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Regulations

VIRGINIA SOIL AND WATER CONSERVATION BOARD

Fast-Track Regulation

Title of Regulation: 4VAC50-20. Impounding Structure Regulations (amending 4VAC50-20-125).

Statutory Authority: § 10.1-604 of the Code of Virginia.

Public Hearing Information: No public hearings are scheduled.

Public Comment Deadline: December 7, 2011.

Effective Date: December 22, 2011.

Agency Contact: David C. Dowling, Policy, Planning, and Budget Director, Department of Conservation and Recreation, 203 Governor Street, Suite 302, Richmond, VA 23219, telephone (804) 786-2291, FAX (804) 786-6141, or email david.dowling@dcr.virginia.gov.

Basis: 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. Authority for the program rests with the Virginia Soil and Water Conservation Board and it is administered on behalf of the board by the Department of Conservation and Recreation, 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 of the Code of Virginia, the board is directed to promulgate regulations for impounding structures.

Purpose: 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 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 and continue to protect the health, safety, and welfare of citizens of the Commonwealth. 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: 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: Existing 4VAC50-20-125 provides an extended timeframe for compliance with spillway design flood requirements of the regulations for dams that 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. The section contains no provision allowing for any extended compliance timeframe for dams that were under construction or alteration permits as of September 26, 2008.

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: 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.

Department of Planning and Budget's Economic Impact Analysis:

Summary of the Proposed Amendments to Regulation. The Virginia Soil and Water Conservation Board (Board) proposes to grandfather certain dams from requirements of the Board's Virginia Impounding Structure Regulations (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. This is contingent on the owner completing all requirements of the permit and any applicable Conditional Operation and Maintenance Certificate by September 26, 2011. Once the full six year permit cycle is complete, the owner would need to meet the standards applied to other dams throughout the Commonwealth.

Result of Analysis. The benefits likely exceed the costs for all proposed changes.

Estimated Economic Impact. Historically dams in Virginia have largely been kept safe under the Regulations that were in effect prior to September 26, 2008 and under which the dams that would be affected by the Board's proposal received their permits. The Regulations that came into effect in 2008 further increase the assurance of safety.

As the Board and Department of Conservation and Recreation point out, the affected dam owners have invested significant sums of money in pursuit of the conditions of their 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.

The proposed regulatory change (grandfathering) 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 significant financial burden on these dam owners at a time when they have just completed a very significant investment in their dams. The proposed grandfathering allows the affected owners to delay their next significant expenditure on dam safety, while still maintaining safe dams, and still eventually meeting the more stringent requirements of the 2008 Regulations. The benefit of permitting these affected dam owners who have maintained safe dams some additional time to meet the new requirements likely outweighs the cost of a short period of time of small additional safety risk.

Businesses and Entities Affected. Approximately 14 dams across the Commonwealth would be affected by this amendment. Several of the 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.

Localities Particularly Affected. The affected dams are located in the following counties: Albemarle 2, Gloucester 1, Hanover 1, King William 1, Lancaster 1, Louisa 1, New Kent 3, Powhatan 2, and Spotsylvania 2.

Projected Impact on Employment. The proposal amendments are unlikely to significantly affect employment.

Effects on the Use and Value of Private Property. The proposed grandfathering will allow owners of the approximately 14 dams to defer required work for up to six years.

Small Businesses: Costs and Other Effects. The proposed grandfathering will allow small business owners of the affected dams to defer required work for up to six years.

Small Businesses: Alternative Method that Minimizes Adverse Impact. The proposed amendments do not adversely impact small businesses.

Real Estate Development Costs. The proposed grandfathering may delay some development costs, but will not significantly reduce costs in the long run.

Legal Mandate. The Department of Planning and Budget (DPB) has analyzed the economic impact of this proposed regulation in accordance with § 2.2-4007.04 of the

Regulations

Administrative Process Act and Executive Order Number 14 (10). Section 2.2-4007.04 requires that such economic impact analyses include, but need not be limited to, the projected number of businesses or other entities to whom the regulation would apply, the identity of any localities and types of businesses or other entities particularly affected, the projected number of persons and employment positions to be affected, the projected costs to affected businesses or entities to implement or comply with the regulation, and the impact on the use and value of private property. Further, if the proposed regulation has adverse effect on small businesses, § 2.2-4007.04 requires that such economic impact analyses include (i) an identification and estimate of the number of small businesses subject to the regulation; (ii) the projected reporting, recordkeeping, and other administrative costs required for small businesses to comply with the regulation, including the type of professional skills necessary for preparing required reports and other documents; (iii) a statement of the probable effect of the regulation on affected small businesses; and (iv) a description of any less intrusive or less costly alternative methods of achieving the purpose of the regulation. The analysis presented above represents DPBs best estimate of these economic impacts.

Agency's Response to Economic Impact Analysis: The Department of Conservation and Recreation concurs with the economic impact analysis prepared by the Department of Planning and Budget regarding the Impounding Structure Regulations (4VAC50-20).

Summary:

The proposed amendments grandfather certain dams from requirements of the regulation 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 amendments 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.

4VAC50-20-125. Delayed effective date for Spillway Design Flood requirements for impounding structures.

A. If an impounding structure has been determined to have an adequate spillway capacity prior to September 26, 2008,

and is currently operating under a Regular Operation and Maintenance Certificate, but will now require spillway modifications due to changes in these regulations, the owner shall submit to the board an Alteration Permit Application in accordance with 4VAC50-20-80 to address spillway capacity at the time of the expiration of their Regular Operation and Maintenance Certificate or by September 26, 2011, whichever is later. The Alteration Permit Application shall contain a construction sequence with milestones for completing the necessary improvements within five years of Alteration Permit issuance. The board may approve an extension of the prescribed time frame for good cause. Should the owner be able to demonstrate that no spillway capacity change is necessary, the impounding structure may be found to be in compliance with this chapter.

B. In accordance with 4VAC50-20-105, the owner shall submit the Operation and Maintenance Certificate Application (Operation and Maintenance Certificate Application for Virginia Regulated Impounding Structures), the Emergency Action Plan or Emergency Preparedness Plan, and the Inspection Report (Annual Inspection Report for Virginia Regulated Impounding Structures) 90 days prior to the expiration of the Regular Operation and Maintenance Certificate.

C. If circumstances warrant more immediate repairs to the impounding structure, the board may direct alterations to the spillway to be completed sooner.

D. During this delay period, owners are required to address other deficiencies that may exist that are not related to the spillway design flood.

E. Any impounding structure owner who, as of September 26, 2008, held an Alteration Permit or Construction Permit under the requirements of this chapter that were effective prior to that date, who has maintained this permit as valid, and who completes all requirements of such permit and any applicable Conditional Operation and Maintenance Certificate by September 26, 2011, shall not be required to meet new requirements of this chapter that became effective on September 26, 2008, until the completion of the first six-year certificate cycle following completion of all requirements of his permit and any applicable certificates. During this six-year period, the owner may be issued a Regular Operation and Maintenance Certificate should the impounding structure otherwise be eligible for such certificate.

V.A.R. Doc. No. R12-2491; Filed October 17, 2011, 2:39 p.m.



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Statutory Authority

§ [10.1-605](#) of the Code of Virginia.

Historical Notes

Derived from Virginia Register Volume 24, Issue 25, eff. September 26, 2008; amended Virginia Register Volume 28, Issue 5, eff. December 22, 2011.

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