Virginia Regulatory Town Hall

Proposed Regulation
Agency Background Document

Agency Name:	State Water Control Board
VAC Chapter Number:	9 VAC 25-670
Regulation Title:	Virginia Water Protection General Permit for Facilities and Activities of Utilities and Public Service Companies Regulated by the Federal Energy Regulatory Commission or the State Corporation Commission and Other Utility Line Activities
Action Title:	Virginia Water Protection General Permit (WP2) for Facilities and Activities of Utilities - Proposed Regulation
Date:	January 8, 2001

This information is required pursuant to the Administrative Process Act (§ 9-6.14:9.1 *et seq.* of the *Code of Virginia*), Executive Order Twenty-Five (98), Executive Order Fifty-Eight (99), and the *Virginia Register Form,Style and Procedure Manual*. Please refer to these sources for more information and other materials required to be submitted in the regulatory review package.

Summary*

Please provide a brief summary of the proposed new regulation, proposed amendments to an existing regulation, or the regulation proposed to be repealed. There is no need to state each provision or amendment or restate the purpose and intent of the regulation; instead give a summary of the regulatory action and alert the reader to all substantive matters or changes. If applicable, generally describe the existing regulation.

The proposed Virginia Water Protection General Permit Regulation (WP2) for Facilities and Activities of Utilities (9VAC25-670 et seq.) has been developed to address a new requirement in the Code of Virginia §44.15:5 to develop a general permit for wetland impacts resulting from the activities of utility projects.

Basis*

Please identify the state and/or federal source of legal authority to promulgate the regulation. The discussion of this statutory authority should: 1) describe its scope and the extent to which it is mandatory or discretionary; and 2) include a brief statement relating the content of the statutory authority to the specific regulation. In addition, where applicable, please describe the extent to which proposed changes exceed federal minimum requirements. Full citations of legal authority and, if available, web site addresses for locating the text of the cited authority must be provided. Please state that the Office of the Attorney General has certified that the agency has the statutory authority to promulgate the proposed regulation and that it comports with applicable state and/or federal law.

The basis for this proposed regulation is Section 62.1-44.2 et seq. of the Code of Virginia. Specifically, Section 62.1-44.15 authorizes the Board to adopt rules governing the issuance of water quality permits. Section 62.1-44.15:5 authorizes the Board to issue a Virginia Water Protection Permit consistent with the provisions of the Clean Water Act and to protect instream beneficial uses and to develop a general permit for wetland impacts resulting from the activities of utility projects. The proposed regulation exceeds federal minimum requirements through the reporting of all impacts to wetlands and through the regulation of Tulloch ditching and fill in isolated wetlands, which are currently not federally regulated.

Section 1341 (formerly Section 401) of the Clean Water Act (33 USC 1341) requires state certification of federal permits for discharges into navigable waters.

The Office of the Attorney General has certified that the State Water Control Board has the authority to adopt the proposed regulation.

Purpose*

Please provide a statement explaining the need for the new or amended regulation. This statement must include the rationale or justification of the proposed regulatory action and detail the specific reasons it is essential to protect the health, safety or welfare of citizens. A statement of a general nature is not acceptable, particular rationales must be explicitly discussed. Please include a discussion of the goals of the proposal and the problems the proposal is intended to solve.

The purpose of this proposed regulation is to establish the procedures and requirements to be followed in connection with the issuance of a VWP general permit by the Board pursuant to the State Water Control Law for impacts to wetlands resulting from the activities of utility projects. The proposed regulation is necessary to protect the public health, safety and welfare by providing a streamlined permitting process while maintaining protection of the Commonwealth's wetland resources, which are important for maintaining water quality, flood control and providing fish and wildlife habitat.

Substance*

Please identify and explain the new substantive provisions, the substantive changes to existing sections, or both where appropriate. Please note that a more detailed discussion is required under the statement providing detail of the regulatory action's changes.

The proposed regulation establishes a VWP general permit with an expected review period of 45 days for permanent impacts less than one acre of surface waters for activities associated with the construction or operation of utility lines. The process of applying for a VWP general permit, and the information the applicant needs to supply, has been detailed. The process of avoidance and minimization of impacts, and compensation for unavoidable impacts, has been specified. Each authorization for coverage expires 3 years from the date of authorization; the permit regulation expires 5 years from the date of promulgation.

Issues*

Please provide a statement identifying the issues associated with the proposed regulatory action. The term "issues" means: 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 include a sentence to that effect.

Advantages of the proposed regulation to the public and the Commonwealth include increased protection of the Commonwealth's aquatic resources while streamlining the permitting process for certain small impacts.

Disadvantages of the proposed regulation to the public include reduced project-specific public comment and increased reporting requirements via an abbreviated registration statement for impacts less than one tenth acre in order to track the goal of no net loss of wetland acreage and function.

