



Virginia  
Regulatory  
Town Hall

## Proposed Regulation Agency Background Document

<b>Agency Name:</b>	State Water Control Board
<b>VAC Chapter Number:</b>	9 VAC 25-210
<b>Regulation Title:</b>	Virginia Water Protection Permit Regulation
<b>Action Title:</b>	Virginia Water Protection Permit Regulation Amendments
<b>Date:</b>	December 21, 2000

This information is required pursuant to the Administrative Process Act (§ 9-6.14:9.1 *et seq.* of the *Code of Virginia*), Executive Order Twenty-Five (98), Executive Order Fifty-Eight (99), and the *Virginia Register Form, Style and Procedure Manual*. Please refer to these sources for more information and other materials required to be submitted in the regulatory review package.

### Summary\*

*Please provide a brief summary of the proposed new regulation, proposed amendments to an existing regulation, or the regulation proposed to be repealed. There is no need to state each provision or amendment or restate the purpose and intent of the regulation; instead give a summary of the regulatory action and alert the reader to all substantive matters or changes. If applicable, generally describe the existing regulation.*

Revisions have been made to the Virginia Water Protection Permit Regulation to incorporate changes to the Code of Virginia §§62.1-44.3, 44.5, 44.15, 44.15:5, and 44.29 relating to wetlands as mandated by the General Assembly in Senate Bill 648 and House Bill 1170, and other changes that the Department or the public deems necessary and are warranted.

### Basis\*

*Please identify the state and/or federal source of legal authority to promulgate the regulation. The discussion of this statutory authority should: 1) describe its scope and the extent to which it is mandatory or discretionary; and 2) include a brief statement relating the content of the statutory authority to the specific regulation. In addition, where applicable, please describe the extent to which proposed changes*

*exceed federal minimum requirements. Full citations of legal authority and, if available, web site addresses for locating the text of the cited authority must be provided. Please state that the Office of the Attorney General has certified that the agency has the statutory authority to promulgate the proposed regulation and that it comports with applicable state and/or federal law.*

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The basis for this regulation is Section 62.1-44.2 et seq. of the Code of Virginia. Specifically, Section 62.1-44.15 authorizes the Board to adopt rules governing the issuance of water quality permits and directs the State Water Control Board to design regulatory programs to achieve no net loss of existing wetland acreage and function. Section 62.1-44.15:5 authorizes the Board to issue a Virginia Water Protection Permit consistent with the provisions of the Clean Water Act and to protect instream beneficial uses. The proposed revisions exceed federal minimum requirements through the reporting of all impacts to wetlands and through the regulation of Tulloch ditching and fill in isolated wetlands, which are currently not federally regulated.

Section 1341 (formerly Section 401) of the Clean Water Act (33 USC 1341) requires state certification of federal permits for discharges into navigable waters.

The Office of the Attorney General has certified that the State Water Control Board has the authority to adopt the proposed amendments.

### Purpose\*

*Please provide a statement explaining the need for the new or amended regulation. This statement must include the rationale or justification of the proposed regulatory action and detail the specific reasons it is essential to protect the health, safety or welfare of citizens. A statement of a general nature is not acceptable, particular rationales must be explicitly discussed. Please include a discussion of the goals of the proposal and the problems the proposal is intended to solve.*

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The purpose of the Virginia Water Protection Permit Regulation 9VAC-25-210 et seq. is to establish the procedures and requirements to be followed in connection with the issuance of a VWP permit by the board pursuant to the State Water Control Law. The proposed amendments are necessary to protect the public health, safety and welfare by providing increased protection of the Commonwealth's wetland resources, which are important for maintaining water quality, flood control and providing fish and wildlife habitat.

### Substance\*

*Please identify and explain the new substantive provisions, the substantive changes to existing sections, or both where appropriate. Please note that a more detailed discussion is required under the statement providing detail of the regulatory action's changes.*

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Substantive changes have been made to the regulation to incorporate statutory changes and to clarify requirements to permittees and the general public. The definition section has been expanded to clarify usage of specific terms. A section on how wetland delineations are to be

conducted has been added. The process of applying for a permit, and the information the applicant needs to supply, have been detailed and clarified, as have the permit review timeframes. The process of avoidance and minimization of impacts, and compensation for unavoidable impacts, has been clarified. The types of permit changes that qualify as minor modifications have been expanded. The use of state general permits for wetland impacts has been added.

### Issues\*

*Please provide a statement identifying the issues associated with the proposed regulatory action. The term "issues" means: 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 include a sentence to that effect.*

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Advantages of the proposed regulatory changes to the public and the Commonwealth are that they provide increased protection of the Commonwealth's aquatic resources by regulating excavation and drainage activities, and impacts to isolated wetlands not currently within the purview of the U.S. Army Corps of Engineers under §404 of the Clean Water Act. The changes provide for no net loss of wetland acreage and function, further protecting a valuable resource of the Commonwealth. The proposed changes also streamline the permitting process by providing more clarity and certainty and decreasing the amount of time for permit issuance.

