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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)	9VAC25-900
VAC Chapter title(s)	Certification of Nonpoint Source Nutrient Credits
Action title	Amendments to establish long-term stewardship requirements and update preconversion baseline land use dates for land use conversion credit generating activities
Date this document prepared	December 3, 2025

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).

This regulatory action is the result of a Periodic Review completed on March 20, 2025. The primary function of this action is to amend 9VAC25-900 to provide clarification about long-term stewardship requirements in order to reduce compliance actions taken by the Virginia Department of Environmental Quality (DEQ or Department) as well as adopting a more recent baseline date for land use conversions. The intent of proposed amendments is to address gaps in 9VAC25-900 that have been identified since the State Water Control Board (Board) initially adopted this regulation in 2020.

Acronyms and Definitions

Define all acronyms or technical definitions used in this form.

BMP– Best Management Practice
Board- State Water Control Board
CGP– General VPDES Permit for Discharges of Stormwater from Construction Activities, 9VAC25-880
DEQ or Department – Virginia Department of Environmental Quality
USEPA – United States Environmental Protection Agency
MS4 – Municipal Separate Storm Sewer System
NPS – Nonpoint Source
TMDL – Total Maximum Daily Load
VPDES – Virginia Pollution Discharge Elimination System
WIP – Watershed Implementation Plan
WLA – Waste Load Allocation
WWTP – Wastewater Treatment Plant

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.”

This regulatory action is being initiated as the result of a periodic review. This regulation needs to be amended to resolve ambiguities regarding the responsibilities of the entities implementing Nonpoint Source (NPS) nutrient credit generating activities for the generation of perpetual NPS nutrient credits (i.e. “nutrient bank sponsors”) that have led to compliance issues related to certain individual credit generating activities. This regulation will be amended to clarify the roles and responsibilities of “nutrient bank sponsors” and designated long-term stewards for properties containing NPS nutrient credit generating activities. The amendments will also consider adopting a more recent baseline date for land use conversions. This regulation needs to be amended to further clarify regulatory requirements.

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.

The basis of this regulation is § 62.1-44.19:20 of the Code of Virginia, which authorizes the Board to adopt regulations for the purpose of establishing procedures for the certification of NPS nutrient credits under Article 4.02 of the Chesapeake Bay Watershed Nutrient Credit Exchange Program, of the State Water Control Law, § 62.1-44.2 et seq. of the Code of Virginia.

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.

This regulation establishes procedures for obtaining NPS credit certification. Credits certified under this program may be used for compliance with the General VPDES Permit for Discharges of Stormwater from Construction Activities in 9VAC25-880 (CGP) in accordance with 9VAC25-875 for offsetting phosphorus loads from new development or redevelopment. NPS nutrient credits may also be utilized for meeting nutrient Total Maximum Daily Load (TMDL) Waste Load Allocation (WLAs) and Chesapeake Bay TMDL special conditions in Municipal Separate Storm Sewer (MS4) general permits, 9VAC25-890, individual MS4 permits, and general and individual VPDES permits authorizing the discharge of industrial stormwater permits in accordance with 9VAC25-31 and 9VAC25-151, providing alternatives for meeting Virginia’s Chesapeake Bay TMDL Watershed Implementation Plan (WIP) obligations.

The periodic review for the Certification of Nonpoint Source Nutrient Credits noted that “[t]his regulation is necessary and continues to be needed; however, ambiguities regarding the responsibilities of the entities implementing NPS nutrient credit generating activities for the generation of perpetual NPS nutrient credits (i.e., “nutrient bank sponsors”) have led to compliance issues related to certain individual credit generating activities.” The periodic review, in recommending that the regulation be amended, further noted: “This regulation will be amended to clarify the roles and responsibilities of “nutrient bank sponsors” and designated long-term stewards for properties containing NPS nutrient credit generating activities. The amendments will also consider adopting a more recent baseline date for land use conversions.”

Virginia’s NPS nutrient trading program is one of the most active in the country with hundreds of credit transactions being made annually to achieve compliance with Virginia Pollution Discharge Elimination System (VPDES) permits. In 2023, approximately 2,123 pounds of perpetual phosphorus credits were sold and the estimated 2023 market value of the NPS nutrient trading program is over \$30,000,000. This market would not exist without DEQ’s promulgation of 9VAC25-900 and the implementation of the NPS nutrient trading program.

This regulation provides an option other than site specific best management practices (BMPs) for permittees to comply with their permit responsibilities to reduce the discharge of nitrogen and phosphorus pollution. In many cases, the use of these credits reduces the cost of compliance to the permittee while providing equivalent water quality benefits. Amendments to this regulation are needed to clarify provisions of the regulation. Because credits are used to offset continuing discharges of pollutants *in perpetuity*, requirements for nutrient banks must include assurances they will continue to generate removals in perpetuity.