Locality 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.

The regulation is effective statewide; however as there is a greater prevalence of wetlands in the eastern Piedmont and Coastal Plain compared to the western parts of the state, localities in these areas may feel greater impact from this regulation.

Public Participation*

Please include a statement that in addition to any other comments on the proposal, the agency is seeking comments on the costs and benefits of the proposal.

In addition to any other comments the Board is soliciting comments on (i) the costs and benefits of the proposal and (ii) the impacts of the regulation on farm or forest lands..

All comments must be received by the close of the comment period. Comments may be submitted by mail, facsimile transmission, e-mail, or by personal appearance at the public hearing(s). Comments are to be submitted to Ellen Gilinsky, Department of Environmental Quality, P.O. Box 10009, Richmond, Virginia 23240 (e-mail: egilinsky@deq.state.va.us) (fax: (804) 698-4032). All written comments must include the name, address and phone number of the commenter.

Fiscal Impact

Please identify the anticipated fiscal impacts and at a minimum include: (a) the projected cost to the state to implement and enforce the proposed regulation, including (i) fund source / fund detail, (ii) budget activity with a cross-reference to program and subprogram, and (iii) a delineation of one-time versus on-going expenditures; (b) the projected cost of the regulation on localities; (c) a description of the individuals, businesses or other entities that are likely to be affected by the regulation; (d) the agency's best estimate of the number of such entities that will be affected; e) the projected cost of the regulation for affected individuals, businesses, or other entities; and f) an estimate of the impact of the proposed regulation upon small businesses as defined in § 9-199 of the Code of Virginia or organizations in Virginia.

The VWP Program is currently funded through a combination of general funds and permit fees. This proposed VWP general permit regulation should reduce permit processing time.

The permit fee for this VWP general permit is $300. The cost of an application will vary according to project size, location and nature, but for wetland impacts resulting from the activities of utility projects should range from $500 to $5,000.

Detail of Changes

Please detail any changes, other than strictly editorial changes, that are being proposed. Please detail new substantive provisions, all substantive changes to existing sections, or both where appropriate. This statement should provide a section-by-section description - or cross-walk - of changes implemented by the proposed regulatory action. Where applicable, include citations to the specific sections of an existing regulation being amended and explain the consequences of the proposed changes.

Section 670-10 - Definitions: Several words are defined to provide clarity.

Section 670-20 - Term: The proposed VWP general permit regulation will expire 5 years from the date of promulgation. Each authorization for coverage under the VWP general permit will expire 3 years from the date of authorization.

Section 670-30 - Authorized Activities: Activities that may be authorized under this VWP general permit include:

- Permanent non-tidal surface water impacts up to one acre.
- Impacts must qualify as a "single and complete project" as defined in Section 670-10 of the regulation.
- The construction, maintenance or repair of utility lines, including outfall structures and the excavation, backfill or bedding for utility lines.
- The construction, maintenance or expansion of a substation facility or pumping station associated with a power line or utility line.
- The construction or maintenance of foundations for overhead utility line towers poles or anchors, provided specific permit conditions are met.
- The construction of access roads for the construction or maintenance of utility lines including overhead power lines and utility line substations.
- As an interim measure before State Programmatic General Permit authority is granted to the Board, we are proposing that the existing 401 Certifications on Corps of Engineers' Nationwide and Regional Permits remain in place. This measure will eliminate the situation where the Board would be issuing a companion permit to the Corps' permit for those projects. These Certifications will be retracted when DEQ is granted State Programmatic General Permit authority for these impacts.

Section 670-40 - Prohibitions:

- Several areas are identified in which the VWP general permit may not be used including wetland areas composed of 10% or more of specified bottomland hardwood species and surface waters with federal or state listed or proposed threatened or endangered species or proposed or designated critical habitat.
- Several activities listed in §670-40 are prohibited from coverage under this VWP general permit.
- This VWP general permit cannot be used in combination with other VWP general permits to exceed the one acre impact threshold.

Section 670-50 - Notification: Notification to the Board is required prior to construction.

- Notification is not required for temporary impacts as defined in Section 670-10.
- For impacts under 1/10 of an acre, an abbreviated registration statement shall serve as the notification.
- For impacts greater than 1/10 of an acre, the full registration statement must be submitted for notification purposes.

Section 670-60 – Registration Statement: This section details informational requirements that are required for adequate VWP general permit processing including measures taken to avoid and minimize impacts as well as a proposed compensatory mitigation plan.

