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Notice of Intended Regulatory Action (NOIRA) Agency Background Document

Agency name	State Water Control Board
Virginia Administrative Code (VAC) Chapter citation(s)	9VAC25-210 (primary) and 9VAC25-200, 9VAC25-220, and 9VAC25-780
VAC Chapter title(s)	Virginia Water Protection Permit Program Regulation (primary) Water Withdrawal Reporting Surface Water Management Area Regulation Local and Regional Water Supply Planning
Action title	Surface Water Withdrawal Permitting Exclusion for Existing Withdrawals - Amendments to Address Grandfathered Withdrawals
Date this document prepared	August 31, 2026

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Order 19 (2022) (EO 19), any instructions or procedures issued by the Office of Regulatory Management (ORM) or the Department of Planning and Budget (DPB) pursuant to EO 19, the Regulations for Filing and Publishing Agency Regulations (1 VAC 7-10), and the *Form and Style Requirements for the Virginia Register of Regulations and Virginia Administrative Code*.

Brief Summary

Provide a brief summary (preferably no more than 2 or 3 paragraphs) of the subject matter, intent, and goals of this regulatory change (i.e., new regulation, amendments to an existing regulation, or repeal of an existing regulation).

Section 62.1-44.15:20 of the State Water Control Law, § 62.1-44.2 et seq. of the Code of Virginia, requires Virginia Water Protection (VWP) Permits to be issued by the Department of Environmental Quality (the Department) for proposed activities that will alter the physical, chemical, or biological properties of state waters and make them detrimental to the public health, animal or aquatic life, or to the uses of such waters for domestic or industrial consumption, or for recreation or other uses. Section 62.1-44.15:22 A, which addresses surface water withdrawals and preservation of instream flow, provides that “[c]onditions contained in a Virginia Water Protection Permit may include the volume of water that may be

withdrawn as a part of the permitted activity and conditions necessary to protect beneficial uses.” The Department implements the requirement to issue VWP Permits for surface water withdrawals in the Commonwealth through the Virginia Water Protection Permit Program Regulation, 9VAC25-210 (VWP Regulation).

Subsection B of § 62.1-44.15:22 provides an exemption from the permitting requirement for “any water withdrawal in existence on July 1, 1989; however, a permit shall be required if a new § 401 certification is required to increase a withdrawal.” This exemption has been incorporated in the VWP Regulation at 9VAC25-210-310 and includes information requirements for owners and operators of surface water withdrawal systems that are subject to the exemption (commonly referred to as “grandfathered” withdrawals). In 2024, almost 80% of total surface water withdrawals (by volume) were from facilities that have grandfathered withdrawals (i.e., they had a water withdrawal in existence on July 1, 1989).

The challenge the Department faces in carrying out its responsibilities to permit surface water withdrawals, conduct water supply planning, and allocate water resources, is that neither the statute nor the regulation specifies whether the grandfathered withdrawal is the amount of water withdrawn prior to July 1, 1989, the capacity of the water withdrawal structures at that time, or any other quantification. The lack of specificity has led to a need for clarity and certainty in how grandfathered withdrawals are addressed in the face of increased demand for surface water withdrawals. Additionally, restrictive and other unclear provisions in the VWP Regulation limit the Department’s ability to manage surface water, including provisions related to the abandonment of a withdrawal (9VAC25-210-310) and who must apply for a permit (9VAC25-210-340). These issues limit the ability of the Department to ensure beneficial uses of state waters are maintained and protected.

The goal of this regulatory action is to amend the VWP Regulation to provide clarification on how exclusions from VWP Permits for surface water withdrawals are addressed, to improve consistency in implementing the VWP Regulation’s provisions, to provide certainty to water users on application of the exclusion provisions, and to provide better information to the Department for permitting, planning, and allocating water resources. This regulatory action follows discussions with an informal workgroup previously formed by the Department to address issues with grandfathered withdrawals (discussed further below).

Acronyms and Definitions

Define all acronyms or technical definitions used in this form.

Board: State Water Control Board

Department: Virginia Department of Environmental Quality

VAC: Virginia Administrative Code

VWP: Virginia Water Protection

VWP Regulation: Virginia Water Protection Permit Program Regulation, 9VAC25-210

Mandate and Impetus

Identify the mandate for this regulatory change and any other impetus that specifically prompted its initiation, (e.g., new or modified mandate, petition for rulemaking, periodic review, or board decision). For purposes of executive branch review, “mandate” has the same meaning as defined in the ORM procedures, “a directive from the General Assembly, the federal government, or a court that requires that a regulation be promulgated, amended, or repealed in whole or part.”

