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Exempt Action - Final Regulation Agency Background Document

Agency name	State Water Control Board
Virginia Administrative Code (VAC) citation(s)	9VAC25-210
Regulation title(s)	Virginia Water Protection Permit Program Regulation
Action title	Amendments Conforming to 2019 Legislation
Final agency action date	June 27, 2019
Date this document prepared	May 15, 2019

While a regulatory action may be exempt from executive branch review pursuant to § 2.2-4002 or § 2.2-4006 of the *Code of Virginia*, the agency is still encouraged to provide information to the public on the Regulatory Town Hall using this form. However, the agency may still be required to comply with the Virginia Register Act, Executive Order 14 (as amended, July 16, 2018), the Regulations for Filing and Publishing Agency Regulations (1 VAC7-10), and the *Virginia Register Form, Style, and Procedure Manual for Publication of Virginia Regulations*.

Brief Summary

Please provide a brief summary (preferably no more than 2 or 3 paragraphs) of this regulatory change (i.e., new regulation, amendments to an existing regulation, or repeal of an existing regulation). Alert the reader to all substantive matters. If applicable, generally describe the existing regulation.

During the 2019 General Assembly, changes were made to Subsection B of §62.1-44.15:21 of the State Water Control Law regarding compensatory mitigation under the Virginia Water Protection (VWP) program. This final regulatory action will amend the *Virginia Water Protection Permit Program Regulation*, 9VAC25-210, in order to incorporate the changes to state law made by Chapter 545 of the 2019 Virginia Acts of Assembly. Under §2.2-4006.A.4.a of the Administrative Process Acts (APA), this regulatory action is exempted from the APA process as it is necessary to conform to the changes in Virginia statutory law where no agency discretion is involved.

The conforming changes to the regulations include: (i) revising a term; (ii) adding a definition; and, (iii) revising language to clarify how the evaluation of compensatory mitigation proposals is conducted in accordance with the legislation.

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 – Administrative Process Act
Board – State Water Control Board
Chapter 545 – Chapter 545 of the 2019 Acts of Assembly
Department – Department of Environmental Quality
VAC – Virginia Administrative Code
VWP – Virginia Water Protection

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 June 27, 2019, the State Water Control approved this amendment to 9VAC25-210 as final regulation as it is necessary to conform the regulations to the 2019 legislation and affirmed that the Board will receive, consider and respond to requests by any interested person at any time with respect to reconsideration or revision.

Mandate and Impetus

Please identify the mandate for this regulatory change, and any other impetus that specifically prompted its initiation (e.g., new or modified mandate, internal staff review, petition for rulemaking, periodic review, board decision, etc.). "Mandate" is defined as "a directive from the General Assembly, the federal government, or a court that requires that a regulation be promulgated, amended, or repealed in whole or part."

Chapter 545 of the 2019 Acts of Assembly (Chapter 545) amended Subsection B of § 62.1-44.15:21 of the State Water Control Law. In accordance with Chapter 545, the Board is to evaluate the VWP permit mitigation options for impacts to wetlands on a case-by-case basis with consideration for which option is practicable and ecologically and environmentally preferable, including, in terms of replacement of acreage and functions, which option has the greatest likelihood of success and avoidance of temporal loss of acreage and function. This evaluation shall be consistent with the U.S. Army Corps of Engineers Compensatory Mitigation for Losses of Aquatic Resources as provided in 33 CFR Part 332. Amendments to 9VAC25-210 have been made in order to conform the regulation with this change to the State Water Control Law.

Legal Basis

Please identify (1) the agency or other promulgating entity, and (2) the state and/or federal legal authority for the regulatory change, including the most relevant citations to the Code of Virginia or Acts of Assembly chapter number(s), if applicable. Your citation must include a specific provision, if any, authorizing the promulgating entity to regulate this specific subject or program, as well as a reference to the agency or promulgating entity's overall regulatory authority.

