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## Periodic Review and Small Business Impact Review Report of Findings

Agency name	State Water Control Board
Virginia Administrative Code (VAC) Chapter citation(s)	9VAC25-210
VAC Chapter title(s)	Virginia Water Protection Permit Regulation
Date this document prepared	November 5, 2020

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

## Acronyms and Definitions

*Define all acronyms used in this Report, and any technical terms that are not also defined in the "Definitions" section of the regulation.*

BMPs- Best Management Practices  
CWA- Clean Water Act  
DEQ- Department of Environmental Quality  
EPA- Environmental Protection Agency  
JPA- Joint Permit Application  
NWP 12- Nationwide Permit 12  
VWP- Virginia Water Protection  
WQC- Water Quality Criteria  
WQS- Water Quality Standards

## Legal Basis

*Identify (1) the promulgating agency, 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 agency to regulate this specific subject or program, as well as a reference to the agency's overall regulatory authority.*

Section 62.1-44.15(10) of the Code of Virginia authorizes the State Water Control Board to "adopt such regulations as it deems necessary to enforce the general water quality management program of the

Board in all or part of the Commonwealth." The Virginia Water Resources and Wetlands Protection Program (Article 2.2 of Chapter 3.1 of the Code of Virginia) establishes requirements related to wetlands. Section 62.1-44.15:20 of the Code of Virginia authorizes the Board to issue Virginia Water Protection Permits and § 62.1-44.15:21 of the Code of Virginia directs the Board to develop General Virginia Water Protection Permits.

### Alternatives to Regulation

*Describe any viable alternatives for achieving the purpose of the regulation that were considered as part of the periodic review. Include an explanation of why such alternatives were rejected and why this regulation is the least burdensome alternative available for achieving its purpose.*

State law directs the State Water Control Board to issue Virginia Water Protection (VWP) permits, after providing an opportunity for public comment, if it has determined that the proposed activity is consistent with the provisions of the Clean Water Act and the State Water Control Law and will protect instream beneficial uses. This regulation establishes the process for determining if projects meet the requirements to obtain a permit. No viable alternatives were identified that achieve the purpose of this regulation that are consistent with state law. This regulation is the least burdensome alternative available that meets the requirements of state law.

### Public Comment

*Summarize all comments received during the public comment period following the publication of the Notice of Periodic Review, and provide the agency response. Be sure to include all comments submitted: including those received on Town Hall, in a public hearing, or submitted directly to the agency. Indicate if an informal advisory group was formed for purposes of assisting in the periodic review.*

An informal advisory group was not formed to assist with the periodic review. The following comments were submitted collectively on the periodic review of this regulation and the periodic review of 9VAC25-660, 9VAC25-670, 9VAC25-680, and 9VAC25-690.

Commenter	Comment	Agency response
Mark Williams, Luck Companies	Does not believe that any changes are necessary, but if changes are being considered, would like to be notified and also to be considered for any technical committees.	The agency is not revising the regulation at this time. The commenter is encouraged to register to receive notifications from the Virginia Regulatory Town Hall ( <a href="https://www.townhall.virginia.gov/">https://www.townhall.virginia.gov/</a> ) concerning any future actions related to this regulation. Requests for volunteers for advisory groups are announced through the Virginia Regulatory Town Hall website.
David Sligh, Wild Virginia <sup>1</sup>	Requests Department of Environmental Quality (DEQ) to begin a rulemaking process to develop and adopt changes	With the recent changes to the federal regulations governing state water quality certification reviews under Section 401 of the CWA, Virginia's regulations are currently

<sup>1</sup> Comments submitted by David Sligh were submitted on behalf of the following organizations: Bonnie Law, Chair, Preserve Franklin County; Nancy Stoner, President, Potomac Riverkeeper Network; Cynthia Munley, Coordinator, Preserve Salem; Freeda Cathcart, Executive Director, The Rural Project; Jennifer Cole, Executive Director, Clean Fairfax; Phil Irwin, Vice President, Rappahannock League for Environmental Protection; Russell Chisholm, Co-chair, Preserve Our Water, Heritage, Rights; and Donna Pitt, Coordinator, Preserve Giles County.