The impetus for this regulatory action is the need to clarify the application of the exclusion for surface water withdrawals that were in existence on July 1, 1989 (i.e., grandfathered withdrawals) from VWP Permit requirements. Additional clarifications are necessary, including clarifications related to abandonment of a surface water withdrawal and who must apply for a permit to ensure the Department can protect beneficial uses of state waters and assist with its statutory responsibilities to plan and allocate water supply resources.

When the General Assembly adopted Article 2, Virginia Water Resources and Wetlands Protection Program, of the State Water Control Law, § 62.1-44.15:20 through § 62.1-44.14:23 of the Code of Virginia (Chapter 659 of the 2007 Acts of Assembly), it excluded all surface water withdrawals existing on July 1, 1989, from the VWP Permit requirement. However, the statute provides that “a permit shall be required if a new § 401 certification is required to increase a withdrawal.” This exclusion was then incorporated into the State Water Control Board’s (Board’s) regulations via 9VAC25-210-310 A 1, which excludes from VWP Permit requirements:

Any surface water withdrawal in existence on July 1, 1989; however, a permit shall be required if a new § 401 certification is required to increase a withdrawal. To qualify for this exclusion, the surface water withdrawal shall be deemed to be in existence on July 1, 1989, if there was an actual withdrawal on or before that date and the withdrawal has not been abandoned.

However, neither the statute nor the regulation specifies whether the grandfathered withdrawal is the amount of water withdrawn prior to July 1, 1989, the capacity of the water withdrawal structures at that time, or any other quantification. This regulatory action is necessary to enable the Department to meet its statutory requirements as well as to provide clarity and predictability for grandfathered withdrawers, VWP Permits applicants, and the public.

Legal Basis

Identify (1) the promulgating agency, and (2) the state and/or federal legal authority for the regulatory change, including the most relevant citations to the Code of Virginia and Acts of Assembly chapter number(s), if applicable. Your citation must include a specific provision, if any, authorizing the promulgating agency to regulate this specific subject or program, as well as a reference to the agency’s overall regulatory authority.

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.

Purpose

Describe the specific reasons why the agency has determined that this regulation is essential to protect the health, safety, or welfare of citizens. In addition, explain any potential issues that may need to be addressed as the regulation is developed.

Article 2 of the State Water Control Law, § 62.1-44.2 et seq. of the Code of Virginia, and the VWP Regulation seek to prevent and reduce water pollution and preserve beneficial uses of state waters. Pursuant to § 62.1-44.15:22 B of the Code of Virginia, no VWP Permit “shall be required for any water withdrawal in existence on July 1, 1989; however, a permit shall be required if a new § 401 certification is required to increase a withdrawal.” This condition is included in the VWP Regulation at 9VAC25-210-310 A. However, the statutory and regulatory language is ambiguous; it is not clear whether the phrase “any water withdrawal in existence on July 1, 1989” refers to a specific volume of water, the maximum capacity of a specific intake and/or treatment structure in place on July 1, 1989, or some additional interpretation.

This exclusion has created a category of users (i.e., grandfathered withdrawals), many of which have large withdrawals that may significantly impact beneficial uses with little oversight by the Department. In 2024, approximately 81% of total surface water withdrawal volumes were from unpermitted facilities; 95% of those withdrawal volumes were from grandfathered withdrawals. This means that roughly 77% of all surface water withdrawal volumes in 2024 were from facilities with grandfathered withdrawals. Some grandfathered withdrawals have increased the volume of water they withdraw by 100 percent or more without obtaining a VWP Permit. This trend could have implications for existing and new permitted users as well as greater environmental impacts to the larger watershed.

This creates challenges for the Department to regulate and manage surface water. For example, the Department utilizes a rolling 5-year average of reported water use when modeling grandfathered withdrawals to evaluate water availability for water withdrawal permitting. These modeling evaluations consider cumulative impacts on water availability during low flow drought conditions to determine whether a proposed withdrawal would negatively impact downstream beneficial uses. Clarification of how grandfathered withdrawals are to be addressed will enable comprehensive water withdrawal permitting analysis and support the Department's statutory charge to ensure protection of beneficial uses. Additionally, regional water supply planning and resources management will benefit from certainty about how grandfathered withdrawals should be accounted for in understanding available water supply and identification of risks to be addressed in water supply plans. A process needs to be established to accurately and consistently quantify water availability to bolster decision-making regarding water resources management, whether for water supply planning purposes, or water withdrawal permitting decisions that consider all withdrawals in a watershed for purposes of evaluating cumulative impacts and ensuring protection of beneficial uses.

The VWP Regulation provides that an abandoned surface water withdrawal does not qualify for a VWP Permit exclusion as a grandfathered withdrawal. However, the abandonment process has been challenging for the Department to implement. In addition, there are other areas of the VWP Regulation that may need clarification or amendments, including provisions related to who must apply for a permit and authorities to ensure that beneficial uses are protected. Amendments to the VWP Regulation may also require amendments to related regulations, including the Water Withdrawal Reporting Regulation (9VAC25-200), Surface Water Management Area Regulation (9VAC25-220), and the Local and Regional Water Supply Planning Regulation (9VAC25-780).

