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## Exempt Action: Final Regulation Agency Background Document

<b>Agency name</b>	State Water Control Board
<b>Virginia Administrative Code (VAC) Chapter citation(s)</b>	9 VAC 25-830
<b>VAC Chapter title(s)</b>	Chesapeake Bay Preservation Area Designation and Management Regulations
<b>Action title</b>	Amendment to incorporate coastal resilience and adaptation to sea-level rise and climate change into existing criteria.
<b>Final agency action date</b>	June 29, 2021
<b>Date this document prepared</b>	June 1, 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.*

Chapter 1207 of the 2020 Acts of Assembly amended the Chesapeake Bay Preservation Act (§ 62.1-44.15:72 of the Code of Virginia) and added “coastal resilience and adaptation to sea-level rise and climate change” to the criteria requirements for regulations to be established by the State Water Control Board for use by local governments under the Chesapeake Bay Preservation Act.

The amendments to the Chesapeake Bay Preservation Area Designation and Management Regulations (9VAC25-830) were developed pursuant to the requirements of Chapter 1207 of the 2020 Acts of Assembly. The amendments provide for an assessment of specific climate change impacts on land development activities in certain areas. It also provides for the allowance of specific measures in certain areas to address the impacts of climate change.

## 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."*

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Virginia Code § 62.1-44.15:72 was amended by Chapter 1207 of the 2020 Acts of Assembly. The amendment added "coastal resilience and adaptation to sea-level rise and climate change" to the criteria requirements for regulations to be established by the State Water Control Board for use by local governments under the Chesapeake Bay Preservation Act. The amendment also provided that the State Water Control Board shall promulgate regulations to implement the provision.

## 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.*

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Act or Bay Act: Chesapeake Bay Preservation Act

CBPA: Chesapeake Bay Preservation Area

DEQ: Department of Environmental Quality

IDA: Intensely Developed Areas

Regulation(s): Chesapeake Bay Preservation Area Designation and Management Regulations

RMA: Resource Management Area

RPA: Resource Protection Area

VAC: Virginia Administrative Code

WQIA: Water Quality Impact Assessment

## 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.*

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On June 29, 2021, the State Water Control Board adopted the amendments to the Chesapeake Bay Preservation Area Designation and Management Regulations.

## 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.*

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Virginia Code § 62.1-44.15:69 provides the authority for the State Water Control Board to promulgate regulation under the Chesapeake Bay Preservation Act (Virginia Code § 62.1-44.15:67 et. seq.). Virginia § 62.1-44.15:72 provides that the State Water Control Board shall promulgate regulations that establish criteria for use by local governments in granting, denying, or modifying requests to rezone, subdivide, or use and develop land in these areas.

Virginia Code § 62.1-44.15:72 was amended to add a provision of “coastal resilience and adaptation to sea-level rise and climate change” to the criteria requirements for regulations to be established by the State Water Control Board for use by local governments under the Chesapeake Bay Preservation Act. The amendment also included language that the State Water Control Board adopt regulations to implement the provision.

**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.*

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Virginia Code § 62.1-44.15:72 was amended to add a provision of “coastal resilience and adaptation to sea-level rise and climate change” to the criteria requirements for regulations to be established by the State Water Control Board for use by local governments under the Chesapeake Bay Preservation Act.

The amendment also included language that the State Water Control Board adopt regulations to implement the provision. This regulatory amendment provides the requirements in the criteria necessary to accomplish the statutory change. The amendment also provides for the assessment of impacts related to activity in the RPA and allowance of adaptation measures to address climate change.

In October 2020, The Governor presented the “Virginia Coastal Resilience Master Planning Framework” (Master Planning Framework, or Framework) which outlined the current and significant risk to Virginia from climate change. As noted in the document, Virginia has and will continue to see impacts from climate change. Coastal Virginia has some of the highest relative sea level rise rates in the United States and Virginia has experienced more than 18 inches of relative sea level rise in the past 100 years. Overall, the combination of relative sea level rise, increases in frequency and duration of rainfall events, rising regional water tables, and storm surge from more frequent and severe weather systems will exacerbate flooding in coastal Virginia.

As stated in the Framework, “Virginia’s coastal region faces a serious threat to public safety and economic viability from the various impacts of climate change. Storm surge from tropical storms and hurricanes, sea level rise, nuisance flooding, altered hydrology, and their impacts on poorly planned development are just some of the issues we must address to ensure a resilient, thriving coast for generations to come.”

Additionally, the Master Planning Framework, identified a goal to “[e]ffectively incorporate climate change projections into all of the Commonwealth’s programs addressing coastal zone built and natural infrastructure at risk due to sea level rise and flooding” and one of the identified actions under this goal is amendments to the Act. It also identified a guiding principle to “[r]ecognize the importance of protecting and enhancing green infrastructure like natural coastal barriers and fish and wildlife habitat by prioritizing nature-based solutions.”

