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Exempt Action: Final Regulation Agency Background Document

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| Agency name | Department of Environmental Quality |
| Virginia Administrative Code (VAC) Chapter citation(s) | 9VAC15-100 |
| VAC Chapter title(s) | Small Energy Storage Facilities Permit by Rule |
| Action title | PBR regulation for Energy Storage - Adoption |
| Final agency action date | December 28, 2021 |
| Date this document prepared | December 22, 2021 |

Although 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 (1VAC7-10), and the *Form and Style Requirements for the Virginia Register of Regulations and Virginia Administrative Code*.

Brief Summary

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.

The General Assembly passed HB 2148 during the 2021 legislative session (Chapter 419 of the 2021 Special Session I Acts of Assembly). The legislation requires that, by January 1, 2022, the Department of Environmental Quality (DEQ) develop a permit by rule (PBR) regulation for energy storage facilities 150 megawatts (MW) or less that is similar to the existing PBR for small renewable energy projects under Article 5, Chapter 11.1 of Title 10.1 of the Code of Virginia.

The Small Energy Storage Facilities Permit by Rule, 9VAC15-100, establishes criteria, procedures and permit requirements as stipulated under the Code of Virginia (§10.1-1197.5 et seq.). The PBR requirements for a complete application to construct and operate are identified under the regulation rather than being developed on a case-by-case basis. Key application criteria include a public notice and comment period, local government approval, interconnection requirements, natural and cultural resource assessments, site plan, context map and a fee structure that should be sufficient to support the program.

Mandate and Impetus

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, or board decision). "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."

The General Assembly passed HB 2148 during the 2021 legislative session that requires the DEQ to develop a PBR regulation for storage facilities similar to the existing PBR for small renewable energy projects under Article 5, Chapter 11.1 of Title 10.1 of the Code of Virginia, specifically §10.1-1197.5 et seq.

Acronyms and Definitions

Define all acronyms used in this form, and any technical terms that are not also defined in the "Definitions" section of the regulation.

- DCR – means Department of Conservation and Recreation.
- DEQ – means Department of Environmental Quality.
- DWR – means Department of Wildlife Resources.
- MW – means megawatts Megawatt of power with alternating current, a measure of generated electricity.
- NOI – means notice of intent.
- PBR – means Permit by Rule.

Statement of Final Agency Action

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, December 28, 2021, the Director of the Department of Environmental Quality adopted the regulation titled: Small Energy Storage Facilities Permit by Rule; a regulation for a Permit by Rule (PBR) for energy storage facilities under 150MW.

Legal Basis

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 legal basis for the Small Energy Storage Facilities Permit by Rule (9VAC15-100) is HB 2148 which amended the Small Renewable Energy Projects Act (Article 5, Chapter 11.1 of Title 10.1 of the Code of Virginia). Specifically, changes to §10.1-1197.5 et seq. of the Code of Virginia authorizes the DEQ to permit renewable energy storage facilities up to 150MW or less in the Commonwealth and to promulgate regulations necessary to carry out appropriate powers and duties for such permitting activities by January 1, 2022.

Purpose

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's intended to solve.

The purpose of the regulation for permitting small solar renewable energy storage is to provide the requirements for applicants and information for existing permitted facilities to authorize and operate an energy storage facility within the Commonwealth as directed by the General Assembly. An appropriate fee structure to fully support the program, an analysis of impacts to natural, cultural and natural heritage resources, mitigation requirements and information pertaining to the location and operation of the facility is included in the regulation. The addition of energy storage is essential to protect the health, safety, or welfare of citizens by streamlining the permitting process for these facilities and helping the Commonwealth meet the aggressive goals of the Virginia Clean Energy Act.

Substance

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 PBR regulation for energy storage establishes the specific criteria required for a complete application to construct and operate a small renewable energy storage facility in Virginia. Rules for public notice and public comment, determining potential significant impact to natural and cultural resources, and establishing an appropriate fee structure, are also included.

Issues

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 PBR regulation for energy storage will streamline the permitting process for these facilities. Energy storage affiliated with existing renewable energy generating projects will provide more reliable energy to the grid system during times when renewable energy is not being produced, thereby making more reliable energy available to the citizens of Virginia. The addition of energy storage will also help meet the aggressive goals of the Virginia Clean Energy Act. There are no disadvantages to the public or the Commonwealth.

Requirements More Restrictive than Federal

Identify and describe any requirement of the regulatory change that is more restrictive than applicable federal requirements. Include a specific citation for each applicable federal requirement, and 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 specific statement to that effect.

There are no applicable federal requirements.

Agencies, Localities, and Other Entities Particularly Affected

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:

The other state agencies affected include the Department of Conservation and Recreation, Department of Historic Resources and Department of Wildlife Resources. All are involved in the review of permit applications.

Localities Particularly Affected:

There are no localities particularly affected by the proposed regulation.

