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

<b>Agency name</b>	Virginia Soil and Water Conservation Board
<b>Virginia Administrative Code (VAC) citation</b>	4 VAC 50-20
<b>Regulation title</b>	Impounding Structure Regulations
<b>Action title</b>	Amend, modify, or delete provisions of Virginia's Impounding Structure Regulations to enhance the Dam Safety Program and to improve public safety.
<b>Document preparation date</b>	October 31, 2005

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 21 (2002) 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 regulatory action is to consider amendments to the Virginia Soil and Water Conservation Board's Impounding Structure Regulations that would: (i) establish an alternative procedure (decision matrix) which would allow for the evaluation of spillway design floods (SDF) less than the probable maximum flood (PMF) where there would be no unreasonable or significant increase in hazard to life and property; (ii) establish alteration permit requirements similar to construction permit requirements; (iii) expand the requirements of an Emergency Action Plan to meet federal requirements; (iv) amend references to new and existing dams to clarify that the regulations refer to all dams unless otherwise specified; (v) improve the applicability and consistency of Table 1 in 4 VAC 50-20-50 and improve the risk classification system; (vi) establish permit application fees for the administration of the dam safety program; (vii) amend or remove the forms that are incorporated by reference; (viii) clarify the meanings of terminologies such as "significantly", "appropriate", and "reasonable" as well as the threshold at which "probable" becomes "possible"; and, (ix) revise the Impounding Structure Regulations, as needed, to improve the administration and implementation of the Virginia Dam Safety Program.

## Legal basis

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

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The Virginia *Dam Safety Act* (§ 10.1-604 through § 10.1-613 of the Code of Virginia) ensures public safety through the proper and safe design, construction, operation, and maintenance of dams in the Commonwealth. This is accomplished through the effective administration of the Virginia Dam Safety Program. Authority for the *Act* rests with the Virginia Soil and Water Conservation Board and is administered on behalf of the Board by the Department of Conservation and Recreation. The Program focuses on enhancing public safety through bringing all dams of regulation size under Regular Operation and Maintenance Certificates.

Pursuant to § 10.1-605, the Board is authorized to promulgate regulations for impounding structures.

*§10.1-605 The Board shall promulgate regulations to ensure that impounding structures in the Commonwealth are properly and safely constructed, maintained and operated.*

These regulations, entitled the Impounding Structure Regulations (4 VAC 50-20-10 et seq.), were first promulgated by the Virginia Soil and Water Conservation Board's predecessor in accordance with the provisions of the Dam Safety Act, Article 2, Chapter 6, Title 10.1 (§10.1-604 et seq.), of the Code of Virginia with an effective date of February 1, 1989 (4 VAC 50-20-10. Authority). Authorities within the regulations were expanded by the Board in July 1, 2002 (Virginia Register Volume 18, Issue 14). This was in reaction to SB1166.

In 2001 (with an effective date of July 1, 2002), Chapter 92 [SB1166] of the Virginia Acts of Assembly dramatically increased the number of dams that fall under state regulation by broadening the definition of an impounding structure. As amended, the definition includes the following:

*§ 10.1-604 "Impounding structure" means a man-made device, whether a dam across a watercourse or other structure outside a watercourse, used or to be used to retain or store waters or other materials. The term includes: (i) all dams that are twenty-five feet or greater in height and that create an impoundment capacity of fifteen acre-feet or greater, and (ii) all dams that are six feet or greater in height and that create an impoundment capacity of fifty acre-feet or greater. The term "impounding structure" shall not include: (a) dams licensed by the State Corporation Commission that are subject to a safety inspection program; (b) dams owned or licensed by the United States government; (c) dams constructed, maintained or operated primarily for agricultural purposes which are less than twenty-five feet in height or which create a maximum impoundment capacity smaller than 100 acre-feet; (d) water or silt retaining dams approved pursuant to § 45.1-222 or § 45.1-225.1; or (e) obstructions in a canal used to raise or lower water.*

The Virginia Soil and Water Conservation Board authorized and directed the filing of this NOIRA relating to the Board's Virginia Impounding Structures Regulations at its July 21, 2005 meeting. The Department is to consider changes and solicit recommendations relating to these Regulations.

