



Virginia
Regulatory
Town Hall

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Notice of Intended Regulatory Action (NOIRA) Agency Background Document

Agency name	Virginia Soil and Water Conservation Board
Virginia Administrative Code (VAC) citation	Chapters 4 VAC 50-80 and 4 VAC 50-60
Regulation title	Nutrient Trading Certification Regulations
Action title	In accordance with the 2012 Nutrient Trading Act (§ 10.1-603.15:1. et seq.) this action will establish new Nutrient Trading Certification Regulations (4VAC50-80-10 et seq.) that shall govern the certification of certain nutrient credits. The action may also require revisions to the Stormwater Management regulations (4 VAC 50-60) related to nutrient credit use and additional off-site options for construction activities pursuant to § 10.1-603.8:1. Pursuant to §10.1-603.15:2 B 9, the action may also include but not be limited to language that addresses other components of Article 1.1:1 in Chapter 6 of Title 10.1 or Article 1.1 in Chapter 6 of Title 10.1 (the Stormwater Management Act) as deemed necessary. As needed the action may also include the development of necessary forms and may include documents incorporated by reference.
Date this document prepared	July 24, 2012

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 14 (2010) 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.

Upon the Governor's signature, Chapters 748 (HB176 – Delegate Knight) and 808 (SB77 – Senator Watkins) of the 2012 Virginia Acts of Assembly established the Nutrient Trading Act

which requires the Virginia Soil and Water Conservation Board to adopt regulations for the purpose of establishing statewide procedures for the certification by the Board of nutrient credits.

Nonpoint credits established by the Virginia Soil and Water Conservation Board in accordance with the legislation and this regulatory action may include credits generated from agricultural and urban stormwater best management practices, incineration or management of manures, land use conversion, stream or wetlands restoration, shellfish aquaculture, algal harvesting, and other established or innovative methods of nutrient control or removal.

The end result of the Nutrient Trading Certification regulations is to establish a registry of credits as part of an enforceable market-based trading program that will involve the exchange of pollution allocations between sources. Today most programs involve exchanges between different point sources however with the development of these regulations it is anticipated that additional trading avenues such as point source to nonpoint source trades or nonpoint to nonpoint trades may become prevalent.

Such trades will be a valuable component towards meeting reductions addressed in the Chesapeake Bay Watershed Implementation Plan and the Chesapeake Bay Total Maximum Daily Load (TMDL).

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.

The primary basis for this regulatory action under state law is pursuant to the Virginia Nutrient Trading Act (§10.1-603.15:1 et seq. of the Code of Virginia) that was recently enacted as part of Chapters 748 and 808 of the 2012 Virginia Acts of Assembly. Specifically, §10.1-603.15:2 A. requires the Virginia Soil and Water Conservation Board (Board) to:

“adopt regulations for the purpose of establishing statewide procedures for the certification by the Board of nutrient credits other than (i) point source nitrogen and point source phosphorus credits generated by point sources covered by the general permit issued pursuant to §62.1-44.19:14 and (ii) nutrient credits certified by the State Water Control Board and the Department of Environmental Quality pursuant to §62.1-44-19:20”.

Also as part of Chapters 748 and 808 revisions to the Stormwater Management Law, including §10.1-603.8.1, regulatory language may include but not be limited to defining requirements for the authorization of nutrient credit use for compliance with permits for regulated construction activities. The Virginia Stormwater Management Program was created by Chapter 372 of the 2004 Virginia Acts of Assembly (HB1177). Section 10.1-603.2:1 of the Code of Virginia speaks to the powers and duties of the Virginia Soil and Water Conservation Board. Among those powers and duties, the Board:

“...shall permit, regulate, and control stormwater runoff in the Commonwealth. In accordance with the VSMP [Virginia Stormwater Management Program], the Board may issue, deny, revoke, terminate, or amend stormwater permits; adopt regulations; approve and periodically review local stormwater management programs and management programs developed in conjunction with a municipal separate storm sewer permit; enforce the provisions of this article; and otherwise act to ensure the general health, safety and welfare of the citizens of the Commonwealth as well as protect the quality and quantity of state waters from the potential harm of unmanaged stormwater.”