Other Entities Particularly Affected:

There are no other entities particularly affected by the proposed regulation.

Detail of All Changes Proposed in this Regulatory Action

*List all changes proposed in this exempt action and the rationale for the changes. Explain the new requirements and what they mean rather than merely quoting the text of the regulation. *Please put an asterisk next to any substantive changes.*

This is a new regulation and the requirements provide criteria for the construction and operation of an energy storage facility with a rated power capacity up to and including 150 MWAC. Additionally, the regulation provides for existing renewable energy solar, wind or combustion projects that want to add an energy storage facility at previously permitted or constructed projects, known as hybrid projects.

| New chapter-section number | New requirements | Other regulations and law that apply | Intent and likely impact of new requirements |
|-----------------------------------|-------------------------|---|--|
| 10 | Definitions | §10.1-1197.5 et seq. | Definitions for terms used in the regulation are provided in this section. The definitions explain meanings of relevant terms as these terms are used in the proposed regulation. |
| 20 | | §10.1-1197.5 et seq. | Section 20 explains that that the regulation applies throughout the Commonwealth and identifies there is different criteria for facilities with a disturbance area greater than 10 acres and those with a disturbance area less than 10 acres. |

| New chapter-section number | New requirements | Other regulations and law that apply | Intent and likely impact of new requirements |
|----------------------------|------------------|--------------------------------------|--|
| 30 | | §10.1-1197.5 et seq. | Section 30 identifies the necessary components for an application to construct and operate an energy storage facility greater than 10 acres in size. |
| 40 | | §10.1-1197.5 et seq. | Section 40 identifies requirements to conduct the analysis of impacts to natural resources. |
| 50 | | §10.1-1197.5 et seq. | Section 50 identifies how the department will determine if impacts to state-listed threatened and endangered species, cultural and natural heritage resources are significant. |
| 60 | | §10.1-1197.5 et seq. | Section 60 provides criteria for mitigation if required. |
| 70 | | §10.1-1197.5 et seq. | Section 70 provides criteria for site plans and context maps. |
| 80 | | §10.1-1197.5 et seq. | Section 80 provides criteria for facility design standards and operation plans. |
| 90 | | §10.1-1197.5 et seq. | Section 90 identifies public participation requirements. |
| 100 | | §10.1-1197.5 et seq. | Section 100 provides criteria for notification of change of ownership, modification, or permit termination. |
| 110 | | §10.1-1197.5 et seq. | Section 110 addresses permit fees. |
| 120 | | §10.1-1197.5 et seq. | Section 120 provides requirements for hybrid projects – those that have both energy generation and storage within the project disturbance zone and those that want to add energy storage to an existing permitted project. |
| 130 | | §10.1-1197.5 et seq. | Section 130 identifies the necessary components for an application to construct and operate an energy storage facility less than 10 acres in size. |

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.

Section 10.1-1197.5 et seq. of the Code of Virginia directs the Department to adopt regulations creating a PBR for energy storage facilities up to 150 MW, similar to the existing PBR regulations for renewable energy projects. The Code provides general requirements for the regulation. The framework and content of this regulation tracks the requirements specified in § 10.1-1197.5. The Department sought to establish requirements that provided only the information necessary to determine compliance and an appropriate fee schedule sufficient to cover the Department’s costs. Small business exemptions are not provided as no statutory authority exists for such an exemption and as this program is voluntary. Any entity that chooses to construct an energy storage facility under 150MW is required to do so in accordance with this regulation or through the requirements of the State Corporation Commission.

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.

There is no anticipated adverse impact on the institution of the family and family stability; however, as these projects help with the storage of clean, renewable energy, that improvement should have a positive impact on the environment which may indirectly impact families.

Public Comment

Summarize all comments received during the public comment period following the publication of the previous stage, and provide the agency response. Include all comments submitted: including those received on Town Hall, in a public hearing, or submitted directly to the agency. If no comment was received, enter a specific statement to that effect.

The Department accepted public comment on a draft of the regulation for 30 days. A summary of the comments and the Department response follows.

1. Commenter: Eric Claunch

Energy storage facilities will likely use the same battery chemistry most commonly used in electric vehicles today (lithium-ion). These battery chemistries have been known to catch fire. Once burning, water does not extinguish the fires; they must burn out on their own, which can take hours or days, depending on the scale. Because of the extreme risks of lithium-ion fires that cannot be easily extinguished, small energy storage facilities should be forbidden in forested areas, mountain ridgelines or remote areas where these fires may easily become uncontrolled due to wind. The risk far outweighs the benefit.

The Proposed Small Energy Storage Facilities Permit by Rule should include an aspect of environmental safety which ensures catastrophic accidents at these facilities don't cause devastating environmental harm (forest fires and water pollution being merely two of many possibilities). And if by chance devastating environmental harm does occur from a facility, there needs to be a stated penalty equal to or greater than the total harm done.

