For structural BMPs, the financial assurance cost estimate calculated pursuant to Part VI.
13. The appropriate fee required pursuant to Part V of this chapter.
14. The proposed site protection instrument or instruments for perpetual credits.

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

408 16. Any state or federal water quality grants received.

409 17. For perpetual credits, notarized proof that all management area property is held with
410 clear title and lien free by owner.

411 18. Any other information deemed necessary by the department.

412 B. Administrative completeness review. Upon receiving an application pursuant to
413 subsection A of this section, the department shall conduct an administrative completeness
414 review prior to the technical review and respond within 30 calendar days of application receipt. If
415 the application is not administratively complete, the department will notify the applicant of the
416 administrative deficiencies. If the application is administratively complete, the department will
417 notify the applicant that application will be technically reviewed for nutrient credit certification.

418 C. Public Notification. The department will post a public notification of the proposed nutrient
419 credit-generating entity on its website.

420 D. Technical review. Once the application is deemed administratively complete, the
421 department will perform a technical review of the application. As part of the technical review,
422 additional information may be required and the nutrient credit-generating entity and
423 management area may be visited. Additionally, if the department chooses, a certification
424 advisory committee may be convened. Within 90 days of the receipt of an administratively
425 complete application, the department will notify the applicant of the status of the technical
426 review of the application.

427 E. Technical completeness. The nutrient credits shall not be certified until the application is
428 administratively and technically complete. An application for a certification is complete when the
429 department receives an application in accordance with subdivision A of this section and the
430 application and any supplemental information is completed to the department's satisfaction.

431 F. Nutrient credit certification. The department shall notify the applicant of approval of the
432 nutrient credit certification and provide any applicable conditions required for credit certification
433 including retirement and release of credits in accordance with 9VAC25-900-100 or the
434 department shall notify the applicant that the nutrient credit-generating entity does not qualify for
435 any certified credits pursuant to the requirements of this part.

436

437 **9VAC25-900-100. Nutrient credit release and registration.**

438 A. Retirement of Credits.

439 1. Pursuant to the requirements of §10.1-603.15:2.B.8, five percent of the total credits
440 certified will be retired by the department at the time of certification and will not
441 placed on the Virginia Credit registry for exchange.

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

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

447 1. For nutrient credit-generating entities using land use conversion, 25% of the credits
448 will be released by the department after the department has verified completion of the
449 conditions of the nutrient credit certification. The remaining 75% of credits will be
450 released by the department after it is satisfied that the implementation plan's
451 performance criteria required pursuant to 9VAC25-900-130 has been achieved.

452 2. For nutrient credit-generating entities using practices besides land use conversion, the
453 schedule for release of credits will be determined by the department and provided to the
454 applicant with the nutrient credit certification. For entities using structural BMPs, the
455 schedule shall also require, prior to release of credits, the approval of the financial
456 assurance mechanism established pursuant to Part VI of this chapter.

457 C. Registration of nutrient credits. Credits will be placed on the registry and classified as
458 term or perpetual credits by the department. The registry will also indicate the number of credits
459 that have been released for exchange. Only credits released by the department are available for
460 exchange.

461
462 **9VAC25-900-110. Establishing baseline.**

463 A. Practices for establishing baseline must be in place prior to the generation of any credits
464 by a nutrient credit-generating entity except in the case of land use conversion as described in
465 subsection E of this section. The practices for establishing baselines, as provided in this section,
466 shall be implemented and properly maintained for each type of operation within the
467 management area. Baselines are applicable statewide for nutrient credit-generating entities
468 including those located in either the Chesapeake Bay Watershed or the Southern Rivers
469 watersheds.

470 B. Agricultural cropland, hayland and pastures. [The baseline for agricultural management](#)
471 [areas are those practices implemented to achieve a level of reduction assigned in the WIP or an](#)
472 [approved TMDLs.](#) Baselines for cropland, hayland, or pastures within the management area
473 shall be established in accordance with either subdivision 1-~~or~~, 2, or 3 of this subsection.

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

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

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

484 b. Nutrient management. Implementation and maintenance of the nutrient
485 management practices required by the nutrient management plan which has been
486 written by a certified nutrient management planner pursuant to the Nutrient
487 Management Training and Certification Regulations, 4VAC5-15.

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

495 d. Cover crop. For croplands, cover crops shall be planted to meet the standard
496 planting date and other specifications in accordance with DCR Specifications for NO.
497 SL-8B contained in the VACS BMP Manual. This requirement applies to all croplands
498 where summer annual crops are grown and the summer annual crop received
499 greater than a total of 50 pounds per acre of nitrogen application from any nutrient
500 source; however, if the cropland is planted to winter cereal crops for harvest in the

501 spring, then cover crops do not need to be planted on these croplands during that
502 production year.

503 e. Livestock water body exclusion. For pastures or when livestock are present within
504 the management area, livestock exclusion fencing shall be placed around perennial
505 streams, rivers, lakes, ponds or other water body having perennial flow. This
506 exclusionary fencing shall be constructed in accordance with DCR Specification for
507 NO. WP-2 contained in the VACS BMP Manual in order to restrict livestock access to
508 the water body. Livestock shall be provided with an alternative watering source. The
509 livestock exclusion fencing shall be placed at least 35 feet from the edge of the water
510 body having perennial flow and this exclusion zone shall contain the riparian buffer
511 required by subdivision 2.c of this subsection. Access points for livestock watering or
512 crossing over a water body shall be a hardened surface constructed to DCR
513 Specifications for NO. WP-2 contained in the VACS BMP Manual and shall be
514 fenced to limit livestock access to the water body at the crossing point. Ponds which
515 have been specifically built for the purpose of livestock watering and which do not
516 have perennial flow through an overflow pipe or spillway are not required to meet the
517 provisions of this subdivision.

518 [3. The department may approve a load based baseline determination equivalent to](#)
519 [full implementation of the practices identified in subdivision 2 of this subsection.](#)

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

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

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

528 a. Implementation and maintenance of the nutrient management practices required
529 by the nutrient management plan which has been written by a certified nutrient
530 management planner pursuant to the Nutrient Management Training and
531 Certification Regulations, 4VAC5-15.

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

540 c. For confined poultry operations, storage of poultry waste according to the nutrient
541 management plan and in a manner that prevents contact with surface water and
542 groundwater. Poultry waste that is stockpiled outside of the growing house for more
543 than 14 days shall be kept in a facility or at a location that provides adequate
544 storage. Adequate storage management practices shall meet the following minimum
545 requirements:

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

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

549 (3) The ground surface of the poultry waste storage area shall have a minimum of
550 two feet separation distance to the seasonal high water table. If poultry waste is

551 stored in an area where the seasonal high groundwater table lies within two feet of
552 the ground surface, the storage area shall be underlain by a low-permeability, hard-
553 surfaced barrier such as concrete or asphalt.

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

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

560 1. For new development and redevelopment, baseline shall be achieved through
561 compliance with the post-construction water quality design criteria requirements of the
562 Virginia Stormwater Management Program Permit Regulations under 9VAC25-870-63.
563 Additionally, for development in a locality with a local stormwater management design
564 criteria ~~ordinance~~ more stringent than 9VAC25-870-63, baselines shall be achieved
565 through compliance with the local stormwater management ordinance.

566 2. For retrofits within the Chesapeake Bay Watershed, baseline shall be at a level
567 necessary to achieve the ~~more stringent~~ nutrient reduction ~~based on: (i) the nutrient~~
568 ~~reductions~~ assigned in the urban sector of the WIP; ~~and (ii) the the best available~~
569 ~~scientific and technical information as determined by the department at the time of~~
570 ~~certification.~~ or the approved local TMDL, whichever is more stringent.

571 3. For retrofits within the Southern Rivers watershed and within a watershed with an
572 approved TMDL with total phosphorus or total nitrogen allocations, baselines shall be at
573 a level necessary to achieve reductions of the approved TMDL. For all other retrofits
574 within the Southern Rivers watershed, baseline shall be ~~at a level necessary to achieve~~
575 ~~a total phosphorus load requirement of 0.41 pounds per acre per year.~~ achieved through
576 compliance with the post-construction water quality design criteria requirements for
577 development on prior developed lands pursuant to 9VAC25-870-63.A.2.

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

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

590
591 **9VAC25-900-120. Credit calculation procedures.**

592 A. Pursuant to this section, the applicant shall calculate the potential nutrient credits
593 generated by the practices implemented at the nutrient credit-generating entity. The applicable
594 delivery factors, dependent upon the basin in which the nutrient credit-generating entity is
595 located, shall be applied when calculating the potential credits generated.

596 B. For agricultural practices, except land use conversion, the potential nutrient credits shall
597 be calculated using removal efficiencies from the department's approved list of agricultural
598 practices. Practices shall be approved by the department based on the efficiencies assigned by

599 the Chesapeake Bay Program. The standards and specifications for implementation of the
600 practices will be established by the department and shall be in accordance with the VACS BMP
601 Manual or the FOTG, as applicable.

602 C. For urban practices, the potential nutrient credits shall be calculated using the applicable
603 removal efficiencies pursuant to 9VAC25-870-65 or using the best available scientific and
604 technical information available at the time of certification as approved by the department.

605 Limitations on potential nutrient credits from certain BMPs are:

606 1. In the Chesapeake Bay Watershed, nutrient reductions from perpetual BMPs that
607 were implemented prior to July 1, 2009 may not be used to generate credits for NPDES
608 permit use. The generation of credits from all other land use conversions and BMPs in
609 the Chesapeake Bay Watershed must represent controls beyond those in place as of
610 July 1, 2005.

611 2. In the Southern River watersheds, nutrient reductions from land use conversions and
612 BMPs that were implemented prior to July 1, 2009 may not be used to generate credits.

613 D. For land use conversions, conversion of land to a more intensive land-use activity will not
614 generate nutrient credits. The number of potential nutrient credits shall be determined by
615 calculating the nutrient credits per acre and multiplying that number by the total acreage which
616 will undergo land use conversion. The nutrient credits per acre is equal to the amount calculated
617 by subtracting the load per acre of nutrient nonpoint source pollution for the proposed land use
618 after conversion from the load per acre for the pre-conversion land use. The values used for the
619 loadings per acre in this calculation shall be based on the applicable loading levels provided in
620 the WIP or the approved TMDL. The pre-conversion land use shall be based on the land use as
621 of the date specified in 9VAC25-900-110.E.