### 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. Include the specific reasons why the agency has determined that the proposed regulatory action is essential to protect the health, safety, or welfare of citizens. Delineate any potential issues that may need to be addressed as the regulation is developed.*

The Impounding Structure Regulations and the Virginia Dam Safety Act were promulgated to protect the health, safety, and welfare of citizens. Amendments to the regulations considered during this action will continue to support and advance this important public safety function.

(i) As part of the regulatory process, there will be a consideration of establishing an alternative procedure (decision matrix) which would allow for the evaluation of spillway design floods (SDF) less than the probable maximum flood (PMF) where there would be no unreasonable or significant increase in hazard to life and property. An Ad Hoc Dam Safety Study Committee, formed at the request of the Board, issued a report on April 30, 2005 that recommended the consideration of such amendments. The Board at their July 21, 2005 meeting authorized regulatory action in response to this report. It is unclear at this time what the details of these provisions might be and the Department welcomes suggestions in this regard. However, an alternative procedure will need increased enforcement options and staffing for the Department which will likely result in increased costs to applicants who choose to pursue the alternative approach.

(ii) The existing Virginia Impounding Structures Regulations will be amended to allow the Department to define "alteration" and enable the Department to monitor and inspect alteration activities in a manner similar to construction activities. Ensuring compliance with alteration plans and permits will ensure impounding structures remain safe and structurally sound.

(iii) Current Virginia requirements for an Emergency Action Plan have been determined by a special workgroup of the Board to be deficient at an October 20, 2005 meeting and will be examined and expanded as needed to meet federal requirements. The Emergency Action Plan requires "a method of providing notification and warning to persons downstream, other affected persons or property owners and local authorities in the event of a flood hazard or the impending failure of the impounding structure" (4 VAC 50-20-70 B). Such amendments would include, but not be limited to, more rigorous regular reviews and the exercising and testing of the plan.

(iv) As recommended by the Virginia Soil and Water Conservation Board, changes to the Regulations will be considered to ensure that all impounding structures be structurally sound and safe, and that the regulations apply to all dams, regardless of age, unless otherwise specified.

(v) The dam hazard/ risk assessment table [Table 1 (4 VAC 50-20-50) of the Regulations] is difficult to understand and allows for significant interpretations to be made in its use. Modifications to the table will improve the applicability of its information and increase consistency in its use.

(vi) The Appropriation Act currently carries language that specifies that “The Department of Conservation and Recreation is authorized to develop a cost recovery system, the funds from which shall be used to support the direct costs of providing inspections, plan review, administrative review, and certifications of non-Soil and Water Conservation District dams. The system shall employ a sliding scale, if practical, and shall be based on factors that directly relate to the costs of the dam inspection program. Total costs recovered from the new system shall not exceed 90 percent of the actual program cost.” Amendments to the regulations will be considered to establish permit application fees for the administration of the Dam Safety Program.

(vii) Removing the Dam Safety forms from the regulations will allow for more frequent revisions as federal and state requirements warrant. These forms are currently outdated and do not meet all federal and state requirements. Vague words and definitions will also be amended.

(viii) The Virginia Soil and Water Conservation Board and their Ad Hoc Advisory Group requested amendments to clarify the meanings of terminologies such as “significantly”, “appropriate”, and “reasonable” as well as the threshold at which “probable” becomes “possible”.

(ix) Other revisions to the Impounding Structure Regulations will be considered, as needed, to improve the administration and implementation of the Virginia Dam Safety Program.