On June 28, 2012, in accordance with Chapters 748 (HB176 – Delegate Knight) and 808 (SB77 – Senator Watkins) of the 2012 Virginia Acts of Assembly and upon or after the July 1, 2012 effective date of the statutes governing this action, the Board authorized the Director of the Department of Conservation and Recreation and the Departmental Regulatory Coordinator to prepare and submit a NOIRA to solicit recommendations regarding the development of new proposed Nutrient Trading Certification Regulations for the Board’s consideration. The Board also authorized the NOIRA to specify that the proposed regulations may also include but not be limited to language that addresses other components of Article 1.1:1 in Chapter 6 of Title 10.1 or Article 1.1 in Chapter 6 of Title 10.1 (the Stormwater Management Act) as deemed necessary. As needed, the action may also include the development of necessary forms and may include documents incorporated by reference.

This authorization extends to, but is not limited to, the drafting and filing of the NOIRA, the establishment and operation of a Regulatory Advisory Panel, the development of the draft proposed regulation and other necessary documents and documentation, as well as the coordination necessary to gain approvals for the NOIRA including those from the Department of Planning and Budget, the Secretary of Natural Resources, the Governor, and the Virginia Registrar of Regulations.

The Board also directs that at least one public hearing shall be held following the publication of the proposed stage of this regulatory action and notice of the hearing will be posted on the Virginia Regulatory Town Hall website and in other appropriate venues. Both oral and written comments may be submitted at that time.

Need

Please detail the specific reasons why the agency has determined that the proposed regulatory action is essential to protect the health, safety, or welfare of citizens. In addition, delineate any potential issues that may need to be addressed as the regulation is developed.

Nutrient trading is a form of exchange (buying & selling) of nutrient reduction credits. These credits have a monetary value that may be paid to the seller for installing Best Management Practices (BMPs) to reduce nitrogen or phosphorous. In general, water quality trading utilizes a market-based approach that allows one source to maintain its regulatory obligations by using pollution reductions created by another source. **As a market-based approach, increased efficiency and cost-effectiveness are achieved by letting the market determine costs.** To

achieve a desired load reduction, trades can take place between point sources (usually wastewater treatment plants), between point and nonpoint sources (a wastewater treatment plant and a farming operation) or between nonpoint sources (such as agriculture and urban stormwater sites or systems).

Virginia has been developing components of a trading program over the last several years and the regulations promulgated pursuant to the NOIRA will further those tools.

Since the passage of House Bill 2862 in the 2005 Session of the General Assembly, significant wastewater facilities have been authorized to engage in trading within each of Virginia's Chesapeake Bay major river basins to achieve compliance with mandated nutrient loading caps prescribed by the State Water Control Board. Nutrient Credit trades between significant point source facilities (municipal wastewater treatment plants and industrial facilities) are governed by the General Virginia Pollutant Discharge Elimination System (VPDES) Watershed Permit for Total Nitrogen and Total Phosphorus Discharges and Nutrient Trading in the Chesapeake Bay Watershed in Virginia (9 VAC 25-820-10) that is authorized by §62.1-44.19:12 – 19 of the Code of Virginia. Complete information regarding the permit can be found at <http://www.deq.virginia.gov/vpdes/nutrienttrade.html>.

The trading program is based on allocations of nitrogen and phosphorus established under the permit. It allows point source to point source trading to comply with load allocations and waste load allocations and allows the use of nonpoint source credits only to offset new or expanding point source facilities. The 2005 legislation also authorized the establishment of the Nutrient Credit Exchange Association, a private non-stock corporation that facilitates trades among its members.

Section 10.1-603.8:1 of the Code of Virginia authorized in 2009 the use of nonpoint source nutrient credits certified by DEQ to meet a portion of the post-construction phosphorus loading requirement of Virginia's stormwater management program in the Chesapeake Bay Watershed. Under current law, perpetual stormwater offsets may be used to meet a portion of the phosphorus loading limitations prescribed under Virginia's stormwater management program.