622 E. For a practice not previously approved by the department, the department will perform a
623 case-by-case review in order to calculate the number of potential nutrient credits generated. The
624 owner shall submit the removal efficiency calculation information for the practice and the
625 calculation of the potential number of credits generated using that efficiency. The department
626 may also request that the submittal include requirements for demonstration projects, the
627 collection of sufficient data to evaluate the results, and any other information the department
628 deems necessary to determine the validity of the credits.

629

630 **9VAC25-900-130. Implementation plan.**

631 A. The implementation plan submitted pursuant to 9VAC25-900-90 shall provide information
632 detailing how the nutrient credit-generating entity will generate credits for the term of the credits.
633 The implementation plan will include the applicable information as required in subsections B
634 through I of this section.

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

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

642 2. The performance standards which shall be used to evaluate whether the nutrient
643 credit-generating entity is generating credits as calculated in 9VAC25-900-120.

644 3. Applicable requirements for the project required pursuant to Part IV.

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

- 647 1. A forest stewardship management plan approved by the State Forester or his
648 representative. This management plan shall include invasive [plant](#) species control and
649 eradication if invasive ~~vegetation impacts~~[plant species impact](#) 5% or more of the nutrient
650 credit-generating entity's acreage. Additionally, the management plan shall include a
651 requirement that any harvesting of timber shall adhere to best management practices as
652 set forth by the Department of Forestry's Water Quality Guide.
- 653 2. Forests shall be planted to achieve an initial survival density of a minimum of 400
654 woody stems per acre including any noninvasive volunteers. Survival of planted
655 deciduous trees shall not be established until the start of the second complete growing
656 season following planting. Survival of planted evergreen trees may be established after
657 completion of the first complete growing season following planting.
- 658 3. Description of agricultural baseline requirements implemented in accordance with
659 9VAC50-900-110.B and 110.C which apply to any remaining portions of the
660 management area which are not undergoing land use conversion. Performance
661 standards and reporting procedures demonstrating ongoing compliance with the
662 baseline shall be included in the implementation plan.
- 663 D. For nutrient credit-generating entities utilizing natural succession land use conversion,
664 the implementation plan shall also include provisions for:
- 665 1. Forests to achieve a density of a minimum of 400 noninvasive woody stems per acre.
666 2. Invasive [plant](#) species control and eradication if invasive ~~vegetation impacts~~[plant](#)
667 [species impact](#) 5% or more of the nutrient credit-generating entity's acreage.
668 3. Description of agricultural baseline requirements implemented in accordance with
669 9VAC25-900-110.B and 110.C which apply to any remaining portions of the
670 management area not undergoing land use conversion. Performance standards for
671 demonstrating ongoing compliance with the agricultural baseline requirements of
672 9VAC25-900-110.B and 110.C shall be included in the implementation plan.
- 673 E. For nutrient credit-generating entities utilizing other land use conversion not subject to
674 either subsection C, D, or G of this section, the implementation plan shall also include
675 provisions:
- 676 1. Description of practices implemented in accordance with 9VAC25-900-110.B and
677 110.C for the nutrient credit-generating entity. Performance standards and reporting
678 procedures demonstrating ongoing compliance with the agricultural practices
679 requirements of 9VAC25-900-110.B and 110.C shall be included in the implementation
680 plan.
- 681 2. Description of agricultural baseline requirements implemented in accordance with
682 9VAC25-900-110.B and 110.C which apply to any remaining portions of the
683 management area which are not undergoing land use conversion. Performance
684 standards and reporting procedures demonstrating ongoing compliance with the
685 agricultural baseline requirements of 9VAC25-900-110.B and 110.C shall be included in
686 the implementation plan.
- 687 F. For nutrient credit-generating entities utilizing non-land conversion agricultural practices,
688 the implementation plan shall also include:
- 689 1. A description of the entire management area. This description shall include: (i) the
690 acreage and use including descriptions for the proposed practices of the nutrient credit-
691 generating entity and baseline area or areas; (ii) water features including all streams,
692 ponds, lakes, wetlands; (iii) environmentally sensitive sites as defined in 4VAC5-15-10;
693 (iv) areas with highly erodible soils; and, (v) the current agricultural operations, crops or
694 animal facilities.

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

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

701 G. For nutrient credit-generating entities utilizing existing wetland and stream mitigation
702 projects pursuant to 62.1-44.15:23, the implementation plan shall also include:

703 1. A copy of the approved mitigation banking instrument.

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

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

707 a. the type of eligible land use conversion;

708 b. the acreage of the area;

709 c. the available mitigation credits;

710 d. the potential nutrient credits; and

711 e. the ratio of mitigation credits to nutrient credits.

712 4. Documentation that complies with the department approved procedure to ensure
713 credits are not used for both wetland or stream credit and nutrient credit purposes. [This](#)
714 [documentation shall include the appropriate notifications to the mitigation banking](#)
715 [Interagency Review Team.](#)

716 H. For nutrient credit-generating entities utilizing urban practices, the implementation plan
717 shall also include:

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

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

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

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

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

734 I. For other types of activities or projects not presented in subsections C thru H of this
735 section, the implementation plan shall include information as deemed appropriate by the
736 department in order to evaluate the credits for certification.

737

738 **9VAC25-900-140. Signature Requirements.**

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

740 1. For a corporation, the application shall be signed by a responsible corporate officer.
741 For the purpose of this section, a responsible corporate officer means a president,
742 secretary, treasurer, or vice-president of the corporation in charge of a principal business
743 function or any other person who performs similar policy-making or decision-making

744 functions for the corporation or the manager of the nutrient credit-generating entity
745 provided the manager is authorized to make management decisions that govern the
746 operation of the entity;

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

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

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

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

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

761 3. The written authorization is submitted to the department.

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

766 D. Any person signing a document under subdivisions A or B of this section shall certify that
767 all submittals are true, accurate and complete to the best of their knowledge and belief.
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Part IV

771

Compliance and Enforcement

772

773

9VAC25-900-150. Inspections and information to be furnished.

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

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

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2. Have access to and copy, at reasonable times, any records that must be kept under the conditions of this chapter, the above referenced approved plans, or as otherwise required by the nutrient credit certification. The owner will make available any records requested by the department which detail nutrient credit-generating entity operations, status, records of transactions or other actions that demonstrate the status of credits and operations of the nutrient credit-generating entity including records required to be kept under any implementation plan, operations and maintenance plan or financial assurance documents;

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3. Inspect at reasonable times any entities, equipment, practices, or operations regulated or required under the provisions of this chapter, the above referenced approved plans, or as otherwise required by the nutrient credit certification; and

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

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

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

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9VAC25-900-160. Recordkeeping and reporting.

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A. The owner of the nutrient credit-generating entity will maintain all records relevant to the management, operations and maintenance of the nutrient credit-generating entity, including

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816 copies of all reports required by this chapter, the nutrient credit certification or the
817 implementation plan, operations and maintenance plan or financial assurance approved under
818 this regulation. Records of all data used to complete the application for certification of nutrient
819 credits shall be kept. All records will be maintained for at least 5 years following the final
820 exchange of any credits. This period of retention shall be extended automatically during the
821 course of any unresolved litigation regarding the regulated activity or regarding control
822 standards applicable to the owner of the nutrient credit-generating entity, or as requested by the
823 Board.

824 B. All applications, reports, or information submitted to the department shall be signed and
825 certified as required by 9VAC25-900-140.

826 C. Reporting requirements.

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

831 2. The owner of the nutrient credit-generating entity shall give advance notice to the
832 department of any planned changes in the entity which may result in noncompliance with
833 the act, this chapter, or the nutrient credit certification.

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

837 4. Where the owner of the nutrient credit-generating entity becomes aware that he
838 submitted incorrect information in an application for nutrient credit certification or in any
839 report to the department, it shall promptly submit the corrected information.

840 5. Each owner shall submit an annual report on the status of the nutrient credit-
841 generating entity operations including credit generating practices, confirmation of the
842 continued implementation and maintenance of practices required to establish baseline in
843 accordance with 9VAC25-900-110, and an up-to-date credit ledger detailing credits
844 available for exchange, credits exchanged and associated purchaser information. This
845 report shall contain recent photographs of any structural BMPs implemented to achieve
846 baseline or for nutrient credit generation and it shall cover the period from July 1st
847 through June 30th of each year. The report shall be submitted annually by August 15th.

848 6. Exchange of credits shall be recorded on the registry. The exchange of credits by the
849 owner of the nutrient credit-generating entity will be reported to the department within 14
850 calendar days of the date of the exchange. This report shall include:

- 851 a. The identification for the credits exchanged;
- 852 b. The name of and contact information for the buyer;
- 853 c. The name of the seller;
- 854 d. The amount of credits exchanged; and
- 855 e. If applicable, the name of the facility and the associated permit number which
856 shall use the purchased credits.

857

858 **9VAC25-900-170. Enforcement and penalties.**

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

861

862 **9VAC25-900-180. Suspension of credit exchange.**

863 A. If the department tentatively decides to suspend the ability of an owner of a nutrient
864 credit-generating entity to exchange credits, the department shall issue a notice of its tentative

865 decision to the owner. If the department determines that suspension is appropriate, it will also
866 remove the ability for the owner to show credits for exchange on the registry. The ability to
867 exchange credits will remain suspended until such time as the owner brings the nutrient credit-
868 generating entity into compliance with this chapter and the nutrient credit certification to the
869 department's satisfaction.

