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Proposed Regulation Agency Background Document

Agency name	State Water Control Board
Virginia Administrative Code (VAC) citation	9 VAC 25-900
Regulation title	Certification of Nonpoint Source Nutrient Credits
Action title	This is a new regulation for certification of nonpoint source nitrogen and phosphorus nutrient credits.
Date this document prepared	November 20, 2013

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 14 (2010) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

Brief summary

In a short paragraph, please summarize all substantive provisions of new regulations or changes to existing regulations that are being proposed in this regulatory action.

This regulation establishes the process for the certification of nonpoint source nitrogen and phosphorus nutrient credits and assures the generation of the credits. The regulation includes application procedures, baseline requirements, credit calculation procedures, release and registration of credits, compliance and reporting requirements for nutrient credit-generating entities, enforcement requirements, application fees, and financial assurance requirements. Nonpoint source nutrient credits must be certified by the Department prior to release, placement on the registry and exchange. The agency developed this regulation as required pursuant to § 62.1-44.19:20 of the State Water Control Law. In addition to the proposed regulation, a review of the small business impacts, as defined in §2.2-4007.1, was conducted as part of the NOIRA comment period.

Legal basis

Please identify the state and/or federal legal authority to promulgate this proposed regulation, including (1) the most relevant citations to the Code of Virginia or General Assembly chapter number(s), if applicable, and (2) promulgating entity, i.e., agency, board, or person. Your citation should include a specific provision authorizing the promulgating entity to regulate this specific subject or program, as well as a reference to the agency/board/person's overall regulatory authority.

The state authority to promulgate the proposed regulation is pursuant to Chesapeake Bay Watershed Nutrient Credit Program, Article 4.02 of Chapter 3.1 of Title 62.1 of the Code of Virginia (§ 62.1-44.19:12 et seq.). Specifically, the authority for the

Board to develop regulations is at § 62.1-44.19:20 which states under subsection A: "The Board shall adopt regulations for the purpose of establishing procedures for the certification of nonpoint source nutrient credits."

Under subsection B of § 62.1-44.19:20, the regulatory language may include but not be limited to: (i) establishing procedures for the certification and registration of credits; (ii) establishing credit calculation procedures; (iii) providing certification of credits on a temporal basis; (iv) establishing requirements to reasonably assure the generation of credits; (v) establishing reporting requirements; (vi) providing the Department the ability to audit/inspect for compliance; (vii) providing that the option to acquire nutrient credits for compliance purposes shall not eliminate any requirement to comply with local water quality requirements; (viii) establishing a credit retirement requirement; and, (ix) establishing other requirements as the Board deems necessary and appropriate.

Additionally, § 62.1-44.15 (10) of the State Water Control Law authorizes the State Water Control Board to adopt such regulations as it deems necessary to enforce the general water quality management program of the Board in all or part of the Commonwealth.

Purpose

Please explain the need for the new or amended regulation by (1) detailing the specific reasons why this regulatory action is essential to protect the health, safety, or welfare of citizens, and (2) discussing the goals of the proposal, the environmental benefits, and the problems the proposal is intended to solve.

Pursuant to § 62.1-44.19:20, the Board is required to adopt regulations for the certification of nonpoint source nutrient credits. Nonpoint credits established by the Board in accordance with the legislation and this regulatory action may include credits generated from agricultural and urban stormwater best management practices, management of animal feeding operations, land use conversion, stream or wetlands restoration, shellfish aquaculture, and other established or innovative methods of nutrient control or removal.

Certified nonpoint source nutrient credits will be placed on a registry of credits that will be developed. The certified credits that are placed on this registry will be part of an enforceable market-based trading program that will involve the exchange of pollution allocations between sources. Currently, most programs involve exchanges between different point sources; however, this regulation is anticipated to make available additional nonpoint source nutrient credits to further trading avenues such as point source to nonpoint source trades or nonpoint to nonpoint trades. These trades will be part of the overall goal of meeting the reductions assigned by the Chesapeake Bay Watershed Implementation Plan and the Chesapeake Bay TMDL.

This regulation is another step towards a successful trading program. The regulation provides clarity and assurances regarding the process for certification and generation of nonpoint source nutrient credits for both the nutrient credit generating entity and those that purchase the nutrient credits.

Substance

Please briefly identify and explain new substantive provisions (for new regulations), substantive changes to existing sections or both where appropriate. Note, more detail about all provisions or changes is provided in the "Detail of changes" section.

