Virginia
Regulatory
Town Hall

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Notice of Intended Regulatory Action (NOIRA)
Agency Background Document

Agency name	State Water Control Board
Virginia Administrative Code (VAC) citation	9VAC25-210
Regulation title	VIRGINIA WATER PROTECTION PERMIT PROGRAM REGULATION
Action title	Incorporation of policies, guidance, regulations, and clarifications specific to the Virginia Water Protection Permit Program
Date this document prepared	March 18, 2014

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 14 (2010) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual.*

Purpose

Please describe the subject matter and intent of the planned regulatory action. Also include a brief explanation of the need for and the goals of the new or amended regulation.

The purpose of this proposed regulatory action is to change the overall organization of the regulation such that it may be more reader-friendly; to incorporate policies and guidance developed in recent years; to incorporate certain federal regulatory provisions relative to the program; and to clarify and correct grammar, spelling, references, and errors. Other amendments to the regulation may be considered by the Board based on comments received in response to the NOIRA or discussions of the regulatory advisory panel (RAP).

Legal basis

Please identify the state and/or federal legal authority to promulgate this proposed regulation, including (1) the most relevant citations to the Code of Virginia or General Assembly chapter number(s), if applicable, and (2) promulgating entity, i.e., agency, board, or person. The identification should include (i) a reference to the agency/board/person's overall regulatory authority, as well as a specific provision authorizing the promulgating entity to regulate this specific subject or program; and a description of the extent to which the authority is mandatory or discretionary.

Section 62.1-44.15(10) of the Code of Virginia sets forth the Board's authority for the adoption of regulations deemed necessary to enforce the general water quality management program of the Board in all or part of the Commonwealth. The basis for this regulatory action is the State Water Control Law (Chapter 3.1 of Title 62.1) with specific provisions in law (§§ 62.1-44.15:20 - 62.1-44.15:23.1) mandating certain actions and allowing discretionary authority over certain matters to the promulgating agency.

Need

Please detail the specific reasons why the agency has determined that the proposed regulatory action is essential to protect the health, safety, or welfare of citizens. In addition, delineate any potential issues that may need to be addressed as the regulation is developed.

In support of the purpose of this regulatory action, the regulation has sustained numerous, minor revisions and at least one detailed revision to incorporate new provisions that resulted from General Assembly actions over the last decade or more, including those related to surface water withdrawals. The last comprehensive revision of this regulation was in 2001. The Virginia Water Protection Permit Program has since implemented many policy and guidance decisions that should be incorporated into the regulation. Portions of overarching federal regulations also need to be incorporated. There are also places that sentence structure and grammar make comprehension of the agency's intent difficult to interpret. Therefore, a re-organization of the regulation format, as well as making the necessary revisions for clarity and accuracy, is being proposed. Concurrently, the associated Virginia Water Protection general permit regulations are also being proposed for revisions to match any revisions made to this regulation, as necessary, and because the general permit regulations are due to expire in 2017. Separate Notices of Intended Regulatory Action (NOIRAs) have been prepared for the applicable general permit regulations. The amendments will protect public health, safety and welfare of citizens as they are designed to clarify, update and streamline the regulation to protect the Commonwealth's wetland and surface water resources, which are important for maintaining water quality, flood control and providing fish and wildlife habitat.

Substance

Please detail any changes that will be proposed. For new regulations, include a summary of the proposed regulatory action. Where provisions of an existing regulation are being amended, explain how the existing regulation will be changed.

The following proposed revisions, clarifications, and additions to this regulation are being considered and include, but may not be limited to, language, information, and provisions pertaining to surface water withdrawals, as regulated under the program, as well as program policy and guidance developed in recent years:

1. Change the overall organization of the regulation: revising the order in which information is provided; moving existing information to new locations, in whole or in part; adding new sections to expand or clarify existing provisions or incorporate new provisions; deleting sections, in whole or in part, to remove obsolete information and duplication; revising references and/or citations made in the regulation; and correcting sentence structure, grammar, spelling, and typographical errors.
2. Revise, clarify, move, add, and/or delete definitions.
3. Revise, clarify, add, and/or delete the activities that require application for a permit and those activities that are excluded from the need to obtain a permit, including activities in specific water sources.
4. Revise and/or clarify the application process: extension of an optional pre-application process for all types of projects; the list of administrative and technical information required to achieve a complete permit application, such as applicant contact information, information specific to certain types of

activities or to certain types of state waters, information specific to protected species, compensation plans including avoidance and minimization efforts, functional assessments, delineations of state waters, monitoring and reporting, erosion and sedimentation plans, alternatives analyses; the provisions for application review suspension, application withdrawal, and/or denial of application; required drawings, diagrams, and maps; and/or acceptable protective instruments.

5. Revise and/or clarify the compensatory mitigation requirements, such as the sequencing of acceptable compensatory mitigation actions and compensatory mitigation provisions; the requirements necessary for mitigation banks and in-lieu fee funds to become operational; the requirements for compensating impacts to open waters; and/or compensation necessary for temporary impacts.
6. Revise and/or clarify the process, informational requirements, and/or provisions for permit actions that occur after initial permit issuance, such as modification of permits and permit authorizations, continuation of coverage for general permit authorizations, reissuance of permits and Section 401 certifications, permit and permit authorization revocation, termination, and variance, and/or permit transitioning.
7. Revise, clarify, add, and/or delete VWP general permit authorization provisions as necessary to accommodate those revisions made to each of the existing VWP general permit regulations.

