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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	4 VAC 50 - 60
Regulation title	Virginia Stormwater Management Program (VSMP) Permit Regulations
Action title	Establish water quality design criteria for new development activities within the Chesapeake Bay Watershed that are consistent with the pollutant loadings called for in the Virginia TMDL Implementation Plan.
Date this document prepared	December 10, 2009

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 36 (2006) 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.

On December 9, 2009, the Virginia Soil and Water Conservation Board adopted final regulations related to the Virginia Stormwater Management Program (VSMP) Permit regulations. These final regulations included the adoption of water quality criteria for discharges of stormwater from construction activities and were the result of a four-year regulatory process that focused extensively on water quality issues. During the regulatory process, the Board considered the establishment of criteria for discharges within the Chesapeake Bay Watershed, and had proposed a 0.28 pounds per acre per year phosphorus standard. However, prior to the finalization of the regulations, EPA released new draft basin-wide target loads for nitrogen and phosphorus for basin-jurisdictions to meet the states' Bay dissolved oxygen water quality standards in the Chesapeake Bay and its tidal tributaries as part of the development of the Chesapeake Bay Total Maximum Daily Load (TMDL). This was based on the output of a new Chesapeake Bay model. These recently released EPA numbers and model results will continue to be refined, with final information expected to be made available to Virginia and the other affected states sometime in 2010.

The Board and Department of Conservation and Recreation recognized that the new data suggested that the 0.28 pounds per acre per year phosphorus standard that was under consideration represented, at present, a greater pollutant reduction level than might be needed to be achieved by regulated construction activities. Desiring to ensure that water quality requirements are based on the best science available, on December 9, 2009, the Board adopted final regulations with an effective date of July 1, 2010 that did not adopt the 0.28 standard for the Bay Watershed but instead included a 0.45 pounds per acre per year statewide phosphorus standard. Following adoption of the regulations, the Board also authorized and directed the Department of Conservation and Recreation to initiate a new regulatory action to establish water quality design criteria for new development activities within the Chesapeake Bay Watershed that are consistent with the pollutant loadings called for in the EPA approved Virginia TMDL Implementation Plan for the Chesapeake Bay Nutrient and Sediment TMDL and to consider compliance methodologies and mechanisms associated with any new design criteria. The Board made it clear that the new regulatory process include the possibility that the new EPA information and Virginia Bay Implementation Plan could lead to the retention of the 0.45 design standard if that is justified.

Legal basis

Please identify the state and/or federal legal authority to promulgate this proposed regulation, including (1) the most relevant law and/or regulation, including Code of Virginia citation and General Assembly chapter number(s), if applicable, and (2) promulgating entity, i.e., agency, board, or person. Describe the legal authority and the extent to which the authority is mandatory or discretionary.

The Virginia Stormwater Management Program was created by Chapter 372 of the 2004 Virginia Acts of Assembly (HB1177). This action transferred the responsibility for the permitting programs for Municipal Separate Storm Sewers (MS4s) and construction activities from the State Water Control Board and DEQ to the Virginia Soil and Water Conservation Board and DCR and provided the Board with authority to adopt regulations that specify minimum technical criteria for stormwater management programs in Virginia 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. This federally-authorized program is administered in accordance with requirements set forth in the federal Clean Water Act (33 USC § 1251 et seq.) as well as the Virginia Stormwater Management Act (§10.1-603.1 et seq.).

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.”

Section 10.1-603.4 also provides additional authority and guidance to the Board in the development of regulations, including authority to develop criteria to control nonpoint source pollution and to establish statewide standards for stormwater management from land disturbing activities.

§10.1-603.4. Development of regulations.