Disadvantages of the proposed regulatory changes to the public are that the activities regulated have been increased (Tulloch ditching and isolated wetlands) and there is now increased reporting of all impacts to wetlands in order to track the goal of no net loss of wetland acreage and function.

### Locality 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.*

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The regulation is effective statewide; however as there is a greater prevalence of wetlands in the eastern Piedmont and Coastal Plain compared to the western parts of the state, localities in these areas may feel greater impact from the changes to the 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.*

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In addition to any other comments the Board is soliciting comments on (i) the costs and benefits of the proposal and (ii) the impacts of the regulation on farm or forest lands..

All comments must be received by the close of the comment period. Comments may be submitted by mail, facsimile transmission, e-mail, or by personal appearance at the public hearing(s). Comments are to be submitted to Ellen Gilinsky, Department of Environmental Quality, P.O. Box 10009, Richmond, Virginia 23240 (e-mail: [egilinsky@deq.state.va.us](mailto:egilinsky@deq.state.va.us)) (fax: (804) 698-4032). All written comments must include the name, address and phone number of the commenter.

### Fiscal Impact

*Please identify the anticipated fiscal impacts and at a minimum include: (a) the projected cost to the state to implement and enforce the proposed regulation, including (i) fund source / fund detail, (ii) budget activity with a cross-reference to program and subprogram, and (iii) a delineation of one-time versus on-going expenditures; (b) the projected cost of the regulation on localities; (c) a description of the individuals, businesses or other entities that are likely to be affected by the regulation; (d) the agency's best estimate of the number of such entities that will be affected; e) the projected cost of the regulation for affected individuals, businesses, or other entities; and f) an estimate of the impact of the proposed regulation upon small businesses as defined in § 9-199 of the Code of Virginia or organizations in Virginia.*

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The VWP Program is currently funded through a combination of general funds and permit fees. The proposed changes to the VWP regulation may incur some additional workload as certain activities not formerly regulated, such as Tulloch ditching or impacts in isolated wetlands, will require permits.

There will be no increased fiscal impacts from the proposed changes for those individuals or entities requiring permits under the former regulation. For applicants not formerly regulated, i.e. those applying to Tulloch ditch in wetlands or perform work in isolated wetlands, new costs will be incurred. The cost of an application can vary from \$500 to \$50,000 depending on the size of the project; permit fees vary from \$200 to \$3,000 depending on the size and nature of the project. However, general permits that are being promulgated under separate regulations should cover 80 to 90% of permitted activities, and will significantly reduce time and cost for the applicant.

### Detail of Changes

*Please detail any changes, other than strictly editorial changes, that are being proposed. Please detail new substantive provisions, all substantive changes to existing sections, or both where appropriate. This statement should provide a section-by-section description - or cross-walk - of changes implemented by the proposed regulatory action. Where applicable, include citations to the specific sections of an existing regulation being amended and explain the consequences of the proposed changes.*

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Significant Amendments to the Virginia Water Protection Permit regulation (9 VAC 25-210 et seq.) that the State Water Control Board has under consideration are as follows:

**Section 210-10 – Definitions:** Numerous definitions have been added to define terms from the statutory changes and to clarify usage of terms that may have different meanings. Definitions for terms no longer used in the regulation or that no longer need to be defined have been deleted. Some existing definitions have been rewritten for purposes of clarity.

**Section 210-45 – Wetland Delineation:** This section has been added to clarify a requirement in the statute that the Corps federal manual shall be used for delineating wetlands and shall be interpreted consistent with federal guidance.

**Section 210-50- Prohibitions and Requirements for permits:** This section has been modified to incorporate language from the statute regarding activities that would require a permit.

**Section 210-60 – Exclusions:** Changes to this section have been made for clarity purposes. The specific listing of Corps Nationwide Permits that are excluded has been deleted as it is out of date and it is not necessary to continue to enumerate them in the regulation.

**Section 210-80 – Application for a permit:** This section has been revised to address changes to the statute and to provide more detail to the regulated public regarding information requirements for applications.

**Section 210-100 – Signatory requirements:** These requirements have been simplified.

**Section 210-115 – Evaluation of Mitigation Alternatives:** This section has been added to address requirements in the statute and to provide more detail to the regulated community as to information requirements necessary to evaluate mitigation proposals.

**Section 210-130 – State General Permits:** This section has been modified to address statutory changes and to incorporate a provision for the establishment of expiration terms for general permits.

**Section 210-140 – Public notice of permit action and public comment period:** This section has been modified to establish a 14 day time frame within which the applicant must publish a public notice in the newspaper before permit processing is suspended.

**Section 210-180- Rules for modification, revocation and reissuance, and termination:** This section has been modified to allow the Board to terminate a permit upon completion of the permitted activity and compensatory mitigation.

**Section 210-185 – Permit extension:** This section has been added to allow the applicant to extend a permit up to the 15 year statutory cap through written notification provided there is no change in the authorized activity.