Alternatives

Please describe all viable alternatives to the proposed regulatory action that have been or will be considered to meet the essential purpose of the action. Also, please describe the process by which the agency has considered or will consider other alternatives for achieving the need in the most cost-effective manner.

The no-action alternative to revising this regulation would allow the clarity issues to continue, and possibly worsen. In addition, some regulatory provisions are in direct conflict with federal mandates that are applicable to permits and permit authorizations issued by the agency on the behalf of the U.S. Army Corps of Engineers' under the State Program General Permit (SPGP-01) program, as currently delegated to the Commonwealth. Other state regulatory provisions are in direct opposition to closely-related federal regulatory provisions that, if left as is, would continue to create disparity and permittee burden over similarly-regulated activities in surface waters.

A partial regulation revision is one alternative that may allow incorporation of some provisions that currently exist in policy or guidance. However, such an action would not address the clarity issues that the full reorganization and revision would provide.

Because the regulation is the over-arching document for the existing Virginia Water Protection general permit regulations that will expire in 2017, it will likely be necessary to revise this regulation as well. For the reasons previously stated, we are proposing the full revision alternative.

Public participation

Please indicate the agency is seeking comments on the intended regulatory action, including ideas to assist the agency in the development of the proposal and the costs and benefits of the alternatives stated in this notice or other alternatives. Also, indicate whether a public hearing is to be held to receive comments on this notice.

The agency is seeking comments on this regulatory action, including but not limited to 1) ideas to be considered in the development of this proposal, 2) the costs and benefits of the alternatives stated in this background document or other alternatives, 3) potential impacts of the regulation and 4) impacts of the

regulation on farm and forest land preservation. The agency is also seeking information on impacts on small businesses as defined in § 2.2-4007.1 of the Code of Virginia. Information may include 1) projected reporting, recordkeeping and other administrative costs, 2) the probable effect of the regulation on affected small businesses, and 3) the description of less intrusive or costly alternatives for achieving the purpose of the regulation.

Anyone wishing to submit written comments may do so by mail, phone, or email to William Norris, Department of Environmental Quality, P.O. Box 1105, Richmond, VA 23218, phone 804-698-4022, email: william.norris@deq.virginia.gov. Comments may also be submitted through the Public Forum feature of the Virginia Regulatory Town Hall web site at: www.townhall.virginia.gov. Written comments must include the name and address of the commenter. In order to be considered, comments must be received by 11:59 pm on the last day of the public comment period.

Public hearing at proposed stage

A public hearing will be held following the publication of the proposed stage of this regulatory action and notice of the hearing will be posted on the Virginia Regulatory Town Hall website (**http://www.townhall.virginia.gov**) and on the Commonwealth Calendar website (**http://www.virginia.gov/connect/commonwealth-calendar**). Both oral and written comments may be submitted at that time.

Regulatory panel

Please indicate, to the extent known, if advisers (e.g., regulatory advisory panel or negotiated rulemaking panel) will be involved in the development of the proposed regulation. Indicate that 1) the agency is not using a panel in the development of the proposal; 2) the agency is using a panel in the development of the proposal; or 3) the agency is inviting comment on whether to use a panel to assist the agency in the development of a proposal.

The Board is using a panel to develop a proposal for a revised regulation. Persons interested in assisting in the development of a proposal for a revised regulation should notify the department contact person by the end of the comment period and provide their name, address, phone number, email address and the organization you represent (if any). The primary function of the panel is to develop recommended regulation amendments for Department consideration through the collaborative approach of regulatory negotiation and consensus. Multi-applications from a single company, organization, group or other entity count as one for purposes of making the decision specified in the preceding sentence. Notification of the composition of the panel will be sent to all applicants.

Family impact

Assess the potential impact of the proposed regulatory action on the institution of the family and family stability including to what extent the regulatory action will: 1) strengthen or erode the authority and rights of parents in the education, nurturing, and supervision of their children; 2) encourage or discourage economic self-sufficiency, self-pride, and the assumption of responsibility for oneself, one's spouse, and one's children and/or elderly parents; 3) strengthen or erode the marital commitment; and 4) increase or decrease disposable family income.

This proposed regulatory action is unlikely to increase or decrease the disposable income available to a family-run business that is subject to the provisions of the Virginia Water Protection Permit Program regulation because the law on which the regulation is based in not being revised, but rather, only the implementation and explanation of the law is being revised.

Acronyms and Definitions

Please define all acronyms used in the Agency Background Document. Also, please define any technical terms that are used in the document that are not also defined in the "Definition" section of the regulations.

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401 certification: the process by which a state or tribe grants, grants with conditions, denies, or waives certification of the issuance of a permit or license by a federal agency under §401 of the Clean Water Act for an activity that may result in a discharge to waters of the U.S. in that state or tribal jurisdiction.

Compensatory Mitigation: sequentially avoiding and minimizing surface water impacts to the extent practicable, and then compensating for remaining unavoidable impacts of a proposed action.

Mitigation banking: wetlands restoration, creation, enhancement, and in exceptional circumstances, preservation, undertaken expressly for the purpose of compensating for unavoidable wetland losses in advance of development actions, when such compensation cannot be achieved at the development site or would not be as environmentally beneficial.

Protective instrument: a deed restriction, easement, or other legally binding document that affects the title to real estate for the purposes of conservation or protection of man-made or natural resources.

State waters: all water, on the surface and under the ground, wholly or partially within or bordering the Commonwealth or within its jurisdiction, including wetlands.