

# Regulations

## A. Floating wasteload allocations.

<u>Facility</u>	<u>VPDES No.</u>
<u>ACSA - Middle River Regional WWTP</u>	<u>VA0064793</u>
<u>North River WWTF</u>	<u>VA0060640</u>
<u>Waynesboro WWTP</u>	<u>VA0025151</u>
<u>Front Royal WWTP</u>	<u>VA0062812</u>
<u>Broad Run WRF</u>	<u>VA0091383</u>
<u>Leesburg WPCF</u>	<u>VA0092282</u>
<u>VA American Water Prince William - Section 1 WWTF</u>	<u>VA0024724</u>
<u>VA American Water Prince William - Section 8 WWTF</u>	<u>VA0024678</u>
<u>H. L. Mooney WWTF</u>	<u>VA0025101</u>
<u>Opequan WRF</u>	<u>VA065552</u>
<u>Parkins Mill WWTF</u>	<u>VA0075191</u>
<u>Alexandria Renew Enterprises WWTP</u>	<u>VA0025160</u>
<u>Arlington County WPCF</u>	<u>VA0025143</u>
<u>Noman M Cole Jr PCP</u>	<u>VA0025364</u>
<u>Aquia WWTP</u>	<u>VA0060968</u>
<u>Culpeper WWTP</u>	<u>VA0061590</u>
<u>FMC WWTF</u>	<u>VA0068110</u>
<u>Fredericksburg WWTF</u>	<u>VA0025127</u>
<u>Little Falls Run WWTF</u>	<u>VA0076392</u>
<u>Massaponax WWTF</u>	<u>VA0025658</u>
<u>HRSD - York River STP</u>	<u>VA0081311</u>
<u>Totopotomoy WWTP</u>	<u>VA0089915</u>
<u>Lynchburg STP</u>	<u>VA0024970</u>
<u>Moores Creek Advanced WRRF</u>	<u>VA0025518</u>
<u>Falling Creek WWTP</u>	<u>VA0024996</u>
<u>Henrico County WWTP</u>	<u>VA0063690</u>
<u>Hopewell WWTP</u>	<u>VA0066630</u>
<u>HRSD - Boat Harbor STP</u>	<u>VA0081256</u>
<u>HRSD - James River STP</u>	<u>VA0081272</u>
<u>HRSD - Williamsburg STP</u>	<u>VA0081302</u>
<u>Proctor's Creek WWTP</u>	<u>VA0060194</u>
<u>Richmond WWTP</u>	<u>VA0063177</u>
<u>South Central Wastewater Authority WWTP</u>	<u>VA0025437</u>

<u>HRSD - Nansemond STP</u>	<u>VA0081299</u>
<u>HRSD - Army Base STP</u>	<u>VA0081230</u>
<u>HRSD - VIP WWTP</u>	<u>VA0081281</u>

## B. Chlorophyll-a based total phosphorus wasteload allocations.

<u>Facility</u>	<u>VPDES No.</u>
<u>Richmond WWTP</u>	<u>VA0063177</u>
<u>Falling Creek WWTP</u>	<u>VA0024996</u>
<u>Proctor's Creek WWTP</u>	<u>VA0060194</u>
<u>Henrico County WWTP</u>	<u>VA0063690</u>
<u>Phillip Morris - Park 500</u>	<u>VA0026557</u>
<u>Hopewell WWTP</u>	<u>VA0063690</u>
<u>South Central Wastewater Authority WWTP</u>	<u>VA0025437</u>

VA.R. Doc. No. R20-6191; Filed August 4, 2021, 9:38 a.m.

## **Final Regulation**

**REGISTRAR'S NOTICE:** The State Water Control Board is claiming an exemption from Article 2 (§ 2.2-4006 et seq.) of the Administrative Process Act in accordance with the second enactment of Chapter 1207 of the 2020 Acts of Assembly, which exempts the actions of the board relating to the initial adoption of regulations necessary to implement the provisions of the act; however, the board is required to provide a public comment period of at least 60 days prior to adoption of final regulations.

**Title of Regulation:** **9VAC25-830. Chesapeake Bay Preservation Area Designation and Management Regulations (amending 9VAC25-830-40, 9VAC25-830-190; adding 9VAC25-830-155).**

**Statutory Authority:** §§ 62.1-44.15:69 and 62.1-44.15:72 of the Code of Virginia.

**Effective Date:** September 29, 2021.

**Agency Contact:** Justin L. Williams, Department of Environmental Quality, 1111 East Main Street, Suite 1400, P.O. Box 1105, Richmond, VA 23218, telephone (804) 698-4185 FAX (804) 698-4178, or email justin.williams@deq.virginia.gov.