**Section 210-200 – Transferability of permits:** This section has been modified to account for cases where the permittee sells the property but retains responsibility for the permit and any enforcement activities.

**Section 210-210 – Minor modification:** This section has been modified to allow minor additional impacts to surface waters that are fully mitigated to be addressed as minor permit modifications.

**Section 210-220 – Waiver of Permits:** This section has been rewritten to clarify the circumstances under which the Board may waive the requirement for a permit.

**Section 210-230 – Denial of the permit:** Language has been added to enumerate the reasons for permit denial in accordance with the statute.

## Alternatives

*Please describe the specific 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.*

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The alternative of not amending the regulation is not feasible as the proposed changes are mandated by action of the General Assembly, and portions of the existing regulation are contrary to the amendments to the Virginia Code passed by the General Assembly. The alternative of developing an entirely new regulation would be time consuming and burdensome. The alternative proposed builds upon the existing regulation and incorporates changes mandated by the legislature and other changes necessary to clarify and streamline the permitting process.

## Public Comment

*Please summarize all public comment received during the NOIRA comment period and provide the agency response.*

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Several written and public comments were received by DEQ in response to the June 19, 2000 Notice of Intended Regulatory Action for Virginia Water Protection Permit Regulation amendments (9 VAC 25-210 et seq.). A total of six Virginia citizens offered comments at the public meeting for the NOIRA held on August 10, 2000. Those comments are summarized as follows:

- The VWPP program should reflect the comprehensive nature of the law by supporting management and protection of all non-tidal wetlands- not just those beyond Federal jurisdiction.
- A regulatory approach that is compatible with the Federal program including wetland determinations based upon the scientifically accepted 1987 USACE Wetland Delineation Manual could eliminate problems.

- Applicants seeking a VWP permit should clearly demonstrate evidence of avoidance and minimization techniques during activity planning and development.
- When wetland impacts are “unavoidable” compensation must insure that “wetland acreage and function” are replaced to offset impacts in the same project area.
- One commenter, representing the interests of the City of Chesapeake, made the following comments and requests:
  - 32% of Chesapeake is wetland, and as such, the City of Chesapeake stands to be the most affected in Hampton Roads by regulatory decisions.
  - Requested development or clarification of the following definitions: “complete application, cumulative impacts, perennial streams, wetlands of minimum ecological value, normal residential gardening, lawn and landscape maintenance.”

Additional written comments received included the following:

- One commenter suggested the maintenance of playground equipment be added to residential exemptions.
- Several commenters objected to the term “unavoidable impacts” and suggested clarification.
- One commenter made the following comments, requests and proposals:
- Requested expansion or clarification of definitions for “ditching” and wetland definition regarding the terms “normal circumstances” and “prevalence of vegetation”.
- Proposed the duration of a permit covering a project always be fifteen years, particularly for bond and monitoring purposes.
- Proposed the program encompass all functions of wetlands and the goal of no net loss should apply to wetland functions as well as acreage.
- Proposed a practicability test be used to minimize impacts.
- Proposed cumulative impacts analysis be broad.
- Proposed compensation should be linked to impact.
- Proposed a buffer requirement for wetlands created for mitigation.
- Requested the Board create a mechanism to avoid default approval after the 45-day review period for general permits expires.
- Requested that all wetlands be presumed to have ecological value and that the applicant should have the burden of proving “minimal ecological value”.
- Proposed restrictions on “normal agricultural and silvicultural activities”.
- Requested public hearings for all VWP Permits.
- Proposed that fifteen days is too short a time to “access compensation implementation, inventory permitted wetland impacts, and work to prevent unpermitted impacts”.
- Requested a citizen appeal process “regarding the sufficiency of application information, approval by default and determinations of minimal ecological value.”

Many of these comments were incorporated by DEQ staff into the proposed amended regulation. For instance, use of the 1987 USACE Wetland Delineation Manual has been proposed in Section 210-45 and avoidance and minimization were clarified in Section

210-115. DEQ staff clarified and incorporated several of the requested definitions into the proposed amended regulation.

**Clarity of the Regulation**

*Please provide a statement indicating that the agency, through examination of the regulation and relevant public comments, has determined that the regulation is clearly written and easily understandable by the individuals and entities affected.*

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DEQ staff worked with a 30 member Technical Advisory Committee to ensure that the proposed regulation is clearly written and understandable to the individuals and entities affected.

**Periodic Review**

*Please supply a schedule setting forth when the agency will initiate a review and re-evaluation to determine if the regulation should be continued, amended, or terminated. The specific and measurable regulatory goals should be outlined with this schedule. The review shall take place no later than three years after the proposed regulation is expected to be effective.*

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The regulation will be reviewed every 3 years to determine if it is meeting its goals.

**Family Impact Statement**

*Please provide an analysis of the proposed regulatory action that assesses the potential impact on the institution of the family and family stability including the extent to which 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.*

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It is not anticipated that these regulation amendments will have a direct impact on families.