



townhall.virginia.gov

Exempt Action: Final Regulation Agency Background Document

Agency name	State Water Control Board
Virginia Administrative Code (VAC) Chapter citation(s)	9 VAC 25-830
VAC Chapter title(s)	Chesapeake Bay Preservation Area Designation and Management Regulations
Action title	Amendment to incorporate additional requirements related to preservation of mature trees and replanting of trees into existing performance criteria.
Final agency action date	June 29, 2021
Date this document prepared	June 2, 2021

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.

This regulatory amendment includes additional language for existing performance criteria requirements related to mature trees and the planting of trees under the Chesapeake Bay Preservation Act program. It includes requirements to preserve and protect mature trees, including during development activities, and specifies that where existing vegetation is removed that includes trees, trees are to be utilized in reestablishing vegetation. It also provides that where vegetation or buffers must be established, the planting of trees should be utilized.

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the General Assembly, the federal government, or a court that requires that a regulation be promulgated, amended, or repealed in whole or part."

Virginia Code § 62.1-44.15:72 was amended by Chapter 1207 of the 2020 Acts of Assembly. The amendment added the preservation of mature trees and replanting of trees to the performance criteria requirements for regulations to be established by the State Water Control Board for use by local governments under the Chesapeake Bay Preservation Act. The amendment also included language for the State Water Control Board to adopt regulations to implement this provision.

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.

CBPA: Chesapeake Bay Preservation Area
 DEQ: Department of Environmental Quality
 IDA: Intensely Developed Areas
 RMA: Resource Management Area
 RPA: Resource Protection Area
 VAC: Virginia Administrative Code
 VDOF: Virginia Department of Forestry

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.

On June 29, 2021, the State Water Control Board adopted the amendments to the Chesapeake Bay Preservation Area Designation and Management Regulations.

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.

Virginia Code § 62.1-44.15:69 provides the authority for the State Water Control Board to promulgate regulations under the Chesapeake Bay Preservation Act (Virginia Code § 62.1-44.15:67 et. seq.). Virginia § 62.1-44.15:72 provides that the State Water Control Board shall promulgate regulations that establish criteria for use by local governments in granting, denying, or modifying requests to rezone, subdivide, or use and develop land in these areas.

Virginia Code § 62.1-44.15:72 was amended to add a provision of ""preservation of mature trees or planting of trees as a water quality protection tool and as a means of providing other natural resource benefits" to the performance criteria requirements for regulations to be established by the State Water Control Board for use by local governments under the Chesapeake Bay Preservation Act. The

amendment also included language for the State Water Control Board to adopt regulations to implement this provision and exempted the regulation amendment from the Administrative Process Act.

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.

Virginia Code § 62.1-44.15:72 was amended to add a provision of “preservation of mature trees or planting of trees as a water quality protection tool and as a means of providing other natural resource benefits;” to the performance criteria requirements for regulations to be established by the State Water Control Board for use by local governments under the Chesapeake Bay Preservation Act.

The amendment also included language for the State Water Control Board to adopt regulations to implement this provision. This regulatory amendment provides the requirements in the performance criteria necessary to accomplish the statutory change.

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.

This amendment includes requirements to preserve and protect mature trees and where existing vegetation is removed, trees are incorporated in reestablishing vegetation as appropriate to site conditions. It also provides that where vegetation or buffers must be (re)established, the planting of trees should be utilized as appropriate to site conditions.

Issues

Identify the issues associated with the regulatory change, including: 1) the primary advantages and disadvantages to the public, such as individual private citizens or businesses, of implementing the new or amended provisions; 2) the primary advantages and disadvantages to the agency or the Commonwealth; and 3) other pertinent matters of interest to the regulated community, government officials, and the public. If there are no disadvantages to the public or the Commonwealth, include a specific statement to that effect.

There are a number of advantages that result from the amendment Overall, as the statutory criteria requirements change, the amendment provides clarity and specifics utilizing existing provisions for local governments who are responsible for implementing the program. It also ensures that the policy of recognizing the water quality protection value of mature trees is recognized. The amendment includes additional specifics regarding mature tree preservation and tree planting consistent with existing requirements and adds a definition of “mature tree” to aid local governments in the implementation. Additional allowance in recognition of other tree planting and preservation ordinances are included to aid landowners, local governments, and developers who operate in these localities, and to provide an incentive for adopting these ordinances since it can be used to demonstrate compliance with new provision language.

There are no disadvantages to the public or the Commonwealth that will result from the adoption of this final regulation.



Requirements More Restrictive than Federal

List all changes to the information reported on the Agency Background Document submitted for the previous stage regarding any requirement of the regulatory change which is more restrictive than applicable federal requirements. If there are no changes to previously reported information, include a specific statement to that effect.

No changes to the previously reported information.