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

- 871 1. Noncompliance by the owner of the nutrient credit-generating entity with any condition
872 of the nutrient credit certification or any plans approved under or required by the nutrient
873 credit certification or this chapter;
- 874 2. Failure of the owner of the nutrient credit-generating entity to disclose fully all relevant
875 material facts or, the misrepresentation of any relevant material facts in applying for a
876 certification or in any other report or document required under the law, this chapter, the
877 nutrient credit certification, or any plans approved or required under the nutrient credit
878 certification;
- 879 3. A change in any condition that results in a temporary elimination of the best
880 management practices approved as part of the nutrient credit certification; or
- 881 4. There exists a material change in the basis on which the nutrient credit certification
882 was issued that requires either a temporary or permanent elimination of activities
883 controlled by the nutrient credit certification necessary to protect human health or the
884 environment.

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886 **9VAC25-900-190. Nutrient credit certification transfer, modification, revocation and**
887 **recertification, or termination.**

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

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

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

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

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

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

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

910 b. The department has received new technical information which would have justified
911 the application of different conditions at the time of issuance.

912 c. The ~~standards or regulations on which~~ department determines good cause exists
913 for modification of milestones within the nutrient credit certification ~~was based have~~

914 | ~~been changed by promulgation of amended standards or regulations or by judicial~~
915 | ~~decision after the certification was issued.~~
916 | ~~d. The department determines good cause exists for modification of a compliance~~
917 | ~~schedule.~~
918 | ~~ed.~~ To correct technical mistakes, such as errors in calculation, or mistaken
919 | interpretations of law made in determining certification conditions.
920 | ~~fe.~~ The department has received notification of a proposed transfer of ownership of
921 | the nutrient credit-generating entity.

922 | 2. Causes for termination. The following are causes for terminating a nutrient credit
923 | certification during its term or for denying an application for certification of nutrient credits
924 | after notice and opportunity for a hearing:

925 | a. The owner of the nutrient credit-generating entity has violated any regulation or
926 | order of the board or department, any provision of the law, or any order of a court,
927 | where such violation results in a release of harmful substances into the environment
928 | or poses a substantial threat of release of harmful substances into the environment
929 | or presents a hazard to human health or the violation is representative of a pattern of
930 | serious or repeated violations which in the opinion of the department, demonstrates
931 | the owners disregard for or inability to comply with applicable laws, regulations or
932 | requirements;

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

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

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

944 | e. A change in any condition that results in a permanent elimination of any of the
945 | best management practices approved as part of the nutrient credit certification; or
946 | f. There exists a material change in the basis on which the nutrient credit certification
947 | was issued that requires either a temporary or a permanent elimination of activities
948 | controlled by the nutrient credit certification necessary to protect human health or the
949 | environment.

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

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

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

958 | 1. The current holder of the certification of nutrient credits notifies the department at
959 | least 30 days in advance of the proposed transfer date in subdivision b2 of this
960 | subsection;

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

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

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

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Part V

981

Fees

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9VAC25-900-200. Purpose, scope and applicability.

984

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

985

986

B. This part applies to all persons who submit an application for a certification of nutrient credits in accordance with 9VAC25-900-90. The fees shall be assessed in accordance with this part.

987

988

989

~~C. When the department finds it necessary to modify or revoke and reissue any certification of nutrient credits under 9VAC25-900-190, the holder of that certification shall be considered an applicant and shall be assessed a fee in accordance with this part even if the department initiated the modification action.~~

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9VAC25-900-210. Determination of application fee amount.

995

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

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997

998

B. Perpetual nutrient credit certifications.

999

1. An applicant for certification of perpetual nutrient credits is assessed a base fee as shown in [Table 1 of 9VAC25-900-230](#).

1000

1001

2. An applicant is assessed a supplementary fee based on the number of potential nutrient credits of phosphorus generated in addition to the base fee specified in subdivision 1 of this subsection. The supplementary fees are shown in [Table 1 of 9VAC25-900-230](#).

1002

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1005

3. Modifications of approved perpetual nutrient credit certifications will be assessed the base fee only unless the modifications generate additional perpetual credits then a supplementary fee based on the number of additional potential nutrient credits of phosphorus will be assessed in addition to the base fee [in accordance with subsection B.2 of this section](#).

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

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1012

C. Term nutrient credit certifications.

1013

~~1. An applicant for certification of term nutrient credits is assessed a base fee [as shown in 9VAC25-900-230](#). Modifications of issued term nutrient credit certifications will be assessed the base fee only unless the modifications generate additional term credits ~~then~~ [plus](#) a supplementary fee based on the number of [additional potential nutrient term credits and the requested term of those](#) credits [as shown in Table 2 of phosphorus will be assessed in addition to the base fee](#) [9VAC25-900-230](#).~~

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[2. A modification of an approved term nutrient credit certification is assessed a base fee plus a supplementary fee based on the number of term credits and the requested term of those credits as shown in Table 2 of 9VAC25-900-230](#)

1020

1021

1022

[3. A renewal fee will be assessed a base fee plus a supplementary fee based on the number of renewing term credits as shown in Table 3 of 9VAC25-900-230 if there are: \(i\)](#)

1023

1024 [no changes to the site or practices which were submitted with the previously approved](#)
 1025 [certification application; \(ii\) the renewal application submitted is an exact duplicate of the](#)
 1026 [previously approved certification application; and, \(iii\) the application is submitted at](#)
 1027 [least 60 days prior to the end date of the term credits for which renewal is sought. If the](#)
 1028 [renewal application is submitted less than 60 days prior to the end date of the term](#)
 1029 [credits, the application will be deemed a new application and shall be assessed a fee as](#)
 1030 [provided in C.1 of this subsection.](#)

1031 [4.](#) The total fee (base fee plus supplementary fee) shall not exceed \$10,000. If the
 1032 calculated fee is greater than \$10,000 then the applicant shall only pay \$10,000.

1033
 1034 **9VAC25-900-220. Payment of application fees.**

1035 A. Due date. All application fees are due on the day of application and must accompany the
 1036 application.

1037 B. Method of payment. Fees shall be paid by check, draft or postal money order made
 1038 payable to "Treasurer of Virginia" and shall be sent to the Department of Environmental Quality,
 1039 Receipts Control, P.O. Box 1104, Richmond, VA 23218. When the department is able to accept
 1040 electronic payments, payments may be submitted electronically.

1041 C. Incomplete payments. All incomplete payments will be deemed non-payments.

1042 D. Late payment. Pursuant to 9VAC25-900-90, no applications will be deemed to be
 1043 complete until the department receives proper payment.

1044
 1045 **9VAC25-900-230. Application fee schedule.**
 1046

Table 1. Perpetual Nutrient Credits Certification Application Fees.

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

1047

Table 2. Term Nutrient Credits Certification Application Fees.

Base Fee	\$ <u>3,000</u>
Supplementary Fees	\$/((Credit*Term Yrs)
First 100 Term Nutrient Credits (1 to 100)	\$ <u>4.00</u>
Second 100 Term Nutrient Credits (101 to 200)	\$ <u>3.00</u>
Third 100 Term Nutrient Credits (201 to 300)	\$ <u>2.00</u>

Fourth 100 and greater Term Nutrient Credits (≥ 301)	<u>\$1.00</u>
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Table 3. Renewal Term Nutrient Credits Certification Application Fees.

<u>Base Fee</u>	<u>\$1,000</u>
<u>Supplementary Fees</u>	<u>\$/((Credit*Term Yrs)</u>
<u>First 100 Term Nutrient Credits (1 to 100)</u>	<u>\$4.00</u>
<u>Second 100 Term Nutrient Credits (101 to 200)</u>	<u>\$3.00</u>
<u>Third 100 Term Nutrient Credits (201 to 300)</u>	<u>\$2.00</u>
<u>Fourth 100 and greater Term Nutrient Credits (≥ 301)</u>	<u>\$1.00</u>

1049

1050 Illustrative Examples

1051 Example 1.

1052 The applicant is submitting an application for nutrient credit certification of a nutrient
 1053 credit-generating entity that will generate perpetual credits. The number potential
 1054 perpetual credits calculated is 150. The required fee is calculated as follows:

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

1055

1056 Example 2.

1057 The applicant is submitting an application for nutrient credit certification of a nutrient
 1058 credit-generating entity that generated credits with a 5-year term. The number potential
 1059 nutrient credits calculated is 275. The required fee is calculated as follows:

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

1060

1061 Example 3.

1062 The applicant is submitting a renewal application for annual credits generated at their
1063 nutrient credit-generating entity for a 5-year term. The number of annual credits being
1064 renewed for another term is 165. The required fee is calculated as follows:

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

1065

Part VI
Financial Assurance

9VAC25-900-240. Financial assurance applicability.

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

B. An owner of a nutrient credit generating entity which utilizes structural BMPs for the generation of term credits with terms that exceed one year shall submit and maintain financial assurance in accordance with this part. The financial assurance mechanism shall be submitted to and approved by the department prior to the release of credits. For the purposes of this part, term credit shall refer to credit with a term of greater than one year.

C. An owner of a nutrient credit generating entity which utilizes structural BMPs for the generation of credits with a term of one year shall not be required to provide financial assurance.

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

9VAC25-900-250. Suspension of nutrient credit exchange.

Failure to provide or maintain adequate evidence of financial assurance in accordance with this part shall be cause for the department to suspend the exchange of credits in accordance with 9VAC25-900-180 or terminate the nutrient credit certification in accordance with 9VAC25-900-190.

9VAC25-900-260. Cost estimates for perpetual and term credit nutrient credit-generating entities.

A. The owner of a nutrient credit-generating entity shall prepare for approval by the department a detailed written cost estimate providing the cost of either repairing or restoring, and operating and maintaining any structural BMPs generating perpetual nutrient credits or term nutrient credits with a term of greater than one year. This written cost estimate shall be submitted as part of the application in accordance with 9VAC25-900-90 and shall include:

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

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

3. The cost estimate shall be based on and include the costs of hiring a third party to either repair or restore, and operate and maintain the structural BMPs generating

1113 nutrient credits. The third party may not be either a parent corporation or subsidiary of
1114 the owner.

1115 B. For a nutrient credit-generating entity generating perpetual credit from structural BMPs,
1116 the cost estimate shall be reviewed for sufficiency by the department at least once every 5
1117 years.