Agency response: The DEQ understands and appreciates the concern for unintended impacts to resources due to fire safety issues; however, the authority for safety resides at the local level.

No changes are made to the proposal as a result of this comment.

2. Commenter: Solar Energy Industries Association (SEIA) and Chesapeake Solar and Storage Association (CHESSA) Joint Comments submitted by William G. Giese, Southeast Regional Director, Solar Energy Industries Association

The proposed regulations differ significantly in places from other PBR, most notably the Small Renewable Energy (Solar) Permit by Rule ("PBR") program found in 9VAC15-60. From an implementation standpoint, consistency between similar programs is key, so that developers can utilize the PBR program efficiently across a variety of different development types.

SEIA submitted several comments earlier in May 2021 regarding proposed regulations for the Solar PBR which include references to pollinator scorecards, similar to these proposed regulations. While our comments below regarding this matter point out that this is confined to a definition of a term, we continue to caution the DEQ in including pollinator scorecards as a part of a broader PBR process. While the Joint Parties actively supports agricultural and pollinator friendly solar development, we oppose the mandatory use of Pollinator Scorecards as part of the permitting process. Though promoted as useful to preserving and augmenting existing pollinator habitat and surrounding agriculture, our member companies have increasingly found over the past several years that pollinator scorecards can present a significant barrier to solar deployment. Such scorecards are often vague; do not define important terms such as "pollinator-friendly," "local" or "native" (which can vary even within states, counties and localities); aren't clear about the benefits to pollinator species; tend to exaggerate the potential for improving stormwater runoff; and rarely seek to quantify or take into account the added upfront cost of using pollinator-friendly seed. More broadly, a pollinator-focused approach enshrined by a Scorecard approach fails to consider other types of ecosystem services that a solar project can provide. Such services may include improved soil health as a result of pausing agricultural use for solar production, increased carbon sequestration, reduced erosion, and improved water retention on the site. And a pollinator-focused approach fails to consider whether such plantings are the most appropriate for the project site or the local bio-region. For these reasons, the Joint Parties recommend that pollinator considerations enshrined in the Scorecard and elsewhere be encouraged, but not strictly required as a permit condition. Operators should have the flexibility to improve pollinator habitat at facility sites in consultation with local vegetation specialists, balance pollinator considerations with other environmental improvements such as carbon sequestration and manage O&M costs to the ultimate benefit of ratepayers.

Furthermore, the current proposed rules would require a 100-foot buffer on projects, limiting generation capacity in areas where the grid needs storage the most, and, ironically, limiting the impact that pollinator habitats can have on the surrounding environment. Such a requirement would greatly limit the locational benefit of energy storage, especially in more populated areas of Virginia. Less land is generally available in more populated areas, and the available land is usually smaller relative to viable rural sites. For Virginia to fully benefit from energy storage's flexibility, resiliency, and dispatchability, buffer requirements cannot be this burdensome. In these comments, the Joint Parties recommend an alternative approach that ensures projects securing permits adherence to all pertinent federal, state, and local authorities' regulations rather than imposing blanket buffer requirements without consideration for the location

Agency response: The regulation in format and structure is very similar to the existing solar PBR; however, as the storage permit by rule covers a type of facility that is very different from a solar generating project, there are differences in specific regulatory language. The regulation has been

amended to remove any reference to the pollinator score card and to allow for an appropriate buffer contingent upon local government zoning.

3. Commenter: Solar Energy Industries Association (SEIA) and Chesapeake Solar and Storage Association (CHESSA) Joint Comments submitted by William G. Giese, Southeast Regional Director, Solar Energy Industries Association

Definition of “Begin commercial operation”: Typically, terms that encompass the beginning of commercial operations are defined to be the time when electricity flows to the grid, not when the battery is charged. That may be a preferred approach for purposes of 9VAC15-100-70(C) regarding submittal of post-construction site maps to the DEQ, - 100(D)(1)(b) regarding recordkeeping, and -130(B)(6) regarding the notification of operation of a given project. We suggest that a carve out for equipment testing purposes be placed within this definition.

Agency response: The regulation has been changed to clarify that the testing period prior to discharging electricity to the electrical grid system is not considered commercial operation.

4. Commenter: Solar Energy Industries Association (SEIA) and Chesapeake Solar and Storage Association (CHESSA) Joint Comments submitted by William G. Giese, Southeast Regional Director, Solar Energy Industries Association

Definition of “Disturbance zone”: this term includes two definitions, one of which only applies for purposes of the pollinator scorecard. That definition includes two undefined areas: “open zone” and “screening zones.” These terms are defined in the scorecard, but the definition of “screening zone” in particular is vague.

