



## **Economic Impact Analysis Virginia Department of Planning and Budget**

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### **9 VAC 25-210 – Virginia Water Protection Permit Program Regulation Department of Environmental Quality June 5, 2015 (amended June 9, 2015)**

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#### **Summary of the Proposed Amendments to Regulation**

The State Water Control Board (Board) proposes to reorganize and amend the Virginia Water Protection Permit Program Regulation. The Board proposes to move all rules regarding surface water withdrawals into one part of this regulation (Part V). The Board also proposes to make many clarifying changes to regulatory text as well as making several substantive changes to the rules that permittees must follow. The substantive changes that the Board proposes include:

1. Adding a definition of public water supply safe yield to clarify for affected entities that safe yield for water supply means something different than the Virginia Department of Health’s definition for safe yield which deals with the maximum capacity of water removing equipment,
2. Removing the distinction between minor surface water withdrawal and major surface water withdrawal,
3. Aligning the hierarchy of acceptable mitigation practices in this regulation as closely as practical to the hierarchy adopted in 2008 by the U.S. Army Corps of Engineers,
4. Changing the rule for compensation of open water impacts so that compensation is discretionary and not required at all “for permanent or temporary impacts open waters that are identified as palustrine<sup>1</sup> by the Cowardin classification method except when such

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<sup>1</sup> According to the United States Department of the Interior’s Fish and Wildlife Service information found at [http://www.na.fs.fed.us/spfo/pubs/n\\_resource/wetlands/wetlands3\\_classification.htm](http://www.na.fs.fed.us/spfo/pubs/n_resource/wetlands/wetlands3_classification.htm) , “(t)he palustrine system includes freshwater wetlands not associated with stream channels, wetlands associated with lakes of less than 20 acres and other wetlands bounded by uplands. Most forested wetlands are in the palustrine system.”

open waters are located in areas of karst topography<sup>2</sup> in Virginia and are formed by the natural solution of limestone”,

5. Changing requirements for the assessment of functions lost so that applicants who are proposing to impact 1.01 acres or more of wetlands only have to complete an assessment if they plan to vary from the compensatory mitigation ratios<sup>3</sup> in the regulation,
6. Allowing administrative continuances of expiring permits for permittees who have submitted a timely and complete application for permit reissuance,
7. Adding a requirement that entities that are claiming their activities are excluded from permitting requirements demonstrate to the satisfaction of the Board that they qualify for the exclusions claimed,
8. Changing the requirement that permittees complete all agreed upon compensatory wetlands building and submit a record of the title instrument that will preserve the mitigation to the Department of Environmental Quality (DEQ) within 120 days of the issuance of the permit to only requiring that this work be done and a title instrument recorded with DEQ prior to breaking ground on any activities covered by the permit,
9. Changing the time frame for approval of in-lieu fee programs from every five years to every 10 years and
10. Requiring that all project location (mapping) information submitted to the Board as part of a permit application be in geographic information system (GIS) format but also allowing DEQ to waive this format requirement on a case by case basis.

Although it is not a specific change that needs to be analyzed in this proposed regulation, it is very important to note that this regulation underpins four other general permit regulations which expire August 1, 2016. If this proposed regulation does not become effective, and the four general permit regulations are not renewed before that date, affected permittees may

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<sup>2</sup> According to information from the Virginia Department of Conservation and Recreation found at [http://www.dcr.virginia.gov/environmental\\_education/underground.shtml](http://www.dcr.virginia.gov/environmental_education/underground.shtml) , Karst topography is land area that includes sinkholes, springs, sinking streams and caves. This landscape features underground streams and aquifers that supply the wells and springs communities use for drinking water.

<sup>3</sup> Compensatory mitigation ratios in the regulation are 2:1 for forest, 1.5:1 for scrub-scrub and 1:1 for emergent or higher.

experience considerable disruption in their projects and incur considerable costs on account of their permits expiring along with the general permit regulations.

