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Notice of Intended Regulatory Action (NOIRA) Agency Background Document

Agency name	Department of Environmental Quality
Virginia Administrative Code (VAC) Chapter citation(s)	9VAC15-60
VAC Chapter title(s)	Small Renewable Energy Projects (Solar) Permit by Rule
Action title	Amend 9VAC15-60 to comport with the requirements of Chapter 688 of the 2022 Acts of Assembly
Date this document prepared	May 19, 2023

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).

[Chapter 688](#) of the 2022 Acts of Assembly, Regular Session, amends the Small Renewable Energy Projects (Solar) Permit by Rule (PBR), [9VAC15-60](#), which establishes criteria, procedures and permit requirements as stipulated under the Code of Virginia ([§10.1-1197.5 et seq.](#)). The existing solar PBR requires an analysis of the beneficial and adverse impacts of the proposed project on natural resources which includes wildlife and historic resources. If DEQ determines significant adverse impacts to wildlife or historic resources will occur, an applicant must submit a mitigation plan detailing reasonable actions to avoid, minimize, or otherwise mitigate such impacts, and to measure the efficacy of those actions.

Chapter 688 defines and adds prime agricultural soils and forest lands to the requirement for an analysis of the beneficial and adverse impacts to natural resources. If a potential solar project would disturb more than 10 acres of prime agricultural soils or 50 acres of contiguous forest lands, or if it would disturb forest lands enrolled in a forestry preservation program, it is deemed to have a significant adverse impact,

requiring the submission of a mitigation plan. If a draft mitigation plan was not provided by the applicant as part of the initial application, the applicant must develop a mitigation plan and conduct a 45-day public comment period. Any application for a small renewable energy project received for which an interconnection request is applied for and received by December 31, 2024, is not subject to these new provisions.

In 2019, DEQ followed the Administrative Process Act (§ 2.2-4000 et seq. of the Code of Virginia), to [amend the Solar PBR regulation](#). DEQ proposed numerous amendments to the regulation concerning: 1) fees, 2) ecological cores (primarily forests), 3) threatened and endangered insects, 4) planting to attract pollinators, 5) historic resources, 6) timeframes, 7) projects with reduced requirements, and 8) clarifications. The purpose of this regulatory action was to clarify the regulatory requirements for applicants and permitted facilities in order to improve the current permitting process. The amendment went through the Notice of Intended Regulatory Action stage, a regulatory advisory plan (RAP) was formed and held multiple meetings, the draft regulation was subjected to public comment, a response to comments document was prepared and all appropriate reviews were conducted. However, promulgation was delayed, and the amendment did not go into effect. While the solar regulation is in the regulatory development process for amendments mandated by Chapter 688, DEQ will also incorporate certain proposed provisions from the 2019 Solar PBR amendment. Although fees were part of the 2019 amendment, fees will not be included in this rulemaking process.

Acronyms and Definitions

Define all acronyms or technical definitions used in this form.

DEQ – means Department of Environmental Quality.

HB – means House Bill.

MW – means Megawatt, a measure of generated electricity.

NOI – means Notice of Intent.

PBR – means Permit by Rule.

RAP – means regulatory advisory panel.

VLR – means Virginia Landmarks Register

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.”

House Bill 206 (HB206) was introduced during the 2022 General Assembly session. It was approved April 11, 2022, and enacted into law during the regular session of the 2022 General Assembly in Chapter

688 of the Acts of Assembly. Chapter 688 amends and reenacts §10.1-1197.6 of the Code of Virginia, by requiring DEQ to consider significant adverse impacts to prime agricultural soils and forest lands. The statute specifies that a disturbance of (i) more than 10 acres of prime agricultural soils, (ii) more than 50 acres of contiguous forest lands, or (iii) forest lands enrolled in a forestry preservation program is deemed to be a significant adverse impact on natural resources. If DEQ determines that there will be a significant adverse impact on wildlife, historic resources, prime agricultural soils, or forest lands, the applicant must submit a mitigation plan following a 45-day public comment period.

The regulation for Small Renewable Energy Projects (Solar) 9VAC15-60 became effective in 2012 and required that if the department determined that significant adverse impacts to wildlife or historic resources or both were likely, the applicant must prepare a mitigation plan. Section 60 under 9VAC15-60 lists the mitigation measures to be taken by the applicant.

The program has grown rapidly and in 2017 there was a legislative modification to increase the size of projects eligible for a PBR from 100 MW to 150 MW. This increase in MW has resulted in much larger projects seeking permits which correlates to increased acreage per project. This increase has led to concerns about the loss of prime agricultural soils and forest land.

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.