As a general matter, an energy storage facility is not conducive to a pollinator habitat given the nature of the equipment installed at an energy storage facility in addition to its much smaller footprint on a megawatt per acre standpoint. Furthermore, because the pollinator scorecard is never referenced after these definitions, we believe that it should be removed to avoid confusion. For example, the current PBR regulations regarding Small Renewable Energy Projects (Solar) do not currently require Pollinator Scorecards. Additionally, it is unclear if the mitigation measures in the rule are intended to apply to the facility disturbance zone or to the pollinator zones. We suggest at a minimum that this should be clarified, and the definitions of “open zone” and “screening zones” directly referenced and clarified if possible, within the confines of this regulation.

Agency response: The definition has been changed. Please see response to comment #2.

5. Commenter: Solar Energy Industries Association (SEIA) and Chesapeake Solar and Storage Association (CHESSA) Joint Comments submitted by William G. Giese, Southeast Regional Director, Solar Energy Industries Association

Definition of “Disturbance zone”: in addition to areas highlighted above, the disturbance zone includes “100 feet from the boundary of the directly impacted area.” This requirement, in essence a 100’ setback from the property line, would greatly limit the locational benefit energy storage can provide the grid.

Agency response: The definition has been changed. Please see response to comment #2.

6. Commenter: Solar Energy Industries Association (SEIA) and Chesapeake Solar and Storage Association (CHESSA) Joint Comments submitted by William G. Giese, Southeast Regional Director, Solar Energy Industries Association

The current language – “100 feet from the boundary of the directly impacted area” –should be removed and replaced with “the lesser of either (i) 100 feet or (ii) the distance as outlined and agreed upon with the local authority having jurisdiction”.

Additionally, DEQ should clarify that this definition only applies to the fenced/screened area of the final facility footprint. Erroneous setbacks could impact access roads needed to enter a project area, or the setbacks could limit the viability of a transmission line to the extent one is needed for a project to access the point of interconnection. Additionally, in line with the comment above, all references to a “100 foot buffer” should be removed throughout the document (15-100-70(A), 15-100-70(C)(1), and 15-100-80(B)).

Agency response: The definition has been changed. Please see response to comment #2.

7. Commenter: Solar Energy Industries Association (SEIA) and Chesapeake Solar and Storage Association (CHESSA) Joint Comments submitted by William G. Giese, Southeast Regional Director, Solar Energy Industries Association

Definitions of “Document certification” and “responsible person”: This definition potentially subjects executives to state false statements liability for virtually any error in a PBR filing. This requirement does not currently exist in 9VAC15-60 regarding solar PBR, nor are the Joint Parties aware of similar requirements in other forms of PBR in Virginia for a variety of energy projects. We recommend that the DEQ remove both of these terms for consistency with other PBR regulations. At a minimum, the type of “penalty of law” should be defined. The current statement that a “responsible person” is expected to sign attests that the person is “aware that there may be significant penalties” for violating their certification, but these penalties are not detailed sufficiently within the proposed regulations. Additionally, the categories of “responsible person” could be modified to refer only to persons expected to have actual knowledge of the matters at issue in a certification.

Agency response: This definition is consistent with other permitting regulations. This wording is to ensure that the correct individual(s) are identified that will be responsible for ensuring all appropriate permit provisions are met.

No changes are made to the proposal as a result of this comment.

8. Commenter: Solar Energy Industries Association (SEIA) and Chesapeake Solar and Storage Association (CHESSA) Joint Comments submitted by William G. Giese, Southeast Regional Director, Solar Energy Industries Association

Definition of “Hybrid renewable energy and storage facility”: For subsection (i), is the threshold inclusive of both the solar generation and the battery capacity? Section 9VAC15-100-120(G) addresses this ambiguity, but for clarity we suggest that this language be included in the definition of this term.

Agency response: The definition for “Hybrid renewable energy and storage facility” has been modified to clarify the rated capacity is rated power capacity in AC. The definition also clarifies and that the storage component of a hybrid facility cannot exceed the maximum rated power capacity of the type of energy generating system defined in law.

9. Commenter: Solar Energy Industries Association (SEIA) and Chesapeake Solar and Storage Association (CHESSA) Joint Comments submitted by William G. Giese, Southeast Regional Director, Solar Energy Industries Association

The definitions of “Small renewable energy project” and “Small energy storage facility” have similar ambiguities.

Agency response: The definition for “Small renewable energy project” is defined in § 10.1-1197.5 and cannot be changed. Changes have been made to the definition of “Small energy storage facility.”

10. Commenter: Solar Energy Industries Association (SEIA) and Chesapeake Solar and Storage Association (CHESSA) Joint Comments submitted by William G. Giese, Southeast Regional Director, Solar Energy Industries Association

All definitions refer to “rated capacity,” which refers to the rated energy capacity of the facility (kWh or MWh). Instead, the definition should refer to the rated power capacity of the facility (kW or MW) in AC for units to match the units outlined in the definition of both “Small renewable energy project” and “Small energy storage facility”.

