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Regulatory
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Notice of Intended Regulatory Action (NOIRA) Agency Background Document

Agency name	State Water Control Board
Virginia Administrative Code (VAC) citation	9 VAC25-680
Regulation title	VIRGINIA WATER PROTECTION GENERAL PERMIT FOR LINEAR TRANSPORTATION PROJECTS
Action title	Incorporation of recent policy and guidance specific to the Virginia Water Protection Permit Program.
Date this document prepared	May 12, 2014

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*.

Purpose

Please describe the subject matter and intent of the planned regulatory action. Also include a brief explanation of the need for and the goals of the new or amended regulation.

The purpose of this proposed regulatory action is to reissue this general permit which expires in 2016 and allow for revisions to correct several administrative procedures; to clarify certain definitions; to revise application and permitting requirements to reflect current guidance and policies; to incorporate certain federal regulatory provisions relative to the program; to increase efficiency; and to make the general permit regulation more relevant and useful. Because the Virginia Water Protection Permit Program Regulation 9VAC25-210-10 et seq. provides authority for this general permit regulation, applicable revisions to that program regulation must also be reflected herein.

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. The identification should include (i) a reference to the agency/board/person's overall regulatory authority, as well as a specific provision

authorizing the promulgating entity to regulate this specific subject or program; and a description of the extent to which the authority is mandatory or discretionary.

Section 62.1-44.15(10) of the Code of Virginia sets forth the Board's authority for the adoption of regulations deemed necessary to enforce the general water quality management program of the Board in all or part of the Commonwealth. The basis for this regulatory action is the State Water Control Law (Chapter 3.1 of Title 62.1) with specific provisions in law (§§ 62.1-44.15:20 - 62.1-44.15:23.1) mandating certain actions and allowing discretionary authority over certain matters to the promulgating agency.

Need

Please detail the specific reasons why the agency has determined that the proposed regulatory action is essential to protect the health, safety, or welfare of citizens. In addition, delineate any potential issues that may need to be addressed as the regulation is developed.

This VWP general permit, promulgated in 2001, was last revised in October 2006. The Virginia Water Protection Permit Program has since implemented many policy and guidance decisions that should be incorporated into the regulation. Portions of overarching federal regulations also need to be incorporated. There are also places that sentence structure and grammar make the agency's intent difficult to interpret. Therefore, making the necessary revisions for clarity and accuracy is being proposed. The reissuance and amendment of this general permit is essential to protect the health, safety and welfare of citizens because it provides necessary protections for wetland and surface water resources while streamlining the permitting process.

Substance

Please detail any changes that will be proposed. For new regulations, include a summary of the proposed regulatory action. Where provisions of an existing regulation are being amended, explain how the existing regulation will be changed.

The following proposed revisions, clarifications, and additions to this regulation are being considered and include, but may not be limited to, language, information, and provisions pertaining to program policy and guidance developed in recent years:

1. Change the overall organization of the regulation: combining the activities covered under 9VAC25-670, 9VAC25-680, and 9VAC25-690 into one general permit regulation; revising the order in which information is provided; moving existing information to new locations, in whole or in part; adding new sections to expand or clarify existing provisions or incorporate new provisions; deleting sections, in whole or in part, to remove obsolete information and duplication; revising references and/or citations made in the regulation; and correcting sentence structure, grammar, spelling, and typographical errors.
2. Revise, clarify, move, add, and/or delete definitions.
3. Revise and/or clarify the activities in specific water sources that require application for a permit authorization and those activities that are excluded.
4. Revise and/or clarify the application process: the list of administrative and technical information required to achieve a complete permit application, such as applicant contact information, information specific to certain types of activities or to certain types of state waters, compensation plans including avoidance and minimization efforts, monitoring and reporting; the provisions for application review suspension and application withdrawal; and required drawings, diagrams, and maps.

5. Revise and/or clarify the compensatory mitigation requirements, such as the sequencing of acceptable compensatory mitigation actions and compensatory mitigation provisions; the requirements for compensating impacts to open waters; and/or compensation necessary for temporary impacts.
6. Revise and/or clarify the process, informational requirements, and/or provisions for permit actions that occur after initial permit authorization issuance, such as modification of permit authorizations, continuation of coverage for permit authorizations, permit authorization revocation and termination, and/or permit authorization transitioning.
7. Revise, clarify, add, and/or delete provisions as necessary to accommodate those revisions made to the VWP program regulation 9VAC25-210 et seq.