	<p>designed to better protect state waters through the VWP program. Virginia needs to account for recent changes in the federal regulations governing state water quality certification reviews under section 401 of the Clean Water Act (CWA). Virginia has the power and duty to fill gaps created by the Environmental Protection Agency's rule changes by protecting our waters fully through the VWP program requirements in situations where issuance of a VWP permit serves as the Water Quality Criteria (WQC) for federally-licensed or -permitted projects.</p>	<p>more stringent than the federal regulations. Virginia is not currently revising our regulations in response to changes in federal law, but may consider amendments in the future.</p>
<p>David Sligh, Wild Virginia</p>	<p>Commenter believes that activities permitted by the DEQ under the VWP have not, in some cases, been regulated in a way that will protect existing high quality state waters, safeguarded the clean waters of the Commonwealth from pollution, or prevented any increase in pollution of state waters. Regulatory actions have not ensured that state water quality standards will be met. This is due to deficiencies in the language of the regulations, or DEQ's failure to interpret the regulations in a protective manner.</p>	<p>Virginia's regulations are currently more stringent than the federal regulations and Virginia is not currently revising our regulations in response to changes in federal law, but may consider amendments in the future.</p>
<p>David Sligh, Wild Virginia</p>	<p>Commenter believes that analysis such as examining results from past projects where utilities have been constructed in Virginia in accordance with Nationwide Permit (NWP) 12 or to examine impacts in other jurisdictions where similar conditions exist should be conducted before determining if a NWP 12 could be protective of Virginia waters and meet all Water Quality Standards (WQS). This would be in lieu of the current requirement of DEQ only requiring implementation of certain best management practices to protect Virginia waters and meet WQS. Implementation of technology based limits must be the first step in controlling pollution sources, but if any evidence indicates that the generally-accepted technologies may not be adequate to meet</p>	<p>The Army Corps of Engineers is the issuer of NWP 12, not DEQ. The 2017 NWP 12 and the VWP permit have substantially the same requirements for linear projects. The Corps does not regulate upland impacts. The Clean Water Act Section 401 certification process allows Virginia DEQ to provide input on a federal action with regards to water quality. The Commonwealth reserves its right to require application for a permit or a certificate or otherwise take action on any specific project that could otherwise be covered under a NWP when it determines on a case-by-case basis that concerns for water quality and the aquatic environment so indicate, or where required by Virginia regulations and law. The regulation allows for the board to require the permittee to follow a program of biological or chemical toxics monitoring to ensure compliance with water quality standards. (9VAC25-210-110 C 1.). No change is needed to the regulation.</p>

	WQS, then DEQ has the duty to take the next step to compare likely levels of pollutants released to levels that will exceed the WQS.	
David Sligh, Wild Virginia	Other aspects of pipeline work to make a water body crossing must also be addressed to make a valid finding that WQS will be upheld, (possible impacts on state waters from blasting through bedrock, changes in bed and bank cause patterns of in-channel erosion and sediment transport.)	<p>This periodic review is on the Virginia Water Protection Permit which is one of many regulatory programs that pipeline projects may be subject to. DEQ has required developers of pipeline projects to provide detailed plans to assess whether construction activities will adversely affect water quality during construction and to ensure that water quality is maintained into the future. Those regulatory requirements protect water quality across the range of pipeline activities, not just temporary construction impacts to streams and wetlands.</p> <p>The types of additional information pipeline developers were required to provide relate to environmental concerns such as karst geologic features, steep slopes, public water supplies and areas prone to rockslides. The submission of this information assists the agency with applying conditions to assure compliance with WQS. The regulation also allows for DEQ to request additional information based on the project. No change is needed to the regulation.</p>
David Sligh, Wild Virginia	Efficiencies with which Best Management Practices (BMPs) can prevent pollution impacts are extremely variable and cannot be assumed to be adequate for the entire state. Commenter believes DEQ needs to take the additional step of considering the need for water quality-based controls.	<p>BMPs are steps that are taken to minimize impacts from projects. The Virginia Stream Restoration &amp; Stabilization Best Management Practices Guide is published by the Virginia Department of Conservation and Recreation and provides guidance on 1) Bank Protection; 2) Bank Stabilization; 3) Grade Control; 4) Flow Deflection/Concentration; and 5) Water Control Construction Measures. These measures, when implemented, prevent or reduce pollution of surface waters. The VWP regulation allows the VWP permit to require the use of BMPs to control or abate the discharge of pollutants. These BMPs are adaptable to different conditions and sites throughout the Commonwealth. Additionally the regulation allows for the board to require the permittee to follow a program of biological or chemical toxics monitoring to ensure compliance with water quality standards. (9VAC25-210-110 C 1.). No change is needed to the regulation.</p>
David Sligh, Wild Virginia	Commenter states they believe the regulation already requires impact analysis to be conducted and states the regulation should be strengthened to explicitly require	The Code of Virginia authorizes the State Water Control Board to issue general permits under the Virginia Water Protection Permit Program, but these are not permit-by-rule