### **Summary:**

*Pursuant to Chapter 1207 of the 2020 Acts of Assembly, which amended the Chesapeake Bay Preservation Act (§ 62.1-44.15:72 et seq. of the Code of Virginia) and added coastal resilience and adaptation to sea-level rise and climate change to the criteria requirements for regulations to be established by the State Water Control Board for use by local governments under the Chesapeake Bay Preservation Act, the amendments define specific criteria related to coastal resilience for Tidewater*

*Virginia localities to consider in land development activities.*

*Changes to the proposed regulation include (i) addition of definitions; (ii) provision of specifics concerning the assessment of climate change for projects in the resource protection area (RPA); (iii) addition of an allowance for the climate change assessment to be part of a water quality impact assessment and explicit language empowering local governments to require those conditions, alterations, or measures in response to a climate change assessment; (iv) refinement of the limitations on exceptions; (v) addition of specifics and conditions on requirements for adaptation measures; and (vi) provisions for exempting living shoreline projects from additional requirements. Additional revisions centered on the recognition of interplay between activities in the RPA and the jurisdiction of wetlands authority and the removal of unnecessary language in light of other revisions.*

## **[ 9VAC25-830-40. Definitions.**

The following words and terms used in this chapter have the following meanings, unless the context clearly indicates otherwise. In addition, some terms not defined herein are defined in § 62.1-44.15:68 of the Act.

"Act" means the Chesapeake Bay Preservation Act, Article 2.5 (§ 62.1-44.15:67 et seq.) of Chapter 3.1 of Title 62.1 of the Code of Virginia.

"Adaptation measure" means a project, practice, or approach to mitigate or address an impact of climate change including sea-level rise, storm surge, and flooding including increased or recurrent flooding.

"Best management practice" means a practice, or combination of practices, that is determined by a state or designated area-wide planning agency to be the most effective, practicable means of preventing or reducing the amount of pollution generated by nonpoint sources to a level compatible with water quality goals.

"Board" means the State Water Control Board.

"Buffer area" means an area of natural or established vegetation managed to protect other components of a Resource Protection Area and state waters from significant degradation due to land disturbances.

"Chesapeake Bay Preservation Area" means any land designated by a local government pursuant to Part III (9VAC25-830-70 et seq.) of this chapter and § 62.1-44.15:74 of the Act. A Chesapeake Bay Preservation Area shall consist of a Resource Protection Area and a Resource Management Area.

"Daylighted stream" means a stream that had been previously diverted into an underground drainage system and has been redirected into an aboveground channel using natural channel design concepts as defined in § 62.1-44.15:51 of the Code of

Virginia, and where the adjacent lands would meet the criteria for being designated as a Resource Protection Area (RPA) as defined by the board under this chapter.

"Department" means the Department of Environmental Quality.

"Development" means the construction or substantial alteration of residential, commercial, industrial, institutional, recreation, transportation, or utility facilities or structures.

"Director" means the Director of the Department of Environmental Quality.

"Erosion and Sediment Control Law" means Article 2.4 (§ 62.1-44.15:51 et seq.) of Chapter 3.1 of Title 62.1 of the Code of Virginia.

"Floodplain" means all lands that would be inundated by flood water as a result of a storm event of a 100-year return interval.

"Highly erodible soils" means soils (excluding vegetation) with an erodibility index (EI) from sheet and rill erosion equal to or greater than eight. The erodibility index for any soil is defined as the product of the formula  $RKLS/T$ , where K is the soil susceptibility to water erosion in the surface layer; R is the rainfall and runoff; LS is the combined effects of slope length and steepness; and T is the soil loss tolerance.

"Highly permeable soils" means soils with a given potential to transmit water through the soil profile. Highly permeable soils are identified as any soil having a permeability equal to or greater than six inches of water movement per hour in any part of the soil profile to a depth of 72 inches (permeability groups "rapid" and "very rapid") as found in the "National Soil Survey Handbook" of November 1996 in the "Field Office Technical Guide" of the U.S. Department of Agriculture Natural Resources Conservation Service.

"Impervious cover" means a surface composed of any material that significantly impedes or prevents natural infiltration of water into the soil. Impervious surfaces include, but are not limited to, roofs, buildings, streets, parking areas, and any concrete, asphalt or compacted gravel surface.

"Infill" means utilization of vacant land in previously developed areas.

"Intensely Developed Areas" means those areas designated by the local government pursuant to 9VAC25-830-100.

"Local governments" means counties, cities, and towns. This chapter applies to local governments in Tidewater Virginia, as defined in § 62.1-44.15:68 of the Act, but the provisions of this chapter may be used by other local governments.

"Local program" means the measures by which a local government complies with the Act and this chapter.

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# Regulations

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"Local program adoption date" means the date a local government meets the requirements of subdivisions 1 and 2 of 9VAC25-830-60.

"Nature-based solution" means an approach that reduces the impacts of sea-level rise, flooding and storm events through the use of environmental processes and natural systems.

"Nontidal wetlands" means those wetlands other than tidal wetlands that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions, as defined by the U.S. Environmental Protection Agency pursuant to § 404 of the federal Clean Water Act in 33 CFR 328.3b.

"Plan of development" means any process for site plan review in local zoning and land development regulations designed to ensure compliance with § 62.1-44.15:74 of the Act and this chapter, prior to issuance of a building permit.

"Public road" means a publicly owned road designed and constructed in accordance with water quality protection criteria at least as stringent as requirements applicable to the Virginia Department of Transportation, including regulations promulgated pursuant to (i) the Erosion and Sediment Control Law and (ii) the Virginia Stormwater Management Act. This definition includes those roads where the Virginia Department of Transportation exercises direct supervision over the design or construction activities, or both, and cases where secondary roads are constructed or maintained, or both, by a local government in accordance with the standards of that local government.