1118

1119 **9VAC25-900-270. Financial assurance requirements for term credits.**

1120 A. For a nutrient credit-generating entity generating term credits with a term of greater than
1121 one year, the owner shall demonstrate financial assurance using any one or a combination of
1122 the mechanisms specified in 9VAC25-900-300 through 9VAC25-900-340.

1123 B. The financial assurance mechanism(s) shall provide funding for the full amount of the
1124 cost estimate at all times.

1125 C. The financial assurance mechanism(s) used to provide evidence of the financial
1126 assurance shall ensure that the funds necessary will be available whenever they are needed.

1127 D. The owner shall provide continuous financial assurance coverage for his term credit
1128 nutrient credit generating entity in accordance with this part until released by the department.

1129 E. After submittal of a complete financial assurance mechanism, the department shall notify
1130 the owner of the tentative decision to approve or reject the financial assurance mechanism.

1131

1132 **9VAC25-900-280. Financial assurance requirements for perpetual credits.**

1133 A. Subject to the requirements and limitations outlined in subsection B of this section, the
1134 owner shall demonstrate financial assurance for his perpetual credit nutrient credit generating
1135 entity using any one or combination of the mechanisms specified in 9VAC25-900-300 through
1136 9VAC25-900-340.

1137 B. The financial assurance mechanism or mechanisms shall provide funding for the full
1138 amount of the cost estimate at all times.

1139 C. Whenever credits are sold, the owner shall, by the current anniversary date of the initial
1140 approval by the Department of the release of credits for sale, either establish or increase one of
1141 the mechanisms outlined in §§ 9VAC25-900-300 through 9VAC25-900-330 in an amount to be
1142 determined in accordance with the following formula:

1143

1144
$$CE/TCIAS * CSDAAP$$

1145 where:

1146 CE = Cost Estimate

1147 TCIAS = Total Number of Credits Initially Available for Sale

1148 CSAAP = Number of Credits Sold During the Applicable Annual Period

1149

1150 D. The owner may only establish or continue to use insurance, as outlined in 9VAC25-900-
1151 340, to demonstrate financial assurance for that portion of the total cost estimate that does not
1152 include credits that have been sold.

1153 E. The financial assurance mechanisms used to provide evidence of the financial assurance
1154 shall ensure that the funds necessary will be available whenever they are needed.

1155 F. The owner shall provide continuous financial assurance coverage for his perpetual credit
1156 nutrient credit generating entity in accordance with this part until released by the department.

1157 G. After submittal of a complete financial assurance mechanism, the department shall notify
1158 the owner of the tentative decision to approve or reject the financial assurance mechanism.

1159

1160 **9VAC25-900-290. Allowable financial mechanisms.**

1161 Subject to the limitations and requirements outlined in sections 9VAC25-900-270 and
1162 9VAC25-900-280, an owner of nutrient credit generating entity using structural BMPs to
1163 generate term or perpetual nutrient credits may use any one or combination of mechanisms
1164 listed in 9VAC25-900-300 through 9VAC25-900-340 to meet the financial assurance
1165 requirements of this part.

1166

1167 **9VAC25-900-300. Trust.**

1168 A. An owner may satisfy the requirements of this part by establishing a trust fund that
1169 conforms to the requirements of this section and by submitting an originally signed triplicate of
1170 the trust agreement to the director. The owner shall also place a copy of the trust agreement
1171 into the facility's operating record. The trustee for the trust fund shall be a bank or financial
1172 institution that has the authority to act as a trustee and whose trust operations are regulated and
1173 examined by a State or Federal agency.

1174 B. Payments into the trust fund shall be made by the owner whenever necessary under the
1175 requirements of sections 9VAC25-900-270 or 9VAC25-900-280.

1176 C. During any annual period when a payment into the fund is necessary under the
1177 requirements outlined in sections 9VAC25-900-270 and 9VAC25-900-280, the owner must
1178 submit the following information to the director no later than the anniversary date of the initial
1179 approval by the Department of the release of credits for sale:

- 1180 1. The calculation for determining the appropriate payment amount into the trust;
1181 2. A statement from the trustee indicating the amount of the currently required deposit
1182 into the trust fund and the subsequent balance of the fund.

1183 D. The owner shall compare the cost estimate with the trustee's most recent annual
1184 valuation of the trust fund:

1185 1. Annually, at least 60 days prior to the anniversary date of the initial approval by the
1186 department of the release of credits for sale. If the value of the fund is less than the amount of
1187 the cost estimate, the owner shall, by the anniversary date of the initial approval by the
1188 department of the release of credits for sale, deposit a sufficient amount into the fund so that its
1189 value after payment at least equals the amount of the cost estimate, or obtain other financial
1190 assurance as specified in this article to cover the difference. If the value of the trust fund is
1191 greater than the total amount of the cost estimate, the owner may submit a written request to
1192 the director for release of the amount that is in excess of the cost estimate; and

1193 2. Whenever the cost estimate changes. If the value of the fund is less than the amount
1194 of the new cost estimate, the owner shall, within 60 days of the change in the cost estimate,
1195 deposit a sufficient amount into the fund so that its value after payment at least equals the
1196 amount of the new estimate, or obtain other financial assurance as specified in this article to
1197 cover the difference. If the value of the trust fund is greater than the total amount of the cost
1198 estimate, the owner may submit a written request to the director for release of the amount that is
1199 in excess of the cost estimate.

1200 E. Subject to the limitations and requirements outlined in sections 9VAC25-900-270 and
1201 9VAC25-900-280, if the owner substitutes other financial assurance as specified in this article
1202 for all or part of the trust fund, he may submit a written request to the director for release of the
1203 amount in excess of the current cost estimate covered by the trust fund.

1204 F. Within 60 days after receiving a request from the owner for release of funds as described
1205 in subsections E and G of this section, the director will instruct the trustee to release to the
1206 owner such funds as the director deems appropriate, if any, in writing.

1207 G. The director shall agree to terminate the trust when:

1208 1. The owner substitutes alternate financial assurance as specified in this article; or

1209 2. The director notifies the owner that he is no longer required by this article to maintain
1210 financial assurance for the operation and maintenance, and/or replacement of the
1211 nutrient credit generating entity's structural BMPs.

1212 H. The trust agreement shall be worded as described in 9VAC25-900-360, except that
1213 instructions in brackets are to be replaced with the relevant information and the brackets
1214 deleted, and the trust agreement shall be accompanied by a formal certification of
1215 acknowledgment and schedules A and B.

1216

1217 **9VAC25-900-310. Surety bond.**

1218 A. An owner may satisfy the requirements of this part by obtaining a surety bond that
1219 conforms to the requirements of this section and by submitting an originally signed duplicate of
1220 the bond to the department. The surety company issuing the bond shall be licensed to operate
1221 as a surety in the Commonwealth of Virginia and be among those listed as acceptable sureties
1222 on federal bonds in the latest Circular 570 of the U.S. Department of the Treasury.

1223 B. Under the terms of the bond, the surety will become liable on the bond obligation when
1224 the owner fails to perform as guaranteed by the bond.

1225 C. The bond shall guarantee that the owner or any other authorized person will:

1226 1. Operate and maintain, and/or replace any structural BMPs for achieving nutrient
1227 reductions at the nutrient credit-generating entity in question and in accordance with the
1228 nutrient credit certification;

1229 2. Operate and maintain, and/or replace any structural BMPs following an order to do so
1230 that has been issued by the department or by a court.

1231 D. The owner shall compare the cost estimate with the penal sum of the bond:

1232 1. Annually, at least 60 days prior to the anniversary date of the initial approval by the
1233 Department of the release of credits for sale. If the penal sum of the bond is less than the
1234 amount of the cost estimate, the owner shall, by the anniversary date of the initial approval by
1235 the Department of the release of credits for sale, increase the penal sum of the bond so that its
1236 value at least equals the amount of the cost estimate, or obtain other financial assurance as
1237 specified in this article to cover the difference. If the penal sum of the bond is greater than the
1238 total amount of the cost estimate, the owner may submit a written request to the director for
1239 permission to reduce the penal sum of the bond to the amount of the cost estimate; and

1240 2. Whenever the cost estimate changes. If the penal sum of the bond is less than the
1241 amount of the new cost estimate, the owner shall, within 60 days of the change in the cost
1242 estimate, increase the penal sum of the bond so that its value at least equals the amount of the
1243 new estimate, or obtain other financial assurance as specified in this article to cover the
1244 difference. If the penal sum of the bond is greater than the total amount of the cost estimate, the
1245 owner may submit a written request to the director for permission to reduce the penal sum of the
1246 bond to the amount of the cost estimate.

1247 E. The surety bond shall guarantee that the owner shall provide alternate evidence of
1248 financial assurance as specified in this article within 60 days after receipt by the department of a
1249 notice of cancellation of the bond from the surety.

1250 F. The bond shall remain in force for its term unless the surety sends written notice of
1251 cancellation by certified mail to the owner and to the department. Cancellation cannot occur,
1252 however, during the 120 days beginning on the date of receipt of the notice of cancellation by
1253 the department as shown on the signed return receipt. The surety shall provide written
1254 notification to the department by certified mail no less than 120 days prior to the expiration date
1255 of the bond, that the bond will expire and the date the bond will expire.

1256 G. The department shall cash the surety bond if it is not replaced XX days prior to expiration
1257 with alternate evidence of financial assurance acceptable to the department or if the owner fails
1258 to fulfill the conditions of the bond.

1259 H. The department shall return the original surety bond to the surety for termination when:

1260 1. The owner substitutes acceptable alternate evidence of financial assurance; or

1261 2. The department notifies the owner that he is no longer required by this part to maintain
1262 evidence of financial assurance for operation and maintenance, and/or replacement of the
1263 structural BMPs at his nutrient credit generating entity.

1264 I. The surety bond shall be worded as described in 9VAC25-900-360, except that
1265 instructions in brackets are to be replaced with the relevant information and the brackets
1266 deleted.

1267

1268 **9VAC25-900-320. Letter of credit.**

1269 A. An owner may satisfy the requirements of this part by obtaining an irrevocable standby
1270 letter of credit that conforms to the requirements of this section and by submitting an originally
1271 signed duplicate of the letter of credit to the department. The issuing institution shall be an entity
1272 that has the authority to issue letters of credit in the Commonwealth of Virginia and whose letter-
1273 of-credit operations are regulated and examined by a federal agency or the State Corporation
1274 Commission.

