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Notice of Intended Regulatory Action (NOIRA) Agency Background Document

Agency name	State Water Control Board
Virginia Administrative Code (VAC) Chapter citation(s)	9 VAC 25-840
VAC Chapter title(s)	Erosion and Sediment Control Regulations
Action title	Amend or modify provisions of the regulations to establish a fee schedule for conducting erosion and sediment control plan reviews for solar projects.
Date this document prepared	June 21, 2021

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*.

Brief Summary

Provide a brief summary (preferably no more than 2 or 3 paragraphs) of the subject matter, intent, and goals of this regulatory change (i.e., new regulation, amendments to an existing regulation, or repeal of an existing regulation).

The intent of this regulatory action is to amend or modify provisions of the Erosion and Sediment Control Regulations (9VAC25-840) to establish a fee schedule for conducting Erosion and Sediment Control Plan reviews for solar projects in accordance with Chapter 497 (Senate Bill 1258) and Chapter 552 (Budget Bill, Item 377 N) of the 2021 Special Session I Acts of Assembly.

Acronyms and Definitions

Define all acronyms or technical definitions used in this form.

Board – State Water Control Board
Department or DEQ – Department of Environmental Quality
ESC – Erosion and Sediment Control

MS4 – Municipal Separate Storm Sewer System
VESCPC – Virginia Erosion and Sediment Control Program
VSMP – Virginia Stormwater Management Program

Mandate and Impetus

Identify the mandate for this regulatory change and any other impetus that specifically prompted its initiation (e.g., new or modified mandate, petition for rulemaking, periodic review, or board decision). For purposes of executive branch review, “mandate” has the same meaning as defined in Executive Order 14 (as amended, July 16, 2018), “a directive from the General Assembly, the federal government, or a court that requires that a regulation be promulgated, amended, or repealed in whole or part.”

Chapter 497 (Senate Bill 1258) of the 2021 Special Session I Acts of Assembly established that any local VESCPC authority that does not operate a regulated MS4 and for which the Department did not administer a VSMP as of July 1, 2020, shall notify the Department if it decides to have the Department provide the local VESCPC authority with (i) review of the ESC Plan required by the ESC Law and attendant regulations and (ii) a recommendation on the ESC Plan’s compliance with the requirements of the ESC Law and attendant regulations, for any solar project and its associated infrastructure with a rated electrical generation capacity exceeding five (5) megawatts. Furthermore, Chapter 497 directed the Department to adopt a fee schedule and charge fees to applicants for conducting such ESC Plan reviews.

Chapter 552 (Budget Bill, Item 377 N) of the 2021 Special Session I Acts of Assembly directed the Department to convene a working group for the purpose of developing the fee schedule for conducting ESC Plan reviews for solar projects. The working group shall include representatives of (i) private sector companies that own or operate solar energy facilities, (ii) local governments that permit solar facilities, and (iii) other stakeholders determined by the Department to be necessary to the development of the fee schedule.

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 and 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.

The Board is authorized to adopt regulations for the effective control of soil erosion, sediment deposition, and nonagricultural runoff to prevent the unreasonable degradation of properties, stream channels, waters, and other natural resources under § 62.1-44.15:52 A of the Code of Virginia (Erosion and Sediment Control Law). Furthermore, the Board is authorized to establish a fee schedule for conduction ESC Plan reviews for solar projects under § 62.1-44.15:55.1 D of the Code of Virginia (Erosion and Sediment Control Law).

Purpose

Describe the specific reasons why the agency has determined that this regulation is essential to protect the health, safety, or welfare of citizens. In addition, explain any potential issues that may need to be addressed as the regulation is developed.

The regulatory amendments are necessary to conform the ESC Regulations (9VAC25-840) to changes made to the Code of Virginia (State Water Control Law) by the 2021 General Assembly through Chapters 497 (Senate Bill 1258) and 552 (Budget Bill, Item N) of the 2021 Special Session I Acts of Assembly.