Virginia's Phase I Watershed Implementation Plan (see: <http://www.deq.virginia.gov/tmdl/baywip.html>), as submitted in December 2010, called for an expansion of the Nutrient Offset and Trading Programs as a tool for introducing additional flexibility and cost effectiveness in the implementation of the practices necessary to achieve the reductions called for in the TMDL.

In the 2011 Session of General Assembly, the House of Delegates and the Senate of Virginia adopted Senate Joint Resolution 334 that directed the Secretary of Natural Resources to undertake a study of the expansion of Virginia's Nutrient Offset and Trading Programs and to provide a report to the 2012 session General Assembly. The resulting report represented the work of a broad-based committee of stakeholders. The report was published as Senate Document 6 (2012). A full record of the agendas, presentations and draft documents of the committee is housed on the Department of Environmental Quality website at: <http://www.deq.virginia.gov/vpdes/NutCrdExStudy.html>.

As a result of the report, legislation was introduced to further advance and refine nutrient trading in the Commonwealth. Chapters 748 (HB176 – Delegate Knight) and 808 (SB77 – Senator Watkins) of the 2012 Virginia Acts of Assembly established the Nutrient Trading Act (§10.1-603.15:1 et seq. of the Code of Virginia). Specifically, §10.1-603.15:2 requires the Virginia Soil and Water Conservation Board (Board) to adopt regulations for the purpose of establishing statewide procedures for the certification by the Board of nutrient credits other than (i) point source nitrogen and point source phosphorus credits generated by point sources covered by the general permit issued pursuant to §62.1-44.19:14 and (ii) nutrient credits certified by the State Water Control Board and the Department of Environmental Quality pursuant to § 62.1-44-19:20. During the promulgation of the regulations, the Board shall consult with the Department of Environmental Quality to avoid duplication and promote consistency where appropriate. The regulations shall be designed in a manner that promotes certainty for credit market participants to the extent possible.

Substance

Please detail any changes that will be proposed. Be sure to define all acronyms. 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.

On June 28, 2012, in accordance with Chapters 748 (HB176 – Delegate Knight) and 808 (SB77 – Senator Watkins) of the 2012 Virginia Acts of Assembly and upon or after the July 1, 2012 effective date of the statutes governing this action, the Board authorized the Director of the Department of Conservation and Recreation and the Departmental Regulatory Coordinator to prepare and submit a NOIRA to solicit recommendations regarding the development of new proposed Nutrient Trading Certification Regulations for the Board’s consideration. The Board also authorized the NOIRA to specify that the proposed regulations may also include but not be limited to language that addresses other components of Article 1.1:1 in Chapter 6 of Title 10.1 or Article 1.1 in Chapter 6 of Title 10.1 (the Stormwater Management Act) as deemed necessary. As needed, the action may also include the development of necessary forms and may include documents incorporated by reference.

Aside from the general regulatory amendments that may be necessary to make to the Stormwater Management regulations, the primary regulatory language will result in the promulgation of a new Chapter under the Virginia Soil and Water Conservation Board. This new Chapter will track regulatory authorities found in the Nutrient Trading Act (§10.1-603.15:1 et seq.).

Specifically, the regulations adopted pursuant to §10.1-603.15:2 shall:

1. Establish procedures for the certification and registration of credits including:
 - a. Certifying credits that may be generated from agricultural and urban stormwater best management practices, use or management of manures, managed turf, land use conversion, stream or wetlands projects, shellfish aquaculture, algal harvesting, and other established or innovative methods of nutrient control or removal, as appropriate;

b. Establishing a process and standards for wetland or stream credits to be converted to nutrient credits. Such process and standards shall only apply to wetland or stream credits established after July 1, 2005, and have not been transferred or used. Under no circumstances shall such credits be used for both wetland or stream credit and nutrient credit purposes;

c. Certifying credits from multiple practices that are bundled as a package by the applicant;

d. Prohibiting the certification of credits generated from activities funded by federal or state water quality grant funds; however, baseline levels may be achieved through the use of such grants;

e. Establishing a timely and efficient review certification process including application requirements, a reasonable application fee schedule not to exceed \$10,000 per application, and review and approval procedures; and

f. Requiring public notification of a proposed nutrient credit-generating facility;