In accordance with § 62.1-44.19:20, the Board was directed to adopt regulations for the purpose of establishing the certification of nonpoint source nutrient credits. The substantive provisions of this regulatory action are consistent with the specifics outlined in § 62.1-44.19:20 and include the following substantive provisions:

- Application procedures for certifying credits that may be generated from effective nutrient controls or removal practices including agricultural and urban stormwater best management practices, land use conversion, stream or wetlands projects, and other appropriate methods of nutrient control or removal. The application procedures include the submittal

of necessary information for determining whether and how many nutrient credits are generated by the nutrient credit-generating entity.

- The approval process for certification of those credits including provisions for retirement, registration and release for exchange.
- The practices, actions, or levels of reductions that must be in place before credits can be generated are specified for establishing the baseline for the specific type of the nutrient credit-generating entity are provided and detailed in the proposed regulation.
- Compliance and enforcement criteria for a nutrient credit-generating entity.
- Appropriate fees and the calculation and submittal of such fees.
- Requirements to reasonably assure the generation of the credit depending on the nature of the credit-generating activity and use, such as legal instruments for perpetual credits, operation and maintenance requirements, and associated financial assurance requirements are detailed in this regulation.

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 the regulatory action poses no disadvantages to the public or the Commonwealth, please indicate.

The primary advantage of this regulatory action is that the proposed regulation action will provide for clarity and certainty for the nutrient trading market by establishing appropriate procedures for the certification and generation of nonpoint source credits. This is an advantage to the regulated community, the public, and the Commonwealth as certainty in this market will help meet commitments outlined in the Chesapeake Bay Watershed Implementation Plan and other TMDLs. The framework and content of this regulatory action largely tracks the specifics outlined in § 62.1-44.19:20 of State Water Control Law regarding the promulgation of these regulations. In working with the Regulatory Advisory Panel (RAP) to develop the proposed regulations, the Department was careful to minimize disadvantages and to develop a program that provides clarity and certainty for those seeking to certify the generation of nonpoint source nutrient credits. This proposed regulatory action should pose no disadvantages to the public or to the Commonwealth.

Requirements more restrictive than federal

Please identify and describe any requirements of the proposal, which are more restrictive than applicable federal requirements. Include a rationale for the more restrictive requirements. If there are no applicable federal requirements or no requirements that exceed applicable federal requirements, include a statement to that effect.

There are no applicable federal regulations.

Localities particularly affected

Please identify any locality particularly affected by the proposed regulation. Locality particularly affected means any locality which bears any identified disproportionate material impact which would not be experienced by other localities.

There are no localities particularly affected by the proposed regulation.

Public participation

Please include a statement that in addition to any other comments on the proposal, the agency is seeking comments on the costs and benefits of the proposal, the impacts of the regulated community, and the impacts of the regulation on farm or forest land preservation.

In addition to any other comments, the Board is seeking comments on the costs and benefits of the proposal, the potential impacts of this regulatory proposal and any impacts of the regulation on farm and forest land preservation. 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) probable effect of the regulation on affected small businesses, and 3) description of less intrusive or costly alternative methods of achieving the purpose of the regulation.

Anyone wishing to submit written comments for the public comment file may do so by mail, email or fax to Debra Harris, Department of Environmental Quality, P.O. Box 1105, Richmond, VA 23218; phone (804)698-4209; FAX (804) 698-4234; email to Debra.Harris@deq.virginia.gov. Comments may also be submitted through the Public Forum feature of the Virginia Regulatory Town Hall web site at: www.townhall.virginia.gov. Written comments must include the name and address of the commenter. In order to be considered, comments must be received by 11:59 p.m. on the last day of the public comment period.

A public hearing will be held and notice of the hearing will be published in the *Virginia Register of Regulations*, posted on the Virginia Regulatory Town Hall website (<http://www.townhall.virginia.gov>), and on the Commonwealth Calendar website (<http://www.virginia.gov/cmsportal3/cgi-bin/calendar.cgi>). Both oral and written comments may be submitted at that time.

Economic impact

Please identify the anticipated economic impact of the proposed new regulations or amendments to the existing regulation. When describing a particular economic impact, please specify which new requirement or change in requirements creates the anticipated economic impact. Please keep in mind that we are looking at the impact of the proposed changes to the status quo.