	<p>the impact analysis for all general permits and WQCs.</p>	<p>actions. Therefore, review is regularly conducted when required by regulations. The regulation (9VAC25-210-210) currently allows for the board to request "plans, specifications, and other pertinent information as may be necessary to determine the effect of an applicant's discharge on the quality of state waters or (ii) such other information as may be necessary to accomplish the purposes of this chapter." The board examines this information to make decisions on the need for permits. No changes are needed to the regulation.</p>
<p>David Sligh, Wild Virginia</p>	<p>The current VWP regulation expressly and improperly limits the scope of the review of projects that include more than one waterbody crossing. The definition of "single and complete project" found in 9VAC25-210-10 allows multiple crossings of the same water body at separate and distinct locations to be considered a "single and complete project". The part of the definition of "single and complete project" that mirrors the Army Corp of Engineer regulations that deem each separate and distant crossing to be a separate project in the 404 review cannot ensure that the objectives of the Water Control Law and the CWA, or the requirements of the WQS regulations will be met.</p>	<p>The VWP and the Army Corp of Engineer regulations do address multiple crossings of a water body differently; however, both regulations do evaluate the crossings of water bodies, and the impacts of crossings are addressed in both regulations. Virginia's regulation allows for multiple crossings to be included as a single project, allowing for a permit to cover multiple crossings instead of the issuance of multiple permits for multiple crossings. All crossings, whether grouped into a single permit coverage or permitted individually, are evaluated to ensure that the objective of the State Water Control Law, the CWA, or the WQS regulations are met. No change is needed to the regulation.</p>
<p>David Sligh, Wild Virginia</p>	<p>Minimum level of substantive review must be conducted for all projects. Parties wishing to be covered by General VWP permits or general WQS may be required to submit information to document their intent to operate under the general permit or certification. DEQ must be required to examine the information submitted and make a documented analysis and finding that the project is or is not qualified to proceed under the general authorization. There will be occasions when it is necessary for DEQ to require an individual application. This type of procedure must be explicitly required in the regulations.</p>	<p>For the General Permit regulations 9VAC25-660, 9VAC25-670, 9VAC25-680, and 9VAC25-690, § 62.1-44.15:21 F. of the Code of Virginia states "Within 15 days of receipt of a general permit coverage application, the Board shall review the application for completeness and either accept the application or request additional specific information from the applicant. Provided the application is not administratively withdrawn, the Board shall, within 45 days of receipt of a complete application, deny, approve, or approve with conditions any application for coverage under a general permit within 45 days of receipt of a complete preconstruction application." Information concerning general permit application is reviewed by staff to verify the activity is eligible for coverage under the general permit, or if a permitting exclusion applies. If the project is not eligible for a general permit, an individual permit may be warranted, or the applicant may change</p>