"Redevelopment" means the process of developing land that is or has been previously developed.

"Resource Management Area" means that component of the Chesapeake Bay Preservation Area that is not classified as the Resource Protection Area.

"Resource Protection Area" means that component of the Chesapeake Bay Preservation Area comprised of lands adjacent to water bodies with perennial flow that have an intrinsic water quality value due to the ecological and biological processes they perform or are sensitive to impacts ~~which~~ that may result in significant degradation to the quality of state waters.

"Silvicultural activities" means forest management activities, including ~~but not limited to~~ the harvesting of timber, the construction of roads and trails for forest management purposes, and the preparation of property for reforestation that are conducted in accordance with the silvicultural best management practices developed and enforced by the State Forester pursuant to § 10.1-1105 of the Code of Virginia and are located on property defined as real estate devoted to forest use under § 58.1-3230 of the Code of Virginia.

"Substantial alteration" means expansion or modification of a building or development that would result in a disturbance of land exceeding an area of 2,500 square feet in the Resource Management Area only.

"Tidal shore" or "shore" means land contiguous to a tidal body of water between the mean low water level and the mean high water level.

"Tidal wetlands" means vegetated and nonvegetated wetlands as defined in § 28.2-1300 of the Code of Virginia.

"Tidewater Virginia" means those jurisdictions named in § 62.1-44.15:68 of the Act.

"Use" means an activity on the land other than development including, ~~but not limited to~~, agriculture, horticulture and silviculture.

"Virginia Stormwater Management Act" means Article 2.3 (§ 62.1-44.15:24 et seq.) of Chapter 3.1 of Title 62.1 of the Code of Virginia.

"Water-dependent facility" means a development of land that cannot exist outside of the Resource Protection Area and must be located on the shoreline by reason of the intrinsic nature of its operation. These facilities include, ~~but are not limited to~~ (i) ports; (ii) the intake and outfall structures of power plants, water treatment plants, sewage treatment plants, and storm sewers; (iii) marinas and other boat docking structures; (iv) beaches and other public water-oriented recreation areas; and (v) fisheries or other marine resources facilities. ]

## **9VAC25-830-155. Climate change resilience and adaptation criteria.**

A. [ Pursuant to § 62.1-44.15:72 of the Code of Virginia, this section provides criteria and requirements to address coastal resilience and adaptation to sea-level rise and climate change. Adaptation measures may be allowed in the Chesapeake Bay Preservation Areas subject to approval by the local government, in accordance with the conditions set forth in this chapter. ]

This section applies in addition to 9VAC25-830-130 and 9VAC25-830-140. Local governments shall incorporate [ ~~these provisions~~ the requirements of this section ] into all relevant ordinances and ensure their enforcement through implementation of appropriate processes and documentation for oversight and enforcement. [ ~~Localities~~ In doing so, local governments ] shall [ ~~update and amend their ordinances to adopt and incorporate these performance criteria by (insert date three years after effective date of this amendment)~~ ensure that the incorporation is consistent with the water quality protections of the Act ].

[ ~~B. Land development and adaption measures or activities, including buffer modifications or encroachments necessary to install adaptation measures, mitigation measures, or other actions necessary to address the impacts of climate change,~~

~~including sea level rise, recurrent flooding, and storm surge, may be allowed in a Chesapeake Bay Preservation area provided the activity complies with all other applicable provisions of this chapter. Nothing in these provisions shall preclude a locality from adopting requirements or criteria in addition to the requirements of these provisions to address the impacts of climate change and sea level rise in Chesapeake Bay Preservation areas in the locality, including extension of the Resource Protection Areas, further restrictions on development, or further preservation of existing vegetation.~~

~~C. B. ] Local governments shall [ consider assess ] the impacts of climate change [ ~~or and~~ ] sea-level rise on any proposed land development in the Resource Protection Area [ during the plan of development or project review process ]. [ ~~Based upon this consideration, local governments may require the installation of additional measures or design features as part~~ Such assessment shall be based on the Resource Protection Area as delineated at the time ] of the proposed land development [ ~~consistent with the requirements of the Act and this chapter. In considering the future impact, local governments shall~~ Such assessment shall at a minimum ]:~~

1. [ ~~Consider~~ Be based upon ] a potential impact range of [ ~~no less than~~ ] 30 years [ ~~or the lifespan of the project if less than 30 years~~ ]:

2. Utilize [ ~~an appropriate a~~ ] model or forecast [ ~~to aid in the consideration of~~ developed by or on behalf of the Commonwealth;

3. Identify potential ] impacts [ ~~through use of~~ ]:

a. [ ~~The most updated~~ From projected sea-level rise using the ] 2017 National Oceanographic and Atmospheric Administration (NOAA) Intermediate-High scenario projection curve [ ~~or any subsequently updated version thereof, on the project site~~ ]:

[ ~~b. A model or forecast that incorporates or utilizes the 2017 National Oceanographic and Atmospheric Administration (NOAA) Intermediate High scenario projection curve; or~~

~~c. A peer reviewed model or forecast that includes NOAA 2017 projections, including the Intermediate High scenario projection curve and has been developed, utilized, or recognized by a state or federal agency and is not based solely upon extrapolation of historical data;~~

3. Include the consideration of future floodplain:

b. From storm surge based upon the most updated NOAA hydrodynamic Sea, Lake, and Overland Surges from Hurricanes model on the project site; and

c. From flooding based upon the most updated Special Flood Hazard Area and the Limit of Moderate Wave Action on the project site. Such assessment of flooding should be in conjunction with the requirements and application of floodplain management requirements and programs.