<p>Description of the individuals, businesses or other entities likely to be affected (positively or negatively) by this regulatory proposal. Think broadly, e.g., these entities may or may not be regulated by this board</p>	<p>Those persons, businesses, or other entities who wish to enter the nutrient trading market by applying for the certification of nutrient credits do so voluntarily. There is no mandate or law requiring anyone to generate nutrient credits. Those that voluntarily choose to generate nutrient credits for exchange are required to apply for the certification of their credits in accordance with this regulation. For instance, a farmer that wishes to convert a pasture area to a forested area does so by choice and if he also chooses to generate nutrient credits for exchange in the nutrient trading market, he will have to do so as required by this regulation.</p>
<p>Agency’s best estimate of the number of (1) entities that will be affected, including (2) small businesses affected. Small business means a business, including affiliates, that is independently owned and operated, employs fewer than 500 full-time employees, or has gross annual sales of less than \$6 million.</p>	<p>There is no way to estimate the number of entities that will be affected as this is a voluntary program. The entity must choose to enter this program and thus be required to adhere to this regulation. Additionally, no small business will be affected by this regulation unless it chooses to be a nutrient credit-generating entity and desire to exchange their credits. The choice to become a nutrient credit-generating entity is entirely voluntarily so it is not possible to guess who may and who may not</p>

	<p>choose to apply for nutrient credit certification under this regulation. The number is unknown at this time and it is likely that as the market grows and develops the number of applicants will also grow.</p>
<p>Benefits expected as a result of this regulatory proposal.</p>	<p>Consistent procedures for the approval of nonpoint source nutrient banks and the ability to offset new growth more cost effectively is the main benefit.</p>
<p>Projected cost to the state to implement and enforce this regulatory proposal.</p>	<p>As noted previously, this is a new program and the cost estimate is based on approximately one full time staff member plus administrative costs. It is estimated that this will be approximately \$100,000 per fiscal year based on staff time and administrative costs for that time. Costs will likely increase as the program and the market for nutrient credits grows and develops.</p>
<p>Projected cost to localities to implement and enforce this regulatory proposal.</p>	<p>There are no projected costs to localities to implement and enforce this regulation as it is a voluntary program. If a locality decides to generate nutrient credits, then the costs will be the same as any other participant to include baseline and credit generating practices construction and maintenance, application preparation and submittal, and fee.</p>
<p>All projected costs of this regulatory proposal for affected individuals, businesses, or other entities. Please be specific and include all costs, including projected reporting, recordkeeping, and other administrative costs required for compliance by small businesses, and costs related to real estate development.</p>	<p>Since participation in the nutrient credit certification program is voluntary, there are no fiscal impacts on parties unless they choose to participate in the program. If an individual/business/other decides to generate nutrient credits, then the costs will be the cost for certification of the credits under this regulation and will include baseline and credit generating practices construction and maintenance, application preparation and submittal, fee, and if needed, associated financial assurance. Costs will vary widely depending on the type of practice implemented. For instance, the estimated cost for a land conversion project under this regulation will be about \$5,000 for application preparation plus an additional \$400/acre costs for planting and the associated fees depending on the number of potential credits. Additionally, for those that are required to submit financial assurance, there is an additional cost for the type of financial assurance mechanism chosen. For example, insurance may be \$1,000-\$2,000 per year for premiums, letters of credit cost 1-2% of the face value annually, surety bonds range from \$200-\$500 dollars cost per year, trust agreements have an annual cost of \$1,500-\$3,000 which is usually paid out of the fund's own proceeds, and certificates of deposit have no annual fees.</p>

Alternatives

Please describe any viable alternatives to the proposal considered and the rationale used by the agency to select the least burdensome or intrusive alternative that meets the essential purpose of the action. 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 regulation.

Section § 62.1-44.19:20 directs the Board to adopt regulations for the certification of nonpoint source nutrient credits and sets out certain requirements for the regulation. This section was added to the State Water Control Law as part of the consolidation of water quality programs under Senate Bill 1279 and was passed by the General Assembly and signed by the Governor in 2013 (Chapter 793 of the 2013 Acts of Assembly) and was based on the language of § 10.1-603.15:2 which was added by House Bill 176 (Chapter 748 of the 2012 Acts of Assembly). A nutrient trading program which includes the exchange of nonpoint source credits provides an alternative method of compliance with water quality permits in a cost effective manner and has been strongly supported by industry. The only alternative is to not develop regulations. To do so would not provide the clarity and assurances that are necessary for the success of the nutrient credit trading program and to also fail to undertake actions specifically required by state law.

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) the establishment of less stringent compliance or reporting requirements; 2) the establishment of less stringent schedules or deadlines for compliance or reporting requirements; 3) the consolidation or simplification of compliance or reporting requirements; 4) the establishment of 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 proposed regulation.