Agency response: Appropriate changes have been made to the proposal.

11. Commenter: Solar Energy Industries Association (SEIA) and Chesapeake Solar and Storage Association (CHESSA) Joint Comments submitted by William G. Giese, Southeast Regional Director, Solar Energy Industries Association

Definition of “Owner”: This definition should not include the reference to “any property interest.” Otherwise, any de minimis owner would be subject to the rule’s public participation and documentation requirements, among others. This should be revised to refer to a single majority owner.

Agency response: The proposal has been changed to reference an individual that has “all or a controlling interest” in a facility.

12. Commenter: Solar Energy Industries Association (SEIA) and Chesapeake Solar and Storage Association (CHESSA) Joint Comments submitted by William G. Giese, Southeast Regional Director, Solar Energy Industries Association

See also 9VAC15-100-30(A)(1)(d): “any” change of “ownership” (an undefined term but presumably would flow from “Owner”) requires a new filing – we recommend that there should be a defined ownership threshold if the definition of “Owner” remains unchanged.

Agency response: This issue is addressed in the new definition of “Owner”

13. Commenter: Solar Energy Industries Association (SEIA) and Chesapeake Solar and Storage Association (CHESSA) Joint Comments submitted by William G. Giese, Southeast Regional Director, Solar Energy Industries Association

Accounting for augmentation: Within the industry, augmentation (adding more batteries as original batteries degrade over time) is critical to an energy storage project's success. It can occur in one of two ways – AC augmentation (project adds inverters and batteries) DC augmentation (project adds batteries behind the same number of inverters). In the case that the project’s fenced/screened area does not change, we recommend DEQ clarify that augmentation would not be considered “construction”, or at a minimum require amendments to the already-secured PBR permit in lieu of securing a second permit. As a specific example, augmentation should be carved out from invalidating a secured permit from the clause in 15-100-30(C)(1)(a).

Agency response: The section has been modified to account for retrofitting an existing electric generating facility with the addition of electric storage. Routine maintenance of either type of facility is not considered a modification or retrofit.

14. Commenter: Solar Energy Industries Association (SEIA) and Chesapeake Solar and Storage Association (CHESSA) Joint Comments submitted by William G. Giese, Southeast Regional Director, Solar Energy Industries Association

9VAC15-100-30(A)(14) and 15-100-90: There is no rationale provided for requiring applicant summary of public comments, which could be voluminous and therefore entail significant cost and administrative burden.

Agency response: This is a requirement of § 10.1-1197.6. B 13 of the Code of Virginia.

No changes are made to the proposal as a result of this comment.

15. Commenter: Solar Energy Industries Association (SEIA) and Chesapeake Solar and Storage Association (CHESSA) Joint Comments submitted by William G. Giese, Southeast Regional Director, Solar Energy Industries Association

9VAC15-100-30(B)(2): see comments above on “Document certification”. We recommend that the DEQ remove this section as well as the term “document certification for the reasons stated above.

Agency response: Please see agency response to item 7.

No changes are made to the proposal as a result of this comment.

16. Commenter: Solar Energy Industries Association (SEIA) and Chesapeake Solar and Storage Association (CHESSA) Joint Comments submitted by William G. Giese, Southeast Regional Director, Solar Energy Industries Association

9VAC15-100-30(C)(2)-(3): Within subsections (2)-(3), it is unclear how long an applicant has to correct deficiencies in an incomplete application. The regulations should clarify whether an applicant has 30 days to correct deficiencies, or whether they just have 30 days from the issuance of an incomplete notification to notify the department that they have corrected those deficiencies.

Agency response: The language indicates that an applicant has 30 days to correct deficiencies and notify the department.

No changes are made to the proposal as a result of this comment.

17. Commenter: Solar Energy Industries Association (SEIA) and Chesapeake Solar and Storage Association (CHESSA) Joint Comments submitted by William G. Giese, Southeast Regional Director, Solar Energy Industries Association

Additionally, certain deficiencies, such as professional certifications, may take longer than 30 days to correct. We recommend that the DEQ extend the correction period to 60 days, rather than 30, to give sufficient time to correct any deficiencies. This is consistent with other PBR regulations governing renewable generating projects.

Agency response: The language proposed for the battery storage regulation is identical to the regulatory language proposed for the Small Renewable Energy Projects (Solar) Permit by Rule 2019 amendments.

No changes are made to the proposal as a result of this comment.

18. Commenter: Solar Energy Industries Association (SEIA) and Chesapeake Solar and Storage Association (CHESSA) Joint Comments submitted by William G. Giese, Southeast Regional Director, Solar Energy Industries Association

9VAC15-100-40(A)(1): Clarify the “or” in sub-section (ii) following “Environmental Review Map Service of known wildlife species and habitat features on the site”. Is the “or” meant to be an “either . . . or” or an “and”?