**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.*

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The final regulatory amendment provides clarity that climate adaptation measures may be allowed in the Chesapeake Bay Preservation Areas subject to approval by the local government, and in accordance with certain conditions set forth in the Chapter, including the consideration of climate change impacts. This ensures these activities are specifically recognized consistent with identification of other allowable activities, particularly within the Resource Protection Area (RPA). Consistent with the language in the

statutory amendment, the proposed regulatory amendment provides criteria for considering climate change impacts for land development in the RPA, identifies the use of a model or forecast for consideration of impacts in proposed land development projects, and provides the ability for locality to impose conditions on proposed development in light of the impacts. The proposed amendment provides exclusions from the exceptions allowance for activity with the RPA. The proposed amendment also provides for an allowance of activity within the RPA for climate adaptation measures with certain conditions including type of measure and limits on the use of fill. Provisions for living shorelines and ensuring consistency with federal requirements on adaptation measures 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.*

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There are a number of advantages that result from the amendment. Overall, as the statutory criteria requirements change, the amendment provides clarity and specifics utilizing existing provisions for local governments responsible for implementing the program. It provides specific allowances for adaptation measures in the RPA while balancing the water quality importance that the RPA buffer provides. It reconciles measures with other authorities and law, including flood management and wetlands management. While the assessment provided will require additional review by localities and developers, the amendment provides factors for considerations and limits the scope of impacts for assessment. Finally, the amendment is consistent with the Master Planning Framework in its focus on nature-based solutions and addressing climate change impacts in the CBPA regulations.

There is no disadvantage the Commonwealth that will result from the adoption of this final regulation.

**Requirements More Restrictive than Federal**

*List all changes to the information reported on the Agency Background Document submitted for the previous stage regarding any requirement of the regulatory change which is more restrictive than applicable federal requirements. If there are no changes to previously reported information, include a specific statement to that effect.*

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No changes to the previously reported information.

**Agencies, Localities, and Other Entities Particularly Affected**

*List all changes to the information reported on the Agency Background Document submitted for the previous stage regarding any other state agencies, localities, or other entities that are particularly affected by the regulatory change. If there are no changes to previously reported information, include a specific statement to that effect.*

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No changes to the previously reported information.

**Public Comment**

*Summarize all comments received during the public comment period following the publication of the proposed stage, and provide the agency response. Ensure to include all comments submitted: including*

*any received on Town Hall, in a public hearing, or submitted directly to the agency or board. If no comment was received, enter a specific statement to that effect.*

The Department received a total of 313 comments during the comment period. Comments were received from seven localities, two Planning District Commissions, and several organizations or associations. Two groups of comments that were the same or substantially the same in wording were received accounting for 277 of the total comments.

Comments focused on clarity, scope, and application of the climate change assessment including timeframe, model or forecast utilized, scope of impacts to be considered, and additional considerations. Comments also focused on the exceptions provisions particularly related to fill material and the 50 foot seaward buffer; language indicating an expansion of the RPA or local government authority; concerns over the interplay with floodplain management; the specifics of adaptation measures allowed including WQIA requirements; and the lack of a standard regulatory advisory panel.

The Department considered such comments, made changes to the amendments based upon comments, including removal of language regarding additional local government activity on climate change, language indicating an expansion of the RPA, specifics on the model or forecast to be utilized in assessing climate change, specific impacts to be assessed, factors for considering measures or conditions for assessment; specifically identifying the types of allowable adaptation measures; and removal of WQIA exemption requirement.

Additional detail is included in the attached “Comments and Responses on Climate Adaptation Amendment”.

**Detail of Changes Made Since the Previous Stage**

*List all changes made to the text since the previous stage was published in the Virginia Register of Regulations and the rationale for the changes. For example, describe the intent of the language and the expected impact. Describe the difference between existing requirement(s) and/or agency practice(s) and what is being proposed in this regulatory change. Explain the new requirements and what they mean rather than merely quoting the text of the regulation. \* Put an asterisk next to any substantive changes.*

The primary changes were to provide additional definitions, provide specifics on the assessment of climate change for projects in the RPA including the model or forecast, the scope and basis of the impacts assessed and factors for the identification of conditions, alterations, or measures. The allowance for the assessment to be part of a WQIA and explicit language empowering local governments to require those conditions, alterations, or measures. Refinement of the limitations on exceptions were also identified. Additional specifics and conditions on requirements for adaptation measures were inserted including the source of allowable adaptation measures, conditions on the use of fill, recognition of overlapping federal requirements and programs, and the allowance for exempting living shorelines from additional performance criteria requirements including a WQIA. Additional revisions centered on the recognition of interplay between activities in the RPA and the jurisdiction of wetlands authority and removal of unnecessary language in light of other revisions.

