



## Fast Track Proposed Regulation Agency Background Document

<b>Agency name</b>	Virginia Soil and Water Conservation Board
<b>Virginia Administrative Code (VAC) citation</b>	4 VAC 50-20
<b>Regulation title</b>	Virginia Impounding Structure Regulations
<b>Action title</b>	Amendment to Virginia Impounding Structure Regulations to grandfather certain dams from changes made to the Regulations in 2008 for one permit cycle
<b>Date this document prepared</b>	October 7, 2010

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*.

### Brief summary

*Please provide a brief summary (no more than 2 short paragraphs) of the proposed new regulation, proposed amendments to the existing regulation, or the regulation proposed to be repealed. Alert the reader to all substantive matters or changes.*

The proposed regulation would grandfather certain dams from requirements of the Virginia Soil and Water Conservation Board's (Board) Virginia Impounding Structure Regulations that first came into effect in 2008 for one six-year permit cycle. These dams had been issued Construction Permits (permits to build a new dam) or Alteration Permits (permits to make repairs and upgrades to existing dams) under a previous version of the Regulations that was effective prior to September 26, 2008. In some cases, these dams later completed construction fully in compliance with the conditions of their permits, only for it to be found that they may not be fully compliant with all changes made to the Regulations effective September 26, 2008. Under the current regulations, there is no provision for grandfathering these dams or providing an extended timeframe for compliance. The proposed regulation would specify that these dams will be issued Regular Operation and Maintenance Certificates, and thus be found in compliance with the Regulations, for one full six year permit cycle. After this time, they would need to meet the standards applied to other dams throughout the Commonwealth.

**Statement of final agency action**

*Please 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.*

This action to amend and adopt final regulation 4 VAC 50-20-125, Impounding Structure Regulations was unanimously approved by the Virginia Soil and Water Conservation Board on July 15, 2010.

**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 General Assembly chapter number(s), if applicable, and (2) promulgating entity, i.e., the agency, board, or person. Describe the scope of the legal authority and the extent to which the authority is mandatory or discretionary.*

The Virginia Dam Safety Act (§10.1-604 through §10.1-613 of the Code of Virginia) ensures public safety through the proper and safe design, construction, operation, and maintenance of impounding structures in the Commonwealth. This is accomplished through the effective administration of the Virginia Dam Safety Program (Program). Authority for the Program rests with the Virginia Soil and Water Conservation Board (Board) and it is administered on behalf of the Board by the Department of Conservation and Recreation's Division of Dam Safety and Floodplain Management. The Program focuses on enhancing public safety through bringing all impounding structures of regulated size under Regular Operation and Maintenance Certificates. Pursuant to §10.1-605, the Board is directed to promulgate regulations for impounding structures:

*§10.1-605 The Board shall promulgate regulations to ensure that impounding structures in the Commonwealth are properly and safely constructed, maintained and operated.*

Further, the Board reserves the sole right to promulgate regulations:

*§10.1-605.1. Delegation of powers and duties. - The Board may delegate to the Director or his designee any of the powers and duties vested in the Board by this article, except the adoption and promulgation of regulations or the issuance of certificates. Delegation shall not remove from the Board authority to enforce the provisions of this article.*

The determination to provide an extended timeframe for compliance with the Board's amendments to the Regulations effective September 26, 2008 for certain dams is discretionary under this authority.

**Purpose**

*Please explain the need for the new or amended regulation. Describe the rationale or justification of the proposed regulatory action. Detail the specific reasons the regulation is essential to protect the health, safety or welfare of citizens. Discuss the goals of the proposal and the problems the proposal is intended to solve.*

This amendment to 4VAC50-20-125 is necessary to allow additional time for compliance for certain dam owners who were issued valid Construction or Alteration Permits by the Board under the requirements of the Regulations as they existed prior to September 26, 2008. These dam owners have invested significant sums of money in pursuit of the conditions of these permits and have proceeded to upgrade their dams in order to achieve compliance with their requirements. Now, due to changes to the Regulations effective September 26, 2008, these dams are now no longer fully compliant with all regulatory requirements of the Virginia Dam Safety Program despite their full compliance with all permits and conditions issued by the Board.

This regulatory change would allow these dam owners to be considered compliant with the Regulations for the first full permit cycle following the completion of their upgrades, and would then require them to meet the same standards that are applicable to all other regulated dams following this time. This will provide an extended timeframe for compliance for these owners to have additional necessary work completed to fully meet the current regulations. In some cases, this may involve a need for dam break inundation zone mapping and other engineering work; in others, additional spillway upgrades may be needed. Requiring all of these conditions to be met immediately would impose a very significant financial burden on these dam owners at a time when they have just completed a very significant investment in their dams.

