



## Notice of Intended Regulatory Action (NOIRA) Agency Background Document

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| <b>Agency name</b>                                 | Department of Environmental Quality   |
| <b>Virginia Administrative Code (VAC) citation</b> | 9VAC15-80   |
| <b>Regulation title</b>                            | Small Renewable Energy Projects (Water Related) Permit by Rule Regulation   |
| <b>Action title</b>                                | Establishment of one or more permits by rule necessary for the construction and operation of small renewable energy projects mandated by the Virginia 2009 Acts of Assembly Chapters 808 and 854 (HB 2175/SB 1347). Specifically, this regulatory action will focus on water-related energy projects – falling water, wave motion, tides, and geothermal power. |
| <b>Date this document prepared</b>                 | June 2011   |

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*.

### 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.*

The purpose of this regulatory action is to implement 2009 state legislation requiring the Department of Environmental Quality to develop one or more permits-by-rule for water-related energy projects with rated capacity not exceeding 100 megawatts, if the Department determines that a permit-by-rule is necessary. By means of this legislation, the General Assembly moved permitting authority for these projects from the State Corporation Commission to DEQ. By requiring a “permit by rule,” the legislature is mandating that permit requirements be set forth “up front” within this regulation, rather than being developed on a case-by-case basis. The legislature mandates that the permit by rule include conditions and standards necessary to protect the Commonwealth’s natural resources. In this regulatory action, DEQ will determine what requirements, if any, must be met for small water-related renewable energy projects; that is, projects generating electricity from falling water (hydroelectric), wave motion, tides, or geothermal power.

## 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.*

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This regulatory action is undertaken by the Department of Environmental Quality pursuant to Code of Virginia Sections 10.1-1197.5 through 10.1-1197.11, 2009 Acts of Assembly Chapters 808 and 854. The legislation mandates that DEQ develop one or more permits by rule for small renewable energy projects, if the department determines that a permit by rule is necessary.

## 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.*

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This regulatory action is necessary in order for DEQ to carry out the requirements of 2009 Acts of Assembly Chapters 808 and 854. The regulatory action is essential to protect the health, safety, and welfare of Virginia citizens because it will establish any necessary requirements, other than those established in applicable environmental permits, to protect Virginia's natural resources which may be affected by the construction and operation of small renewable energy projects.

## 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.*

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This regulatory action will address the need for a reasonable degree of certainty and timeliness in the natural-resource protections required of water-related energy projects by setting forth, as fully as practicable, these required protections “up front” in this new permit by rule. It is anticipated that the regulatory action will encompass whether water-related projects are likely to have a significant adverse impact on natural resources; and, if so, then how the Department might address potential environmental impacts, mitigation plans, facility site planning, public participation, permit fees, inter-agency consultations, compliance, enforcement, and other topics that may be brought up during the public comment period.

## 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.*

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DEQ and most other regulatory agencies generally consider permit requirements on a case-by-case basis as each application is received. The natural-resource protections required of applicants who wish to construct and operate water-related energy projects have heretofore been subject to case-by-case consideration by the State Corporation Commission. In enacting this new legislation, the Virginia General Assembly chose to direct DEQ to develop this permit by rule rather than adhering to the more traditional case-by-case alternative. In the current regulatory action, DEQ will consider only the permit-by-rule alternative mandated by the General Assembly. Concerning provisions within this permit by rule, DEQ will solicit public input and consider alternatives and issues presented by the public and the regulatory advisory panel which meet the goals of the regulation and of the agency.

## 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.*

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The agency is seeking comments on the intended regulatory action, 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, 3) potential impacts of the regulation and 4) impacts of the regulation on farm and forest land preservation. 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) 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 may do so by mail, email or fax to Carol C. Wampler, Department of Environmental Quality, 629 East Main Street, P.O. Box 1105, Richmond, VA 23218, phone: 804-698-4579, fax: 804-698-4346 or [carol.wampler@deq.virginia.gov](mailto:carol.wampler@deq.virginia.gov). Comments may also be submitted through the Public Forum feature of the Virginia Regulatory Town Hall web site at: [www.townhall.virginia.gov](http://www.townhall.virginia.gov). All written comments must include the name and address of the commenter. In order to be considered, comments must be received by 11:59 p.m. on the last day of the public comment period.

## Public Hearing at Proposed Stage

A public hearing will not be held after publication of the proposed stage of the regulatory action unless requests for a public hearing are received during the NOIRA public comment period from at least 25 persons or the Department decides that a public hearing is necessary.

## Regulatory 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 Department plans to use a Regulatory Advisory Panel (RAP) to help develop a proposal. Persons interested in assisting in the development of a proposal should notify the department contact person by **September 1, 2011**, and provide their name, address, phone number, email address and the organization they represent (if any). The primary function of the panel will be to develop recommended regulation provisions for Department consideration through the collaborative approach of regulatory negotiation and consensus. The Director will select RAP members from the list of persons who have expressed interest in serving. Multiple 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.

**Note: The first meeting of the Water-Related Regulatory Advisory Panel (RAP) will be held on Tuesday, September 27, 2011, at 9:30 a.m. at DEQ's Piedmont Regional Office, 4949-A Cox Road, Glen Allen, Virginia 23060.**

## 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.*

The Department does not expect that the regulation will have a direct impact on the institution of the family and family stability.