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Fast-Track Regulation Agency Background Document

Agency name	Board for Professional Soil Scientists, Wetland Professionals, and Geologists
Virginia Administrative Code (VAC) citation(s)	18 VAC 145-30-140
Regulation title(s)	Regulations Governing Certified Professional Wetland Delineators
Action title	Prohibition on using the work of another without written consent
Date this document prepared	November 20, 2017

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 17 (2014) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

Brief summary

Please provide a brief summary (preferably no more than 2 or 3 paragraphs) of the proposed new regulation, proposed amendments to the existing regulation, or the regulation proposed to be repealed. Alert the reader to all substantive matters or changes. If applicable, generally describe the existing regulation.

The proposed amendment to 18 VAC 145-30-140 will make explicit that a Virginia Certified Professional Wetland Delineator is prohibited from using the work of another without written consent. The Standards of Practice and Conduct already prohibit certificate holders from signing work they do not themselves prepare, review, or approve; this amendment clarifies that using the work of another person/organization when rendering services requires written consent.

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.

“Board” means the Board for Professional Soil Scientists, Wetland Professionals, and Geologists.

“Department” means the Department of Professional and Occupational Regulation.

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 September 6, 2017, the Board for Professional Soil Scientists, Wetland Professionals, and Geologists approved the proposed amendment to 18 VAC 145-30-140 and voted to use the fast-track process for its promulgation.

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.

Code of Virginia § 54.1-201.5 grants authority to the Board to promulgate regulations, “in accordance with the Administrative Process Act (§ 2.2-4000 et seq.) necessary to assure continued competency, to prevent deceptive or misleading practices by practitioners and to effectively administer the regulatory system administered by the regulatory board.” The Board is the promulgating entity for regulations governing wetland professionals.

Purpose

Please explain the need for the new or amended regulation. Describe the rationale or justification of the proposed regulatory action. Describe the specific reasons the regulation is essential to protect the health, safety or welfare of citizens. Discuss the goals of the proposal and the problems the proposal is intended to solve.

This amendment is proposed to address concerns in the wetland delineation community about the inappropriate use of professional work. The Board requested this proposed addition to the Standards of Practice and Conduct to promote transparency and ensure minimum competency in the practice of wetland delineation by certified professionals.

Rationale for using fast-track process

Please explain the rationale for using the fast-track process in promulgating this regulation. Why do you expect this rulemaking to be noncontroversial?

The fast-track rulemaking process is being used to amend the Board's Standards of Practice and Conduct because the proposed amendment is not expected to be controversial. Members of the regulated community requested the change and it provides helpful clarification to existing guidelines and prohibitions on representations of professional opinion.

Substance

Please briefly identify and explain the new substantive provisions, the substantive changes to existing sections, or both. A more detailed discussion is provided in the "Detail of changes" section below.

The Board's proposed amendment to existing 18 VAC 145-30-140 adds a new prohibited act to the "Standards of practice and conduct" section, to make explicit that a Virginia Certified Professional Wetland Delineator is prohibited from using the work of another without written consent.

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 there are no disadvantages to the public or the Commonwealth, please indicate.

The primary advantage to the public of adding the proposed amendment is ensuring the integrity of the regulatory program for Virginia Certified Professional Wetland Delineators and promoting an ethical marketplace overall, by prohibiting certificate holders from using another's work without permission. Moreover, businesses engaged in wetland delineation and their individual employees will be better protected against improper use of their work. There are no disadvantages to the public or individual private citizens or businesses.

The primary advantage to the Commonwealth is that the regulatory program will be able to take disciplinary action against certificate holders who use the work of another without permission. Not only do such individuals take advantage of other professionals in their field, such behavior puts the public's health, safety, and welfare at potential risk. There are no identified disadvantages to the agency or the Commonwealth.

Requirements more restrictive than federal

Please identify and describe any requirement of the proposal which is more restrictive than applicable federal requirements. Include a rationale for the need 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 requirements in the proposed regulations that are more restrictive than any applicable federal requirements.

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.

None identified.

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.

There are no alternatives to the proposed amendment that would effectively make explicit a clear prohibition on certificate holders using the work of another without written consent. This change benefits small business by protecting their professional work from being used inappropriately or without permission. The proposal does not affect reporting requirements.

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 requirement creates the anticipated economic impact.

Summary: The Board's regulations are being amended to make explicit that a Virginia Certified Professional Wetland Delineator is prohibited from using the work of another without written consent. No fiscal impact is expected from this regulatory change.

All costs incurred in support of board activities and regulatory operations are paid by the Department and funded through fees paid by applicants and regulants. All boards within the Department must operate within the Code provisions of the Callahan Act (§ 54.1-113) and the general provisions of § 54.1-201. Each regulatory program's revenues must be adequate to support both its direct costs and a proportional share of agency operating costs. The Department allocates costs to its regulatory programs based on consistent, equitable, and cost-effective methodologies. The Board has no other source of income.