### Rationale for using fast track process

*Please explain the rationale for using the fast track process in promulgating this regulation. Why do you expect this rulemaking to be noncontroversial?*

*Please note: If an objection to the use of the fast-track process is received within the 30-day public comment period from 10 or more persons, any member of the applicable standing committee of either house of the General Assembly or of the Joint Commission on Administrative Rules, the agency shall (i) file notice of the objections with the Registrar of Regulations for publication in the Virginia Register, and (ii) proceed with the normal promulgation process with the initial publication of the fast-track regulation serving as the Notice of Intended Regulatory Action.*

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This rulemaking is expected to be noncontroversial as it simply provides an extended timeframe for compliance with additional requirements of the Regulations that became effective on September 26, 2008. This extended timeframe will apply only to a very select number of dams, believed to be approximately 14 across the Commonwealth. These dams still meet all requirements of the Regulations that were effective prior to that time, and will be brought into full compliance with all amendments to the Regulations following the completion of one permit cycle. This amendment is intended to prevent an unreasonable burden from being placed upon these dam owners, who have recently completed significant investments in their dams in a good faith effort to comply with the past requirements imposed by the Board.

### Substance

*Please briefly identify and explain the new substantive provisions, the substantive changes to existing sections, or both where appropriate. (Provide more detail about these changes in the "Detail of changes" section.)*

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The existing 4VAC50-20-125 provides an extended timeframe for compliance with spillway design flood requirements of the Regulations for dams which were compliant with the requirements of a previous version of the Regulations and were under Regular Operation and Maintenance Certificate as of September 26, 2008. It contains no provision allowing for any extended compliance timeframe for dams that were under Construction or Alteration Permits as of the September 26, 2008 date.

The proposed amended section would include a new subsection E, which would allow dams that were issued Construction or Alteration Permits by the Board under the Regulations that were effective prior to September 26, 2008 to be considered compliant with the Regulations for one permit cycle following their completion of all conditions of these permits and any accompanying Conditional Operation and Maintenance Certificates. This will allow these dam owners additional time to come into compliance with new regulatory requirements.

### Issues

*Please identify the issues associated with the proposed regulatory action, 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, please indicate.*

The primary advantage of this regulatory action for owners of affected dams is the provision of an extended timeframe for compliance with the amendments made to the Regulations in 2008. This will allow for increased flexibility in preparing for upgrades and will avoid a situation where a second upgrade is needed immediately following an upgrade also undertaken pursuant to direction from the Board. The primary disadvantage of this regulatory action will be to downstream property owners, roadway users, and residents, in that these dams will not be fully upgraded to meet all regulatory requirements until following the completion of one six-year permit cycle. However, even in the absence of this regulatory action, it is likely that the affected dams would fall under Conditional Operation and Maintenance Certificates, in which case a compliance schedule would likewise be set and further upgrades would take place over a determined period of time.

### Requirements more restrictive than federal

*Please identify and describe any requirement of the proposal which is more restrictive than applicable federal requirements. Include a rationale for the need for the more restrictive requirements. If there are no applicable federal requirements or no requirements that exceed applicable federal requirements, include a statement to that effect.*

There are no federal requirements that are applicable to this regulatory action.

### Localities particularly affected

*Please identify any locality particularly affected by the proposed regulation. Locality particularly affected means any locality which bears any identified disproportionate material impact which would not be experienced by other localities.*

No dams owned by local governments are included in those believed to be affected by this regulatory amendment. Therefore, it is not believed that any locality will be particularly impacted by this regulation.

**Regulatory flexibility analysis**

*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) the establishment of less stringent compliance or reporting requirements; 2) the establishment of less stringent schedules or deadlines for compliance or reporting requirements; 3) the consolidation or simplification of compliance or reporting requirements; 4) the establishment of 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 proposed regulation.*

This regulatory amendment does provide for a less stringent compliance schedule for specified dam owners, some of which may be small businesses. Alternatively, small businesses may also be located downstream of these dams and would be affected should one of these dams fail.

**Economic impact**

*Please identify the anticipated economic impact of the proposed new regulations or amendments to the existing regulation. When describing a particular economic impact, please specify which new requirement or change in requirement creates the anticipated economic impact.*

<p><b>Projected cost to the state to implement and enforce the proposed regulation, including (a) fund source / fund detail, and (b) a delineation of one-time versus on-going expenditures</b></p>	<p>No cost is anticipated to the state’s Dam Safety Program as a result of this regulatory amendment. As two of the dams that would be benefitted by this amendment are owned by the Virginia Department of Game and Inland Fisheries, this regulatory amendment could have a positive impact on the Commonwealth by providing an extended timeframe for compliance.</p>	
<p><b>Projected cost of the new regulations or changes to existing regulations on localities.</b></p>	<p>No cost is anticipated to local governments as a result of this regulatory amendment.</p>	
<p><b>Description of the individuals, businesses or other entities likely to be affected by the new regulations or changes to existing regulations.</b></p>	<p>Public and private dam owners would be positively impacted by the regulatory amendment through a provision of an extended timeframe for compliance with additional requirements of the Regulations put in place in 2008. Downstream residents and property owners would be negatively impacted in that these dams would not meet all requirements of the current Regulations; however, these dams</p>	