## **Result of Analysis**

Benefits likely outweigh costs for most proposed changes. For one proposed change, costs will likely outweigh benefits.

## **Estimated Economic Impact**

Most of the changes that the Board is proposing for this regulation are either to consolidate all of the surface water withdrawal rules into one part (Part V) of the regulation (so that they are easier to find) or to modify language to eliminate confusion about what the rules are. For instance, the wording of rules for tidal surface water withdrawal have, according to Board staff, caused confusion about permitting requirements for some individuals. The Board proposes to slightly reword these rules but does not propose to change the rules themselves in any substantive way. Affected entities are very unlikely to incur extra costs on account of changes such as these, but will benefit from the increased clarity of the regulatory text.

Currently, the Board regulates surface water withdrawal but the Virginia Department of Health (VDH) regulates the equipment that permittees use to withdraw water. As a consequence of this, permittees can become confused because the differing regulations have differing meanings for the same words. To alleviate this confusion, the Board proposes to add a definition for “public water supply safe yield” to make it clear that the Board is referring to how much water it is safe to withdraw from a given surface water source when they use the term safe yield rather than referring to, as VDH does when using the term safe yield, the maximum capacity of equipment to process the withdrawn water safely. No affected entity is likely to incur costs on account of this change. Interested parties who have occasion to read by the Board’s and VDH’s regulations are likely to benefit from this clarification.

During the 2007 revision of this regulation, the Board attempted to set up a simplified application and a streamlined process for minor surface water withdrawals so that entities completing minor projects would incur fewer costs. In subsequent practice, however, Board staff discovered that they needed approximately the same information to evaluate a minor surface water withdrawal as they needed to evaluate a major surface water withdrawal. This has led to situations where filing a streamlined application for minor water withdrawal cause delays and

greater costs for applicants as Board staff had to contact them repeatedly to obtain information that would have been readily available on the longer, non-streamlined application. The Board now proposes to eliminate the process for application for minor surface water withdrawal and instead require all applicants to fill out the same application and provide the same information to the Board. Board staff estimates that this will save applicants who would currently use the streamlined application between four and eight hours of a consultant's time at \$200 per hour. Board staff also reports that this change will save Board staff time because they will be able to analyze applications as they first come in rather than having to contact the applicant, sometime multiple times, to obtain further information that the Board must have.

Prior to 2008, the Board's hierarchy of acceptable compensatory mitigation practices matched the hierarchy enforced by the U.S. Army Corps of Engineers fairly closely. In 2008, however, the Corp of Engineers adopted new rules that, according to Board staff, essentially flipped the hierarchy of mitigation practices on the federal level. This change meant that some permit applicants who need both federal and state permits may incur extra costs associated with the federal and state hierarchies being very different from each other. These costs may be associated with the applicant having to complete both federal and state mitigation priorities or they may be associated with the time spent and costs incurred appealing one or both of the compensation requirements. The Board now proposes to amend its compensatory mitigation hierarchy to align it as closely as possible with the federal hierarchy. This change will minimize any extra associated costs that might be incurred by applicants. Board staff reports that it will not, however, eliminate these costs completely in all cases because the Board and the Army Corps of Engineers will still sometimes differ in the mitigation practice that they order. Nonetheless, affected applicants will benefit greatly from the aligning of the hierarchy in this regulation to that used by the federal government.

Currently, all permit holders whose activities cause open water impacts must engage in compensatory mitigation. Board staff reports that the current regulation already allows for Department of Environmental Quality (DEQ) discretion to vary from this rule, but also reports that advisory groups that met to discuss this regulation recommended that the Board formalize exemptions from this rule in situations where more mitigation was being required than necessary to protect Virginia's surface water. The Board now proposes to not require compensatory mitigation "for permanent or temporary impacts open waters that are identified as palustrine by

the Cowardin classification method except when such open waters are located in areas of karst topography in Virginia and are formed by the natural solution of limestone.” This change will benefit permittees in the Commonwealth as it will decrease their mitigation costs.