## 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.*

The current Impounding Structures Regulations contain vague language and confusing references to new and existing dams, outdated required forms, and sections that lack adequate explanation in the application of or interpretation of procedures contained within. Additionally, an Ad Hoc Dam Safety Study Committee, formed at the request of the Board, issued a report on April 30, 2005 that in summary recommended changes in the Impounding Structure Regulations: (i) to formalize the current practice of treating “new” and “existing” dams alike and (ii) to provide an alternative procedure which would allow spillway design floods (SDF) less than the PMF in cases where there would be no significant increase in downstream hazard. The Board at their July 21, 2005 meeting authorized regulatory action in response to this report. The Department has identified no alternatives consistent with current law to address the concerns and direction stated above. Maintaining the regulations as they currently are will significantly hamper the efforts of the Board to strengthen the Dam Safety Program and to ensure the safety of impounding structures and will not allow for the full exploration of potential strategies to develop alternative procedures to safely and responsibly reduce the SDF.

## Public Participation

*Please indicate the agency is seeking comments on the intended regulatory action, to include 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 meeting is to be held to receive comments on this notice. Indicate that 1) the agency is not holding a public meeting because the agency has authorized proceeding without holding a meeting or 2) the agency is holding a meeting. If a public meeting is to be held, indicate that the date, time and place of the meeting may be found in the calendar of events section of the Virginia Register of Regulations.*

The Board is seeking comments on the intended regulatory action and general ideas on how to improve the implementation and operation of the Dam Safety Program. The Virginia Impounding Structure Regulations (Dam Safety) can be found at <http://leg1.state.va.us/000/reg/TOC04050.HTM>

The Board is also seeking information regarding 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.

Persons desiring to submit written comments pertaining to this notice may do so by mail, the Internet, or facsimile. Comments pertaining to this notice should be sent to the Regulatory Coordinator at: Virginia Department of Conservation and Recreation, 203 Governor Street, Suite 302, Richmond, Virginia 23219. Comments may also be e-mailed to the Regulatory Coordinator at: [regcord@dcr.state.va.us](mailto:regcord@dcr.state.va.us). Or comments may be faxed to the Regulatory Coordinator at: (804) 786-6141. All written comments must include the name and address of the commenter (e-mail addresses would also be appreciated). In order to be considered, comments must be received by 5:00 p.m. on the date established as the close of the comment period.

The Department as authorized by the Board intends to utilize a public participatory approach to these regulatory amendments and hold a public meeting to provide opportunity for public comment. Notice of the meeting will be posted in the Calendar of Events section of the Virginia Register of Regulations and be posted on the Town Hall. Both oral and written comments may be submitted at that time.

Following publication of the proposed regulation in the Virginia Register, the Department as authorized by the Board will hold at least one public hearing to provide opportunity for public comment. Notice of the hearing(s) will be posted in the Calendar of Events section of the Virginia Register of Regulations and be posted on the Town Hall. Both oral and written comments may be submitted at that time.

## Participatory Approach

*Please indicate the extent to which an ad hoc advisory group will be used in the development of the proposed regulation. Indicate that 1) the agency is not using the participatory approach in the development of the proposal because the agency has authorized proceeding without using the*

*participatory approach; 2) the agency is using the participatory approach in the development of the proposal; or 3) the agency is inviting comment on whether to use the participatory approach to assist the agency in the development of a proposal.*

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The Board is using the participatory approach to develop the proposal. The DCR, as authorized by the Board, will be forming a Technical Advisory Committee to consist of relevant stakeholders to assist in the development of proposed regulations. Persons interested in participating on the advisory committee should provide their name, address, phone number, e-mail address, and the name of the organization that they represent in writing to the agency contact person by no later than 5:00 pm on the last day of the comment period.

### Family impact

*Assess the potential impact of the proposed regulatory action on the institution of the family and family stability.*

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It is not anticipated that this regulation will have a direct impact on the institution of the family or family stability. However, the improvements to the regulations will result in more properly maintained and operated impounding structures which will have safety benefits for families living downstream from regulated dams. Alterations to the regulations may also have fiscal implications on dam owners.