4. Assess the potential impacts in light of the proposed land development on buffer function including loss of riparian buffer vegetation and vegetation migration; ] water [ ~~level, storm surge, or other impacts in altering migration;~~ as well as the potential impacts resulting in additional future land disturbance or development in ] the Resource Protection Area [ ~~or diminishing the protection of water quality due to the proposed development from these impacts; and~~ 4. Identify measures, conditions, or alterations connected ] to the proposed land development [ .

5. Identify conditions, alterations, or adaptation measures for the proposed land development ] to address these [ potential ] impacts as necessary and appropriate based upon site conditions [ ; nature ], type [ , and size ] of proposed land development [ ~~, and projected~~ including whether such proposed land development is in an Intensely Developed Area overlay; extent of ] potential impacts [ ; ~~This includes;~~ and the necessity to minimize future land disturbance.

6. Local governments may require this assessment to be submitted as part of a Water Quality Impact Assessment. The specific content and procedures for the assessment shall be established by each local government and shall be of sufficient specificity to demonstrate compliance with this requirement.

7. Based upon the assessment, local governments shall, as necessary and appropriate, require conditions, alterations, or the installation of adaptation ] measures [ ~~such~~ ] as [ ~~state or federally recognized or approved best management practices appropriate for part of~~ ] the [ ~~site conditions and proposed~~ ] land development [ ~~to address such impacts~~ consistent with the requirements of the Act and this chapter ].

[ ~~D. Local governments shall not grant exceptions to the requirements of 9VAC25-830-130, 9VAC250-830-140, or 9VAC20-830-155 where:~~

1. The impact of climate change, including sea level rise on the land development is not considered as outlined in subsection C of this section for exceptions in the Resource Protection Area;

2. The exception consists of approval solely for the use of fill or other material to the Resource Protection Area or within 100 feet of the Resource Protection Area; or

3. The exception permits encroachment into seaward 50 feet of the buffer area of the Resource Protection Area notwithstanding permitted modifications and adaptive measures.

~~E. C. ] Local governments may allow [ ~~adaption~~ adaptation ] measures [ ~~or activities~~ ] within the Resource Protection Area [ ~~to address climate change, including sea level rise~~ ] subject to the following criteria [ ~~These criteria~~ ] and requirements [ , which ] shall apply [ ~~to such adaptation measure or activity~~ ] in~~

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# Regulations

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~~[ lieu of the criteria addition to those found ] in 9VAC25-830-130 and 9VAC25-830-140 [ 1. Where the including the requirement for a Water Quality Impact Assessment pursuant to subdivision 6 of 9VAC25-830-140. The ] adaptation [ measures or activity is within a Resource Protection Area that has been previously developed, including Intensely Developed Areas, and is not naturally vegetated, the adaptation measure or activity measure ] shall:~~

~~[ 1. Be a nature-based solution adaptation measure that uses environmental processes, natural systems, or natural features, is appropriate for site conditions, and is:~~

~~a. A Best Management Practice approved by the Chesapeake Bay Program Partnership; ]~~

~~b. [ a. Be designed, implemented An approved Virginia Stormwater Best Management Practice listed in the Virginia Stormwater Best Management Practice Clearinghouse;~~

~~c. An approved Shoreline Protection Strategy in accordance with the Tidal Wetlands Guidelines as determined by the Virginia Marine Resource Commission; or~~

~~d. A project that is an eligible activity for funding by the Virginia Community Flood Preparedness Fund as determined by the Virginia Department of Conservation and Recreation.~~

~~2. Be designed, installed, ] and maintained in accordance with [ best management practices the ] applicable [ to the ] adaptation measure [ or activity as recognized or approved by a state or federal agency; b. Not consist solely specifications in accordance with the type ] of the [ use of fill or other materials to raise the elevation of a Resource Protection Area;~~

~~e. Incorporate natural features or measures such as the planting of vegetation or trees, maximize preservation of existing natural vegetation and trees particularly mature trees, and minimize land disturbance and impervious cover to the maximum extent practicable consistent with the applicable best management practices; and~~

~~d. Where applicable, obtain any applicable federal, state, and local permits and comply with any applicable federal, state, and local requirements.~~

~~2. Where the adaptation measure or activity is within a Resource Protection Area that is naturally vegetated or has not been previously developed, the measure or activity shall:~~

~~a. Be designed and implemented in accordance with best management practices applicable to the adaptation measure or activity as recognized or approved by state or federal agencies;~~