Section 62.1-44.19:20 directs the Board to adopt regulations governing the certification of nonpoint source nutrient credits. Pursuant to § 62.1-44.19:20, certain requirements of the regulations are provided. The framework and content of this proposed regulation tracks the requirements specified in § 62.1-44.19:20. In working with the Regulatory Advisory Panel (RAP) to develop the proposed regulations, the Department sought to establish compliance and reporting requirements that provided only the information necessary to determine compliance and were on a workable schedule. Small business exemptions are not provided as no statutory authority exists for such a provisions as any one that generates nonpoint source nutrient credits for exchange as part of the trading program is required to certify those credits under this regulation once it is effective.

Public comment

Please summarize all comments received during the public comment period following the publication of the NOIRA, and provide the agency response.

The NOIRA was published in the Virginia Register on September 10, 2012. The comment period ended on October 10, 2012. There were 23 submittals in total and most were requests to serve on the Regulatory Advisory Panel. Of the 23 submittals, five (5) submittals provided comment on the NOIRA in addition to the request to serve on the Regulatory Advisory Panel.

Commenter	Comment	Agency response
Douglas Beisch, Williamsburg Environmental Group, Inc.	We feel that nutrient trading and certification is an important, perhaps critical, tool in meeting the aggressive water quality improvement objectives of the Commonwealth. The efforts to develop a clear and efficient regulatory structure that allows for a variety of additional tools to be brought to bear is crucial for not only regulated entities, but for private parties seeking to establish innovative nutrient reduction mechanisms. We suggest the regulations be flexible and science-based, with an efficient process for certification based on established nutrient	Recommendations accepted and taken under consideration during the drafting of the regulation.

	<p>reduction guidance (Chesapeake Bay Program, VIMS, DCR, etc.) for the Chesapeake Bay, and that uncertainties be hedged by appropriate trading ratios including delivery ratios and margins of safety. This will allow for quick deployment of these well-studied technologies while also providing the regulatory assurances needed. Expediting the implementation of innovative technologies should be accomplished, where practicable, if these tools are to be of any practical use in satisfying the Bay TMDL milestones and objectives.</p>	
<p>Steven Herzog, P.E. Director, DPU Hanover County</p>	<p>Hanover County has great interest in these regulations. We see nutrient trading as being critical to the success of both our non-point source and point source compliance strategies in the short and long term. These regulations should allow the maximum flexibility in trading possible while meeting environmental goals and needs. Consideration should be given to allowing inter-basin trading.</p>	<p>Recommendations accepted and taken under consideration during the drafting of the regulation.</p>
<p>Ann Jennings Virginia Executive Director Chesapeake Bay Foundation</p>	<p>CBF concurs that nutrient trading must be incorporated into efforts to achieve the Chesapeake Bay Total Maximum Daily Loads for nutrients and sediment; however, it is equally critical that the details of the credit or offset certification, permit compliance, public notification, and enforcement requirements ensure actual water quality improvements and protect local waterways. We, therefore, find the pending regulatory development an important step toward Virginia achieving a restored Chesapeake Bay.</p> <p>CBF suggests that the strength of Virginia's Nutrient Trading Program will be dictated by certain key decisions during development of the regulations. In particular, regulatory development affords the opportunity to clarify issues unresolved during the 201 study, including mechanisms for ensuring that local water quality is not jeopardized, the definition of baseline for various land uses, and mechanisms for ensuring that non-traditional practices are appropriately considered and evaluated for credit generation.</p>	<p>Recommendations accepted and taken under consideration during the drafting of the regulation.</p>
<p>Robert C. Steidel President Virginia Association of Municipal Wastewater Agencies, Inc. (VAMWA)</p>	<p>VAMWA was a lead proponent in the 2012 General Assembly of the legislation under which the Regulations are required. This activity reflected the continuation of VAMWA's long-term support for nutrient trading, including Virginia's landmark 2005 legislation and its successful implementation. VAMWA is interested in a well-designed credit certification process that provides the opportunity for robust credit generation and a sufficient credit supply that cost-effectively supports continued economic growth in the Commonwealth.</p>	<p>Recommendations accepted and taken under consideration during the drafting of the regulation.</p>
<p>Randy Bartlett President Virginia Municipal Stormwater Association, Inc. (VAMSA)</p>	<p>Most VAMSA members own and operate municipal separate storm sewer systems ("MS4s"), which are permitted under state-issued VSMP/VPDES permits. The 2012 legislation under which DCR is developing the Regulations expressly authorizes MS4s to trade nutrient credits. VAMSA supports a credit certification approach that provides localities (MS4s) with the flexibility to select the best option(s) based on local needs, embraces innovation and judges each credit generating proposal on its merits. The concept of trading annual credits is especially well-suited to MS4s given the ongoing nature of MS4s' regulatory relationship with the Commonwealth through the VSMP/VPDES permit program.</p>	<p>Recommendations accepted and taken under consideration during the drafting of the regulation.</p>

Small business impact review result

Include a discussion of the agency’s determination of whether the regulation should be amended or repealed, consistent with the stated objectives of applicable law, to minimize the economic impact of regulations on small businesses.