Agencies, Localities, and Other Entities Particularly Affected

List all changes to the information reported on the Agency Background Document submitted for the previous stage regarding any other state agencies, localities, or other entities that are particularly affected by the regulatory change. If there are no changes to previously reported information, include a specific statement to that effect.

No changes to the previously reported information.

Public Comment

Summarize all comments received during the public comment period following the publication of the proposed stage, and provide the agency response. Ensure to include all comments submitted: including any received on Town Hall, in a public hearing, or submitted directly to the agency or board. If no comment was received, enter a specific statement to that effect.

The Department received a total of 319 comments during the comment period. Comments were received from seven localities, two Planning District Commissions, several organizations or associations, and citizens. Two groups of comments that were the same or substantially the same in wording were received accounting for 284 of the total comments. Additionally, a Stakeholder Advisory Group (SAG) was formed to provide discussion and feedback on the proposal and comments received. The SAG met May 13th and 14th, 2021.

Comments primarily focused on a request for a definition of mature tree; the consideration of native species; clarity of term “maximum extent practicable” and its application; revisions to other statutory or legislative provisions, polices or activities, provisions related to tree removal for sightlines and vistas; and requests for a traditional regulatory process.

The Department considered such comments, made changes to the language based upon comments, including changes to recognize other state laws and local tree planting and preservation ordinances. The CBPA Regulations have existing provisions related to vegetation, tree removal, and vegetation establishment and the amendment based upon mature trees and planting of trees were tied to existing requirements. The amendment is to conform with statutory changes and the requirement to implement the changes in regulations.

Additional detail is included in the attached “Comments and Responses on Mature Tree/Tree Planting Amendment”

Detail of Changes Made Since the Previous Stage

*List all changes made to the text since the previous stage was published in the Virginia Register of Regulations and the rationale for the changes. For example, describe the intent of the language and the expected impact. Describe the difference between existing requirement(s) and/or agency practice(s) and what is being proposed in this regulatory change. Explain the new requirements and what they mean rather than merely quoting the text of the regulation. * Put an asterisk next to any substantive changes.*

The primary changes centered around providing a definition of “mature tree”, providing a three year timeline for localities to amend their ordinances and adopt into their local Chesapeake Bay Preservation Act programs, removal of the term “maximum extent practicable” and identifying that the planting of native species is preferred for planting and replanting vegetation. The proposal primarily focuses on setting the standard for removal “as necessary” with additional language provided for the removal of trees for sightlines. In the planting of trees, the language focuses on “appropriate site conditions,” “maximizing buffer function,” and tailoring to “project specifications.”

Current chapter-section number	New chapter-section number, if applicable	New requirement from previous stage	Updated new requirement since previous stage	Change, intent, rationale, and likely impact of updated requirements
9 VAC 25-830-40		Definition of mature tree		Addition of a definition was in response to request to comments and to provide a standard that was clear, easier to implement, and based upon existing general references including existing Guidance. Use of diameter at breast height (dbh) is a common forestry term and application for determining tree diameter. In implementing, the definition provides a presumption of a mature tree for use by localities in incorporating provisions and will result in review specific to mature trees in standard plan of review process.
9 VAC 25-830-130(2)			Mature trees shall be protected during development and only be removed where necessary including to provide for the proposed use or development.	The intent is to specifically recognize the preservation and protection of mature trees is consistent with the change in the statutory criteria requirement. Additionally, localities which have existing tree planting or preservation ordinances do not have to update their ordinances or provisions for this amendment for RMA areas.
9 VAC 25-830-140(3)			Where such buffer must be established, the planting of trees	The intent is to include this consideration consistent with the

			should be incorporated as appropriate to site conditions and in consideration of the buffer function.	statutory criteria, existing provisions, existing Guidance (i.e., Riparian Buffers Modification & Mitigation Guidance Manual), and recognition of site conditions and buffer function.
9 VAC 25-830-140(3)(b)			Where such buffer must be established, the planting of trees should be incorporated as appropriate to site conditions and in consideration of the buffer function.	The intent is to include this consideration consistent with the statutory criteria, existing provisions, existing Guidance (i.e., Riparian Buffers Modification & Mitigation Guidance Manual), and recognition of site conditions and buffer function.
9 VAC 25-830-140(5)(a)(1)			Mature trees shall be preserved and trimmed or pruned in lieu of removal, as site conditions permit. Any mature tree removal should be limited to the fewest number of trees feasible for a reasonable sightline based upon site conditions.	The intent is to emphasize the change in the statutory criteria requirement that mature trees should be preserved and in doing so trimming and pruning should be utilized before removal and removal should be limited. Additionally, where a mature tree is removed, a tree should be planted as site conditions allow in consideration of the buffer function.
9 VAC 25-830-140			Where such buffer must be established, the planting of trees should be incorporated as appropriate to site conditions and in consideration of the buffer function.	The intent is to include this consideration consistent with the statutory criteria, existing provisions, existing Guidance (i.e., Riparian Buffers Modification & Mitigation Guidance Manual), and recognition of site conditions and buffer function.
9 VAC 25-830-140(5)(a)(4)			Mature trees can be removed as necessary consistent with the best available technical advice and permit conditions or requirements and trees should be utilized in the	The intent is to preserve mature trees consistent with the statutory criteria while still providing for their removal consistent with the project.

