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Exempt Action: Final Regulation Agency Background Document

Agency name	State Water Control Board
Virginia Administrative Code (VAC) Chapter citation(s)	9 VAC 25-870
VAC Chapter title(s)	Virginia Stormwater Management Program (VSMP) Regulation
Action title	Amendment to the Virginia Stormwater Management Program Regulation (9VAC25-870) to meet changes made during the 2020 General Assembly session.
Final agency action date	September 24, 2020
Date this document prepared	August 28, 2020

Although a regulatory action may be exempt from executive branch review pursuant to § 2.2-4002 or § 2.2-4006 of the *Code of Virginia*, the agency is still encouraged to provide information to the public on the Regulatory Town Hall using this form. However, the agency may still be required to comply with the Virginia Register Act, Executive Order 14 (as amended, July 16, 2018), the Regulations for Filing and Publishing Agency Regulations (1VAC7-10), 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 this regulatory change (i.e., new regulation, amendments to an existing regulation, or repeal of an existing regulation). Alert the reader to all substantive matters. If applicable, generally describe the existing regulation.

The intent of this final regulatory action is to amend language in the Virginia Stormwater Management Program (VSMP) Regulation (9VAC25-870) to reflect changes made to the Code of Virginia (State Water Control Law) by the 2020 General Assembly through Chapters 313, 667, 1102 and 1103 of the 2020 Acts of Assembly.

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, internal staff review, petition for rulemaking, periodic review, or board decision). "Mandate" is defined as "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the General Assembly, the federal government, or a court that requires that a regulation be promulgated, amended, or repealed in whole or part."

Chapter 313 (House Bill 859) of the 2020 Acts of Assembly directs the State Water Control Board (Board) to adopt regulations that require the owner of property that is zoned for residential use and on which is located a privately owned stormwater management facility serving one or more residential properties to record the long-term maintenance and inspection requirements for such facility with the deed for the owner's property.

Chapter 667 (House Bill 882) of the 2020 Acts of Assembly directs the Board to adopt regulations that provide for the use of a proprietary best management practice only if another state, regional, or national certification program has verified and certified its nutrient or sediment removal effectiveness. In addition, the regulations shall provide for the evaluation and potential inclusion of emerging or innovative nonproprietary stormwater control technologies that may prove effective in reducing nonpoint source pollution.

Chapters 1102 and 1103 (Senate Bill 747 and House Bill 1609) of the 2020 Acts of Assembly established that any publicly owned treatment works that is permitted under the Watershed General Virginia Pollutant Discharge Elimination System (VPDES) Permit pursuant to § 62.1-44.19:14 and is constructing or expanding the treatment works, wastewater collection system, or other facility used for public wastewater utility operations may, as an alternative to acquiring and using certain perpetual nutrient credits pursuant to subsection B of § 62.1-44.19:21, permanently retire a portion of its wasteload allocation if (i) notice is given by such applicant to the Department of Environmental Quality (Department), (ii) a ratio of 10 pounds of nitrogen allocation for each pound of phosphorous allocation retired is also permanently retired and applied toward the land-disturbing project, and (iii) the general permit registration list is modified to reflect the permanent retirement of the wasteload allocation. Except for a water reclamation and reuse project at a treatment works, no more than 10 pounds per year of phosphorous allocation may be applied toward a single project's postconstruction phosphorus control requirement.

Acronyms and Definitions

Define all acronyms used in this form, and any technical terms that are not also defined in the "Definitions" section of the regulation.

- Board – State Water Control Board
- Department – Department of Environmental Quality
- VPDES – Virginia Pollutant Discharge Elimination System
- VSMP – Virginia Stormwater Management Program

Statement of Final Agency Action

Provide a statement of the final action taken by the agency including: 1) the date the action was taken; 2) the name of the agency taking the action; and 3) the title of the regulation.

The Board adopted amendments at its meeting on September 24, 2020. In accordance with § 2.2-4006 B of the Code of Virginia (Administrative Process Act), the Board will receive, consider and respond to petitions by any person at any time with respect to reconsideration of this regulation.

Legal Basis

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

The Board is authorized to adopt regulations under § 62.1-44.15:25 of the Code of Virginia (Stormwater Management Act). Furthermore, the Board is authorized to adopt regulations that specify minimum technical criteria and administrative procedures for VSMPs under § 62.1-44.15:28 of the Code of Virginia (Stormwater Management Act). This regulatory amendment is being processed as a final exempt action under § 2.2-4006 A.4.a of the Code of Virginia (Administrative Process Act) as this regulatory action is necessary to conform to the changes in Virginia statutory law where no agency discretion is involved.

Purpose

Explain the need for the regulatory change, including a description of: (1) the rationale or justification, (2) the specific reasons the regulatory change is essential to protect the health, safety or welfare of citizens, and (3) the goals of the regulatory change and the problems it's intended to solve.

The regulatory amendments are necessary to conform the VSMP Regulation (9VAC25-870) to changes made to the Code of Virginia (State Water Control Law) by the 2020 General Assembly through Chapters 313, 667, and 1103 of the 2020 Acts of Assembly.

Substance

Briefly identify and explain the new substantive provisions, the substantive changes to existing sections, or both. A more detailed discussion is provided in the "Detail of Changes" section below.

The substance of this action is to amend language in the VSMP Regulation (9VAC25-870) to reflect changes made to the Code of Virginia (State Water Control Law) by the 2020 General Assembly through Chapters 313, 667, 1102 and 1103 of the 2020 Acts of Assembly. The amendments seek to spell out and clarify the concepts of "nonproprietary best management practices" and "proprietary best management practices"; provide for reciprocity; disclosure and nutrient credit use.