		<p>the project proposal in such a way as to be eligible for general permit coverage. The timeframe for the agency conducting the review is specified in statute. The specific procedures for staff review of these applications is addressed through the issuance of guidance documents that detail the process for reviewing applications. If a project does meet the requirements of the general permit, DEQ issues a coverage letter, informing the applicant that they may proceed with their project in accordance with the conditions set by the coverage letter, the general permit, and the general permit regulation. No change is needed to the regulation.</p>
<p>David Sligh, Wild Virginia</p>	<p>Scope of VWP permit reviews must cover all potential impacts. EPA's new rule for implementation of the CWA section 401 narrows the scope of activities that a state may address through a WQC. Virginia has the authority under State Water Control Law to continue to address the entire range of activities that may impact our waters and must make sure that the VWP regulations clarify that (t)his wider focus and scope of review is not only allowed, but is required of DEQ.</p>	<p>The VWP regulation includes general procedures and requirements for the issuance of Virginia Water Protection permits for activities that cause a discharge to surface waters and for which a federal Section 401 permit is required in order to effectuate the proper and comprehensive protection of such waters. The commenter is correct that the State Water Control Law addresses a larger range of impacts to state waters; however, this regulation focuses on requirements specific to obtaining a VWP permit. Other regulations adopted by the Board and other agency programs address other potential environmental impacts of the project. No change is needed to the regulation.</p>
<p>David Sligh, Wild Virginia</p>	<p>WQC and VWP applications must be denied where they are incomplete. The State must approve or deny a request for certification within a reasonable period, not to exceed one year. Virginia should track the deadlines that the pertinent federal agencies apply and if the applicant has failed to provide adequate information before the deadline passes, officially deny the request. DEQ should be required by the regulation to have a strict procedure to document the pertinent dates and to act within the necessary time periods.</p>	<p>Section § 62.1-44.15:21 E. of the Code of Virginia states "Within 15 days of receipt of an individual permit application, the Board shall review the application for completeness and either accept the application or request additional specific information from the applicant. Provided the application is not administratively withdrawn, the Board shall, within 120 days of receipt of a complete application, issue the permit, issue the permit with conditions, deny the permit, or decide to conduct a public meeting or hearing." 9VAC25-210- 80 D states "An incomplete permit application may be administratively withdrawn from processing by the board for failure to provide the required information after 60 days from the date of the latest written information request made by the board." Dates additional information is requested concerning permit applications is tracked using the agency's Comprehensive Data Management System. An agency process already exists outside of the</p>

		<p>regulation to track applications received by the agency and no change is needed to the regulation.</p> <p>For the General Permit regulations (VAC25-660, 9VAC25-670, 9VAC25-680, and 9VAC25-690, § 62.1-44.15:21 F. of the Code of Virginia states "Within 15 days of receipt of a general permit coverage application, the Board shall review the application for completeness and either accept the application or request additional specific information from the applicant. Provided the application is not administratively withdrawn, the Board shall, within 45 days of receipt of a complete application, deny, approve, or approve with conditions any application for coverage under a general permit within 45 days of receipt of a complete preconstruction application." Information concerning general permit application is tracked using the agency's Comprehensive Data Management System- (CEDS) and VWP general permit applications are reviewed and acted upon as required by state law. No change is needed to the regulation.</p>
<p>David Sligh, Wild Virginia</p>	<p>Commenter states WQC are not limited by other state statutes or regulations. In the case of pipelines, DEQ has asserted that it and the Board were limited in making certain decisions in relation to the WQC/VWP by other regulatory measures. For example, the Board conditioned its "upland" WQC for the Atlantic Coast Pipeline such that it would not become effective until specified plans and reports had been completed and the DEQ had approved those plans and reports. The Board clearly ordered that it would have another opportunity to rule before the WQC was effective and construction could begin. The DEQ Director expressed his opinion that certain portions of the erosion and sediment control regulations restrained the Board from playing the role it had specified for itself in the WQC, despite the fact those other regulations could not narrow the Board's authority under CWA section under CWA section 401 or the VWP statute and regulations. The language of the VWP</p>	<p>This periodic review is of the VWP regulation. Requirements related to erosion and sediment control are found in other Board regulations and not part of this periodic review. All projects must adhere to all applicable regulations, even if other regulations are not specifically mentioned in the regulation. Each regulation is adopted under a specified authority of the Board and is applicable to activities specified in the regulation. A project may be subject to multiple regulations due to the scope and location of the project. No change is needed to this regulation.</p>