Section 670-70 - Mitigation: Compensatory mitigation for unavoidable permanent impacts or for conversion of forested wetlands to emergent wetlands is to be provided in the form of any one or combination of the following: creation, restoration, the purchase or use of mitigation bank credits, or a contribution to an approved in-lieu fee fund. Preservation of wetlands or preservation or restoration of upland buffers adjacent to State waters is acceptable when utilized in conjunction with

creation, restoration or mitigation bank credits. Mitigation for unavoidable impacts is to be provided at the following replacement to loss ratios:

Forested Wetlands	2:1	Emergent Wetlands	1:1
Scrub/Shrub Wetlands	1.5:1	Open water (ponds, lakes)	1:1

All aspects of the compensatory mitigation plan shall be finalized, submitted and approved by DEQ prior to any construction activity.

Section 670-80 – Modification: This section allows for minor changes under specific conditions provided that the total impacts to surface waters do not exceed one half acre, including 125 linear feet of perennial stream channel.

Alternatives

Please describe the specific 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.

The alternative of not developing this VWP general permit regulation is not feasible as the proposed regulation is mandated by action of the General Assembly.

Public Comment

Please summarize all public comment received during the NOIRA comment period and provide the agency response.

Several written and public comments were received by DEQ in response to the June 19, 2000 Notice of Intended Regulatory Action VWPP Regulation amendments and all VWPP general permits. A total of six Virginia citizens offered comments at the public meeting for the NOIRA held on August 10, 2000. Those comments are summarized as follows:

- The VWPP program should reflect the comprehensive nature of the law by supporting management and protection of all non-tidal wetlands, not just those beyond Federal jurisdiction.
- A regulatory approach that is compatible with the Federal program including wetland determinations based upon the scientifically accepted 1987 USACE Wetland Delineation Manual could eliminate problems.
- General permits developed under this program should use comprehensive tools including adequate reporting, "no net loss" mitigation and adequate impact thresholds to ensure the protection of Virginia's waters as well as our fish and wildlife resources.
- When wetland impacts are "unavoidable" compensation must insure that "wetland acreage and function" are replaced to offset impacts in the same project area.
- One commenter, representing the interests of the City of Chesapeake, made the following comments and requests:
  - 32% of Chesapeake is wetland, and as such, the City of Chesapeake stands to be the most affected in Hampton Roads by regulatory decisions.

- Requested the VWPP TAC consider the following: municipal and public utility activities be covered by General Permits, State regulations maintain consistency with Federal, funding for staff to avoid lengthy delays, and the DEQ hold joint training sessions with the Corps for municipalities.
- Requested development or clarification of the following definitions: "complete application, cumulative impacts, perennial streams, wetlands of minimum ecological value, normal residential gardening, lawn and landscape maintenance."

Additional written comments received included the following:

- One commenter made the following comments, requests and proposals:
- Requested expansion or clarification of definitions for "ditching" and wetland definition regarding the terms "normal circumstances" and "prevalence of vegetation".
- Proposed the duration of a permit covering a project always be fifteen years, particularly for bond and monitoring purposes.
- Proposed the program encompass all functions of wetlands and the goal of no net loss should apply to wetland functions as well as acreage.
- Proposed a practicability test be used to minimize impacts.
- Proposed cumulative impacts analysis be broad.
- Proposed compensation should be linked to impact.
- Proposed a buffer requirement for wetlands created for mitigation.
- Requested the Board create a mechanism to avoid default approval after the 45-day review period for VWP general permits expires.
- Requested that all wetlands be presumed to have ecological value and that the applicant should have the burden of proving "minimal ecological value".
- Proposed restrictions on "normal agricultural and silvicultural activities".
- Requested public hearings for all VWP Permits.
- Proposed that fifteen days is too short a time to "access compensation implementation, inventory permitted wetland impacts, and work to prevent unpermitted impacts".
- Requested a citizen appeal process "regarding the sufficiency of application information, approval by default and determinations of minimal ecological value."

These comments were incorporated by DEQ staff as appropriate.

Clarity of the Regulation

Please provide a statement indicating that the agency, through examination of the regulation and relevant public comments, has determined that the regulation is clearly written and easily understandable by the individuals and entities affected.

DEQ staff worked with a 30 member Technical Advisory Committee to ensure that the proposed regulation is clearly written and understandable to the individuals and entities affected.

Periodic Review

Please supply a schedule setting forth when the agency will initiate a review and re-evaluation to determine if the regulation should be continued, amended, or terminated. The specific and measurable regulatory goals should be outlined with this schedule. The review shall take place no later than three years after the proposed regulation is expected to be effective.

The regulation will be reviewed every 3 years and revised as necessary to determine if it is meeting its goals.

Family Impact Statement

Please provide an analysis of the proposed regulatory action that assesses the potential impact on the institution of the family and family stability including the extent to which 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 these regulation amendments will have a direct impact on families.