The regulation needs to be amended to clarify requirements for long-term stewardship when credits are certified for perpetual removal of nutrients. Ambiguities regarding the responsibilities of the entities implementing NPS nutrient credit generating activities for the generation of perpetual NPS nutrient credits (i.e. “nutrient bank sponsors”) have led to compliance issues related to certain individual credit generating activities that have been issued NPS nutrient credit certification. This regulatory action also proposes to clarify the roles and responsibilities of “nutrient bank sponsors” and designated long-term stewards for properties containing NPS nutrient credit generating activities. Proposed regulatory amendments are intended to provide clarification on NPS nutrient credit certification requirements and where applicable, ensure NPS nutrient credit certification meets the appropriate temporal basis of perpetual NPS credit certification pursuant to § 62.1-44.19:20.B.3. The amendments will also consider adopting a more recent baseline date for land use conversions.

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 regulation is necessary and continues to be needed to support nutrient load reductions in Virginia; however, ambiguities regarding the responsibilities of the entities implementing NPS nutrient credit generating activities for the generation of perpetual NPS nutrient credits (i.e. "nutrient bank sponsors") have led to compliance issues related to certain individual credit generating activities. This regulatory action proposes to clarify the roles and responsibilities of "nutrient bank sponsors" and designated long-term stewards for properties containing NPS nutrient credit generating activities; revisions to sections covering the procedure for application for certification of nutrient credits, nutrient credit release and registration, establishing baseline implementation plan's and financial assurance applicability will be considered. The regulatory action will also consider providing standards for close-out procedures, requiring conservation easements, defining site protection, including compensatory mitigation plans, cost estimates for perpetual and term credit nutrient credit-generating projects, financial assurance requirements for perpetual credits, allowable financial mechanisms, addressing credit release, and enforcement and penalties. Additional amendments may be identified following the submittal of public comments on this Notice and by the regulatory advisory panel during deliberations of this general permit regulation.

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 considered was to maintain this regulation as is. This alternative was rejected because, as noted above, the periodic review completed in 2025 determined that aspects of the regulation need to be addressed through a regulatory action.

Another alternative considered was the repeal of this regulation. This alternative was rejected, because the regulation provides the regulated community with offsite compliance options via the one-time acquisition of perpetual NPS nutrient credits for achieving VPDES permit compliance under 9VAC25-875, 9VAC25-890, and 9VAC25-151.

NPS nutrient credits may also be utilized for meeting nutrient TMDL Waste Load Allocation (WLAs) and Chesapeake Bay TMDL special conditions in MS4 general permits, 9VAC25-890, individual MS4 permits, and general and individual VPDES permits authorizing the discharge of industrial stormwater permits in accordance with 9VAC25-31 and 9VAC25-151, providing a cost-effective strategy for meeting Virginia's Chesapeake Bay TMDL WIP obligations. Without this regulation, regulated entities under 9VAC25-875 and the CGP, 9VAC25-880, and dischargers of industrial stormwater in accordance with 9VAC25-31 and 9VAC25-151 would be limited to achieving VPDES permit compliance through onsite treatment of stormwater. Regulated entities under 9VAC25-890 (MS4 permittees) would be limited to either onsite stormwater treatment or the acquisition of term point source nutrient credits. Term point source nutrient credits generated by entities under the General Virginia Pollutant Discharge Elimination System (VPDES) Watershed Permit Regulation for Total Nitrogen and Total Phosphorus Discharges and Nutrient Trading in the Chesapeake Bay Watershed in Virginia (9VAC25-820), i.e. wastewater treatment plants (WWTP) , are often less desirable for MS4 permittees due to the need to acquire term point source nutrient credits annually for one year of permit compliance. WWTPs under 9VAC25-820 are also less willing to transfer term point source nutrients credits to MS4 permittees versus other WWTP permittees in need of nutrient credits. CGP permittees under 9VAC25-880 and dischargers of industrial stormwater in accordance with

9VAC25-31 and 9VAC25-151 are not permitted to utilize term point source credits. This regulation provides needed flexibility for VPDES permit compliance and is the least burdensome alternative available for achieving the purpose of the regulation.

**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 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: (i) projected reporting, recordkeeping, and other administrative costs; (ii) the probable effect of the regulation on affected small businesses; and (iii) the description of less intrusive or costly alternatives for achieving the purpose of the regulation.

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

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, P.O. Box 1105, Richmond, Virginia 23218, 804-494-9635, and 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.

A public hearing will not be held following the publication of the proposed stage of this regulatory action.

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 DEQ'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 DEQ's 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.