Agency response: The or means that the applicant can use data identified in (i) –DWR’s Virginia Fish and Wildlife Information Service. The applicant may also choose to use information from (ii) which will also include information from the Center for conservation Biology at the College of William and Mary. The applicant is not required to use both.

No changes are made to the proposal as a result of this comment.

19. Commenter: Solar Energy Industries Association (SEIA) and Chesapeake Solar and Storage Association (CHESSA) Joint Comments submitted by William G. Giese, Southeast Regional Director, Solar Energy Industries Association

9VAC15-100-60: A Small energy storage facility located in a CAPZ is noted as a significant adverse impact in 15-100-50(A)(2); however, unlike the Solar PBR regulations, no mitigation plan is outlined for this specific significant adverse impact in 15-100-60. Similar to Solar PBR regulations, incorporate a CAPZ Payment as a means to mitigate the project's location. Due to energy storage's energy density relative to wind and solar, incorporate a \$/acre payment rate of \$500/acre.

Agency response: Changes have been made to the proposal to remove any references to the CAPZ zone.

20. Commenter: Solar Energy Industries Association (SEIA) and Chesapeake Solar and Storage Association (CHESSA) Joint Comments submitted by William G. Giese, Southeast Regional Director, Solar Energy Industries Association

9VAC15-100-70(A): In addition to earlier comments related to this section regarding the striking of "100 foot buffer", we recommend DEQ add "pursuant to 9VAC15-100-30" to the end of sub-section (v). For energy storage projects with a disturbance zone of 10 acres or less, no mitigation is required; therefore, sub-section (v) only pertains to energy storage projects whose disturbance zone is greater than 10 acres.

Agency response: Changes have been made to the proposal to reflect the comment.

21. Commenter: Solar Energy Industries Association (SEIA) and Chesapeake Solar and Storage Association (CHESSA) Joint Comments submitted by William G. Giese, Southeast Regional Director, Solar Energy Industries Association
9VAC15-100-70(C):

This section appears to be duplicative with 9VAC15-100-110(D)(1) (both d & e). We recommend DEQ move forward with one of these sections as currently written.

Agency response: Section 70 pertains to information submitted for post-construction site maps which will be submitted long after the PBR has been issued. Section 110 pertains to fees that are required at the time of application submittal.

No changes are made to the proposal as a result of this comment.

22. Commenter: Solar Energy Industries Association (SEIA) and Chesapeake Solar and Storage Association (CHESSA) Joint Comments submitted by William G. Giese, Southeast Regional Director, Solar Energy Industries Association

9VAC15-100-100(E)(3): As opposed to other PBR regulations, such as 9VAC15-60, violating a mitigation plan within this regulation, inadvertently or otherwise, results in enforcement actions governed within the regulation. For instance, 9VAC15-60-140 lists 6 different enforcement actions that the department may take if an applicant is in violation of the PBR application. When determining whether a PBR can be terminated, 9VAC15-60-100 (C) (1)-(2) states that the department may terminate a PBR after the department has taken enforcement actions pursuant to the subsequent section. Subsection 2 of that regulation states the following: " 2. After the department has taken enforcement actions pursuant to 9VAC15-60-140, the owner or operator persistently operates the project in significant violation of the project's mitigation plan."

This seems unnecessarily excessive, such that an applicant may be in violation of their mitigation plan unknowingly, in which the department, without any type of notification or enforcement aimed to correct the violation, can unilaterally revoke a PBR. We recommend that this subsection be removed and that the department consider language more consistent with other PBR type regulations.

Agency response: The regulation has been clarified to include a specific enforcement section for battery storage.

23. Commenter: Solar Energy Industries Association (SEIA) and Chesapeake Solar and Storage Association (CHESSA) Joint Comments submitted by William G. Giese, Southeast Regional Director, Solar Energy Industries Association

9VAC15-100-120: Subsection (A) references “combining and satisfying” requirements of 9VAC15-100-30, but it is unclear what this means. For instance, a hybrid application that must “combine and satisfy” requirements may result in significant duplication of documentation and work. We recommend that the department make clear that where some documentation, such as an interconnection agreement, is required by one application it is not required by the other.

Agency response: The DEQ does not intend for an applicant to submit duplicative documents for a hybrid project, and in fact, encourages the combining of specific analysis where appropriate. The applicant can combine analysis requirements under Section 40, mitigation requirements under Section 60, map requirements under Section 70 and the public participation requirements under Section 90 so that some analysis for the hybrid project can be addressed together. However, not all aspects of the requirements may be able to be combined. For example, the air quality analysis for the storage component of a project may be very different than the air quality analysis for the energy generating component. Current language provides flexibility for the applicant to determine which aspects of the application can be combined and which will need to be submitted for each component of a hybrid facility independently.

No changes are made to the proposal as a result of this comment.