As part of the NOIRA, comments on the impacts on small businesses were requested to include information on: 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. No comments were submitted regarding impacts to small businesses.

Family impact

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.

There is no anticipated adverse impact on the institution of the family and family stability; however, improvement in water quality does have a positive impact on health which may indirectly impact families.

Detail of changes

Please list all changes that are being proposed and the consequences of the proposed changes. If the proposed regulation is a new chapter, describe the intent of the language and the expected impact. Please describe the difference between existing regulation(s) and/or agency practice(s) and what is being proposed in this regulatory action.

If the proposed regulation is intended to replace an emergency regulation, please list separately (1) all differences between the pre-emergency regulation and this proposed regulation, and (2) only changes made since the publication of the emergency regulation.

As part of the development of the regulation, a Regulatory Advisory Panel (RAP) was convened and ten public meetings of the RAP were held. During the meetings, the RAP discussed the various requirements for this regulation. For the most part, the proposed requirements reflect issues discussed and agreed to by the RAP; however, topics of concern were noted and those topics are highlighted in the table below with further discussion following.

Section number 9VAC25-900-	Proposed requirements	Intent and likely impact of proposed requirements
Part I		
10	Definitions	Definitions for terms used in the regulation are provided in this section. The definitions explain meanings of relevant terms as these terms are used in the proposed regulation. In a number of instances, the definitions reflect specific decisions debated and recommended by the RAP; however, the term "management area" was an issue of non-consensus for the RAP. Further discussion on

Section number 9VAC25-900-	Proposed requirements	Intent and likely impact of proposed requirements
		this topic is provided in #1 below.
PART II		
20	Authority and delegation of authority.	Section 20 provides the statutory authority for this regulation and the delegation of authority for implementation of the regulation and its requirements.
30	Purpose and applicability	Section 30 explains the purpose of the regulations and when the regulatory requirements apply.
40	Relationship to other laws and regulations	Section 40 explains the relationship of this regulation to other regulations; mainly, it provides a list of those that may use the credits as allowed under § 62.1-44.19:21. The intent is to provide a more comprehensive view of the nutrient trading program of which the certification process is a component, and to provide the limitations of the regulation.
50	Appeal process	Section 50 details the appeal process pursuant to § 62.1-44.19:23.
60	Limitations, liability, and prohibitions	Section 60 section explains the limitations and the prohibitions for nutrient credit certification.
70	Documents and internet resources	Section 70 lists the documents referenced as information sources within the regulation and provides the URL address for the internet available resources.
PART III		
80	Procedure for application for certification of nutrient credits	Section 80 explains the application requirements and what information is needed for submittal of an application for certification of nutrient credits. The requirements of this section reflect issues discussed and recommended by the RAP; however, the requirements for public notification, site visits and the conditions for convening of a Technical Advisory Committee (TAC) were issues of non-consensus for the RAP. Further discussions on these specific issues are provided in #2 and #3 below.
90	Nutrient credit release and registration	Section 90 provides the criteria for the retirement of credits, the release schedule for credits, and registration. Additionally, the provisos for exchange of credits and to insure local water quality is not contravened are contained in this section. The RAP requested further clarification regarding the retirement of credits and the conditions on exchanges to ensure compliance with local water quality requirements. This was an issue of non-consensus for the RAP. Further discussions on this specific issue are provided in #4 and #5 below.
100	Establishing baseline	Section 100 details the requirements necessary to establish baseline within the management area. The RAP had many discussions regarding the requirements of this section; however, consensus was not reached on the agricultural baseline requirements. Additionally, the RAP requested further explanation of the urban baseline requirements. These issues are discussed in #6 through #8 below.
110	Credit calculation procedures	Section 110 provides the parameters for calculating the number of nutrient credits a proposed nutrient credit-generating entity will produce. The parameters are specific to the type of practices implemented such as agricultural, urban, etc.

