

Authorization to initiate a Notice of Intended Regulatory Action for the Impounding Structure Regulations (4VAC50-20)

§ 10.1-605. Promulgation of regulations by the Board; guidance document.

A. The Board shall adopt regulations to ensure that impounding structures in the Commonwealth are properly and safely constructed, maintained and operated. Dam safety regulations promulgated by the State Water Control Board shall remain in full force until amended in accordance with applicable procedures.

§ 2.2-4007.01. Notice of intended regulatory action; public hearing.

A. In the case of all regulations, except those regulations exempted by §2.2-4002, 2.2-4006, 2.2-4011, or 2.2-4012.1, an agency shall (i) provide the Registrar of Regulations with a Notice of Intended Regulatory Action that describes the subject matter and intent of the planned regulation and (ii) allow at least 30 days for public comment, to include an on-line public comment forum on the Virginia Regulatory Town Hall, after publication of the Notice of Intended Regulatory Action.

Whenever a Virginia statutory change necessitates a change to, or repeal of, all or a portion of a regulation or the adoption of a new regulation, the agency shall file a Notice of Intended Regulatory Action with the Registrar within 120 days of such law's effective date.

An agency shall not file proposed regulations with the Registrar until the public comment period on the Notice of Intended Regulatory Action has closed.

B. Agencies shall state in the Notice of Intended Regulatory Action whether they plan to hold a public hearing on the proposed regulation after it is published. Agencies shall hold such public hearings if required by basic law. If the agency states an intent to hold a public hearing on the proposed regulation in the Notice of Intended Regulatory Action, then it shall hold the public hearing. If the agency states in its Notice of Intended Regulatory Action that it does not plan to hold a hearing on the proposed regulation, then no public hearing is required unless, prior to completion of the comment period specified in the Notice of Intended Regulatory Action, (i) the Governor directs the agency to hold a public hearing or (ii) the agency receives requests for a public hearing from at least 25 persons.

Recommended Motion:

The Virginia Soil and Water Conservation Board authorizes the Department to convene a regulatory advisory panel to make recommendations on potential regulatory changes, to hold other stakeholder group meetings as it deems necessary, and to prepare a draft proposed regulation and any associated documents for the Board's review and consideration. The Board directs the Department to conduct these activities in accordance with the Administrative Process Act, Executive Order 19 (2022), and all other applicable laws, policies, and procedures. Additionally, the Board authorizes the Department to coordinate, as necessary, with the Office of Regulatory Management to develop any additional documents needed to file this Notice of Intended Regulatory Action.



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Notice of Intended Regulatory Action (NOIRA) Agency Background Document

Agency name	Virginia Soil and Water Conservation Board
Virginia Administrative Code (VAC) Chapter citation(s)	4VAC50-20
VAC Chapter title(s)	Impounding Structure Regulations
Action title	Amend provisions of Impounding Structure Regulations
Date this document prepared	March 27, 2024

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Order 19 (2022) (EO 19), any instructions or procedures issued by the Office of Regulatory Management (ORM) or the Department of Planning and Budget (DPB) pursuant to EO 19, the Regulations for Filing and Publishing Agency Regulations (1 VAC 7-10), 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).

This regulatory action will consider amendments to the Virginia Soil and Water Conservation Board's Impounding Structure Regulations. The Board is undertaking this regulatory action in response to comments received during a periodic review, as well as recognizing that amendments and clarifications may be needed in certain areas of the regulation. Specifically, the Board authorized this regulatory action to consider concerns related to: (i) roadways on or below an impounding structure for hazard potential classifications; (ii) the incremental damage analysis process; (iii) the potential expansion of special criteria low hazard dams; and (iv) simplifying the emergency preparedness plan requirements.

Acronyms and Definitions

Define all acronyms or technical definitions used in this form.

There are no acronyms used in this document.

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 the ORM procedures, "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."

At the April 27, 2023 meeting, the Virginia Soil and Water Conservation Board approved the initiation of a periodic review of the Impounding Structure Regulations. The public comment period began on December 18, 2023 and continued through January 8, 2024. This regulatory action is being conducted in response to comments that were received during that periodic review, as well as recognizing that amendments and clarifications may be needed in certain areas of the regulation. The results of the periodic review may be found at: <https://townhall.virginia.gov/L/viewpreview.cfm?PRID=2485>.