Current regulation requires that permit holders who propose to impact more than one acre of wetlands provide an assessment of functions that will be lost on account of their proposed activity. The Board now proposes to amend this requirement so that an assessment will only need to be done if the permittee wants to vary from the compensatory mitigation ratios in the regulation. For instance, a permittee that proposes to impact two acres of forest wetlands would only need to pay for an assessment if he wanted to provide less compensatory mitigation than the 2:1 ratio (two acres of wetlands built or restored for every acre disturbed or destroyed) but would not have to pay for an assessment if he followed that ratio. This change will benefit permittees as they will not have to pay for an assessment independently of the assessment made by the Board that the default appropriate level of mitigation are the ratios in the regulation. Board staff reports that permittee assessments can cost between \$500 and \$1,500 each.

Current regulation requires permittees who want to have their permits reissued by the Board to submit a complete application in a timeframe set by the Board but does not address extraordinary situations that might arise which would delay Board staff in evaluating those applications before the end date of the permit requested to be reissued. Because of this, some permittees may suffer a permit lapse that could possibly stop them from working on a project. The Board proposes to add an administrative continuance to this regulation so that Board staff can extend the expiration date of an existing permit so long as they have a completed application. This change will benefit permittees as it will eliminate the possibility of permitted work having to be stopped on account of an expiring permit even though the permit holder did everything he was supposed to in order to get the permit reissued in a timely fashion.

Current regulation contains numerous exclusions for activity that does not need to be permitted by the Board under this regulation. Board staff reports, however, that enforcement staff has many enforcement actions that start because individuals did not get permits that they were actually required to get because they thought that their activity was excluded. The Board now proposes to require that individuals who want to claim an exclusion demonstrate to the Board that the exclusion claimed is appropriate. Board staff reports that costs for this amendment will

be minimal since staff will be working with affected individuals to both minimize those costs and to also minimize any need for enforcement against those individuals. The benefits of this change likely outweigh its costs.

Currently, permittees must complete compensatory mitigation wetlands creation and submit a record of the title instrument (deed restriction, etc) that will preserve the mitigation to DEQ within 120 days of the issuance of a permit. This has led to situations where permittees incurred costs for either completing compensatory wetlands building or incurred costs for modifying their permits when their plans to engage in activities covered by the permit either were eliminated or were greatly delayed. For example, someone who planned to build a housing development might incur costs for mitigation required by their permit within 120 days of the issuing of their permit even if their plans to build are delayed for an extended time or if they never build the development at all. The Board now proposes to amend this regulation to allow permit holders to complete their compensatory mitigation and submit their records to DEQ before they break ground on their project rather than within 120 days. This will benefit permittees as they will not incur costs for mitigation as soon or at all if they never engage in the permitted activities.

Current regulation requires organizations that run in-lieu fee compensatory mitigation programs to be re-approved by the Board every five years but allows the Board to remove approval at any time if the approved organization fails to follow Board rules. The Board proposes to only require program re-approval every ten years but will retain the ability to remove approval mid-cycle if that becomes necessary because the approved organization is failing to follow rules or doing a shoddy job. This change is unlikely to cause any entity to incur costs and is likely just as protective of the environment as the current rule is. Both Board staff and any approved organizations will benefit from their re-approval paperwork and costs only occurring half as often.

Currently, permit applicants are required to provide specific and detailed project location (mapping) information but the format that the information must be in is not currently specified. Board staff reports that, in order to support agency tracking initiatives, help support the goals and objectives identified by the Virginia Geographic Information Network and better evaluate compensatory mitigation proposals, the Board proposes to require that such information be

provided in geographic information system (GIS) format. Board staff reports that the vast majority of permit applicants, including the 90% of applicants who hire a consultant to compile and submit permit application, already have access to GIS software (although only about 50% of applications are submitted with GIS format location information) and that several free drawing/mapping tools are available. Board staff further reports that conservation organizations have urged the Board to make this change so that they can more easily access permit application information that is subject to request under the Freedom of Information Act (FOIA).