Section number 9VAC25-900-	Proposed requirements	Intent and likely impact of proposed requirements
120	Implementation plan	Section 120 provides requirements for the Implementation Plan which details how the nutrient credit-generating entity will generate credits for the term of the credits.
130	Signature requirements	Section 130 provides the criteria for who should sign the application for nutrient credit certification.
PART IV		
140	Inspections and information to be furnished	Section 140 provides the requirements under which the nutrient credit-generating entity shall be subject to inspections by the Department. Some on the RAP requested that Section 140 contain much more detailed information regarding the inspection criteria and frequency. The RAP agreed to majority of Part IV; however, there was no consensus on the issue of how to provide assurances for certified credits when baseline/regulatory changes are made. Further discussion on these issues is provided in #9 and #10 below.
150	Recordkeeping and reporting	Section 150 explains the requirements for recordkeeping and what information shall be reported to the Department.
160	Enforcement and penalties	Section 160 states that all applicable procedures under State Water Control Law may be used to enforce the regulation.
170	Suspension of credit exchange	Section 170 provides the causes for suspension of the ability to exchange credits on the registry and the process for such suspension.
180	Nutrient credit certification transfer, modification, revocation and recertification, expiration and termination	Section 180 allows for the nutrient credit certification to be modified, revoked and reissued, or terminated either at the request of the party holding the certification or upon the department's initiative for cause the causes for modification, revocation and recertification, or termination by the Department . Some members of the RAP expressed concern that these provisions caused uncertainty and could deter investment in nonpoint nutrient trading banks.
PART V		
190	Purpose and applicability of fees	Section 190 provides the basis for the fees.
200	Determination of application fee amount	Section 200 details how to determine the appropriate fee amount to be submitted.
210	Payment of application fees	Section 210 provides instructions on how to pay the fee.
220	Application fee schedule	Section 220 is a table that lists the base fee and the supplementary fee amounts for the various types of credits.
PART VI		
230	Financial assurance applicability	Section 230 provides the information on what types of nutrient credit-generating entities are required to have financial assurance in accordance with Part VI. The RAP did not agree to the overall concept of requiring financial assurance as many noted the financial assurance costs to be too restrictive for structural BMPs and providing for financial assurance would not make credit generation a cost effective option for these types of practices. Further discussion of this issue is noted in #11 below.
240	Suspension of nutrient	Section 240 details that in cases where the financial assurance is

Section number 9VAC25-900-	Proposed requirements	Intent and likely impact of proposed requirements
	credit exchange	not maintained in accordance with this part, the Department may take appropriate enforcement action.
250	Cost estimates for perpetual and term credit nutrient credit-generating entities	Section 250 provides the criteria to be used in development of the cost estimate for structural BMPs.
260	Financial assurance requirements for term credits	Section 260 provides the requirement for using financial assurance mechanisms for those structural BMPs that generate term credits
270	Financial assurance requirements for perpetual credits	Section 270 provides the criteria for using financial assurance mechanism for those structural BMPs that generate perpetual credits. It should be noted that this section requires that financial assurance obligations be met using non-insurance mechanisms once all perpetual credits are sold. This was deemed necessary as the "cash" mechanism would be available into the future if needed and it does not rely on continual payment of premiums into perpetuity.
280	Allowable financial mechanisms	Section 280 provides that more than one type of mechanism may be used to meet financial assurance obligations.
290	Trust	Section 290 provides the requirements for using a "Trust" as a financial assurance mechanism.
300	Surety bond	Section 300 provides the requirements for using a "Surety Bond" as a financial assurance mechanism.
310	Letter of credit	Section 310 provides the requirements for using a "Letter of Credit" as a financial assurance mechanism.
320	Certificate of deposit	Section 320 provides the requirements for using a "Certificate of Deposit" as a financial assurance mechanism.
330	Insurance	Section 330 provides the requirements for using "Insurance" to provide financial assurance.
340	Incapacity of financial providers or owners	Section 340 provides assurances that the Department will be notified of any event, such as bankruptcy, that may cause the financial mechanism to be invalid.
350	Wording of the financial assurance mechanism	Provides the specific language necessary for the different types of financial mechanisms that may be used.

The following is a list of topics which are areas of concern or non-consensus by the RAP. The issues are provided along with the Department response and reasoning for requirements contained in the proposed regulation.

1. Management Area (9VAC25-900-10)

The RAP did not reach consensus on this term. Many in the nutrient banking community felt that this term was too prescriptive and would deter participation by larger farms as the entire management area is required to meet baseline. Some bankers indicated that some may attempt to transfer ownership of individual fields to minimize the management area. The "management area" definition was supported by the environmental community.