~~b. Preserve to the maximum extent practicable any existing vegetation in the additional 50 feet landward adaptation measure identified in 9VAC25-830-155 C 1.~~

~~3. Allow for the use of fill only under the following conditions:~~

~~a. The grading and slope created by the use of fill shall be no greater than necessary based upon the project specifications and implemented in a manner that minimizes the impact of run-off;~~

~~b. The fill must have the necessary biogeochemical characteristics, including sufficient organic content, to support the growth of vegetation and adequate permeability to allow infiltration consistent with the project specifications;~~

~~c. The use of fill shall not enhance stormwater runoff ] from the Resource Protection Area [ , and any lateral flow onto adjacent properties shall be controlled ];~~

~~[ e. Not consist solely d. Any impacts on the management ] of [ the use of fill or other materials to raise stormwater upland of ] the [ elevation of a ] Resource Protection Area [ created by the use of fill shall be mitigated as necessary ];~~

~~[ & e. The use of fill shall not negatively impact septic systems and drainfields; and~~

~~f. The use of fill shall be consistent with any applicable federal or state law, including floodplain management requirements in 44 CFR Part 60.~~

~~4. ] Maximize [ the ] preservation of existing [ natural ] vegetation [ and trees, particularly including ] mature trees [ , incorporate the planting and establishment of vegetation, particularly trees, ] and minimize land disturbance [ and impervious cover to the maximum extent practicable consistent with the applicable best management practices; and e. Where applicable, obtain any applicable federal, state, and local permits and comply consistent ] with [ any applicable the adaptation measure specifications.~~

~~5. Comply with all ] federal, state, and local requirements [ : 3. Where the adaptation measure or activity is a best management practice recognized or approved by a state or federal agency to reduce runoff, prevent erosion, and filter nonpoint source pollution, a Water Quality Impact Assessment in accordance with subdivision 6 of 9VAC25-830-140 shall not be required. All other measures or activities shall require a Water Quality Impact Assessment in accordance with subdivision 6 of 9VAC25-830-140 including any required permits and conditions.~~

~~6. Nothing in this provision shall be construed to authorize approval or allowance of an adaptation measure in contravention of floodplain management requirements, including the National Flood Insurance Program and established floodplain ordinances, or construed to require a locality to approve or allow an adaptation measure in contravention of its participation in the National Flood Insurance Program Community Rating System.~~

~~D. Local governments shall ensure that any activity in the Resource Protection Area is consistent with Chapter 13 Title~~

28.2. Code of Virginia, and the accompanying Tidal Wetlands Guidelines which provide for "minimum standards for the protection and conservation of wetlands," and "ensure protection of shorelines and sensitive coastal habitat from sea level rise and coastal hazard." Shoreline management and alteration projects should be coordinated to address the requirements of the most updated Tidal Wetlands Guidelines in conjunction with the requirements of this chapter, including subdivision 5 a (4) of 9VAC25-830-140 ].

[ ~~4. Where the proposed adaptation measure is E. For ] a living shoreline [ ~~project or related activity~~, as defined in § 28.2-104.1 of the Code of Virginia, where ] the locality otherwise approves of the project, the [ ~~projects project~~ minimizes land disturbance and ] maintains or establishes a vegetative buffer inland of the living shoreline [ ~~to maximum extent practicable, minimizes land disturbance to the maximum extent practicable, and the project~~, complies with the fill conditions in subdivision C 3 of this section, and ] receives approval from the Virginia Marine Resources Commission [ ~~including a permit or the local wetlands board~~ ] as applicable, [ ~~and any other necessary permits or approvals, the adaptation measure shall be the locality may~~ ] exempt [ ~~it~~ ] from additional [ ~~performance criteria~~ ] requirements [ ~~or criteria~~ ], including a Water Quality Impact Assessment.~~

[ F. Local governments shall not grant exceptions to the requirements of 9VAC25-830-130, 9VAC25-830-140, or this section where:

1. The assessment of climate change and sea-level rise as outlined in subsection B of this section has not occurred; or

2. The proposed adaptation measure allows for the use of fill in a Resource Protection Area contravention of the requirements of 9VAC25-830-155 C 3. ]

## **[ 9VAC25-830-190. Land development ordinances, regulations, and procedures.**

A. Local governments shall review and revise their land development regulations, as necessary, to comply with § 62.1-44.15:74 of the Act. To achieve this:

1. Local zoning ordinances shall ensure that the uses permitted by the local zoning regulations are consistent with the Act and this chapter;

2. Local land development ordinances and regulations shall incorporate either explicitly or by direct reference the performance criteria in Part IV (9VAC25-830-120 et seq.) of this chapter. Specific development standards that implement the performance criteria from subdivisions 1, 2 and 4 of 9VAC25-830-130 (minimizing land disturbance and impervious cover and preserving existing vegetation) shall be included;

3. Local land development ordinances and regulations shall protect the integrity of Chesapeake Bay Preservation Areas by incorporating standards to ensure (i) the protection of

water quality; (ii) the preservation of Resource Protection Area land categories, as set forth in 9VAC25-830-80, including the 100-foot wide buffer area; and (iii) the compatibility of development with Resource Management Area land categories, as set forth in 9VAC25-830-90;