Nonetheless, this change is likely to create a significant barrier for the dozen or so affected small permit applicants each year who do not currently have access to GIS software and who will either face a likely steep learning curve to utilize free GIS software or else will incur costs for easier to use, paid-for software or for hiring a consultant at \$300-\$500 per 3-4 hour time unit. Board staff reports that the Board will have the power to exempt applicants from this requirement but that the Board would likely only exempt a subset of the applicants who currently do not use GIS software. Because the applicants who are most likely to be affected by this requirement are the least likely to be able to easily absorb the costs of it, and because the Board's intent to offer exemptions indicates that not all applications need to be consistent, costs likely outweigh benefits for this proposed change.

## **Businesses and Entities Affected**

Board staff reports that these proposed regulatory amendments will affect any entity whose activities would require a permit because those activities will affect surface waters. Such activities may include expansion of existing buildings, facilities or related appurtenances, new construction or changes to operational practices. The Board processes approximately 400 general permits and approximately 40 individual permits per year. Board staff reports that about 40% of those permits are obtained by the Virginia Department of Transportation. Small businesses will be affected by these proposed changes but Board staff does not have an estimate of how many permits per year are obtained by small businesses.

## **Localities Particularly Affected**

No locality will be particularly affected by this proposed regulation.

## **Projected Impact on Employment**

The GIS format requirement in the proposed regulation may lead to an increase in the utilization of permit consultants.

## **Effects on the Use and Value of Private Property**

The GIS format requirement in the proposed regulation may increase the cost of developing private property.

## **Small Businesses: Costs and Other Effects**

Some small businesses will likely be impacted by these proposed regulatory changes although the number of such entities is unknown. Some small businesses may incur time or money costs on account of being newly required to submit mapping information in GIS format.

## **Small Businesses: Alternative Method that Minimizes Adverse Impact**

Given that the costs of requiring mapping information in GIS format will fall disproportionately on small permit applicants, including small business applicants, the Board may wish to eliminate this proposed requirement and allow applicants to submit mapping information as they do now.

## **Real Estate Development Costs**

The GIS format requirement in the proposed regulation may increase the real estate development costs for some small permit applicants.

## **Legal Mandate**

**General:** The Department of Planning and Budget (DPB) has analyzed the economic impact of this proposed regulation in accordance with § 2.2-4007.04 of the Code of Virginia and Executive Order Number 17 (2014). Section 2.2-4007.04 requires that such economic impact analyses determine the public benefits and costs of the proposed amendments. Further the report should include but not be limited to:

- the projected number of businesses or other entities to whom the proposed regulation would apply,
- the identity of any localities and types of businesses or other entities particularly affected,
- the projected number of persons and employment positions to be affected,
- the projected costs to affected businesses or entities to implement or comply with the regulation, and
- the impact on the use and value of private property.



**Small Businesses:** If the proposed regulation will have an adverse effect on small businesses, § 2.2-4007.04 requires that such economic impact analyses include:

- an identification and estimate of the number of small businesses subject to the proposed regulation,
- the projected reporting, recordkeeping, and other administrative costs required for small businesses to comply with the proposed regulation, including the type of professional skills necessary for preparing required reports and other documents,
- a statement of the probable effect of the proposed regulation on affected small businesses, and
- a description of any less intrusive or less costly alternative methods of achieving the purpose of the proposed regulation.

Additionally, pursuant to § 2.2-4007.1, if there is a finding that a proposed regulation may have an adverse impact on small business, the Joint Commission on Administrative Rules (JCAR) is notified at the time the proposed regulation is submitted to the *Virginia Register of Regulations* for publication. This analysis shall represent DPB's best estimate for the purposes of public review and comment on the proposed regulation.

AMH

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