1275 B. The letter of credit shall be irrevocable and issued for a period of at least one year. The
1276 letter of credit shall provide that the expiration date will be automatically extended for a period of
1277 at least one year. If the issuing institution decides not to extend the letter of credit beyond the
1278 current expiration date, it shall, at least 120 days before the expiration date, notify both the
1279 owner and the department by certified mail of that decision. The 120-day period will begin on
1280 the date of receipt of [letter of credit's](#) notice of cancellation by the department as shown on the
1281 signed return receipt. If the letter of credit is canceled by the issuing institution, the owner shall
1282 obtain alternate evidence of financial assurance to be in effect prior to the expiration date of the
1283 letter of credit.

1284 C. The owner shall compare the cost estimate with the face amount of the letter of credit:

1285 1. Annually, at least 60 days prior to the anniversary date of the initial approval by the
1286 Department of the release of credits for sale. If the face amount of the letter of credit is less
1287 than the amount of the cost estimate, the owner shall, by the anniversary date of the initial
1288 approval by the Department of the release of credits for sale, increase the face amount of the
1289 letter of credit so that its value at least equals the amount of the cost estimate, or obtain other
1290 financial assurance as specified in this article to cover the difference. If the face amount of the
1291 letter of credit is greater than the total amount of the cost estimate, the owner may submit a
1292 written request to the director for permission to reduce the face amount of the letter of credit to
1293 the amount of the cost estimate; and

1294 2. Whenever the cost estimate changes. If the face amount of the letter of credit is less than
1295 the amount of the new cost estimate, the owner shall, within 60 days of the change in the cost
1296 estimate, increase the face amount of the letter of credit so that its value at least equals the
1297 amount of the new estimate, or obtain other financial assurance as specified in this article to

1298 cover the difference. If the face amount of the letter of credit is greater than the total amount of
1299 the cost estimate, the owner may submit a written request to the director for permission to
1300 reduce the face amount of the letter of credit to the amount of the cost estimate.

1301 D. The issuing institution may cancel the letter of credit only if alternate evidence of financial
1302 assurance acceptable to the department is substituted as specified in this part or if the owner is
1303 released by the department from the requirements of financial assurance.

1304 E. The department shall cash the letter of credit when:

1305 1. The issuing institution has provided proper notification, as outlined in section B of this
1306 part, of its intent not to renew the letter of credit, and the owner has not, within days prior to
1307 expiration, replaced the letter of credit with alternate evidence of financial assurance acceptable
1308 to the department; or

1309 2. The owner has failed to operate and maintain, and/or replace his nutrient credit
1310 generating entity's structural BMPs in accordance with this chapter and the nutrient credit
1311 certification.

1312 F. The department shall return the original letter of credit to the issuing institution for
1313 termination when:

1314 1. The owner substitutes acceptable alternate evidence of financial assurance; or

1315 2. The department notifies the owner that he is no longer required by this part to
1316 maintain evidence of financial assurance for the structural BMPs at his nutrient credit
1317 generating entity.

1318 G. The letter of credit shall be worded as described in 9VAC25-900-360, except that
1319 instructions in brackets are to be replaced with the relevant information and the brackets
1320 deleted.

1321

1322 **9VAC25-900-330. Certificate of deposit.**

1323 A. An owner may satisfy the requirements of this chapter, wholly or in part, by obtaining a
1324 certificate of deposit and assigning all rights, title and interest in the certificate of deposit to the
1325 department, conditioned so that the owner shall operate and maintain, and/or replace the
1326 structural BMPs at his nutrient credit generating entity. The issuing institution shall be an entity
1327 that has the authority to issue certificates of deposit in the Commonwealth of Virginia and whose
1328 operations are regulated and examined by a federal agency or the State Corporation
1329 Commission (Commonwealth of Virginia). The owner must submit the originally signed
1330 assignment and the originally signed certificate of deposit, if applicable, to the department.

1331 B. The amount of the certificate of deposit shall be at least equal to the approved cost
1332 estimate. The owner shall maintain the certificate of deposit and assignment until such time as
1333 he is released by the department from financial assurance.

1334 C. The owner shall be entitled to demand, receive and recover the interest and income from
1335 the certificate of deposit as it becomes due and payable as long as the market value of the
1336 certificate of deposit used continues to at least equal the amount of the current approved cost
1337 estimate.

1338 D. The department shall cash the certificate of deposit if the owner has failed to operate and
1339 maintain/replace his nutrient credit generating entity's structural BMPs in accordance with this
1340 chapter and the nutrient credit certification.

1341 E. Whenever the approved cost estimate increases to an amount greater than the amount of
1342 the certificate of deposit, the owner shall, within 60 days of the increase, cause the amount of
1343 the certificate of deposit to be increased to an amount at least equal to the new estimate or
1344 obtain another certificate of deposit to cover the increase.

1345 F. The department shall return the original assignment and certificate of deposit, if
1346 applicable, to the issuing institution for termination when:

1347 1. The owner substitutes acceptable alternate evidence of financial assurance as
1348 specified in this part; or

1349 2. The department notifies the owner that he is no longer required to maintain evidence
1350 of financial assurance for his structural BMPs.

1351 G. The assignment shall be worded as described in 9VAC25-770-190 C, except that
1352 instructions in brackets shall be replaced with the relevant information and the brackets deleted.

1353

1354 **9VAC25-900-340. Insurance**

1355 A. An owner may demonstrate financial assurance for replacement costs and or operation
1356 and maintenance by obtaining insurance which conforms to the requirements of this section.
1357 The insurance shall be effective before the credits are released by the Department for sale. The
1358 insurer must be licensed pursuant to Chapter 10 (§ 38.2-1000 et seq.) of Title 38.2 of the Code
1359 of Virginia. The owner shall provide the Department with an original signed copy of the
1360 insurance policy. The department shall be listed as an additional insured on the policy, but the
1361 department will not be obligated for payment of the premium in any manner.

1362 B. The insurance policy shall guarantee that funds will be available to fund the replacement
1363 of the structural BMP and or reasonable and necessary costs for the operation and
1364 maintenance of the structural BMP.C. The insurance policy shall be issued and maintained for a
1365 face amount at least equal to the current cost estimate for replacement and/or operation and
1366 maintenance, whichever is applicable. The term face amount means the total amount the
1367 insurer is obligated to pay under the policy. Actual payments by the insurer will not change the
1368 face amount although the insurer's future liability will be lowered by the amount of the
1369 payments.

1370 C. The insurance policy shall provide that the insurer will pay for the replacement and/or
1371 operation and maintenance of the structural BMP. Justification and documentation of the
1372 expenditures must be submitted to and approved by the director. Requests for payment will be
1373 granted by the insurer only if the remaining value of the policy is sufficient to cover the
1374 remaining costs of replacement and/or operation and maintenance of the structural BMP, or if
1375 the director approves the payment. The insurer shall notify the director when a payment has
1376 been made.

1377 D. Each policy shall contain a provision allowing assignment of the policy to a successor
1378 owner. Such assignment may be conditional upon consent of the insurer, provided that such
1379 consent is not unreasonably refused.

1380 E. The insurance policy shall provide that the insurer may not cancel, terminate or fail to
1381 renew the policy except for failure to pay the premium. The automatic renewal of the policy
1382 shall, at a minimum, provide the insured with the option of renewal at the face amount of the
1383 expiring policy. If there is a failure to pay the premium, the insurer may cancel the policy by
1384 sending notice of cancellation by certified mail to the owner and to the Department 120 days in
1385 advance of cancellation. Within 60 days of receipt of notice from the insurer that it does not
1386 intend to renew the policy, the owner shall obtain alternate financial assurance and submit it to
1387 the Department.

1388 F. The owner may cancel the insurance policy only if alternate financial assurance is
1389 substituted as specified in this article, or if the owner, is no longer required to demonstrate
1390 financial responsibility.

1391 G. Within 10 days after commencement of a voluntary or involuntary proceeding under Title
1392 11 (Bankruptcy) of the U.S. Code, naming an owner as debtor, the owner shall notify the
1393 director by certified mail of such commencement.

1394 H. The wording of the insurance endorsement shall be identical to the wording specified in.
1395 ACORD Certificates of Insurance are not valid proof of insurance.

1396

1397 **9VAC25-900-350. Incapacity of financial providers or owner.**

1398 A. An owner who fulfills the requirements of this part by obtaining a trust fund, a letter of
1399 credit, a surety bond, or an insurance policy, will be deemed to be without the required financial
1400 assurance in the event of bankruptcy of the trustee or issuing institution, or a suspension or
1401 revocation of the authority of the trustee institution to act as trustee or of the institution issuing a
1402 surety bond, letter of credit, or insurance policy to issue such mechanisms. The owner or
1403 operator shall establish other financial assurance within 60 days of such event.

1404 B. An owner shall notify the director by certified mail of the commencement of a voluntary or
1405 involuntary proceeding under Title 11 (Bankruptcy), U.S. Code, naming the owner or operator
1406 as debtor, within 10 days after commencement of the proceeding. A guarantor of a corporate
1407 guarantee as specified in 9VAC20-70-220 shall make such a notification if he is named as
1408 debtor, as required under the terms of the corporate guarantee.

1409

1410 **9VAC25-900-360. Wording of the financial assurance mechanism.**

1411 A. The wording of the financial assurance mechanisms shall be as provided in this section.

1412

1413 **B. Wording of trust agreements.**

1414 (NOTE: Instructions in parentheses are to be replaced with the relevant information and the
1415 parentheses deleted.)

1416 TRUST AGREEMENT

1417 Trust agreement, the "Agreement," entered into as of (date) by and between (name of the
1418 owner), a (State) (corporation, partnership, association, proprietorship), the "Grantor," and
1419 (name of corporate trustee), a (State corporation) (national bank), the "Trustee."