Alternatives

Please describe all viable alternatives to the proposed regulatory action that have been or will be considered to meet the essential purpose of the action. Also, please describe the process by which the agency has considered or will consider other alternatives for achieving the need in the most cost-effective manner.

The no-action alternative to revising this regulation would allow the non-clarity issues to continue. In addition, some regulatory provisions are in direct conflict with federal mandates that are applicable to permits and permit authorizations issued by the agency on the behalf of the U.S. Army Corps of Engineers' under the State Program General Permit (SPGP-01) program, as currently delegated to the Commonwealth. Other state regulatory provisions are in direct opposition to closely-related federal regulatory provisions that, if left as is, would continue to create uncertainty regarding similarly-regulated activities in surface waters.

A partial regulation revision is one alternative that may allow incorporation of certain, currently-applied provisions. However, as the Virginia Water Protection Permit Program Regulation provides authority for this general permit regulation and concurrently being proposed for revision, it will likely be necessary to revise this general permit regulation as well.

Since we anticipate the continued use of a general permit for the appropriate regulated activities, reissuance must occur before the regulation expires in 2016, and therefore, the full revision alternative would allow reissuance along with revisions for the reasons previously stated.

Public participation

Please indicate the agency is seeking comments on the intended regulatory action, including ideas to assist the agency in the development of the proposal 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 on this notice.

The agency is seeking comments on this regulatory action, including but not limited to 1) ideas to be considered in the development of this proposal, 2) the costs and benefits of the alternatives stated in this background document or other alternatives, 3) potential impacts of the regulation and 4) impacts of the regulation on farm and forest land preservation. The agency 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, phone, or email to William Norris, Department of Environmental Quality, P.O. Box 1105, Richmond, VA 23218, phone 804-698-4022, email: william.norris@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 pm 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 of this regulatory action and notice of the hearing will be posted on the Virginia Regulatory Town Hall website (<http://www.townhall.virginia.gov>) and on the Commonwealth Calendar website (<http://www.virginia.gov/connect/commonwealth-calendar>). Both oral and written comments may be submitted at that time.

Technical advisory committee

A technical advisory committee will be involved in the development of the proposed regulation.

The Board is using a technical advisory committee to develop a proposal. Persons interested in assisting in the development of a proposal should notify the department contact person by the end of the comment period and provide their name, address, phone number, email address and the organization you represent (if any). Any persons who want to be on the advisory committee are encouraged to attend the public meeting mentioned above. The primary function of the advisory committee is to develop recommended regulation amendments for Department consideration through the collaborative approach of regulatory negotiation and consensus. Multi-applications from a single company, organization, group or other entity count as one for purposes of making the decision specified in the preceding sentence. Notification of the composition of the advisory committee will be sent to all applicants.

Family impact

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 proposed regulatory action is unlikely to increase or decrease the disposable income available to a family-run business that is subject to the provisions of the Virginia Water Protection Permit Program regulation because the law on which the regulation is based in not being revised, but rather, only the implementation and interpretation of the law is being considered for revision.

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.

401 certification: the process by which a state or tribe grants, grants with conditions, denies, or waives certification of the issuance of a permit or license by a federal agency under §401 of the Clean Water Act for an activity that may result in a discharge to waters of the U.S. in that state or tribal jurisdiction.

Compensatory Mitigation: sequentially avoiding and minimizing surface water impacts to the extent practicable, and then compensating for remaining unavoidable impacts of a proposed action.

Mitigation banking: wetlands restoration, creation, enhancement, and in exceptional circumstances, preservation, undertaken expressly for the purpose of compensating for unavoidable wetland losses in advance of development actions, when such compensation cannot be achieved at the development site or would not be as environmentally beneficial.

State waters: all water, on the surface and under the ground, wholly or partially within or bordering the Commonwealth or within its jurisdiction, including wetlands.