	<p>regulations must clarify the interaction amongst all of the state and federal authorities that apply and preserve the wide latitude the state has been given under the State Water Control Law.</p>	
<p>David Sligh, Wild Virginia</p>	<p>Multiple federal permits must be covered by a single, unified WQC. When examining cumulative impacts and multiple water body crossings, when more than one agency is asked to permit a project, certifications for each of those agency reviews must be folded into one individual VWP and WQC review. This is needed to ensure that all issues are addressed in a rational and unified fashion. The segregation of reviews and approvals for project activities regulated by two or more federal agencies makes no sense and the regulations should be amended to end this practice.</p>	<p>This regulation addresses the issuance of permits under the authority delegated to the State Water Control Board. Coordination between multiple permitting agencies already occurs through the Joint Permit Application (JPA) used to apply for permits (i.e. standard/permits or general permits) from the Norfolk District US Army Corps of Engineers for work in the waters of the United States (including wetlands) within Virginia. The JPA is also used to apply for corresponding permits from the Virginia Marine Resources Commission, the Virginia Department of Environmental Quality, and/or Local Wetlands Boards. Permits are issued by the permitting entity authorized to issue the required permits. No change is needed to this regulation.</p>
<p>David Sligh, Wild Virginia</p>	<p>DEQ chose to waive its authority to issue a WQC for the Southside Connector Project. State law requires individual upland certifications for all pipelines 36 inches or greater in diameter. DEQ inferred that it may not conduct an individual upland WQC review when the pipeline is smaller than 36 inches. The Board retains the authority to require upland portions of any federally-regulated pipeline or any other project that may result in discharges and have similar impacts be required to obtain a WQC, no matter the size of the projects or features of it.</p>	<p>The VWP regulation (9VAC25-210) addresses the general procedures for the issuance of a Virginia Water Protection permit for activities in waters of the Commonwealth. Multiple Virginia Water Protection general permit regulations have been adopted by the board that address projects with smaller impacts to wetlands. Section 62.1-44.15:81 of the Code of Virginia states that a "federal license or permit for a natural gas transmission pipeline greater than 36 inches inside diameter subject to § 7c of the federal Natural Gas Act (15 U.S.C. § 717f(c)) shall submit a separate application" that addresses additional requirements specified in state law. The project mentioned by the commenter was less than 36 inches in diameter. The Virginia Water Protection General Permit for Facilities and Activities of Utility and Public Service Companies Regulated by the Federal Energy Regulatory Commission or the State Corporation Commission and Other Utility Line Activities (9VAC25-670) has been adopted by the board. Natural gas transmission pipelines that are greater than 36 inches inside diameter are not allowed to obtain coverage under this general permit. General permits are appropriate for activities that are considered to have minimal impacts to human health and the environment and projects for pipelines that are less than 36</p>



		<p>inches may be appropriate for coverage under a VWP general permit. Each project is evaluated to examine applicability of the general permit. No change is needed to the regulation.</p>
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**Effectiveness**

*Pursuant to § 2.2-4017 of the Code of Virginia, indicate whether the regulation meets the criteria set out in Executive Order 14 (as amended, July 16, 2018), including why the regulation is (a) necessary for the protection of public health, safety, and welfare, and (b) is clearly written and easily understandable.*

This regulation is necessary for the protection of state waters and the uses of such waters; animal and aquatic life; and public health, safety, and welfare. This regulation establishes general procedures and requirements for the issuance of Virginia Water Protection permits for the activities authorized by such permits in accordance with the provisions of State Water Control Law and the Clean Water Act. This regulation is clearly written and easily understandable.

[RIS2]  
**Decision**

*Explain the basis for the promulgating agency's decision (retain the regulation as is without making changes, amend the regulation, or repeal the regulation).*

The regulation is effective and continues to be needed and is being retained.

**Small Business Impact**

*As required by § 2.2-4007.1 E and F of the Code of Virginia, discuss the agency's consideration of: (1) the continued need for the regulation; (2) the nature of complaints or comments received concerning the regulation; (3) the complexity of the regulation; (4) the extent to which the regulation overlaps, duplicates, or conflicts with federal or state law or regulation; and (5) the length of time since the regulation has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the regulation. Also, discuss why the agency's decision, consistent with applicable law, will minimize the economic impact of regulations on small businesses.*

This regulation continues to be needed. This regulation establishes procedures and requirements for the issuance of Virginia Water Protection permits.

One comment was received during the periodic review supporting the current regulation. Comments were also submitted requesting the regulation be revised.

This regulation establishes procedures for applying for a VWP permit and permit coverage, criteria to be met as part of the permit and permit coverage, and the processes for issuing VWP permits and permit coverage. This regulation is clearly written and easily understandable.

This regulation includes the Joint Application Process, a process for obtaining corresponding permits from the Virginia Marine Resources Commission, the Virginia Department of Environmental Quality, and/or Local Wetlands Boards. This process assists the applicants with obtaining approvals needed for their project through a consolidated submission of information. This process does not conflict with state or federal law.

The Virginia Water Protection Permit regulation was last amended by the State Water Control Board in 2020 to conform to changes to state law.

This regulation protects water quality in Virginia. This regulation does allow for some activities to occur under the provisions of individual permits, or general permits and general permit coverage. The use of general permits minimizes the impact the regulations have on a segment of the regulated community, which may potentially benefit small businesses.

### **Family Impact**

*Please assess the potential impact of the regulation's impact on the institution of the family and family stability.*

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This regulation does not have a direct impact on the family or family stability.