Substance

Briefly identify and explain the new substantive provisions that are being considered, the substantive changes to existing sections that are being considered, or both.

This regulatory action will clarify how the VWP Regulation implements the exclusion in § 62.1-44.15:22 of the Code of Virginia that provides that no VWP Permit is "required for any [surface] water withdrawal in existence on July 1, 1989; however a permit shall be required if a new § 401 certification is required to increase a withdrawal." This regulatory action will clarify what constitutes a grandfathered withdrawal, when a grandfathered withdrawal must obtain a VWP Permit, and how grandfathered withdrawals are addressed in the VWP Regulation and related regulations including the Water Withdrawal Reporting Regulation (9VAC25-200), Surface Water Management Area Regulation (9VAC25-220), and the Local and Regional Water Supply Planning Regulation (9VAC25-780).

Additionally, restrictive and other unclear provisions in the VWP Regulation limit the Department's ability to manage surface water, including provisions related to the abandonment of a withdrawal (9VAC25-210-310) and who must apply for a permit (9VAC25-210-340). These issues limit the ability of the Department to ensure beneficial uses of state waters are maintained and protected. For example, the VWP

Regulation provides that the grandfathered exclusion does not apply if a surface water withdrawal has been abandoned and will be addressed by this regulatory action, such as by clarifying how long a cessation of a withdrawal can continue before it is deemed an abandonment.

The regulatory action does not intend to alter the listed exclusions that are not associated with grandfathered withdrawals.

Alternatives to Regulation

Describe any viable alternatives to the regulatory change that were considered, and the rationale used by the agency to select the least burdensome or intrusive alternative that meets the essential purpose of the regulatory change. Also, include discussion of less intrusive or less costly alternatives for small businesses, as defined in § 2.2-4007.1 of the Code of Virginia, of achieving the purpose of the regulatory change.

One alternative the Department tried was an informal workgroup to discuss possible solutions to clarify the challenges identified above in the Purpose section. The Department formed an informal workgroup in August 2024 comprised primarily of entities with grandfathered withdrawals to discuss the current interpretation and implementation of the exclusion in § 62.1-44.15:22 of the Code of Virginia, which is included in 9VAC25-210-310 A of the VWP Regulation. The purpose of the informal workgroup was to seek an interpretation that would be acceptable to the Department and the relevant parties. The informal workgroup held five meetings and discussed several potential solutions. However, this workgroup and the Department were unable to reach consensus on any recommendations.

Another alternative to this regulatory action is to continue operating within the existing regulatory language. This action was rejected because it will result in a continuation of the challenges identified in the Purpose section including limiting the ability of the Department to ensure beneficial uses of state waters are maintained and protected.

Periodic Review and Small Business Impact Review Announcement

If you wish to use this regulatory action to conduct, and this NOIRA to announce, a periodic review (pursuant to § 2.2-4017 of the Code of Virginia and the ORM procedures), and a small business impact review (§ 2.2-4007.1 of the Code of Virginia) of this regulation, keep the following text. Modify it as necessary for your agency. Otherwise, delete the paragraph below and insert “This NOIRA is not being used to announce a periodic review or a small business impact review.”

This NOIRA is not being used to announce a periodic review or a small business impact review.

Public Participation

Indicate how the public should contact the agency to submit comments on this regulation, and whether a public hearing will be held, by completing the text below. In addition, as required by § 2.2-4007.02 of the Code of Virginia, describe any other means that will be used to identify and notify interested parties and seek their input, such as regulatory advisory panels or general notices.

The Board is providing an opportunity for comments on this regulatory proposal, including but not limited to (i) the costs and benefits of the regulatory proposal, (ii) any alternative approaches, and (iii) the potential impacts of the regulation. The Board 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 for the public comment file may do so through the Public Comment Forums feature of the Virginia Regulatory Town Hall web site at: <https://townhall.virginia.gov>. Comments may also be submitted by mail or email to Morgan Emanuel, Regulatory and Guidance Analyst, DEQ Policy Division, P.O. Box 1105, Richmond, Virginia 23218, or morgan.emanuel@deq.virginia.gov. 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 not be held following the publication of the proposed stage of this regulatory action unless requests for a public hearing are received during the NOIRA public comment period from at least 25 persons.

Regulatory Advisory 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. Persons interested in assisting in the development of a proposal should notify the Department's contact person by the end of the comment period and provide their name, address, phone number, email address and the organization they represent (if any). The primary function of the panel is to develop recommended regulation amendments for the Department's consideration through the collaborative approach of regulatory negotiation and consensus. Notification of the composition of the panel will be sent to all applicants.