The Board is authorized to adopt regulations that specify minimum technical criteria and administrative procedures for stormwater management programs in Virginia. The regulations shall:

- 2. Establish minimum design criteria for measures to control nonpoint source pollution and localized flooding, and incorporate the stormwater management regulations adopted pursuant to the Virginia Erosion and Sediment Control Law (§ 10.1-560 et seq.), as they relate to the prevention of stream channel erosion. These criteria shall be periodically modified as required in order to reflect current engineering methods;*
- 6. Establish statewide standards for stormwater management from land disturbing activities of one acre or greater, except as specified otherwise within this article, and allow for the consolidation in the permit of a comprehensive approach to addressing stormwater management and erosion and sediment control, consistent with the provisions of the Erosion and Sediment Control Law (§ 10.1-560 et seq.) and this article. However, such standards shall also apply to land disturbing activity exceeding an area of 2500 square feet in all areas of the jurisdictions designated as subject to the Chesapeake Bay Preservation Area Designation and Management Regulations (9 VAC 10-20 et seq.) adopted pursuant to the Chesapeake Bay Preservation Act (§ 10.1-2100 et seq.);*
- 7. Require that stormwater management programs maintain after-development runoff rate of flow and characteristics that replicate, as nearly as practicable, the existing predevelopment runoff characteristics and site hydrology, or improve upon the contributing share of the existing predevelopment runoff characteristics and site hydrology if stream channel erosion or localized flooding is an existing predevelopment condition...;*
- 8. Encourage low impact development designs, regional and watershed approaches, and nonstructural means for controlling stormwater;*
- 9. Promote the reclamation and reuse of stormwater for uses other than potable water in order to protect state waters and the public health and to minimize the direct discharge of pollutants into state waters; and*
- 11. Provide for the evaluation and potential inclusion of emerging or innovative stormwater control technologies that may prove effective in reducing nonpoint source pollution.*

Also, requirements set forth in the federal Clean Water Act (33 USC § 1251 et seq.), formerly referred to as the Federal Water Pollution Control Act or Federal Water Pollution Control Act Amendments of 1972, Public Law 92-500, as amended by Public Law 95-217, Public Law 95-576, Public Law 96-483, and Public Law 97-117, or any subsequent revisions thereto, and its attendant regulations set forth in 40 CFR Parts 122, 123, 124 and 125 requires states to establish a permitting program for the management of stormwater for municipal separate storm sewer systems (MS4s) and construction activities disturbing greater than or equal to an acre.

The EPA has advised the Commonwealth that the Virginia Stormwater Management Program (VSMP) Permit Regulations and the associated water quality standards “are the operative requirements of the Construction and MS4 permit programs, and as such, EPA has a responsibility to review these regulations to ensure that they are protective of water quality. If these regulations are not protective of water quality, the Commonwealth cannot rely upon them to meet federal water quality requirements in NPDES [National Pollutant Discharge Elimination System] permits. This would require the Commonwealth or the permitting agency to develop site specific permits which is a time and resource consuming endeavor.”

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.

As noted above, the Board adopted final regulations that included a 0.45 pounds per acre per year statewide phosphorus standard. The Board did not adopt the 0.28 standard for the Chesapeake Bay Watershed that had been based on the Tributary Strategies due to further developing science on necessary reduction levels expected to be finalized in 2010 as a part of the Chesapeake Bay TMDL process. However, in a December 2, 2009 letter from EPA Administrator Lisa P. Jackson to Governor Kaine, EPA indicated that if the Bay jurisdictions’ Watershed Implementation Plans that will be developed to meet nutrient and sediment limits in a Chesapeake Bay Total Maximum Daily Load do not support EPA’s expectations, then EPA “is committed to taking specific actions, such as objecting to permits and withholding grant funds.” Furthermore, Administrator Jackson had stated that “[w]ithout significant reductions in pollutants delivered to the Chesapeake Bay system from stormwater runoff, the burden for reaching the load limits would shift more heavily to other sources including agriculture, point sources, air sources and others.” Her letter continues by stating that if the regulations are not stringent enough to support the underlying water quality requirements, “the Commonwealth may be required to develop and issue site-specific (individual) permits that would be subject to EPA review and approval.”