The Department has considered the issues. The use of "management area" and the definition as stated in the proposed regulation is necessary. The "management area" definition is based on and somewhat consistent with current practice. Currently, the baseline is applied to the entire FSA tract and this has not led to properties being subdivided to avoid baseline

requirements. The application of baseline throughout the management area is necessary in order to help address the larger broad-based concerns of leakage. For example, leakage can occur when cropland is converted to forest to generate credits if the landowner also clears forest elsewhere to make up for the loss of cropland. Requiring the entire management area (i.e., the whole farm) to implement the necessary practices for establishing baseline will minimize leakage and ensure that any TMDL required reductions are provided prior to credits being generated.

2. Public Notification (9VAC25-900-80.C)

The RAP did not reach consensus on the public notification requirements. Many in the environmental community preferred the public notification to be a public comment period like the APA-type public notice and comment process.

As the statute requires public notification of a proposed nutrient credit-generating entity and does not stipulate a public comment process, the language as stated in Subsection 80.C of the proposed regulation meets the statutory requirements. As proposed, this language will allow any interested parties to know of a proposed nutrient credit-generating entity and will also provide contact information for those needing additional information without adding a time-consuming formalized commenting process for every application. As there are many types of nutrient credit-generating entities, flexibility in the public notification procedures is a common-sense solution and does not prohibit the Department from requesting comments if needed or desired.

3. Site Visit and Convening a Technical Advisory Committee (9VAC25-900-80.D)

The RAP did not reach consensus on the flexibility provided for the Department to decide when a site visit may need to occur or a Technical Advisory Committee (TAC) may need to be convened. Many on the RAP prefer that a site visit always be required and that for any new practice the Department be required to convene a TAC.

The Department has considered the issues regarding when to perform a site visit and when to choose to convene a TAC. In regards to site visits, the Department regularly performs site visits and by guidance will ensure that any new nutrient credit-generating entity will have a site visit prior to approval of the certification. However, as technology advances and nutrient credit-generating entities apply for recertification, there may be no need for a site visit prior to approval of the certification if nothing at the site has changed. Additionally, flexibility for convening of a TAC is necessary as the Department is developing the process for approval of new/innovative BMPs for inclusion in the clearinghouse and it is likely that convening a TAC under this regulation will be a duplicative step and will impede the process that is being developed. As this program matures, it is likely that the staff will have sufficient background and knowledge to process nutrient credit certification applications minimizing the need for technical advisors.

4. 5% Retirement for Phased Release (9VAC25-900-90.A)

The RAP had concerns about the "retirement of credits" when the schedule of release requires phased release of credits. As required by the proposed regulation, the Department will establish a schedule of release for each nutrient credit-generating entity and as part of that process will also provide details on the number of credits to be retired in conjunction with the number of credits released in phases.

5. Local Water Quality Compliance (9VAC25-900-90.C.2)

The RAP did not reach consensus on the requirements to ensure compliance with local water quality requirements. Some considered the proposed requirements to be too overreaching while others said the language did not provide enough assurances for the protection of local water quality. Additionally, there was also a request to establish a de minimis threshold below which trades could occur such as the informal 1% rule commonly applied to TMDL modeling. However, such a de minimis threshold was determined to be too site specific and to develop that threshold would be very resource intensive.

The proposed language provides for a workable methodology for exchanging credits when local water quality requirements are an issue. Per the statute, these regulations shall provide that "the option to acquire nutrient credits for compliance purposes shall not eliminate any requirement to comply with local water quality requirements". In order to meet the statutory requirements, the exchange of credits where local water quality requirements apply is addressed in the proposed regulation of 9VAC25-900-90.C.2 and provides necessary conditions to ensure exchanges comply with and do not contravene local water quality requirements.

6. Agricultural Lands Baseline (9VAC25-900-100.B)

The RAP did not reach consensus on the agricultural baseline requirements. Some on the RAP wanted additional practices beyond those required by the Resource Management Plan (RMP) such as riparian buffer for pasture lands. Others on the RAP preferred only a non-practice based approach (i.e. modeling) to establishing baseline.

The Department has considered the issue. Those persons that proactively chose to apply for and receive a Certificate of Resource Management Plan Implementation in accordance with 4VAC50-70 should not be required to meet additional criteria to meet the baseline requirements. These people have shown the necessary motivation to provide protection of water quality. Requiring additional criteria beyond the RMP does not provide incentives for either the RMP or nutrient certification process. The current language provides flexibility and clarity for the baseline requirements by allowing baseline to be met by one of three possible ways with each obtaining the goal of meeting the WIP or approved TMDL. Additionally, to insure appropriate consideration of environmental concerns, the calculation procedure for land conversions has been revised to note that no credits shall be generated within 35 feet of a water body with perennial water flow. This change does not require a 35 foot buffer on pasture but eliminates the ability to manipulate the baseline provisions and generate credits for land conversions within 35 feet of a stream.