Statutory Authority

Code of Virginia § 10.1-1197.6 and Chapter 688 of the 2022 Acts of Assembly

Promulgating Entity

Department of Environmental Quality

Federal Requirements

There are no federal standards associated with this regulation

State Requirements

- Code of Virginia Sections 10.1-1197.5 through 10.1-1197.11,
- Chapter 688 of the 2022 Acts of Assembly
- Administrative Code Chapter 60, Small Renewable Energy Projects (Solar) Permit by Rule, 9VAC15-60

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 regulatory action is necessary in order for DEQ to carry out the requirements of the 2022 Acts of Assembly Chapter 688. The regulatory action is essential to protect the health, safety, and welfare of Virginia citizens by establishing necessary requirements (in addition to those already established in 9VAC15-60), to protect Virginia's prime agricultural soils and forest lands which may be affected by the construction and operation of small renewable energy projects.

Potential Issues:

Review and authorization of projects in the Code of Virginia, [§ 10.1-1197.7](#), requires DEQ to consult with agencies in the Secretariat of Natural and Historic Resources upon submission of a complete solar PBR application. The new requirements for prime agricultural soils and forest land will require DEQ to consult with the Virginia Department of Agriculture and Consumer Services (DACCS) and the Virginia Department of Forestry (DOF). These agencies are in the Secretariat of Agriculture and Forestry, requiring a change to [§ 10.1-1197.7](#).

Prior to authorization of the solar project and in accordance with § 10.1-1197.6 B 14 of the Code of Virginia, the applicant must conduct a 30-day public review and comment period. Chapter 688 added language to § 10.1-1197.6 B 8 requiring a 45-day public comment period if a draft mitigation plan was not submitted with the application. Interaction of the two comment periods will be addressed during the regulatory process.

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.

The Small Renewable Energy Projects (Solar) Permit by Rule regulation establishes the specific criteria required for a complete application to construct and operate a solar project in Virginia. Additional substantive provisions that are being considered include:

- Add and clarify definitions;
- Add prime agricultural soils and forest lands to the existing requirement for the analysis of the beneficial and adverse impacts to natural resources;
- Add mitigation plan requirements for prime agricultural soils and forest lands;
- Clarify timeframe for submittal of a Notice of Intent (NOI);
- Clarify that avoidance mitigation as it relates to cemeteries is required to assure consistency with state law;
- Clarify requirements for site plans;
- Clarify public participation requirements;
- Specify the operation, recordkeeping, and reporting requirements;
- Clarify size of projects exempt from permitting;
- Clarify procedures for modification or transfer of ownership of a permitted facility;
- Incorporate other provisions previously identified in the 2019 solar PBR amendments (excluding fees); and
- Improve overall regulatory structure, procedures, and use.

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.

Alternatives to the proposal are being considered by the department. The department has tentatively determined that the first alternative is appropriate, as it is the least burdensome and least intrusive alternative that fully meets the purpose of the regulatory action. The alternatives being considered by the department, along with the reasoning by which the department has rejected any of the alternatives being considered, are discussed below.

1. Amend the regulation to satisfy the provisions of the law and associated regulations and policies. This option is being selected because it meets the stated purpose of the regulatory action: to implement the legislatively mandated requirements of Chapter 688 of the 2022 Acts of Assembly.
2. Make alternative regulatory changes to those required by the provisions of the law and associated regulations and policies. This option is not being selected because it would not meet the legislatively mandated requirements of Chapter 688 of the 2022 Acts of Assembly.
3. Take no action to amend the regulations and continue to implement an outdated regulation. This option is not being selected because it would not meet the legislatively mandated requirements of Chapter 688 of the 2022 Acts of Assembly.

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."

In addition, pursuant to the ORM procedures and § 2.2-4007.1 of the *Code of Virginia*, the agency is conducting a periodic review and small business impact review of this regulation to determine whether this regulation should be terminated, amended, or retained in its current form. Public comment is sought on the review of any issue relating to this regulation, including whether the regulation (i) is necessary for the protection of public health, safety, and welfare; (ii) minimizes the economic impact on small businesses consistent with the stated objectives of applicable law; and (iii) is clearly written and easily understandable.

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 department is seeking comments on this regulation, including but not limited to: ideas to be considered in the development of this regulation, the costs and benefits of the alternatives stated in this

background document or other alternatives, and the potential impacts of the regulation. The department 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, email or fax to Susan Tripp, Department of Environmental Quality, 1111 East Main Street, Suite 1400, P.O. Box 1105, Richmond, VA 23218; Telephone: (804)-664-3470; Fax: (804)-698-4319; Email Address: susan.tripp@deq.virginia.gov. Comments may also be submitted through the Public Forum feature of the Virginia Regulatory Town Hall (<http://www.townhall.virginia.gov>). Written comments must include the name and address of the commenter. In order to be considered, comments must be received before midnight 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 and notice of the hearing will be posted on the Virginia Regulatory Town Hall website (<https://townhall.virginia.gov>) and on the Commonwealth Calendar website (<https://commonwealthcalendar.virginia.gov/>). Both oral and written comments may be submitted at that time.

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.

A regulatory advisory panel has been selected by the department to assist in the development of the proposed regulatory amendments. The primary function of the panel is to develop recommended regulation amendments for department consideration through the collaborative approach of regulatory negotiation and consensus.