			projects as appropriate.	
9 VAC 25-830-140			In considering such measures, the local government shall consider the planting of trees as a component of any such measure (i.e., in regards to establishing a buffer in the Intensely Developed Area overlay).	The intent is to include trees consistent with the statutory criteria in the consideration by local governments.
9 VAC 25-830-190		Provides for three years for localities to update ordinances and local program.		In response to comments, this provides a timeline for locality implementation of new performance criteria requirements.

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
9 VAC 25-830-130(2)		Indigenous vegetation shall be preserved to the maximum extent practicable.	Mature trees shall be protected and only be removed where necessary including to provide for the proposed use or development. The intent is to specifically recognize the preservation and protection of mature trees is consistent with the change in the statutory criteria requirement. Additionally, localities which have existing tree planting or preservation ordinances do not have to update their ordinances or provisions for this amendment for RMAs.
9 VAC 25-830-140(3)		Requirement to reestablish buffer.	Where such buffer must be established, the planting of trees should be incorporated as appropriate to site conditions and in consideration of the buffer function. The intent is to include this consideration consistent with the statutory criteria, existing provisions, existing guidance, and recognition of site conditions and buffer function. Additional language providing

Current section number	New section number, if applicable	Current requirement	Change, intent, rationale, and likely impact of new requirements
			that planting of native species is preferred.
9 VAC 25-830-140(3)(b)		Requirement to reestablish buffer on agricultural land converted to other uses.	Where such buffer must be established, the planting of trees should be incorporated as appropriate to site conditions and in consideration of the buffer function. The intent is to include this consideration consistent with the statutory criteria, existing provisions, existing guidance, and recognition of site conditions and buffer function. Additional language providing that planting of native species is preferred.
9 VAC 25-830-140(4)(a)(2)		Establishment of vegetated areas to mitigate effects of buffer encroachment elsewhere on lot or parcel.	Where such vegetation must be established, the planting of trees should be incorporated as appropriate to site conditions and in consideration of the buffer function. The intent is to include this consideration consistent with the statutory criteria, existing provisions, existing guidance, and recognition of site conditions and buffer function. Additional language providing that planting of native species is preferred.
9 VAC 25-830-140(5)(a)(1)		Allowance for tree pruning or removal for sight lines and vistas.	Mature trees shall be preserved and trimmed or pruned in lieu of removal, as site conditions permit; any removal should be limited to the fewest number of trees feasible for a reasonable sightline based upon site conditions. The intent is to emphasize with the change in the statutory criteria requirement that mature trees should be preserved and in doing so trimming and pruning should be utilized before removal and removal should be limited. Additionally, where a mature tree is removed, a tree should be planted as site conditions allow in consideration of the buffer function. Additional language providing that planting of native species is preferred.

Current section number	New section number, if applicable	Current requirement	Change, intent, rationale, and likely impact of new requirements
9 VAC 25-830-140(5)(a)(4)		Allowance for tree removal for shoreline erosion control projects.	Mature trees can be removed as necessary consistent with the best available technical advice and applicable permit conditions or requirements; trees should be utilized in shoreline erosion control projects as appropriate. The intent is to preserve mature trees consistent with the statutory criteria while still ensuring the allowance.
9 VAC 25-830-140(7)		Consideration of planting trees as a component to (re)establishing vegetated areas in Intensely Developed Area overlays	In considering such measures, the local government shall consider the planting of trees as a part of any such measures. The intent is to include trees consistent with the statutory criteria in the consideration by local governments. Additional language providing that planting of native species is preferred.

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.

The primary alternative considered was to leave the regulation unchanged as the regulations already require the preservation of indigenous vegetation; however, given the statutory change in the criteria requirements and the amendment language to adopt regulations to implement the provision, this alternative was not pursued given in particular the emphasis placed on the preservation of mature trees and the planting of trees as a water quality protection tool and as a means of providing other natural resource benefits in the new statutory language. These provisions apply to land development and land use consistently, applicable to individuals and businesses.

The amendment does provide a three-year timeline for localities to amend their ordinances and adopt the requirements into their local Chesapeake Bay Preservation Act programs and a recognition of existing tree preservation and planting ordinances as a relief to requiring additional changes for local governments in certain areas.

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.

This is no impact on the institution of the family and family stability by this action.