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 Dam Safety Act is established in §10.1-604 et seq. of the Code of Virginia. The Virginia Soil and Water Conservation Board is designated as the promulgating regulatory authority in §10.1-605. Section 10.1-605 of the Code of Virginia requires the Board to "adopt regulations to ensure that impounding structures in the Commonwealth are properly and safely constructed, maintained, and operated". Section 10.1-604.1 authorizes the Board to adopt "regulations in accordance with §10.1-605 to establish a simplified methodology for dam break inundation zone analysis.

Section 10.1-605.1 authorizes the Board to delegate to the Director or his designee any of the powers and duties vested in the Board by the article, except the adoption and promulgation of regulations. In §10.1-605.2, the Board is required to adopt regulations that consider the impact of downstream limited-use or private roadways with low traffic volume and low public safety risk on the determination of the hazard potential classification of an impounding structure. Section 10.1-605.3 allows the Board to develop a general permit for the regulations of low hazard potential impounding structures in accordance with §10.1-605.

At the March 27, 2024 meeting, the Virginia Soil and Water Conservation Board approved the initiation of a regulatory action to address (i) roadways on or below an impounding structure for hazard potential classifications; (ii) the incremental damage analysis process; (iii) the potential expansion of special criteria low hazard dams; and (iv) simplifying the emergency preparedness plan requirements

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.

As outlined in the section above, the adoption of these regulations is required in several sections of the Code of Virginia. These regulations protect public safety by establishing the appropriate construction, operation, and maintenance standards for impounding structures regulated by the Board.

This proposed regulatory action will clarify current requirements, provide flexibility in meeting existing standards, and continue the Board's commitment to public safety.

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.

This regulatory action is needed to provide clarification on the impact of roadways on or below impounding structures on the hazard classification of an impounding structure (4VAC50-20-45 and 4VAC50-20-52). Additional amendments to the current analysis, or a new methodology, to determine the correlation between the impacts of an impounding structure failure and a roadway may need to be developed.

Additional clarifications may be needed in 4VAC50-20-52 to provide additional methodologies to conduct an incremental damage analysis to more clearly determine what constitutes a downstream threat to persons or property.

The Board also seeks to examine the potential expansion of special criteria low hazard dams (4VAC50-20-51) and to simplifying the emergency preparedness plan requirements (4VAC50-20-177). Potentially expanding the ability for dams to be considered as "special criteria low hazard dams" and simplifying the emergency action preparedness plans could allow certain impounding structures to achieve regulatory compliance, while maintain public safety.

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.

There are no functional alternatives to amending these regulations. The Board is unable to address the concerns and questions that were raised through the issuance of guidance documents or other similar mechanisms. Amending the regulations will strengthen the Dam Safety Program and ensure the safety of both the regulated impounding structure and the public.

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 the ORM procedures), and a small business impact review (§ 2.2-4007.1 of the Code of Virginia) of this regulation, keep the following text. Modify it 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 Virginia Soil and Water Conservation Board is providing an opportunity for comments on this regulatory proposal, including but not limited to (i) the costs and benefits of the regulatory proposal, (ii) any alternative approaches, and (iii) the potential impacts of the regulation.

Anyone wishing to submit written comments for the public comment file may do so through the Public Comment Forums feature of the Virginia Regulatory Town Hall web site at: <https://townhall.virginia.gov>. Comments may also be submitted by mail, email or fax to Christine Watlington Jones, 600 East Main Street, 24th Floor, Richmond, Virginia 23219; phone: 804.786.3319; fax: 804.371.2630; and christine.watlington@dcr.virginia.gov. In order to be considered, comments must be received by 11:59 pm on the last day of the public comment period.

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 website (<https://www.townhall.virginia.gov>) and on the Commonwealth Calendar website (<https://www.virginia.gov/connect/commonwealth-calendar>). Both oral and written comments may be submitted at that time.

A regulatory advisory panel will be appointed to assist with this regulatory action. Persons interested in assisting in the development of a proposal should notify Christine Watlington Jones by the end of the comment period and provide their name, address, phone number, email address and the organization represented (if any).