4. Local land development ordinances and regulations shall provide for (i) depiction of Resource Protection Area and Resource Management Area boundaries on plats and site plans, including a notation on plats of the requirement to retain an undisturbed and vegetated 100-foot wide buffer area, as specified in subdivision 3 of 9VAC25-830-140; (ii) a plat notation of the requirement for pump-out and 100% reserve drainfield sites for onsite sewage treatment systems, when applicable; and (iii) a plat notation of the permissibility of only water dependent facilities or redevelopment in Resource Protection Areas, including the 100-foot wide buffer area; and

5. Local governments shall require, during the plan of development review process, the delineation of the buildable areas that are allowed on each lot. The delineation of buildable areas shall be based on the performance criteria specified in Part IV (9VAC25-830-120 et seq.) of this chapter, local front and side yard setback requirements, and any other relevant easements or limitations regarding lot coverage.

B. Local governments shall undertake the following as necessary, to comply with § 62.1-44.15:74 of the Act:

1. Local governments shall evaluate the relationship between the submission requirements, performance standards, and permitted uses in local land development ordinances and regulations to identify any obstacles to achieving the water quality goals of the Act and this chapter as set forth in § 62.1-44.15:74 B of the Act, 9VAC25-830-50 and 9VAC25-830-120. Local governments shall revise these ordinances and regulations, as necessary, to eliminate any obstacles identified in the submission requirements or development standards.

2. Local governments shall review and revise their land development ordinances and regulations adopted pursuant to § 62.1-44.15:74 and Articles 1 (§ 15.2-2200 et seq.), 2 (§ 15.2-2210 et seq.), 4 (§ 15.2-2233 et seq.), 5 (§ 15.2-2239), 6 (15.2-2240 et seq.), and 7 (§ 15.2-2280 et seq.) of Chapter 22 of Title 15.2 of the Code of Virginia to assure that their subdivision ordinances, zoning ordinances, and all other components of their local Chesapeake Bay Preservation Act programs are consistent in promoting and achieving the protection of state waters. In addition, local governments shall identify and resolve any conflicts among the components of the local programs and with other local ordinances, regulations and administrative policies, to assure that the intent of the Act and this chapter is fulfilled.

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# Regulations

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3. Local governments shall review and revise their land development ordinances and regulations to ensure consistency with the water quality protection goals, objectives, policies, and implementation strategies identified in the local comprehensive plan.

C. Local governments shall update and amend their ordinances and regulations to adopt and incorporate updated requirements in Part IV (9VAC25-830-120 et seq.) of this chapter based upon statutory revisions to Virginia Code § 62.1-44.15:72. by September 29, 2024. ]

VA.R. Doc. No. R21-6647; Filed July 30, 2021, 1:38 p.m.

## Final Regulation

**REGISTRAR'S NOTICE:** The State Water Control Board is claiming an exemption from Article 2 (§ 2.2-4006 et seq.) of the Administrative Process Act in accordance with the second enactment of Chapter 1207 of the 2020 Acts of Assembly, which exempts the actions of the board relating to the initial adoption of regulations necessary to implement the provisions of the act; however, the board is required to provide a public comment period of at least 60 days prior to adoption of final regulations.

**Title of Regulation:** 9VAC25-830. Chesapeake Bay Preservation Area Designation and Management Regulations (amending 9VAC25-830-40, 9VAC25-830-130, 9VAC25-830-140, 9VAC25-830-190).

**Statutory Authority:** §§ 62.1-44.15:69 and 62.1-44.15:72 of the Code of Virginia.

**Effective Date:** September 29, 2021.

**Agency Contact:** Justin L. Williams, Department of Environmental Quality, 1111 East Main Street, Suite 1400, P.O. Box 1105, Richmond, VA 23218, telephone (804) 698-4185 FAX (804) 698-4178, or email [justin.williams@deq.virginia.gov](mailto:justin.williams@deq.virginia.gov).

### Summary:

*Pursuant to Chapter 1207 of the 2020 Acts of Assembly, which amended the Chesapeake Bay Preservation Act (§ 62.1-44.15:72 et seq. of the Code of Virginia) and added coastal resilience and adaptation to sea-level rise and climate change to the criteria requirements for regulations to be established by the State Water Control Board for use by local governments under the Chesapeake Bay Preservation Act, the amendments provide performance criteria requirements related to trees, particularly mature trees, under the Chesapeake Bay Preservation Act program, including (i) requiring preservation and protection of mature trees, including in instances where existing vegetation is removed that includes trees and requiring that trees are utilized in reestablishing vegetation to the maximum extent practicable; and (ii) providing that where vegetation or buffers must be established, the planting of trees should be utilized where practicable.*

## [ 9VAC25-830-40. Definitions.

The following words and terms used in this chapter have the following meanings, unless the context clearly indicates otherwise. In addition, some terms not defined herein are defined in § 62.1-44.15:68 of the Act.

"Act" means the Chesapeake Bay Preservation Act, Article 2.5 (§ 62.1-44.15:67 et seq.) of Chapter 3.1 of Title 62.1 of the Code of Virginia.