2. Establish credit calculation procedures for all proposed credit-generating practices, including the determination of baselines in accordance with the following:

a. Baselines established for agricultural practices shall be those actions necessary to achieve a level of reduction assigned in the Virginia Chesapeake Bay TMDL Watershed Implementation Plan or approved TMDLs as implemented on the tract, field, or other land area under consideration.

b. Baselines for urban practices from new development and redevelopment shall be in compliance with postconstruction nutrient loading requirements of the Virginia Stormwater Management Program regulations. Baselines for all other existing development shall be at a level necessary to achieve the reductions assigned in the urban sector in the Virginia Chesapeake Bay TMDL Watershed Implementation Plan or approved TMDLs.

c. Baselines for land use conversion shall be based on the pre-conversion land use and the level of reductions assigned in the Virginia Chesapeake Bay TMDL Watershed Implementation Plan or approved TMDLs applicable to that land use.

d. Baselines for other credit-generating practices shall be based on the Virginia Chesapeake Bay TMDL Watershed Implementation Plan or approved TMDLs using the best available scientific and technical information.

e. Unless otherwise established by the Board, for certification within the Chesapeake Bay Watershed a credit-generating practice that involves land use conversion shall represent controls beyond those in place as of July 1, 2005. For other waters for which a TMDL has been approved, the practice must represent controls beyond those in place at the time of TMDL approval.

f. Credit quantities shall be established using the best available scientific and technical information at the time of certification.

g. The Board shall establish baseline dates for all credit-generating practices based on the Virginia Chesapeake Bay TMDL Watershed Implementation Plan or approved TMDLs;

3. Provide certification of credits on an appropriate temporal basis, such as annual, term of years, or perpetual, depending on the nature of the credit-generating practice. A credit shall be certified for a term of at least 12 months;

4. Establish requirements to reasonably assure the generation of the credit depending on the nature of the credit-generating activity and use, such as legal instruments for perpetual credits, operation and maintenance requirements, and associated financial assurance requirements. Financial assurance requirements may include but not be limited to letters of

credit, escrows, surety bonds, insurance, and, where the credits are used or generated by a locality, authority, utility, sanitation district, or permittee operating an MS4 or a point source permitted under Article 4.02 (§ 62.1-44.19:12 et seq.) of Chapter 3.1 of Title 62.1, its existing tax or rate authority;

5. Establish appropriate reporting requirements;

6. Provide for the ability of the Department to inspect or audit for compliance with the requirements of such regulations;

7. Provide that the option to acquire nutrient credits for compliance purposes shall not eliminate any requirement to comply with local water quality requirements;

8. Establish a credit retirement requirement whereby five percent of credits in the Chesapeake Bay Watershed are permanently retired at the time of certification pursuant to this section for the purposes of offsetting growth in unregulated nutrient loads; and

9. Establish such other requirements as the Board deems necessary and appropriate.

C. The Department shall establish and maintain an online Virginia Nutrient Credit Registry of credits as follows:

1. The registry shall include all credits certified pursuant to this article and may include point source nitrogen and point source phosphorus credits generated from point sources covered by the general permit issued pursuant to § 62.1-44.19:14 or nutrient credits certified by the State Water Control Board and the Department of Environmental Quality pursuant to § 62.1-44.19:20 at the option of the owner. No other credits shall be valid for compliance purposes.

2. Registration of credits on the registry shall not preclude or restrict the right of the owner of such credits from transferring the credits on such commercial terms as may be established by and between the owner and the regulated or unregulated party acquiring the credits.

3. The Department shall establish procedures for the listing and tracking of credits on the registry, including but not limited to (i) notification of the availability of new nutrient credits to the locality where the credit-generating practice is implemented at least five business days prior to listing on the registry to provide the locality an opportunity to acquire such credits at fair market value for compliance purposes and (ii) notification that the listing of credits on the registry does not constitute a representation by the Board or the owner that the credits will satisfy the specific regulatory requirements applicable to the prospective user's intended use and that the prospective user is encouraged to contact the Board for technical assistance to identify limitations, if any, applicable to the intended use.

4. The registry shall be publicly accessible without charge.

D. The owner or operator of a credit-generating facility that fails to comply with the provisions of this section shall be subject to the enforcement and penalty provisions of § 10.1-603.15:4.