	<p>would meet all requirements of the Regulations as they existed prior to the adoption of the 2008 amendments and would need to become fully compliant following the completion of their first full six year permit cycle. In the absence of this amendment, these dams are not likely to be upgraded immediately, but are likely to be placed under Conditional Operation and Maintenance Certificates for upgrades over time. Thus, this amendment is not anticipated to greatly affect the protection that is afforded to those downstream over the long term.</p>	
<p><b>Agency’s best estimate of the number of such entities that will be affected. Please include an estimate of the number of small businesses affected.</b> Small business means a business entity, including its affiliates, that (i) is independently owned and operated and (ii) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million.</p>	<p>Approximately 14 dams across the Commonwealth would be affected by this amendment. Several of these dam owners may be small businesses. Small businesses that are located downstream of these dams may also be impacted should one of these dams fail.</p>	
<p><b>All projected costs of the new regulations or changes to existing regulations for affected individuals, businesses, or other entities. Please be specific and include all costs. Be sure to include the projected reporting, recordkeeping, and other administrative costs required for compliance by small businesses. Specify any costs related to the development of real estate for commercial or residential purposes that are a consequence of the proposed regulatory changes or new regulations.</b></p>	<p>No costs are anticipated to result from the amendment. Dam repair costs will be deferred for those dam owners affected by this regulatory amendment.</p>	
<p><b>Beneficial impact the regulation is designed to produce.</b></p>	<p>The amendment is expected to have the beneficial impact of allowing dam owners who have in good faith upgraded their dams in accordance with conditions set by the Board, an additional permit cycle to bring those dams into full compliance with all requirements of the Regulations.</p>	

**Alternatives**

*Please describe any viable alternatives to the proposal considered and the rationale used by the agency to select the least burdensome or intrusive alternative that meets the essential purpose of the action. Also, include discussion of less intrusive or less costly alternatives for small businesses, as defined in §2.2-4007.1 of the Code of Virginia, of achieving the purpose of the regulation.*

The primary alternative to this action is to leave the current regulations in place as written, which would result in the dams that are the subject of this regulatory action being found noncompliant with the requirements of the Regulations despite their having met all conditions imposed upon them by the Board at the time of permit issuance. This alternative is not believed beneficial, as it is unlikely that these dam owners would be able to immediately make further upgrades to their dams after having recently undertaken significant actions in response to the Board’s direction.

A secondary alternative to this action would be to create a grandfathering provision that would operate to prevent these dams from ever being held to the new regulatory standards. This would create a separate class of dams that would be exempted from new safety requirements. This alternative was also not selected due to the need for all dams to meet required standards and the fact that, over time, there will no longer be a rational reason for treating these dams differently from all others in the Commonwealth's inventory of dams.

The alternative chosen, which will provide these dams with an additional six-year permit cycle before being held to additional requirements of the Regulations that became effective on September 26, 2008, is believed to strike a balance between reasonable recognition of the great efforts undertaken by these dam owners to date and the long term need to have all of the Commonwealth's dams in compliance with safety standards.

**Family impact**

*Please assess the 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 final regulation will have a direct impact on the institution of the family or family stability.

**Detail of changes**

*Please list all changes that are being proposed and the consequences of the proposed changes. If the proposed regulation is a new chapter, describe the intent of the language and the expected impact in each section. Please describe the difference between the requirements of the new provisions and the current practice or if applicable, the requirements of other existing regulations in place.*

*If the proposed regulation is intended to replace an emergency regulation, please list separately (1) all provisions of the new regulation or changes to existing regulations between the pre-emergency regulation and the proposed regulation, and (2) only changes made since the publication of the emergency regulation.*

For changes to existing regulations, use this chart:

<b>Current section number</b>	<b>Proposed new section number, if applicable</b>	<b>Current requirement</b>	<b>Proposed change and rationale</b>
4VAC50-20-125		This section provides an extended timeframe for compliance with spillway design flood requirements	The proposed amended section would include a new subsection E, which would allow dams that were issued Construction or Alteration Permits by the Board under the

		<p>of the Regulations for dams which were compliant with the requirements of a previous version of the Regulations and were under Regular Operation and Maintenance Certificate as of September 26, 2008. It contains no provision allowing for any extended compliance timeframe for dams that were under Construction or Alteration Permits as of the September 26, 2008 date.</p>	<p>Regulations that were effective prior to September 26, 2008 to be considered compliant with the Regulations for one permit cycle following their completion of all conditions of these permits and any accompanying Conditional Operation and Maintenance Certificates. This will allow these dam owners additional time to come into compliance with new regulatory requirements that did not exist at the time that their permits were issued.</p>
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