The Code of Virginia specifies that the Virginia Soil and Water Conservation Board shall permit, regulate, and control stormwater runoff in the Commonwealth. As noted above, the Code requires the Board to “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”. Degraded water quality in the Chesapeake Bay and many of the Commonwealth’s streams and tributaries is well documented and is clearly an issue of concern to the citizens of the Commonwealth.

The January 2005 *Chesapeake Bay Nutrient and Sediment Reduction Tributary Strategy for the Commonwealth of Virginia* outlined Virginia’s commitment to improving local water quality and the water quality and living resources of the Chesapeake Bay through the reduction of nutrients (nitrogen and phosphorus) and sediment. The report noted that “[t]he Chesapeake Bay and many of the rivers and streams that flow into it are degraded. Excess amounts of nitrogen, phosphorus

and sediment flow into the bay and its tributaries from the land, from the air, from wastewater treatment plants and from industrial facilities. These nutrients and sediment foul our waters and harm the finfish, shellfish, aquatic plants and other organisms that make up the Bay's fragile ecosystem. We also suffer economically from an impaired Chesapeake Bay. The Bay's living resources and its economic potential are compromised by poor water quality. Commercial and recreational fisheries will benefit from cleaner water as will the broader economy."

The 2008 Virginia Water Quality Assessment designates a significant portion of the Commonwealth's rivers, lakes, streams, and the Chesapeake Bay as impaired because they do not meet water quality standards. The water quality standards are established to protect drinking water supplies, aquatic life, production of edible and marketable fish and shellfish, wildlife, and recreational uses of state waters, including swimming, fishing and shellfish harvesting.

A 2007 EPA Office of the Inspector General report entitled "Development Growth Outpacing Progress in Watershed Efforts to Restore the Chesapeake Bay; Report No.2007-P-00031; September 10, 2007, noted that "new development is increasing nutrient and sediment loads at rates faster than loads are being reduced from developed lands". The Chesapeake Bay Program Office estimated that impervious surfaces in the Bay watershed grew significantly – by 41 percent – in the 1990s. Meanwhile, the population increased by only 8 percent. Because progress in reducing loads is being offset by increasing loads from new development, greater reductions will be needed to meet the Bay goals as well as to address stream impairments across the Commonwealth. The Chesapeake Bay Program Office estimated that loads from developed and developing lands increased while loads from agriculture and wastewater facilities decreased. Currently, 32% of the phosphorus loads and 28% of the sediment loads to the Bay Watershed are attributed to urban and suburban sources, making it one of the most significant contributors to the Bay's poor health.

It is clear from the EPA studies and correspondence and studies of Virginia's water quality that, in accordance with the Board's authority under the Stormwater Management Act, the Virginia Stormwater Management Program (VSMP) Permit Regulations must contain a scientifically-based water quality design criteria for stormwater that will be consistent with the pollutant loadings called for in the EPA-approved Virginia TMDL Implementation Plan for the Chesapeake Bay Nutrient and Sediment TMDL.

Substance

Please detail any changes that will be proposed. 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 December 9, 2009, the Virginia Soil and Water Conservation Board directed the Department of Conservation and Recreation to initiate a new regulatory action that may result in amending the Virginia Stormwater Management Program (VSMP) Permit Regulations to establish water quality design criteria for new development activities within the Chesapeake Bay Watershed portion of Virginia that are consistent with the pollutant loadings called for in the EPA approved

Virginia TMDL Implementation Plan for the Chesapeake Bay Nutrient and Sediment TMDL and to consider compliance methodologies and mechanisms associated with any new design criteria. Such methodologies and mechanisms may include, but are not limited to, provisions affecting urban development areas and off-site options such as a state buy down provision.