24 Commenter: Dominion Energy (DE) Jason Williams

DE supports the premise for a PBR for energy storage and appreciates the time and thoughtfulness DEQ has dedicated to the draft regulation. We are providing comments that we believe will streamline the PBR process and offer potential additional changes that could improve the efficiency and predictability of the PBR process.

Agency response: As the PBR is already a permit by regulation, by definition it is predictable.

25. Commenter: Dominion Energy (DE) Jason Williams

Section 9VAC15-100-20 applies the definition of “disturbance zone” by proposing to require an application process whenever the disturbance zone is greater than 10 acres.

1. Evaluate the implications of including a 100-ft boundary around the area of land disturbance as part of the “disturbance zone.” For example, where the area of land disturbance abuts the property boundary, the additional 100-ft boundary will extend the permitted area beyond the area under the permittee’s control. To fully comply with the PBR and the default 100-ft boundary, the permittee might need to acquire additional easements or property.

2. Remove language referring to the DCR solar site pollinator/bird habitat scorecard.

DE further recommends the removal of the definition of the DCR Virginia Solar Site Pollinator/Bird Habitat Scorecard” form 9VAC15-100-10 as this term is applicable for solar projects and not energy storage facilities.

Agency response: Please see response to comment number #2.

26. Commenter: Dominion Energy (DE) Jason Williams

9VAC15-100-30 A 1 the applicant would submit a “notice of intent “ (NOI) to the department. If an applicant seeks changes for a project that results in an increase in acreage, the proposal would require them to resubmit the NOI. DE recommends removing the requirement to resubmit additional NOI as it is duplicative of the application requirements. The current process under the Solar PBR works well and requires the applicant to characterize the approximate dimensions of the site in the NOI. Later the applicant submits detailed site plans, including any expanded acreage, which are made available for the public review and comment.

Agency response: An increase the size of a facility is important information for the public to be made aware of prior to the permitting of the facility; DEQ does not consider the information and notification to the general public as duplicative, but rather, informative.

No changes are made to the proposal as a result of this comment.

27. Commenter: Dominion Energy (DE) Jason Williams

9VAC15-100-30 A 12 will require that an applicant certify that they have registered, applied for or obtained all necessary permits. DE encourages a rewording to require either 1.0 list all the permits anticipated for the project or 2.0 simply certify that the permittee will apply for all other permit requirements. Typically it is not feasible to obtain or apply for all environmental permits prior to applying for the PBR authorizations. The PBR authorization is one of the more involved, longer lead-time permitting items and often other permits are applied for after PBR application is submitted. In the past, DEQ has worked with applicants to accept the application with a certification reflecting that appropriate environmental permits will be obtained. DE recommends formal modification of the provision.

Agency response: Language has been modified to reflect the intent of the comment.

28. Commenter: Dominion Energy (DE) Jason Williams

Under 9VAC15-100-30 A 15 a fee would be due with the application. DE notes that rendering the fee at this stage is inconsistent with DEQ’s many other permit programs. This inconsistency may cause confusion. However, if DEQ deems payment of the fee with the application to be most efficient, then DE is supportive of the proposal.

Agency response: The permit fee is required at the time of application submittal for all renewable energy PBRs regulated under §10.1-1197.5 et seq. of the Code of Virginia

No changes are made to the proposal as a result of this comment.

29. Commenter: Dominion Energy (DE) Jason Williams

9VAC15-100-40 includes a desktop survey for natural heritage resources, rare, threatened and endangered species and Virginia Natural Landscape Ecological Cores. The regulation requires that the evaluation be conducted within six months of application submittal. DCR could recommend on site surveys that would be submitted with the application.

DE notes that onsite surveys can entail substantial time and cost. When surveys are recommended pursuant to a habitat model where there is no documented occurrence of a species, DE finds it difficult to justify the substantial time and cost.

DE notes that numerous species, particularly plants, are not readily identifiable throughout the year. The field survey window can be as narrow as two months, which can lead to a project delay of 10 months or more. DE could be compelled to pause an important renewable energy project, conduct surveys, and then re-evaluate natural heritage resources and Ecological Cores six months prior to application

submittal. New species information can arise and further compound project delays and costs. This can cause an unending loop of project delays.

To avoid delays and untenable costs of the deployment of renewable energy infrastructure, DE recommends that the result for predicated suitable habitat models should not be the basis for a recommended onsite natural heritage resource survey. We further recommend that the initial evaluation should be allowed twelve months prior to application submittal, and that further evaluation of natural heritage resources should not require after any field surveys have been completed.

DE offers the follow edit:

9VAC15-100-40 3 C

C. The applicant shall conduct a one-time preconstruction desktop survey of natural heritage resources and Virginia Natural Lands Assessment Ecological Cores within the disturbance zone within ~~six~~ twelve months period to the date of the application submittal.