7. Animal Feeding Operations (AFO) Baseline (9VAC25-900-100.C)

Some on the RAP noted a concern with the use of a VPDES or VPA permit to meet baseline for an AFO and preferred just the practice-based criteria of Subsection C.2; however, the Department believes that a valid VPDES or VPA permit is an appropriate mechanism of establishing baseline. AFOs that are required to hold a valid VPDES or VPA permit meet the baseline criteria for minimizing nutrient load impacts from the AFO's operation as that is the purpose of the permitting process. Requiring only a practice-based approach is duplicative of the effort and review that is part of the permitting process and is, therefore, unnecessary when a permit has been issued to an AFO. Additionally, most AFOs are also adjacent to other agricultural lands under common ownership and subject to other baseline requirements if included in the definition of "management area".

8. Urban Baseline (9VAC25-900-100.D)

The RAP requested further clarification of the urban baseline requirements. Some noted the difference in new development and redevelopment as compared to the use of the WIP or TMDL for retrofits and wanted to see further clarification. The urban baseline language in this section has been clarified as has the limitation for generation of nutrient credits for practices previously implemented to meet provisions of a permit or law under 9VAC25-900-60.I. In regards to the issue of new development, redevelopment and retrofits, the requirements of the proposed regulation meet the statutory provision for urban baseline which states: "baselines for urban practices from new development and redevelopment, which shall be in compliance with postconstruction nutrient loading requirements of the Virginia Stormwater Management Program regulations" and "baselines for all other existing development shall be at a level necessary to achieve the reductions assigned in the urban sector in the Virginia Chesapeake Bay TMDL Watershed Implementation Plan or approved TMDLs". The proposed regulatory language adheres to the statutory requirement for urban baseline.

9. Future Validity of Credit Certification (Part IV of 9VAC25-900)

The RAP agreed to majority of Part IV; however, there was no consensus on the issue of how to provide assurances for certified credits when baseline/regulatory changes are made and a few on the RAP want to see further requirements regarding the Department's inspection scheduling and criteria.

Through this process assurances regarding the validity of the certification have been made; however, that level of site specific criteria is best addressed as part of the certification process and as condition of the nutrient credit certification as credit quantities are established at the time of certification using the best available scientific and technical information as required pursuant to the statute.

10. Department Inspection Criteria (9VAC25-900-140)

The RAP did not agree to the compliance and enforcement criteria as there was a request by some to provide greater detail regarding the inspection criteria and frequency to be used by the Department.

The proposed regulation does not provide that level of detail as inspection checklists and frequency are to be provided in Department guidance as is current practice in other programs.

11. Financial Assurance (Part VI of 9VAC25-900)

The RAP did not agree to the overall concept of requiring financial assurance as many noted the financial assurance costs to be too restrictive for structural BMPs and providing for financial assurance would not make it cost effective for credit generation.

In accordance with the statutory provisions, the regulations are to "establish requirements to reasonably assure the generation of the credit depending on the nature of the credit-generating activity and use, such as legal instruments for perpetual credits, operation and maintenance requirements, and associated financial assurance requirements. Financial assurance requirements may include letters of credit, escrows, surety bonds, insurance, and where the credits are used or generated by a locality, authority, utility, sanitation district, or permittee operating an MS4 or a point source permitted under this article, its existing tax or rate authority". Financial assurance for structural BMPs was deemed the most appropriate type of practice to require financial assurance. These practices require continued operation and maintenance. If a structural BMP is damaged or destroyed, there will need to be some type of financial assurance available in order to assure the continued generation of the credit.

Acronyms and definitions

Please define all acronyms used in the Agency Background Document. Also, please define any technical terms that are used in the document that are not also defined in the "Definition" section of the regulations.

"APA" means the Administrative Process Act.

"BMP" means best management practices.

"EPA" means the Environmental Protection Agency.

"FSA" means Farm Service Agency.

"Leakage" means an unexpected or unaccounted for net increase in the nutrient loads that occurs when reduction activities taken to produce credits incentivize countervailing actions that diminish or negate the reductions achieved. For example, leakage can occur when cropland is converted to forest to generate credits if the landowner also clears forest elsewhere to make up for the loss of cropland.

"TAC" means technical advisory committee.