Substance

Briefly identify and explain the new substantive provisions that are being considered, the substantive changes to existing sections that are being considered, or both.

The substance of this action is to amend or modify language in the ESC Regulations (9VAC25-840) to reflect Chapters 497 (Senate Bill 1258) and 552 (Budget Bill, Item 377 N) of the 2021 Special Session I Acts of Assembly. The amendments seek to establish a fee schedule for conducting ESC Plan reviews for solar projects set an amount representing no less than 60 percent, not to exceed 62 percent, of the costs for the Department to conduct such reviews. Additionally, the establishment of a single regulation that contains all fees deposited into the Stormwater Management Fund and Virginia Erosion and Sediment Control Fund is under consideration.

Alternatives to Regulation

Describe any viable alternatives to the regulatory change that were considered, and the rationale used by the agency to select the least burdensome or intrusive alternative that meets the essential purpose of the regulatory change. 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 regulatory change.

No alternatives to this regulatory action were considered. The regulatory amendments are necessary to conform the ESC Regulations (9VAC25-840) to Chapters 497 and 552 of the 2021 Special Session I Acts of Assembly.

Periodic Review and Small Business Impact Review Announcement

If you wish to use this regulatory action to conduct, and this NOIRA to announce, a periodic review (pursuant to § 2.2-4017 of the Code of Virginia and Executive Order 14 (as amended, July 16, 2018)), and a small business impact review (§ 2.2-4007.1 of the Code of Virginia) of this regulation, keep the following text. Modify as necessary for your agency. Otherwise, delete the paragraph below and insert "This NOIRA is not being used to announce a periodic review or a small business impact review."

This NOIRA is not being used to announce a periodic review or a small business impact review.

Public Participation

Indicate how the public should contact the agency to submit comments on this regulation, and whether a public hearing will be held, by completing the text below. In addition, as required by § 2.2-4007.02 of the Code of Virginia describe any other means that will be used to identify and notify interested parties and seek their input, such as regulatory advisory panels or general notices.

The agency is seeking comments on this regulation, including but not limited to: ideas to be considered in the development of this regulation, the costs and benefits of the alternatives stated in this background

document or other alternatives, and the potential impacts of the regulation. The agency is also seeking information on 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) the probable effect of the regulation on affected small businesses; and 3) the description of less intrusive or costly alternatives for achieving the purpose of the regulation.

Anyone wishing to submit written comments may do so by mail, email or fax to Andrew Hammond; P.O. Box 1105, Richmond, Virginia 23218; 804-698-4101; Andrew.Hammond@deq.virginia.gov. Comments may also be submitted through the Public Forum feature of the Virginia Regulatory Town Hall (<http://www.townhall.virginia.gov>). Written comments must include the name and address of the commenter. In order to be considered, comments must be received before midnight on the last day of the public comment period.

Public Hearing at Proposed Stage

A public hearing will be held following the publication of the proposed stage of this regulatory action and notice of the hearing will be posted on the Virginia Regulatory Town Hall (<http://www.townhall.virginia.gov>) and on the Commonwealth Calendar (<https://www.virginia.gov/connect/commonwealth-calendar>).

Regulatory Advisory Panel

Please indicate, to the extent known, if advisers (e.g., regulatory advisory panel or negotiated rulemaking panel) will be involved in the development of the proposed regulation. Indicate that 1) the agency is not using a panel in the development of the proposal; 2) the agency is using a panel in the development of the proposal; or 3) the agency is inviting comment on whether to use a panel to assist the agency in the development of a proposal.

The Board is using a panel to develop a proposal. Persons interested in assisting in the development of a proposal should notify the Department's contact person by the end of the comment period and provide their name, address, phone number, email address and the organization you represent (if any). The primary function of the panel is to develop recommended regulation amendments for Department consideration through the collaborative approach of regulatory negotiation and consensus. Multi-applications from a single company, organization, group or other entity count as one for purposes of making the decision specified in the preceding sentence. Notification of the composition of the panel will be sent to all applicants.