This action will address the required Chesapeake Bay TMDL reductions and provide for the protection and improvement of water quality that will assist with the restoration and enhancement of the living resources of Virginia's Chesapeake Bay and tributaries.

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.

No viable alternatives to this action have been identified. As noted previously, in a December 2, 2009 letter from the EPA Administrator Lisa P. Jackson to Governor Kaine, EPA indicated that if the Bay jurisdictions' Watershed Implementation Plans, to meet nutrient and sediment limits in a Chesapeake Bay Total Maximum Daily Load, do not support EPA's expectations, then the agency "is committed to taking specific actions, such as objecting to permits and withholding grant funds." Furthermore, Administrator Jackson had stated that "[w]ithout significant reductions in pollutants delivered to the Chesapeake Bay system from stormwater runoff, the burden for reaching the load limits would shift more heavily to other sources including agriculture, point sources, air sources and others." Her letter continues by stating that if the regulations are not stringent enough to support the underlying water quality requirements, "the Commonwealth may be required to develop and issue site-specific (individual) permits that would be subject to EPA review and approval."

The Board is additionally obligated to develop strategies that will 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. Degraded water quality in the Chesapeake Bay and many of the Commonwealth's streams and tributaries is well-documented and is clearly an issue of concern to the citizens of the Commonwealth. The protection of the Commonwealth's water resources requires the attention of the Commonwealth and its regulatory and voluntary programs. Additionally, although urban runoff from stormwater does not constitute the biggest load, it is the only significant source that is increasing, while at the same time the impacts of two other major sources, agriculture and wastewater treatment are declining.

Public participation

Please indicate the agency is seeking comments on the intended regulatory action, to include 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.

The Board is seeking comments on the intended regulatory action to amend the Virginia Stormwater Management Program (VSMP) Permit Regulations (Chapter 60), including but not limited to: (1) ideas to assist in the development of a 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 regarding 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) probable effect of the regulation on affected small businesses, and (3) description of less intrusive or costly alternative methods of achieving the purpose of the regulation.

Anyone wishing to submit written comments pertaining to this notice may do so via the Regulatory Townhall website, or by mail, or fax.

- Comments sent by mail pertaining to this notice should be sent to the Regulatory Coordinator at: Virginia Department of Conservation and Recreation, 203 Governor Street, Suite 302, Richmond, Virginia 23219.
- Electronic comments also may be submitted on the Virginia Regulatory Townhall at www.townhall.virginia.gov.
- Or comments may be faxed to the Regulatory Coordinator at: (804) 786-6141.

All written comments must include the name and address of the commenter. In order to be considered, comments must be received by 5:00 p.m. on the date established as the close of the comment period. For additional information regarding this regulatory action you may contact Mr. David Dowling at (804) 786-2291.

Copies of the regulations adopted by the Board on December 9 that will be under consideration for amendment may be found at <http://www.dcr.virginia.gov/lr2d.shtml>.

A public hearing will not be held.

Participatory approach

Please indicate, to the extent known, if advisers (e.g., ad hoc advisory committees, technical advisory committees) will be involved in the development of the proposed regulation. Indicate that 1) the agency is not using the participatory approach in the development of the proposal because the agency has authorized proceeding without using the participatory approach; 2) the agency is using the participatory approach in the development of the proposal; or 3) the agency is inviting comment on whether to use the participatory approach to assist the agency in the development of a proposal.

The Board has directed the use of the participatory approach to develop the proposal. The Board authorized the Director of the Department of Conservation and Recreation to establish a Regulatory Advisory Panel to make recommendations to the Director and the Board on potential regulatory changes and authorized the Department to prepare draft proposed regulations for the Board's review and consideration.

Persons interested in participating on the advisory panel should provide their name, address, phone number, e-mail address, and the name of the organization that they represent in writing to the agency contact person by no later than 5:00 p.m. on the last day of the comment period.

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, the improvement of water quality and control of water quantity does have public health and safety benefits that have an indirect impact on families.