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Final Regulation Agency Background Document

Approving authority name	State Water Control Board
Virginia Administrative Code (VAC) citation	9 VAC 25-770
Regulation title	Virginia Financial Responsibility Requirements for Mitigation Associated with Tidal Dredging Projects
Action title	Financial Assurances for Tidal Dredging Project Mitigation

This information is required for executive review (www.townhall.state.va.us/dpbpages/apaintro.htm#execreview) and the Virginia Registrar of Regulations (legis.state.va.us/codecomm/register/regindex.htm), pursuant to the Virginia Administrative Process Act (www.townhall.state.va.us/dpbpages/dpb_apa.htm), Executive Orders 21 (2002) and 58 (1999) (www.governor.state.va.us/Press_Policy/Executive_Orders/EOHome.html), and the *Virginia Register Form, Style, and Procedure Manual* (http://legis.state.va.us/codecomm/register/download/styl8_95.rtf).

Brief summary

*Please provide a brief summary of the proposed new regulation, proposed amendments to the existing regulation, or the regulation proposed to be repealed. Alert the reader to all substantive matters or changes. If applicable, generally describe the existing regulation. Also alert the reader to changes made to the regulation since publication of the proposed. Do **not** state each provision or amendment or restate the purpose and intent of the regulation.*

The purpose of the proposed regulation is to specify the mechanisms by which the State Water Control Board may require demonstration of financial responsibility for the completion of compensatory mitigation requirements for dredging projects in tidal waters permitted under the Virginia Water Protection Permit (VWPP) Program. Financial responsibility may be demonstrated by a letter of credit, certificate of deposit, or performance bond. When the U.S. Army Corps of Engineers requires demonstration of financial responsibility, then the mechanism and amount approved by the Corps shall be used to meet this requirement. This regulation will replace the emergency regulation that became effective on December 4, 2002.

Statement of final agency action

Please 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 December 4, 2003 the SWCB approved promulgation of 9 VAC 25-770, Virginia Financial Responsibility Requirements for Mitigation Associated with Tidal Dredging Projects

Legal basis

Please identify the state and/or federal source of legal authority to promulgate this proposed regulation, including (1) the most relevant law and/or regulation, including Code of Virginia citation and General Assembly bill and chapter numbers, if applicable, and (2) promulgating entity, i.e., the agency, board, or person. Describe the legal authority and the extent to which the authority is mandatory or discretionary.

If the final text differs from the text at the proposed stage, please indicate whether the Office of the Attorney General has certified that the agency has the statutory authority to promulgate the final regulation and that it comports with applicable state and/or federal law.

The basis for this regulation is amendments to Section 62.1-44.15 5(c) of the Code of Virginia, passed by the 2002 General Assembly (HB91/SB 327). The text of the amendments is as follows:

(5c) Any certificate issued by the Board under this chapter relating to dredging projects governed under Chapter 12 (§ [28.2-1200](#) et seq.) or Chapter 13 (§ [28.2-1300](#) et seq.) of Title 28.2 may be conditioned upon a demonstration of financial responsibility for the completion of compensatory mitigation requirements. Financial responsibility may be demonstrated by a letter of credit, a certificate of deposit or a performance bond executed in a form approved by the Board. If the U.S. Army Corps of Engineers requires demonstration of financial responsibility for the completion of compensatory mitigation required for a particular project, then the mechanism and amount approved by the U.S. Army Corps of Engineers shall be used to meet this requirement.

The State Water Control Board is the promulgating entity. On March 21, 2003 the OAG stated that the SWCB had the authority to promulgate the draft regulation. No changes to the regulation have been made since that time.

Purpose

Please explain the need for the new or amended regulation. Describe the rationale or justification of the proposed regulatory action. Detail the specific reasons it is essential to protect the health, safety or welfare of citizens. Discuss the goals of the proposal and the problems the proposal is intended to solve.

The purpose of the regulation is to ensure that the public and the Commonwealth are not made responsible financially for completing dredging mitigation projects. The regulation requires that permittees responsible for the dredging activities provide financial assurance that the project will be completed without cost to the Commonwealth or the general public. The regulation specifies the mechanisms by which the State Water Control Board may require demonstration of financial responsibility for the completion of compensatory mitigation requirements for dredging projects in tidal waters permitted under the Virginia Water Protection Permit (VWPP) Program. Financial responsibility may be demonstrated by letter of credit, certificate of deposit, or performance bond. When the U.S. Army Corps of Engineers requires demonstration of financial responsibility, then the mechanism and amount approved by the Corps shall be used to meet this requirement.

Substance

Please identify and explain the new substantive provisions, the substantive changes to existing sections, or both where appropriate. A more detailed discussion is required under the "All changes made in this regulatory action" section.

This regulation specifies the mechanisms by which the Board may require such financial assurances to ensure completion of mitigation requirements for tidal dredging projects, but would allow that this requirement could be satisfied by bonding required by the Corps, to avoid duplication. These requirements would apply only to tidal dredging projects and not to non-tidal dredging projects or any other types of projects requiring VWP permits.

Issues

Please identify the issues associated with the proposed regulatory action, 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, please indicate.

VWP permits require compensatory mitigation for unavoidable impacts to tidal wetlands and subaqueous bottoms disturbed by dredging activities. In some cases, particularly when multiple property owners are involved in dredging of coves for boating access, these mitigation projects

are not completed due to a lack of financial resources or clear responsibility. The U.S. Army Corps of Engineers sometimes but not always requires bonding to ensure project completion. The advantage to the public and the Commonwealth of having this regulation in place is ensuring that mitigation projects for tidal dredging projects are completed at no expense to the Commonwealth or to the general public. There are no disadvantages to the public or the Commonwealth.

Changes made since the proposed stage

Please describe all changes made to the text of the proposed regulation since the publication of the proposed stage. For the Registrar’s office, please put an asterisk next to any substantive changes.

The Agency has made no changes since the proposed stage.

Section number	Requirement at proposed stage	What has changed	Rationale for change
	n/a	n/a	n/a

Public comment

Please summarize all public comment received during the 60-day period following the publication of the proposed stage, and provide the agency response. If no public comment was received, please so indicate.

Commenter	Comment	Agency response
Wetlands Watch	Support regulation but want additional protections included	Requested additions are either already in the VWPP regulations authorizing these permits, or are beyond the statutory authority for this regulation

All changes made in this regulatory action

Please detail all changes that are being proposed and the consequences of the proposed changes. Detail new provisions and/or all changes to existing sections.

There are no changes being proposed.

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change and rationale
n/a	n/a	n/a	n/a

Impact on family

Please assess the 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.

The regulation is not expected to have any impact on the institution of the family and family stability. However, in the event a community association conducting a tidal dredging project were unable to complete the work, the regulation would have a beneficial effect on families in that with financial assurance in place, individual property owners would not be held liable for completion of the work.