E. Nutrient credits from stormwater nonpoint nutrient credit-generating facilities in receipt of a Nonpoint Nutrient Offset Authorization for Transfer letter from the Department of Environmental Quality prior to July 1, 2012, shall be considered certified nutrient credits and shall not be subject to further certification requirements or to the credit retirement requirement under subdivision B 8. However, such facilities shall be subject to the other provisions of this article, including registration, inspection, reporting, and enforcement.

Beyond the regulatory specifics outlined in §10.1-603.15:2 above, additional regulatory insight may be found in:

§ 10.1-603.15:3. Nutrient credit use by regulated entities.

§ 10.1-603.15:4. Enforcement and penalties.

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. Also, please describe the process by which the agency has considered or will consider other alternatives for achieving the need in the most cost-effective manner.

The Nutrient Trading Act (§10.1-603.15:1 et seq.) passed by the General Assembly and signed by the Governor in 2012 directs the Virginia Soil and Water Conservation Board to adopt regulations to govern the expansion of Virginia’s Nutrient Offset and Trading Programs. Nutrient offset and trading programs are considered to provide an alternative method of compliance with water quality permits in a cost effective manner and have been strongly supported by the construction industry. An alternative to this action is to not develop regulations to expand Virginia’s Nutrient Offset and Trading Programs thereby not providing alternative means of compliance in a cost effective manner and fail to undertake actions specifically authorized by the General Assembly.

Public participation

Please indicate whether the agency is seeking comments on the intended regulatory action, including 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 hearing is to be held to receive comments on this notice.

Please also indicate, pursuant to your Public Participation Guidelines, whether a Regulatory Advisory Panel or a Negotiated Rulemaking Panel will be used in the development of the proposed regulation. Please state one of the following: 1) a panel will be appointed and the agency’s contact if you’re interested in serving on the panel is _____; 2) a panel will not be used; or 3) public comment is invited as to whether to use a panel to assist in the development of this regulatory proposal.

The Board is seeking comments on this regulatory action, including but not limited to 1) ideas to be considered in the development of this proposal, 2) the costs and benefits of the alternatives stated in this background document or other alternatives and 3) potential impacts of the regulation. The Board is also seeking information on 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) the probable effect of the regulation on affected small businesses, and 3) the description of less intrusive or costly alternatives for achieving the purpose of the regulation.

Anyone wishing to submit comments may do so via the Regulatory Town Hall website, www.townhall.virginia.gov, or by mail to the Regulatory Coordinator at: Virginia Department of Conservation and Recreation, 203 Governor Street, Suite 302, Richmond, Virginia 23219.

Comments may also be emailed to the Regulatory Coordinator at: regcord@dcr.virginia.gov. Comments may also be faxed to the Regulatory Coordinator at: (804) 786-6141. All written comments must include the name and address of the commenter (email addresses would also be appreciated). In order to be considered, comments must be received by midnight on the last day of the public comment period.

The Board further authorizes that following the passage of 30 days from the publication of the Notice of Intended Regulatory Action form, a Regulatory Advisory Panel composed of relevant stakeholders shall be established to make recommendations to the Department and the Board on the development of the Nutrient Trading Certification Regulations and associated stormwater management regulations, and that the Department prepare a draft proposed regulation for the Board's review and consideration. Such action shall include the establishment of a new Chapter in the Virginia Administration Code under the Virginia Soil and Water Conservation Board numbered 4VAC 50-80-10 et seq. as well as include potential amendments to the stormwater management regulations.

Persons interested in participating on the Regulatory Advisory Panel should provide their name, address, telephone number, email address, and the name of the organization they represent to the Regulatory Coordinator for consideration by no later than midnight on the last day of the public comment period.

The Department as authorized by the Board intends to utilize a public participatory approach. 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.

Family impact

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.

It is not anticipated that this regulation will have a direct impact on the institution of the family or family stability. However, improvement of water quality does have positive public health and safety benefits that have an indirect impact on families. The potential exists that, through reduced costs for localities to implement the TMDL utilizing trading mechanisms, families will benefit as taxpayers.