Economic Impact:

Projected cost to the state to implement and enforce the proposed regulation, including: a) fund source / fund detail; and b) a delineation of one-time versus on-going expenditures	\$0
Projected cost of the new regulations or	\$0

changes to existing regulations on localities.	
Description of the individuals, businesses, or other entities likely to be affected by the new regulations or changes to existing regulations.	Certified wetland professionals and applicants for certification.
Agency’s best estimate of the number of such entities that will be affected. Please include an estimate of the number of small businesses affected. Small business means a business entity, including its affiliates, that: a) is independently owned and operated and; b) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million.	The Board currently certifies 109 individual wetland professionals. Individual applicants also will be affected; the Board receives approximately 5-7 applications each year.
All projected costs of the new regulations or changes to existing regulations for affected individuals, businesses, or other entities. Please be specific and include all costs including: a) the projected reporting, recordkeeping, and other administrative costs required for compliance by small businesses; and b) specify any costs related to the development of real estate for commercial or residential purposes that are a consequence of the proposed regulatory changes or new regulations.	\$0
Beneficial impact the regulation is designed to produce.	The regulation will ensure the integrity of the regulatory program for Virginia Certified Professional Wetland Delineators by prohibiting certificate holders from using another’s work without permission. Businesses engaged in wetland delineation and their individual employees will be better protected against improper use of their work.

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.

No viable alternatives have been identified.

Public participation notice

If an objection to the use of the fast-track process is received within the 30-day public comment period from 10 or more persons, any member of the applicable standing committee of either house of the General Assembly or of the Joint Commission on Administrative Rules, the agency shall: 1) file notice of the objections with the Registrar of Regulations for publication in the Virginia Register; and 2) proceed with the normal promulgation process with the initial publication of the fast-track regulation serving as the Notice of Intended Regulatory Action.

Periodic review and small business impact review report of findings

If this fast-track is the result of a periodic review/small business impact review, use this form to report the agency's findings. Please (1) summarize all comments received during the public comment period following the publication of the Notice of Periodic Review and (2) indicate whether the regulation meets the criteria set out in Executive Order 17 (2014), e.g., is necessary for the protection of public health, safety, and welfare, and is clearly written and easily understandable. In addition, as required by 2.2-4007.1 E and F, please include a discussion of the agency's consideration of: (1) the continued need for the regulation; (2) the nature of complaints or comments received concerning the regulation from the public; (3) the complexity of the regulation; (4) the extent to which the regulation overlaps, duplicates, or conflicts with federal or state law or regulation; and (5) the length of time since the regulation has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the regulation.

This section is not applicable.

Family impact

Please assess the impact of this 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 family impact.

Detail of changes

Please list all changes that are being proposed and the consequences of the proposed changes; explain the new requirements and what they mean rather than merely quoting the proposed text of the regulation. 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 follow the instructions in the text following the three chart templates below.

For changes to existing regulation(s), please use the following chart:

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change, intent, rationale, and likely impact of proposed requirements
145-30-140	N/A	Nine professional responsibility guidelines and prohibitions are provided in this section of the board's	Adds a new subsection (#10) to make explicit that a Virginia Certified Professional Wetland Delineator is prohibited from using the work of another

		<p>regulations, "Standards of practice and conduct." Summarized below:</p> <ol style="list-style-type: none"> 1. No false statements or misrepresentations in application. 2. No fraud, deceit, or misrepresentation in advertising or providing professional services 3. No signing (knowingly) work not prepared, reviewed, and approved by certificate holder 4. Disclosure of conflict of interest 5. Professional opinion must be based on adequate knowledge, technical competence 6. No misrepresentation (knowingly) in expressing professional opinion 7. Immediate notification requirement if professional judgment is overruled and public health, safety, or welfare is threatened 8. Reasonable care standard when rendering professional services 9. Requirement to sign and date all work prepared or reviewed & approved by certificate holder 	<p>without written consent.</p> <p>The Standards of Practice and Conduct already prohibit certificate holders from signing work they do not themselves prepare, review, or approve; this amendment clarifies that using the work of another person/organization when rendering services requires written consent.</p> <p>This amendment is proposed to address concerns in the wetland delineation community about the inappropriate use of professional work. The Board requested this proposed addition to the Standards of Practice and Conduct to promote transparency and ensure minimum competency in the practice of wetland delineation by certified professionals.</p> <p>The anticipated impact of the proposed amendment is to ensure the integrity of the regulatory program for Virginia Certified Professional Wetland Delineators and promoting an ethical marketplace overall, by prohibiting certificate holders from using another's work without permission. Moreover, businesses engaged in wetland delineation and their individual employees will be better protected against improper use of their work.</p> <p>This amendment will allow the Board to take disciplinary action against certificate holders who use the work of another without permission. Not only do such individuals take advantage of other professionals in their field, such behavior puts the public's health, safety, and welfare at potential risk.</p>
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