1420 Whereas, the Virginia Department of Environmental Quality or SWCB? has established certain
1421 regulations applicable to the Grantor, requiring that the owner of a nutrient credit generating
1422 facility must provide assurance that funds will be available when needed for (operation and
1423 maintenance and or replacement of the facility,

1424 Whereas, the Grantor has elected to establish a trust to provide (all or part of) such financial
1425 assurance for the facility identified herein,

1426 Whereas, the Grantor, acting through its duly authorized officers, has selected the Trustee to be
1427 the trustee under this agreement, and the Trustee is willing to act as trustee,

1428 Now, therefore, the Grantor and the Trustee agree as follows:

1429 Section 1. Definitions. As used in this Agreement:

1430 A. The term "fiduciary" means any person who exercises any power of control, management, or
1431 disposition or renders investment advice for a fee or other compensation, direct or indirect, with
1432 respect to any moneys or other property of this trust fund, or has any authority or responsibility
1433 to do so, or who has any authority or responsibility in the administration of this trust fund.

1434 B. The term "Grantor" means the owner who enters into this Agreement and any successors or
1435 assigns of the Grantor.

1436 C. The term "Trustee" means the Trustee who enters into this Agreement and any successor
1437 Trustee.

1438 Section 2. Identification of Facility and Cost Estimates. This Agreement pertains to facility(ies)
1439 and cost estimates identified on attached Schedule A.

1440 (NOTE: On Schedule A, for each facility list, as applicable, name, address, and the current)
1441 operation and maintenance and or replacement cost estimates, or portions thereof, for which
1442 financial assurance is demonstrated by this Agreement.)

1443 Section 3. Establishment of Fund. The Grantor and the Trustee hereby establish a trust fund,
1444 the "Fund," for the benefit of the Department of Environmental Quality, Commonwealth of
1445 Virginia. The Grantor and the Trustee intend that no third party have access to the Fund except
1446 as herein provided. The Fund is established initially as property consisting of cash or securities,
1447 which are acceptable to the Trustee, described in Schedule B attached hereto. Such property
1448 and any other property subsequently transferred to the Trustee is referred to as the fund,
1449 together with all earnings and profits thereon, less any payments or distributions made by the
1450 Trustee pursuant to this Agreement. The Fund will be held by the Trustee, IN TRUST, as
1451 hereinafter provided. The Trustee undertakes no responsibility for the amount or adequacy of,
1452 nor any duty to collect from the Grantor, any payments to discharge any liabilities of the Grantor
1453 established by the Commonwealth of Virginia's Department of Environmental Quality.

1454 Section 4. Payment for (operation and maintenance and or replacement)). The Trustee will
1455 make such payments from the Fund as the Department of Environmental Quality,
1456 Commonwealth of Virginia will direct, in writing, to provide for the payment of the costs of
1457 (operation and maintenance and or replacement)) of the facility covered by this Agreement. The
1458 Trustee will reimburse the Grantor or other persons as specified by the Department of
1459 Environmental Quality, Commonwealth of Virginia, from the Fund for (operation and
1460 maintenance and or replacement)) expenditures in such amounts as the Department of
1461 Environmental Quality will direct, in writing. In addition, the Trustee will refund to the Grantor
1462 such amounts as the Department of Environmental Quality specifies in writing. Upon refund,
1463 such funds will no longer constitute part of the Fund as defined herein.

1464 Section 5. Payments Comprising the Fund. Payments made to the Trustee for the fund will
1465 consist of cash or securities acceptable to the Trustee.

1466 Section 6. Trustee Management. The Trustee will invest and reinvest the principal and income
1467 of the Fund and keep the Fund invested as a single fund, without distinction between principal
1468 and income, in accordance with investment guidelines and objectives communicated in writing
1469 to the Trustee from time to time by the Grantor, subject, however, to the provisions of this
1470 Section. In investing, reinvesting, exchanging, selling and managing the Fund, the Trustee or
1471 any other fiduciary will discharge his duties with respect to the trust fund solely in the interest of

1472 the beneficiary and with the care, skill, prudence, and diligence under the circumstances then
1473 prevailing which persons of prudence, acting in a like capacity and familiar with such matters,
1474 would use in the conduct of any enterprise of a like character and with like aims; except that:

1475 A. Securities or other obligations of the Grantor, or any other owner of the facility, or any of their
1476 affiliates as defined in the Investment Company Act of 1940, as amended, 15 USC § 80a-2(a),
1477 will not be acquired or held, unless they are securities or other obligations of the federal or a
1478 state government;

1479 B. The Trustee is authorized to invest the Fund in time or demand deposits of the Trustee, to
1480 the extent insured by an agency of the federal or state government; and

1481 C. The Trustee is authorized to hold cash awaiting investment or distribution uninvested for a
1482 reasonable time and without liability for the payment of interest thereon.

1483 Section 7. Commingling and Investment. The Trustee is expressly authorized in its discretion:

1484 A. To transfer from time to time any or all of the assets of the Fund to any common, commingled
1485 or collective trust fund created by the Trustee in which the Fund is eligible to participate subject
1486 to all of the provisions thereof, to be commingled with the assets of other trusts participating
1487 herein. To the extent of the equitable share of the Fund in any such commingled trust, such
1488 commingled trust will be part of the Fund; and

1489 B. To purchase shares in any investment company registered under the Investment Company
1490 Act of 1940, 15 USC § 80a-1 et seq., of one which may be created, managed, underwritten, or
1491 to which investment advice is rendered or the shares of which are sold by the Trustee. The
1492 Trustees may vote such shares in its discretion.

1493 Section 8. Express Powers of Trustee. Without in any way limiting the powers and discretions
1494 conferred upon the Trustee by the other provisions of this Agreement or by law, the Trustee is
1495 expressly authorized and empowered:

1496 A. To sell, exchange, convey, transfer or otherwise dispose of any property held by it, by private
1497 contract or at public auction. No person dealing with the Trustee will be bound to see to the
1498 application of the purchase money or to inquire into the validity or expediency of any such sale
1499 or other dispositions;

1500 B. To make, execute, acknowledge and deliver any and all documents of transfer and
1501 conveyance and any and all other instruments that may be necessary or appropriate to carry out
1502 the powers herein granted;

1503 C. To register any securities held in the fund in its own name or in the name of a nominee and
1504 to hold any security in bearer form or in book entry, or to combine certificates representing such
1505 securities with certificates of the same issue held by the Trustee in other fiduciary capacities, or
1506 to deposit or arrange for the deposit of such securities in a qualified central depository even
1507 though, when so deposited, such securities may be merged and held in bulk in the name of the
1508 nominee of such depository with other securities deposited therein by another person, or to
1509 deposit or arrange for the deposit of any securities issued by the United State government, or
1510 any agency or instrumentality thereof with a Federal Reserve Bank, but the books and records
1511 of the Trustee will at all times show that all such securities are part of the Fund;

1512 D. To deposit any cash in the fund in interest-bearing accounts maintained or savings
1513 certificates issued by the Trustee, in its separate corporate capacity, or in any other banking
1514 institution affiliated with the Trustee, to the extent insured by an agency of the Federal or State
1515 government; and

1516 E. To compromise or otherwise adjust all claims in favor of or against the Fund.

1517 Section 9. Taxes and Expenses. All taxes of any kind that may be assessed or levied against or
1518 in respect of the Fund and all brokerage commissions incurred by the Fund will be paid from the
1519 Fund. All other expenses incurred by the Trustee in connection with the administration of this
1520 Trust, including fees for legal services rendered to the Trustee, the compensation of the Trustee
1521 to the extent not paid directly by the Grantor, and all other proper charges and disbursements of
1522 the Trustee will be paid from the Fund.

1523 Section 10. Annual Valuation. The Trustee will annually, at the end of the month coincident with
1524 or preceding the anniversary date of establishment of the Fund, furnish the Grantor and to the
1525 director of the Department of Environmental Quality, Commonwealth of Virginia, a statement
1526 confirming the value of the Trust. Any securities in the Fund will be valued at market value as of
1527 no more than 30 days prior to the date of the statement. The failure of the Grantor to object in
1528 writing to the Trustee within 90 days after the statement has been furnished to the Grantor and
1529 the director of the Department of Environmental Quality, Commonwealth of Virginia will
1530 constitute a conclusively binding assent by the Grantor, barring the Grantor from asserting any
1531 claim or liability against the Trustee with respect to matters disclosed in the statement.

1532 Section 11. Advice of Counsel. The Trustee may from time to time consult with counsel, who
1533 may be counsel to the Grantor, with respect to any question arising as to the construction of this
1534 Agreement or any action to be taken hereunder. The Trustee will be fully protected, to the extent
1535 permitted by law, in acting upon the advice of counsel.

1536 Section 12. Trustee Compensation. The Trustee will be entitled to reasonable compensation for
1537 its services as agreed upon in writing from time to time with the Grantor.

1538 Section 13. Successor Trustee. The Trustee may resign or the Grantor may replace the
1539 Trustee, but such resignation or replacement shall not be effective until the Grantor has
1540 appointed a successor trustee and this successor accepts the appointment. The successor
1541 trustee shall have the same powers and duties as those conferred upon the Trustee hereunder.
1542 Upon acceptance of the appointment by the successor trustee, the Trustee will assign, transfer
1543 and pay over to the successor trustee the funds and properties then constituting the Fund. If for
1544 any reason the grantor cannot or does not act in the event of the resignation of the Trustee, the
1545 Trustee may apply to a court of competent jurisdiction for the appointment of a successor
1546 trustee or for instructions. The successor trustee and the date on which he assumes
1547 administration of the trust will be specified in writing and sent to the Grantor, the director of the
1548 Department of Environmental Quality, Commonwealth of Virginia, and the present trustees by
1549 certified mail 10 days before such change becomes effective. Any expenses incurred by the
1550 Trustee as a result of any of the acts contemplated by this section will be paid as provided in
1551 Section 9.