"Best management practice" means a practice, or combination of practices, that is determined by a state or designated area-wide planning agency to be the most effective, practicable means of preventing or reducing the amount of pollution generated by nonpoint sources to a level compatible with water quality goals.

"Board" means the State Water Control Board.

"Buffer area" means an area of natural or established vegetation managed to protect other components of a Resource Protection Area and state waters from significant degradation due to land disturbances.

"Canopy tree" means a tree that typically reaches 35 feet in height or taller when mature.

"Chesapeake Bay Preservation Area" means any land designated by a local government pursuant to Part III (9VAC25-830-70 et seq.) of this chapter and § 62.1-44.15:74 of the Act. A Chesapeake Bay Preservation Area shall consist of a Resource Protection Area and a Resource Management Area.

"Daylighted stream" means a stream that had been previously diverted into an underground drainage system and has been redirected into an aboveground channel using natural channel design concepts as defined in § 62.1-44.15:51 of the Code of Virginia, and where the adjacent lands would meet the criteria for being designated as a Resource Protection Area (RPA) as defined by the board under this chapter.

"Department" means the Department of Environmental Quality.

"Development" means the construction or substantial alteration of residential, commercial, industrial, institutional, recreation, transportation, or utility facilities or structures.

"Director" means the Director of the Department of Environmental Quality.

"Erosion and Sediment Control Law" means Article 2.4 (§ 62.1-44.15:51 et seq.) of Chapter 3.1 of Title 62.1 of the Code of Virginia.

"Floodplain" means all lands that would be inundated by flood water as a result of a storm event of a 100-year return interval.

"Highly erodible soils" means soils (excluding vegetation) with an erodibility index (EI) from sheet and rill erosion equal to or greater than eight. The erodibility index for any soil is defined as the product of the formula  $RKLS/T$ , where K is the soil susceptibility to water erosion in the surface layer; R is the rainfall and runoff; LS is the combined effects of slope length and steepness; and T is the soil loss tolerance.

"Highly permeable soils" means soils with a given potential to transmit water through the soil profile. Highly permeable soils are identified as any soil having a permeability equal to or greater than six inches of water movement per hour in any part of the soil profile to a depth of 72 inches (permeability groups "rapid" and "very rapid") as found in the "National Soil Survey Handbook" of November 1996 in the "Field Office Technical Guide" of the U.S. Department of Agriculture Natural Resources Conservation Service.

"Impervious cover" means a surface composed of any material that significantly impedes or prevents natural infiltration of water into the soil. Impervious surfaces include; ~~but are not limited to,~~ roofs, buildings, streets, parking areas, and any concrete, asphalt or compacted gravel surface.

"Infill" means utilization of vacant land in previously developed areas.

"Intensely Developed Areas" means those areas designated by the local government pursuant to 9VAC25-830-100.

"Local governments" means counties, cities, and towns. This chapter applies to local governments in Tidewater Virginia, as defined in § 62.1-44.15:68 of the Act, but the provisions of this chapter may be used by other local governments.

"Local program" means the measures by which a local government complies with the Act and this chapter.

"Local program adoption date" means the date a local government meets the requirements of subdivisions 1 and 2 of 9VAC25-830-60.

"Mature tree" means a canopy tree with a diameter at breast height (DBH) of 12 inches or greater or an understory tree with a DBH of four inches or greater.

"Nontidal wetlands" means those wetlands other than tidal wetlands that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions, as defined by the U.S. Environmental Protection Agency pursuant to § 404 of the federal Clean Water Act in 33 CFR 328.3b.

"Plan of development" means any process for site plan review in local zoning and land development regulations designed to ensure compliance with § 62.1-44.15:74 of the Act and this chapter, prior to issuance of a building permit.

"Public road" means a publicly owned road designed and constructed in accordance with water quality protection criteria at least as stringent as requirements applicable to the Virginia Department of Transportation, including regulations promulgated pursuant to (i) the Erosion and Sediment Control Law and (ii) the Virginia Stormwater Management Act. This definition includes those roads where the Virginia Department of Transportation exercises direct supervision over the design or construction activities, or both, and cases where secondary roads are constructed or maintained, or both, by a local government in accordance with the standards of that local government.

"Redevelopment" means the process of developing land that is or has been previously developed.

"Resource Management Area" means that component of the Chesapeake Bay Preservation Area that is not classified as the Resource Protection Area.

"Resource Protection Area" means that component of the Chesapeake Bay Preservation Area comprised of lands adjacent to water bodies with perennial flow that have an intrinsic water quality value due to the ecological and biological processes they perform or are sensitive to impacts ~~which~~ that may result in significant degradation to the quality of state waters.

"Silvicultural activities" means forest management activities, including ~~but not limited to~~ the harvesting of timber, the construction of roads and trails for forest management purposes, and the preparation of property for reforestation that are conducted in accordance with the silvicultural best management practices developed and enforced by the State Forester pursuant to § 10.1-1105 of the Code of Virginia and are located on property defined as real estate devoted to forest use under § 58.1-3230 of the Code of Virginia.

"Substantial alteration" means expansion or modification of a building or development that would result in a disturbance of land exceeding an area of 2,500 square feet in the Resource Management Area only.