<b>Current chapter-section number</b>	<b>New chapter-section number, if applicable</b>	<b>New requirement from previous stage</b>	<b>Updated new requirement since previous stage</b>	<b>Change, intent, rationale, and likely impact of updated requirements</b>
9 VAC 25-830-40		Definition of adaptation measure and nature based solution		Addition of a definition was in response to request to comments and to provide clarity on the recognition and types of

				adaptation measures with the provisions.
	9 VAC 25-830-155(A)		Language regarding not limiting local government authority removed	The language was intended to reflect localities additional activities related to climate change and reflect current authority. However, for clarity and lack of necessity, the language was removed. With revision, Subsection A and B were combined.
	9 VAC 25-830-155(B)		Changes were made to provide specificity including use of models, scope of impacts, factor in the assessment, and ability to incorporation into WQIA.	The intent is to ensure, given the impacts of climate change and sea-level rise particularly in the RPA, that projects properly assess and address these impacts and appropriate measures are utilized.
	9 VAC 25-830-155(C)		Changes were made to provide specifics on allowable adaptation measures, including source and type. Additional changes include adding conditions on the use of fill and ensure consistency with existing flood plain management programs.	The intent is to provide specifics on the allowable adaptation measures through the use of nature-based solutions. Additionally, conditions on the use of fill are provided to allow for its use while still maintaining certain conditions necessary due to its placement in the RPA. Finally, the intent for specific language for floodplain management requirements was added to harmonize these provisions.
	9 VAC 25-830-155(D)		This subsection was added and includes language to ensure the coordination of projects and allowances as they relate to both the amendments and Tidal Wetland Guidelines where the jurisdictional interest of the two programs overlaps.	The intent is to recognize the need for coordination between these programs and projects. It also reconciles ensuring that shoreline management projects are in accordance with Tidal Wetland Guidelines.
	9 VAC 25-830-155(E)			Changes were made to leave to localities the ability to exempt certain

				performance criteria requirements including a WQIA and to reflect the definition of living shoreline.
	9 VAC 25-830-155(F)		Timeline for incorporating requirements moved to provisions on locality programs.	The intent is for the language to mirror other amendments and reside in the incorporation provisions.

**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.*

<b>New chapter-section number</b>	<b>New requirements</b>	<b>Other regulations and law that apply</b>	<b>Intent and likely impact of new requirements</b>
9 VAC 25-830-40	Definition of adaptation measure and nature based solution		Provide clarity and definition of adaptation measures which are allowable with conditions in the RPA and to provide a definition of nature based solution which is tied to the allowance for an adaptation measure.
9 VAC 25-830-155(A)	Localities must adopt changes into ordinances and programs within three years of effective date.	9 VAC 20-830-10 et. seq.	This is consistent with the requirement to incorporate criteria in locality ordinances and programs and provides a timeframe for doing so. The impact will be on localities that implement the program.
9 VAC 25-830-155(B)	Local governments to consider impact of climate change on projects proposed in Resource Protection	9 VAC 20-830-130; 9 VAC 20-830-140; 9 VAC 20-830-150	The intent is to ensure, given the impacts of climate change and sea-level rise particularly in the RPA, that projects properly assess and address potential impacts and identify appropriate adaptation measures for use.
9 VAC 25-830-155(C)	Local governments may allow climate change adaptation and resilience activities in RPA.	9 VAC 20-830-130; 9 VAC 20-830-140; 9 VAC 20-830-150	The intent is to allow climate change adaptation activities to occur within the RPA so long as certain conditions are met, to identify specific adaptation measures including best management practices, and to provide conditions on the use of fill.

New chapter-section number	New requirements	Other regulations and law that apply	Intent and likely impact of new requirements
9 VAC 25-830-155(D)	Activity in CBPA must be consistent with VMRC Tidal Wetland Guidelines and coordinated.	9 VAC 20-830-130; 9 VAC 20-830-140; 9 VAC 20-830-150	The intent is to ensure these projects are reconciled and coordinated where jurisdictional interests overlap.
9 VAC 25-830-155(E)	Allowance for waiving of requirements for living shorelines if conditions are met.	9 VAC 20-830-130; 9 VAC 20-830-140; 9 VAC 20-830-150	The intent is to promote these projects by allowing localities to provide for exemptions from other performance criteria requirements including a WQIA.
9 VAC 25-830-155(F)	Limitation on the need for an exception granted by local governments related to climate change impacts and implementation of adaptation measures.	9 VAC 20-830-130; 9 VAC 20-830-140; 9 VAC 20-830-150	The intent is to ensure an assessment of climate change impacts is conducted and that fill is utilized appropriately.
9 VAC 25-830-190	Localities are given a three year timeframe from regulatory adoption to incorporate these provisions in their existing ordinances and Chesapeake Bay Preservation Act program.		To provide a timeframe for adoption into local government requirements.

### 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.*

As this amendment is a result of a statutory change, the alternative of leaving the regulations unchanged was not considered. Additional specifications for requirements were included as necessary and consistent with the Act and existing regulatory provisions. These provisions apply to land development and use consistently, including individuals and businesses. Provisions were limited to the RPA in lieu of all areas under the Regulations. Additionally, factors were identified in the assessment provision that reflect individual site conditions and projects and an allowance for inclusion of the assessment within existing documenting requirements (WQIA). Conditions were provided to allow the use of fill, under certain conditions, in lieu prohibition. Additional potential relief from requirements were identified for living shoreline projects. The amendments also provide a period of time for localities to incorporation the new requirements into their programs.



### 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.*

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This is no impact on the institution of the family and family stability by this action.