1552 Section 14. Instructions to the Trustee. All orders, requests and instructions by the Grantor to
1553 the Trustee will be in writing, signed by such persons as are designated in the attached Exhibit
1554 A or such other designees as the grantor may designate by amendment to Exhibit A. The

1555 Trustee will be fully protected in acting without inquiry in accordance with the Grantor's orders,
1556 requests and instructions. All orders, requests, and instructions by the Director of the
1557 Department of Environmental Quality, Commonwealth of Virginia, to the Trustee will be in
1558 writing, signed by the Director and the Trustee will act and will be fully protected in acting in
1559 accordance with such orders, requests and instructions. The Trustee will have the right to
1560 assume, in the absence of written notice to the contrary, that no event constituting a change or
1561 a termination of the authority of any person to act on behalf of the Grantor or the
1562 Commonwealth of Virginia's Department of Environmental Quality hereunder has occurred. The
1563 Trustee will have no duty to act in the absence of such orders, requests and instructions from
1564 the Grantor and/or the Commonwealth of Virginia's Department of Environmental Quality,
1565 except as provided for herein.

1566 Section 15. Notice of Nonpayment. The Trustee will notify the Grantor and the Director of the
1567 Department of Environmental Quality, Commonwealth of Virginia, by certified mail within 10
1568 days following the expiration of the 30-day period after the anniversary of the establishment of
1569 the Trust, if no payment is received from the Grantor during that period. After the pay-in period
1570 is completed, the Trustee is not required to send a notice of nonpayment.

1571 Section 16. Amendment of Agreement. This Agreement may be amended by an instrument in
1572 writing executed by the Grantor, the Trustee, and the Director of the Department of
1573 Environmental Quality, Commonwealth of Virginia, or by the Trustee and the Director of the
1574 Department of Environmental Quality, Commonwealth of Virginia, if the Grantor ceases to exist.

1575 Section 17. Irrevocability and Termination. Subject to the right of the parties to amend this
1576 Agreement as provided in Section 16, this Trust will be irrevocable and will continue until
1577 terminated at the written agreement of the Grantor, the Trustee, and the Director of the
1578 Department of Environmental Quality, Commonwealth of Virginia, or by the Trustee and the
1579 Director if the Grantor ceases to exist. Upon termination of the Trust, all remaining trust
1580 property, less final trust administration expenses, will be delivered to the Grantor.

1581 Section 18. Immunity and Indemnification. The Trustee will not incur personal liability of any
1582 nature in connection with any act or omission, made in good faith, in the administration of this
1583 Trust, or in carrying out any directions by the Grantor or the Director of the Department of
1584 Environmental Quality, Commonwealth of Virginia, issued in accordance with this Agreement.
1585 The Trustee will be indemnified and saved harmless by the Grantor or from the Trust Fund, or
1586 both, from and against any personal liability to which the Trustee may be subjected by reason of
1587 any act or conduct in its official capacity, including all expenses reasonably incurred in its
1588 defense in the event the Grantor fails to provide such defense.

1589 Section 19. Choice of Law. This Agreement will be administered, construed and enforced
1590 according to the laws of the Commonwealth of Virginia.

1591 Section 20. Interpretation. As used in the Agreement, words in the singular include the plural
1592 and words in the plural include the singular. The descriptive headings for each section of this
1593 Agreement will not affect the interpretation of the legal efficacy of this Agreement.

1594 In witness whereof the parties have caused this Agreement to be executed by their respective
1595 officers duly authorized and their corporate seals to be hereunto affixed and attested as of the
1596 date first above written. The parties below certify that the wording of this Agreement is

1597 substantively identical to the wording specified in 9VAC25-900-360 B, as such regulations were
1598 constituted on the date shown immediately below.

(Signature of Grantor)

By: (Title) (Date)

Attest:

(Title) (Date)

(Seal)

(Signature of Trustee)

By

Attest:

(Title) (Date)

(Seal)

1599 Certification of Acknowledgment:

1600 COMMONWEALTH OF VIRGINIA

1601 STATE OF _____

1602 CITY/COUNTY OF _____

1603 On this date, before me personally came (owner) to me known, who being by me duly sworn,
1604 did depose and say that she/he resides at (address), that she/he is (title) of (corporation), the
1605 corporation described in and which executed the above instrument; that she/he knows the seal
1606 of said corporation; that the seal affixed to such instrument is such corporate seal; that it was so
1607 affixed by order of the Board of Directors of said corporation, and that she/he signed her/his
1608 name thereto by like order.

1609 (Signature of Notary Public)

1610

1611 **C. Wording of surety bond guaranteeing performance or payment.**

1612 (NOTE: instructions in parentheses are to be replaced with the relevant information and the
1613 parentheses deleted.)

1614 PERFORMANCE OR PAYMENT BOND

1615 Date bond executed: _____

1616 Effective date: _____

1617 Principal: (legal name and business address) _____

1618 Type of organization: (insert "individual," "joint venture," "partnership," or "corporation")
1619 _____

1620 State of incorporation: _____

1621 Surety: (name and business address) _____

1622 Name, address, , and (operation and maintenance and or replacement)) cost estimate for the
1623 facility: _____

1624 Penal sum of bond: \$_____

1625 Surety's bond number: _____

1626 Know all men by these present, That we, the Principal and Surety hereto are firmly bound to the
1627 Department of Environmental Quality, Commonwealth of Virginia, (hereinafter called the
1628 Department) in the above penal sum for the payment of which we bind ourselves, our heirs,
1629 executors, administrators, successors and assigns, jointly and severally; provided that, where
1630 the Surety(ies) are corporations acting as co-sureties, we, the Sureties, bind ourselves in such
1631 sum "jointly and severally" only for the purpose of allowing a joint action or actions against any
1632 or all of us, and for all other purposes each Surety binds itself, jointly and severally with the
1633 Principal, for the payment of each sum only as is set forth opposite the name of such Surety, but
1634 if no limit of liability is indicated, the limit of liability shall be the full amount of the penal sum.

1635 Whereas, said Principal is required to have from the Department of Environmental Quality,
1636 Commonwealth of Virginia, in order to own or operate the, nutrient credit generating facility
1637 identified above, and

1638 Whereas, said Principal is required to provide financial assurance for (operation and
1639 maintenance and or replacement) of the facility as a condition of the or an order issued by the
1640 department,

1641 Now, therefore the conditions of this obligation are such that if the Principal shall faithfully
1642 perform (operation and maintenance and or replacement), whenever required to do so, of the
1643 facility identified above in accordance with the order or the operation and maintenance and or
1644 replacement) plan submitted to receive and other requirements of as such plan and may be

1645 amended or renewed pursuant to all applicable laws, statutes, rules, and regulations, as such
1646 laws, statutes, rules, and regulations may be amended,

1647 Or, if the Principal shall faithfully perform (operation and maintenance and or replacement)
1648 following an order to begin (operation and maintenance and or replacement)) issued by the
1649 Commonwealth of Virginia's Department of Environmental Quality or by a court, or following a
1650 notice of termination of the permit,

1651 Or, if the Principal shall provide alternate financial assurance as specified in the Department's
1652 regulations and obtain the director's written approval of such assurance, within 90 days of the
1653 date notice of cancellation is received by the Director of the Department of Environmental
1654 Quality from the Surety, then this obligation will be null and void, otherwise it is to remain in full
1655 force and effect for the life of the management facility identified above.

1656 The Surety shall become liable on this bond obligation only when the Principal has failed to fulfill
1657 the conditions described above. Upon notification by the Director of the Department of
1658 Environmental Quality, Commonwealth of Virginia, that the Principal has been found in violation
1659 of the requirements of the Department's regulations, the Surety must either perform (operation
1660 and maintenance and or replacement) in accordance with the approved plan and other
1661 requirements or forfeit the operation and maintenance and or replacement) amount guaranteed
1662 for the facility to the Commonwealth of Virginia.

1663 Upon notification by the Director of the Department of Environmental Quality, Commonwealth of
1664 Virginia, that the Principal has been found in violation of an order to begin (operation and
1665 maintenance and or replacement) the Surety must either perform (operation and maintenance
1666 and or replacement) in accordance with the order or forfeit the amount of the (operation and
1667 maintenance and or replacement) guaranteed for the facility to the Commonwealth of Virginia.

1668 The Surety hereby waives notification of amendments to the (operation and maintenance and or
1669 replacement) (corrective action) plans, orders, applicable laws, statutes, rules, and regulations
1670 and agrees that such amendments shall in no way alleviate its obligation on this bond.

1671 For purposes of this bond, (operation and maintenance and or replacement) shall be deemed to
1672 have been completed when the Director of the Department of Environmental Quality,
1673 Commonwealth of Virginia, determines that the conditions of the approved plan have been met.

1674 The liability of the Surety shall not be discharged by any payment or succession of payments
1675 hereunder, unless and until such payment or payments shall amount in the aggregate to the
1676 penal sum of the bond, but the obligation of the Surety hereunder shall not exceed the amount
1677 of said penal sum unless the Director of the Department of Environmental Quality,
1678 Commonwealth of Virginia, should prevail in an action to enforce the terms of this bond. In this
1679 event, the Surety shall pay, in addition to the penal sum due under the terms of the bond, all
1680 interest accrued from the date the Director of the Department of Environmental Quality,
1681 Commonwealth of Virginia, first ordered the Surety to perform. The accrued interest shall be
1682 calculated at the judgment rate of interest pursuant to § 6.2-302 of the Code of Virginia.

1683 The Surety may cancel the bond by sending written notice of cancellation to the owner and to
1684 the Director of the Department of Environmental Quality, Commonwealth of Virginia, provided,
1685 however, that cancellation cannot occur (1) during the 120 days beginning on the date of receipt

1686 of the notice of cancellation by the director as shown on the signed return receipt; or (2) while
1687 an enforcement action is pending.

1688 The Principal may terminate this bond by sending written notice to the Surety, provided,
1689 however, that no such notice shall become effective until the Surety receives written
1690 authorization for termination of the bond by the Director of the Department of Environmental
1691 Quality, Commonwealth of Virginia.

1692 In witness whereof, the Principal and Surety have executed this Performance Bond and have
1693 affixed their seals on the date set forth above.

1694 The persons whose signatures appear below hereby certify that they are authorized to execute
1695 this surety bond on behalf of the Principal and Surety and I hereby certify that the wording of
1696 this surety bond is substantively identical to the wording specified in 9VAC25-900-360 C as
1697 such regulations were constituted on the date shown immediately below.

