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Notice of Intended Regulatory Action (NOIRA) Agency Background Document

Agency name	Virginia Soil and Water Conservation Board
Virginia Administrative Code (VAC) citation(s)	4VAC50-20
Regulation title(s)	Impounding Structure Regulations
Action title	Amend provisions of Virginia's Impounding Structure Regulations
Date this document prepared	May 22, 2019

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Order 14 (as amended, July 16, 2018), the Regulations for Filing and Publishing Agency Regulations (1 VAC 7-10), and the *Virginia Register Form, Style, and Procedure Manual for Publication of Virginia Regulations*.

Brief Summary

Please 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 will consider amendments to the Virginia Soil and Water Conservation Board's Impounding Structure Regulations. The Board is undertaking this regulatory action in response to comments received during a periodic review, as well as recognition that amendments and clarifications may be needed. Specifically the Board authorized this regulatory action to consider concerns related to: (i) roadways on or below an impounding structure for hazard potential classifications; (ii) the incremental damage analysis process; (iii) gate requirements; (iv) the requirements for agricultural exempt dams; (v) requiring the use of temporal curves to determine the probable maximum precipitation; and (vi) the development of a realistic and achievable process for certain impounding structures to achieve regulatory compliance, while maintain public safety.

Acronyms and Definitions

Please define all acronyms or technical definitions used in the Agency Background Document.

There are no acronyms used in this document.

Mandate and Impetus

Please 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, board decision, etc.). For purposes of executive branch review, "mandate" has the same meaning as defined in Executive Order 14 (as amended, July 16, 2018), "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."

At the June 28, 2018 meeting, the Virginia Soil and Water Conservation Board approved the initiation of a periodic review of the Impounding Structure Regulations. The public comment period began on August 20, 2018 and continued through October 8, 2018. This regulatory action is being conducted in response to comments that were received during that periodic review. The results of the periodic review may be found at: <http://townhall.virginia.gov/L/ViewPReview.cfm?PRid=1677>.

Legal Basis

Please 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 Dam Safety Act is established in §10.1-604 et seq. of the Code of Virginia. The Virginia Soil and Water Conservation Board is designated as the promulgating regulatory authority in §10.1-605. Section 10.1-605 of the Code of Virginia requires the Board to "adopt regulations to ensure that impounding structures in the Commonwealth are properly and safely constructed, maintained, and operated". Section 10.1-604.1 authorizes the Board to adopt "regulations in accordance with §10.1-605 to establish a simplified methodology for dam break inundation zone analysis.

Section 10.1-605.1 authorizes the Board to delegate to the Director or his designee any of the powers and duties vested in the Board by the article, except the adoption and promulgation of regulations. In §10.1-605.2, the Board is required to adopt regulations that consider the impact of downstream limited-use or private roadways with low traffic volume and low public safety risk on the determination of the hazard potential classification of an impounding structure. Section 10.1-605.3 allows the Board to develop a general permit for the regulations of low hazard potential impounding structures in accordance with §10.1-605.

At the May 22, 2019 meeting, the Virginia Soil and Water Conservation Board approved the initiation of a regulatory action to address (i) roadways on or below an impounding structure for hazard potential classifications; (ii) the incremental damage analysis process; (iii) gate requirements; (iv) the requirements for agricultural exempt dams; (v) requiring the use of temporal curves to determine the probable maximum precipitation; and (vi) the development of a realistic and achievable process for certain impounding structures to achieve regulatory compliance, while maintain public safety.

Purpose

Please 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, please explain any potential issues that may need to be addressed as the regulation is developed.

As outlined in the section above, the adoption of these regulations is required in several sections of the Code of Virginia. These regulations protect public safety by establishing the appropriate construction, operation, and maintenance standards for impounding structures regulated by the Board.

This proposed regulatory action will clarify current requirements, provide flexibility in meeting existing standards, and continue the Board's commitment to public safety.

Substance

Please 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 is needed to provide clarification on the impact of roadways on or below impounding structures on the hazard classification of an impounding structure (4VAC50-20-45 and 4VAC50-20-52). Revisions are anticipated to the established incremental damage analysis provisions to clarify the process including when such an analysis is appropriate and which resources may be used to determine impacts. Additional amendments to the current analysis, or a new methodology, to determine the correlation between the impacts of an impounding structure failure and a roadway may need to be developed.

Current language in the regulations related to the requirements related to gates and valves is vague and confusing (4VAC50-20-270 and 4VAC50-20-280). Amendments that clarify the requirements for existing dams are anticipated through this regulatory action.

In November 2015, the Board adopted the Probable Maximum Precipitation Study for Virginia (and associated PMP Evaluation Tool and Database). On September 27, 2018, the Board authorized the use of the temporal curves from the 2018 Virginia PMP Temporal Distribution Analysis; these curves are Virginia based and developed from the 2015 Virginia PMP study. One of the amendments to the regulations under consideration is requiring the use of these curves, rather than allowing the owner's engineer to choose which engineering analysis is used (4VAC50-20-50).

There is confusion about the requirements and responsibilities related to agricultural exempt dams (4VAC50-20-165). There are questions about the standards such dams need to be built to, if any; and the requirements for dam break inundation zone mapping and other engineering studies, if any. Amendments to the regulation which address these questions, as allowed by law, would be beneficial.

Finally, the Board seeks the development of a realistic and achievable process for certain impounding structures to achieve regulatory compliance, while maintain public safety. There are currently impounding structures that are operating under conditional certificates that have no mechanism to achieve full regulatory compliance. In certain cases, utilizing enforcement provisions may not be the appropriate mechanism to ensure compliance. If such a process could be established, there would be an additional tool to increase public safety and assist dam owners in meeting their legal and financial responsibilities.

Alternatives

Please 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.

There are no functional alternatives to amending these regulations. The Board is unable to address the concerns and questions that were raised through the issuance of guidance documents or other similar mechanisms. Amending the regulations will strengthen the Dam Safety Program and ensure the safety of both the regulated impounding structure and the public.

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 Executive Order 14 (as amended, July 16, 2018)), and a small business impact review (§ 2.2-4007.1 of the Code of Virginia) of this regulation, keep the following text. Modify 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

Please indicate how the public should contact the agency to submit comments on this regulation, including ideas to assist the agency in the development of the regulation and the costs and benefits of the alternatives stated in this notice or other alternatives.

Also, indicate whether a public hearing is to be held to receive comments. Please include one of the following choices: 1) a panel will be appointed and the agency’s contact if you’re interested in serving on the panel is _____; 2) a panel will not be used; or 3) public comment is invited as to whether to use a panel to assist in the development of this regulation.

The Virginia Soil and Water Conservation Board 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. Also, the Board is 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://www.townhall.virginia.gov>. Written comments must include the name and address of the commenter. Comments may also be submitted by mail, email or fax to: Christine Watlington, 600 East Main Street, 24th Floor, Richmond, Virginia 23219; phone: 804.786.3319; fax: 804.371.2630; and christine.watlington@dcr.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 be held following the publication of the proposed stage of this regulatory action, and notice of the hearing will be posted on the Virginia Regulatory Town Hall website (<https://www.townhall.virginia.gov>) and on the Commonwealth Calendar website (<https://www.virginia.gov/connect/commonwealth-calendar>). Both oral and written comments may be submitted at that time.

A regulatory advisory panel will be appointed to assist with this regulatory action. Persons interested in assisting in the development of a proposal should notify Christine Watlington by the end of the comment period and provide their name, address, phone number, email address and the organization you represent (if any).