Detail of All Changes Proposed in this Regulatory Action

*List all changes proposed in this exempt action and the rationale for the changes. Explain the new requirements and what they mean rather than merely quoting the text of the regulation. *Please put an asterisk next to any substantive changes.*

Current section number	New section number, if applicable	Current requirement	Change, intent, rationale, and likely impact of new requirements
9VAC25-870-10		Definitions. "Best management practice"	Added clarifying language to the definition to identify the concepts of "nonproprietary best management practice" and "proprietary best management practice": "Best management practice" or "BMP" means...to prevent or reduce the pollution of surface waters and groundwater systems. "This includes: 1. <u>Nonproprietary best management practice</u> " means both structural and nonstructural practices to prevent or reduce the pollution of surface waters and groundwater systems that are in the public domain and are not protected by trademark or patent or copyright. 2. <u>Proprietary best management practice</u> " means both structural and nonstructural practices to prevent or reduce the pollution of surface waters and groundwater systems that are privately owned and controlled and may be protected by trademark or patent or copyright."
9VAC25-870-65 B		Water Quality Compliance	Clarification of the concept of "nonproprietary BMPs: "B. The <u>nonproprietary BMPs</u> listed in this subsection are approved for use as necessary to effectively reduce the phosphorus load and runoff volume in accordance with the Virginia Runoff Reduction Method. Other approved <u>nonproprietary BMPs</u> found on the Virginia Stormwater BMP Clearinghouse Website may be utilized. Design specifications and the pollutant removal efficiencies for all approved <u>nonproprietary BMPs</u> are found on the Virginia Stormwater BMP Clearinghouse Website."
9VAC25-870-65 C		Water Quality Compliance - BMPs	Clarification of the concept if "nonproprietary BMPs: "C. <u>Nonproprietary BMPs</u> differing from those listed in subsection B of this section or proprietary BMPs certified in other states shall be reviewed and approved by the director in accordance with procedures established by the department."
9VAC25-870-65 D		Water Quality Compliance – VSMP Limitations	Replace text on limitations with language clarifying the concept of "proprietary BMPs" and add subsections to addresses existing proprietary BMPs and

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			<p>the enactment clause and to address the approval of new proprietary BMPs after July 1, 2020: <u>“D. Proprietary BMPs listed on the Virginia Stormwater BMP Clearinghouse Website are approved for use in accordance with the Virginia Runoff Reduction Method. 1. Any proprietary BMP listed on the Virginia Stormwater BMP Clearinghouse Website prior to July 1, 2020, shall by December 31, 2021, provide documentation to the department showing that another state, regional, or national certification program has verified and certified its nutrient or sediment removal effectiveness. Any proprietary BMP that fails to provide the department with the documentation required by December 31, 2021, shall not be approved for use in any stormwater management plan submitted on or after January 1, 2022, until such proprietary BMP provides the department with such required documentation. 2. Any proprietary BMP approved for use after July 1, 2020 must meet the requirements of § 62.1-44.15:28 A 9 of the Code of Virginia.</u></p>
9VAC25-870-65 D	9VAC25-870-65 E	Water Quality Compliance – VSMP Limitations	Text originally in Subsection D: <u>“E. A VSMP authority may establish limits...”</u>
9VAC25-870-65 E	9VAC25-870-65 F	Water Quality Compliance – VSMP discretion	Subsection Lettering revised to reflect addition of new Subsection D: <u>“E.F. The VSMP authority shall have the discretion...”</u>
9VAC25-870-65 F	9VAC25-870-65 G	Water Quality Compliance – Offsite alternatives	Subsection Lettering revised to reflect addition of new Subsection D: <u>“F.G. Offsite alternatives...”</u>
	9VAC25-870-65 H		<p>New section H added to clarify retirement of wasteload allocations: <u>“H. Any publicly owned treatment works that is permitted under the watershed general VPDES permit pursuant to § 62.1-44.19:14 of the Code of Virginia and is constructing or expanding the treatment works, wastewater collection system, or other facility used for public wastewater utility operations may, in accordance with § 62.1-44.19:21.2 C of the Code of Virginia, permanently retire a portion of its wasteload allocation to meet the design criteria of subsection A of 9VAC25-870-63. Notice shall be given</u></p>

Current section number	New section number, if applicable	Current requirement	Change, intent, rationale, and likely impact of new requirements
			by such applicant to the VSMP authority and to the department.”
	9VAC25-870-112 C		New Subsection C added to clarify recording of long-term maintenance and inspection requirements: <u>“C. In addition to the requirements of subsection A of this section, any owner of property that is zoned for residential use and on which is located a privately owned stormwater management facility serving one or more residential properties shall record the long-term maintenance and inspection requirements with the deed for the property.”</u>

Regulatory Flexibility Analysis

Pursuant to § 2.2-4007.1B of the Code of Virginia, please describe the agency’s analysis of alternative regulatory methods, consistent with health, safety, environmental, and economic welfare, that will accomplish the objectives of applicable law while minimizing the adverse impact on small business. Alternative regulatory methods include, at a minimum: 1) establishing less stringent compliance or reporting requirements; 2) establishing less stringent schedules or deadlines for compliance or reporting requirements; 3) consolidation or simplification of compliance or reporting requirements; 4) establishing performance standards for small businesses to replace design or operational standards required in the proposed regulation; and 5) the exemption of small businesses from all or any part of the requirements contained in the regulatory change.

No alternative regulatory methods were available to accommodate this statutory change.

Family Impact

In accordance with § 2.2-606 of the Code of Virginia, please 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.

No impact on the institution of the family and family stability is anticipated as a result of this regulatory action.