The Board is authorized to adopt regulations under § 62.1-44.15 of the State Water Control Law and to promulgate general permits under § 62.1-44.15.21. This regulatory amendment is being processed as a final exempt action under §2.2-4006.A.4.a of the APA as this regulatory action is necessary to conform to the changes in Virginia statutory law where no agency discretion is involved.

Purpose

Please explain the need for the regulatory change, including a description of: (1) the rationale or justification, (2) the specific reasons the regulatory change is essential to protect the health, safety or welfare of citizens, and (3) the goals of the regulatory change and the problems it is intended to solve.

The regulatory amendments are necessary to conform the regulations to changes made to the State Water Control Law by the 2019 General Assembly (Chapter 545 of the 2019 Acts of Assembly).

Issues

Please identify the issues associated with the regulatory change, 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, include a specific statement to that effect.

The regulated public is likely to experience more flexibility in obtaining project approvals. There are no identified disadvantages to the public. However, the department will likely have to spend more time during its evaluation of mitigation options. No other matters of interest were identified.

Agencies, Localities, and Other Entities Particularly Affected

Please identify any other state agencies, localities, or other entities particularly affected by the regulatory change. "Particularly affected" are those that are likely to bear any identified disproportionate material impact, which would not be experienced by other agencies, localities, or entities. "Locality" can refer to either local governments or the locations in the Commonwealth where the activities relevant to the regulation or regulatory change are most likely to occur. If no agency, locality, or entity is particularly affected, include a specific statement to that effect.

Other State Agencies Particularly Affected:
None

Localities Particularly Affected:
None

Other Entities Particularly Affected:
In some situations, such as large construction projects, entities in the business of providing compensatory mitigation services may be disadvantaged if business opportunities are negatively impacted by the mitigation options evaluation process.

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) establishing less stringent compliance or reporting requirements; 2) establishing less stringent schedules or deadlines for compliance or reporting requirements; 3) consolidation or simplification of compliance or reporting requirements; 4) establishing 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 regulatory change.

This regulatory amendment is necessary in order to conform the VWP regulation to changes in the State Water Control Law as made by the 2019 General Assembly (Chapter 545 of the 2019 Acts of Assembly). If these changes are not made, the regulations will not be consistent with the State Water Control Law.

Detail of All Changes Made in this Regulatory Action

Current section number	Current requirement	Change, intent, rationale, and likely impact of new requirements
9VAC25-210-10	None	Made changes necessary to incorporate Chapter 545 by adding a definition for "Temporal loss".
9VAC25-210-10	"Ecologically preferable" means capable of providing a higher likelihood than alternative proposals of replacing existing wetland acreage and functions, stream functions, water quality, and fish and wildlife resources.	Revised the term to be consistent with the language of Chapter 545. Chapter 545 refers to "Ecologically <u>and environmentally preferable</u> " so the term was revised to be consistent with the statute. There was no change to the definition.

Current section number	Current requirement	Change, intent, rationale, and likely impact of new requirements
9VAC25-210-116	Compensation.	<p>Revised to the updated term “ecologically <u>and environmentally</u> preferable” in Subsection B, Subdivisions C.1 and E.2</p> <p>Amended Subdivisions C.2 and C.3 to be consistent with Chapter 545. The following change was made to both Subdivision C.2 and C.3: (i) deleted "the appropriate compensatory mitigation option for project impacts shall be evaluated on a case-by-case basis, in terms of replacement of wetland acreage and functions and the greatest likelihood of success"; and, (ii) added "the Board shall evaluate the appropriate compensatory mitigation option on a case-by-case basis with consideration for which option is practicable and ecologically and environmentally preferable, including, in terms of replacement of acreage and functions, which option offers the greatest likelihood of success and avoidance of temporal loss of acreage and function. This evaluation shall be consistent with the U.S. Army Corps of Engineers Compensatory Mitigation for Losses of Aquatic Resources as provided in 33 CFR Part 332." A compensatory mitigation option will be evaluated to determine if it is practicable and ecologically and environmentally preferable to purchasing bank credits.</p>

Family Impact

In accordance with § 2.2-606 of the Code of Virginia, please 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.

No impacts on the family were identified.