1698 Principal

1699 Signature(s): _____

1700 Name(s) and Title(s): (typed)_____

1701 Corporate Surety

1702 Name and Address: _____

1703 State of Incorporation: _____

1704 Liability Limit: \$____

1705 Signature(s): _____

1706 Name(s) and Title(s): (typed)_____

1707 Corporate Seal:

1708

1709 **D. Wording of irrevocable standby letter of credit.**

1710 (NOTE: Instructions in parentheses are to be replaced with the relevant information and the
1711 parentheses deleted.)

1712 IRREVOCABLE STANDBY LETTER OF CREDIT

1713 Director

1714 Department of Environmental Quality

1715 P.O. Box 1105

1716 Richmond, Virginia 23218

1717 Dear (Sir or Madam):

1718 We hereby establish our Irrevocable Letter of Credit No..... in your favor at the request and for
1719 the account of (owner's name and address) up to the aggregate amount of (in words) U.S.
1720 dollars \$____, available upon presentation of

1721 1. Your sight draft, bearing reference to this letter of credit No ____ together with

1722 2. Your signed statement declaring that the amount of the draft is payable pursuant to
1723 regulations issued under the authority of the Department of Environmental Quality,
1724 Commonwealth of Virginia.

1725 The following amounts are included in the amount of this letter of credit: (Insert the facility name
1726 and address, and the operation and maintenance and or replacement)cost estimate, or portions
1727 thereof, for which financial assurance is demonstrated by this letter of credit.)

1728 This letter of credit is effective as of (date) and will expire on (date at least one year later), but
1729 such expiration date will be automatically extended for a period of (at least one year) on (date)
1730 and on each successive expiration date, unless, at least 120 days before the current expiration
1731 date, we notify you and (owner or operator's name) by certified mail that we decide not to
1732 extend the Letter of Credit beyond the current expiration date. In the event you are so notified,
1733 unused portion of the credit will be available upon presentation of your sight draft for 120 days
1734 after the date of receipt by you as shown on the signed return receipt or while a compliance
1735 procedure is pending, whichever is later.

1736 Whenever this letter of credit is drawn on under and in compliance with the terms of this credit,
1737 we will duly honor such draft upon presentation to us, and we will pay to you the amount of the
1738 draft promptly and directly.

1739 I hereby certify that I am authorized to execute this letter of credit on behalf of (issuing
1740 institution) and I hereby certify that the wording of this letter of credit is substantively identical
1741 to the wording specified in 9VAC25-900-710 D as such regulations were constituted on the date
1742 shown immediately below.

1743 Attest:

1744 (Print name and title of official of issuing institution) (Date)

(Signature)

(Date)

1745 This credit is subject to the most recent edition of the Uniform Customs and Practice for
1746 Documentary Credits, International Chamber of Commerce Publication No. 600, and any
1747 subsequent revisions thereof approved by a congress of the International Chamber of
1748 Commerce and adhered to by us . If this credit expires during an interruption of business as
1749 described in Article 36 of said Publican 600, the bank hereby specifically agrees to effect
1750 payment if this credit is drawn against within thirty (30) days after resumption of our business.

1751

1752 **E. Assignment of certificate of deposit account.**

1753 City _____, 20____

1754 FOR VALUE RECEIVED, the undersigned assigns all right, title and interest to the Virginia
1755 Department of Environmental Quality, Commonwealth of Virginia, and its successors and
1756 assigns the Virginia Department of Environmental Quality the principal amount of the
1757 instrument, including all monies deposited now or in the future to that instrument, indicated
1758 below:

1759 This assignment includes all interest now and hereafter accrued.

1760 Certificate of Deposit Account No. _____

1761 This assignment is given as security to the Virginia Department of Environmental Quality in the
1762 amount of _____ Dollars (\$_____).

1763 Continuing Assignment. This assignment shall continue to remain in effect for all subsequent
1764 terms of the automatically renewable certificate of deposit.

1765 Assignment of Document. The undersigned also assigns any certificate or other document
1766 evidencing ownership to the Virginia Department of Environmental Quality.

1767 Additional Security. This assignment shall secure the payment of any financial obligation of the
1768 (name of owner) to the Virginia Department of Environmental Quality for operation and
1769 maintenance and or replacement)) at the (facility name) located (physical address)

1770 Application of Funds. The undersigned agrees that all or any part of the funds of the indicated
1771 account or instrument may be applied to the payment of any and all financial assurance
1772 obligations of (name of owner) to the Virginia Department of Environmental Quality for operation
1773 and maintenance and or replacement ") at the (facility name and address). The undersigned
1774 authorizes the Virginia Department of Environmental Quality to withdraw any principal amount
1775 on deposit in the indicated account or instrument including any interest, if indicated, and to apply
1776 it in the Virginia Department of Environmental Quality's discretion to fund(operation and
1777 maintenance and or replacement) at the (facility name) or in the event of (owner) failure to
1778 comply with the 9VAC25-900. The undersigned agrees that the Virginia Department of
1779 Environmental Quality may withdraw any principal and/or interest from the indicated account or
1780 instrument without demand or notice. (The undersigned) agrees to assume any and all loss of
1781 penalty due to federal regulations concerning the early withdrawal of funds. Any partial
1782 withdrawal of principal or interest shall not release this assignment.

1783 The party or parties to this Assignment set their hand or seals, or if corporate, has caused this
1784 assignment to be signed in its corporate name by its duly authorized officers and its seal to be
1785 affixed by authority of its Board of Directors the day and year above written.

(Owner) SEAL

(print owner's name)

SEAL

(Owner)

(print owner's name)

1786 THE FOLLOWING SECTION IS TO BE COMPLETED BY THE BRANCH OR LENDING
1787 OFFICE:

1788 The signature(s) as shown above compare correctly with the name(s) as shown on record as
1789 owner(s) of the Certificate of Deposit indicated above. The above assignment has been properly
1790 recorded by placing a hold in the amount of \$ _____ for the benefit of the
1791 Department of Environmental Quality.

1792 The accrued interest on the Certificate of Deposit indicated above shall be maintained to
1793 capitalize versus being mailed by check or transferred to a deposit account.

(Signature)

(Date)

(print name)

(Title)

1794

1795

1796 **F. Wording of insurance endorsement.**

1797 ENDORSEMENT.

1798 [NOTE: The instructions in brackets are to be replaced by the relevant information and the
1799 brackets deleted.]

1800 Name: [name of each covered location]

1801 Address: [address of each covered location]

1802 Policy number:

1803 Period of coverage: [current policy period]

1804 Name of Insurer:

1805 Address of Insurer:

1806 Name of insured:

1807 Address of insured:

1808 Endorsement:

1809 1. This endorsement certifies that the policy to which the endorsement is attached
1810 provides insurance covering the operation and maintenance and or replacement in
1811 connection with the insured's obligation to demonstrate financial responsibility under the
1812 9VAC25-900).

1813 [List the name(s) and address(es) of the credit generating facility (ies)

1814 for [insert: "operating and maintaining and or replacement of the credit generating
1815 facility] in accordance with and subject to the limits of liability, exclusions, conditions, and
1816 other terms of the policy;

1817 The limits of liability are [insert the dollar amount of the operation and maintenance and
1818 or replacement], exclusive of legal defense costs, which are subject to a separate limit
1819 under the policy. This coverage is provided under [policy number]. The effective date of
1820 said policy is [date].

1821 2. The insurance afforded with respect to such occurrences is subject to all of the terms
1822 and conditions of the policy; provided, however, that any provisions inconsistent with
1823 subsections (a) through (d) for occurrence policies and (a) through (e) for claims-made
1824 policies of this paragraph 2 are hereby amended to conform with subsections (a) through
1825 (e):

1826 a. Bankruptcy or insolvency of the insured shall not relieve the insurer of its
1827 obligations under the policy to which this endorsement is attached.

1828 b. The insurer is liable for the payment of amounts within any deductible applicable
1829 to the policy to the provider of operation and maintenance and or replacement, with a
1830 right of reimbursement by the insured for any such payment made by the insurer.
1831 This provision does not apply with respect to that amount of any deductible for which
1832 coverage is demonstrated under another mechanism or combination of mechanisms
1833 as specified in 9VAC25-900.

1834 c. Whenever requested by the State Water Control Board, the insurer agrees to
1835 furnish to State Water Control Board a signed duplicate original of the policy and all
1836 endorsements.

1837 d. Cancellation or any other termination of the insurance by the insurer, except for
1838 nonpayment of premium or misrepresentation by the insured, will be effective only
1839 upon written notice and only after the expiration of 120 days after a copy of such
1840 written notice is received by the insured and the State Water Control Board.

1841 Cancellation for nonpayment of premium or misrepresentation by the insured will be
1842 effective only upon written notice and only after expiration of a minimum of 120 days
1843 after a copy of such written notice is received by the insured and the State Water
1844 Control Board.

1845 [Insert for claims-made policies:]

1846 e. The insurance covers claims otherwise covered by the policy that are reported to
1847 the insurer within six months of the effective date of cancellation or nonrenewal of
1848 the policy except where the new or renewed policy has the same retroactive date or
1849 a retroactive date earlier than that of the prior policy, and which arise out of any
1850 covered occurrence that commenced after the policy retroactive date, if applicable,
1851 and prior to such policy renewal or termination date. Claims reported during such
1852 extended reporting period are subject to the terms, conditions, limits, including limits
1853 of liability, and exclusions of the policy.

1854 I hereby certify that the wording of this endorsement is in no respect less favorable than the
1855 coverage specified in 9VAC25-900. I further certify that the insurer is licensed to transact the
1856 business of insurance or eligible to provide insurance as an excess or surplus lines insurer in
1857 the Commonwealth of Virginia.

1858 [Signature of authorized representative of insurer]

1859 [Name of person signing]

1860 [Title of person signing], authorized representative of [name of insurer]

1861 [Address of representative]

1862 Statutory Authority

1863 (Title of person signing)

1864 Signature of witness or notary:

1865 (Date)