Agency response: The six-month requirement is consistent with the current Small Renewable Energy Projects (Solar) Permit by Rule. A 12-month timeline for an environmental review/assessment is too long as habitats and wildlife are not static and constantly changing.

No changes are made to the proposal as a result of this comment.

30. Commenter: Dominion Energy (DE) Jason Williams

Under 9VAC15-100-50, significant adverse impacts to natural heritage resources would be deemed “likely” whenever Ecological Cores categorized as C1-Outstanding or C2-Very High occur within the proposed project disturbance zone. DE embraces protection of areas of high ecological integrity and implementing sound environmental proactive to protect wildlife. We also have an interest in obtaining defensible, durable permits, based on clear regulatory requirements, to deploy renewable energy infrastructure.

Virginia does not have a consultation or permitting program guiding the evaluation of natural heritage resources, Ecological Cores or wildlife. DE notes that framing the likely significant adverse impacts to natural resources and wildlife in regulation could potentially be used as a basis for imposing additional requirements using a process that has not been the subject of state rulemaking under Virginia’s Administrative process Act. VA Code § § 2.2-4000 et seq. or independent of a permitting program. Specifically, a determination of likely significant adverse impacts could be viewed as an opportunity to impose compensatory mitigation requirements that are not fully contemplated by the Code of Virginia. Importantly, compensatory mitigation may entail substantial financial and compliance responsibilities. DE notes that the Ecological Core designation may be inconsistent with on-the-ground conditions and not synonymous with high ecological value. Ecological Cores are identified using the Virginia Natural Landscape Assessment (VNLA”). The VNLA was last updated in 2017. It is based on the 2011 National Land Cover Database, which can reflect on-the-ground conditions from years prior to 2011. Over a ten-year period of time, it is highly possible that ecological core areas have been fragmented by development. In addition, the Ecological Cores can include areas managed for silviculture, such as planted, homogeneous stands of trees.

For these reasons, if DEQ retains the inclusion of Ecological Cores as a permitting consideration, we recommend that the regulation acknowledge the option to field-verify the ecological integrity designation prior to a finding of significant adverse impacts. This option could increase regulatory certainty and avoid permit conditions that could be potentially cost prohibitive to the installation of new energy storage infrastructure.

Agency response: Changes have been made to the regulation to require permitting considerations for ecological cores to pertain only to hybrid projects.

31. Commenter: Dominion Energy (DE) Jason Williams

9VAC15-100-80 requires the applicant to prepare a plan that details operation parameters, including emergency procedures, contact and application and frequency of herbicides over the life of the project. Some of these details cannot be provided during the time of PBR application. The detailed engineering design cannot be completed and operation and maintenance plans are not developed until further into project construction. DE recommends that an interim operating plan be required with the application, which states the permittee's standardized procedures for emergencies and vegetation management.

Agency response: The PBR is a permit for authorization to construct *and operate*. These parameters must be included in the application documents as the application documents actually constitute the permit.

No changes are made to the proposal as a result of this comment.

32. Commenter: Dominion Energy (DE) Jason Williams

9VAC15-100-100 D requires notification of construction commencement and commencement of commercial operation must be provided within 15 days. This is a tight timeline for milestone dates that shift regularly due to weather and other variables. Thirty days would be more manageable.

Agency response: The regulation has been modified to reflect the 30-day timeframe.

33. Commenter: Dominion Energy (DE) Jason Williams

9VAC15-100-70 requires the submittal of post-construction maps to the department within six months after beginning commercial operation. And under 9VAC15-100-100 D, post-construction maps are required to reflect the project mitigation and avoidance plan. DE notes that efficiency could be gained by aggregating these requirements into on map submittal six months post-construction.

Agency response: It is expected that any post-construction map showing final panel or storage placement would also include mitigation/avoidance areas (if required).

No changes are made to the proposal as a result of this comment.

34. Commenter: Dominion Energy (DE) Jason Williams

9VAC15-100-130 B requires seven forms of documents to the DEQ. This is inconsistent with the Solar PBR, which requires just a letter and the local government certification form. DE is not aware of any issues with this streamlined documentation approach for smaller renewable energy projects. DE recommends that the 9VAC15-100-130 B be modified to align with the Solar PBR to minimize the documentation burden on permittees as well as the document management burden on the DEQ.

Agency response: Most projects permitted under the Small Renewable Energy Projects (Solar) Permit by Rule (Solar PBR) are much larger than 10 acres; whereas, the DEQ has been informed that most stand-alone energy storage facilities, i.e. those not associated with a solar generating facility considered a hybrid facility, will have a foot print smaller than 10 acres. Therefore, these facilities cannot follow the same permitting format as the section 130 projects under the Solar PBR as there would be no documentation required at all – other than local government approval and that would not meet the requirements set forth by the 2020 General Assembly.

No Changes are made to the proposal as a result of this comment.