"Tidal shore" or "shore" means land contiguous to a tidal body of water between the mean low water level and the mean high water level.

"Tidal wetlands" means vegetated and nonvegetated wetlands as defined in § 28.2-1300 of the Code of Virginia.

"Tidewater Virginia" means those jurisdictions named in § 62.1-44.15:68 of the Act.

"Understory tree" means a tree that typically reaches 12 feet to 35 feet in height when mature.

"Use" means an activity on the land other than development including, ~~but not limited to,~~ agriculture, horticulture, and silviculture.



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# Regulations

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"Virginia Stormwater Management Act" means Article 2.3 (§ 62.1-44.15:24 et seq.) of Chapter 3.1 of Title 62.1 of the Code of Virginia.

"Water-dependent facility" means a development of land that cannot exist outside of the Resource Protection Area and must be located on the shoreline by reason of the intrinsic nature of its operation. These facilities include, ~~but are not limited to~~ (i) ports; (ii) the intake and outfall structures of power plants, water treatment plants, sewage treatment plants, and storm sewers; (iii) marinas and other boat docking structures; (iv) beaches and other public water-oriented recreation areas; and (v) fisheries or other marine resources facilities. ]

## **9VAC25-830-130. General performance criteria.**

Through their applicable land use ordinances, regulations, and enforcement mechanisms, local governments shall require that any use, development, or redevelopment of land in Chesapeake Bay Preservation Areas meets the following performance criteria:

1. No more land shall be disturbed than is necessary to provide for the proposed use or development.

2. Indigenous vegetation shall be preserved to the maximum extent practicable, consistent with the use or development proposed. Mature trees shall [ be protected during development and ] only [ be ] removed where [ determined to be ] necessary [ , including ] to provide for the proposed use or development [ and protected during development to the maximum extent practicable ].

[ A locality which has an ordinance providing for the conservation, planting, and replacement of trees during the land development process pursuant to § 15.2-961 or 15.2-961.1 of the Code of Virginia may rely on such ordinance for demonstrating compliance with this requirement related to mature trees in Resource Management Areas. ]

3. All development exceeding 2,500 square feet of land disturbance shall be accomplished through a plan of development review process consistent with § 15.2-2286 A 8 of the Code of Virginia and subdivision 1 e of 9VAC25-830-240.

4. Land development shall minimize impervious cover consistent with the proposed use or development.

5. Any land disturbing activity that exceeds an area of 2,500 square feet (including construction of all single family houses, septic tanks, and drainfields, but otherwise as defined in § 62.1-44.15:51 of the Code of Virginia) shall comply with the requirements of the local erosion and sediment control ordinance. Enforcement for noncompliance with the erosion and sediment control requirements referenced in this criterion shall be conducted under the provisions of the Erosion and Sediment Control Law and attendant regulations.

6. Any Chesapeake Bay Preservation Act land-disturbing activity as defined in § 62.1-44.15:24 of the Code of Virginia shall comply with the requirements of 9VAC25-870-51 and 9VAC25-870-103.

7. Onsite sewage treatment systems not requiring a Virginia Pollutant Discharge Elimination System (VPDES) permit shall:

a. Have pump-out accomplished for all such systems at least once every five years.

(1) If deemed appropriate by the local health department and subject to conditions the local health department may set, local governments may offer to the owners of such systems, as an alternative to the mandatory pump-out, the option of having a plastic filter installed and maintained in the outflow pipe from the septic tank to filter solid material from the effluent while sustaining adequate flow to the drainfield to permit normal use of the septic system. Such a filter should satisfy standards established in the Sewage Handling and Disposal Regulations (12VAC5-610) administered by the Virginia Department of Health.

(2) Furthermore, in lieu of requiring proof of septic tank pump-out every five years, local governments may allow owners of onsite sewage treatment systems to submit documentation every five years, certified by an operator or onsite soil evaluator licensed or certified under Chapter 23 (§ 54.1-2300 et seq.) of Title 54.1 of the Code of Virginia as being qualified to operate, maintain, or design onsite sewage systems, that the septic system has been inspected, is functioning properly, and the tank does not need to have the effluent pumped out of it.

b. For new construction, provide a reserve sewage disposal site with a capacity at least equal to that of the primary sewage disposal site. This reserve sewage disposal site requirement shall not apply to any lot or parcel recorded prior to October 1, 1989, if the lot or parcel is not sufficient in capacity to accommodate a reserve sewage disposal site, as determined by the local health department. Building shall be prohibited on the area of all sewage disposal sites until the structure is served by public sewer or an onsite sewage treatment system that operates under a permit issued by the board. All sewage disposal site records shall be administered to provide adequate notice and enforcement. As an alternative to the 100% reserve sewage disposal site, local governments may offer the owners of such systems the option of installing an alternating drainfield system meeting the following conditions:

(1) Each of the two alternating drainfields in the system shall have, at a minimum, an area not less than 50% of the area that would otherwise be required if a single primary drainfield were constructed.

(2) An area equaling 50% of the area that would otherwise be required for the primary drainfield site must be reserved

for subsurface absorption systems that utilize a flow diversion device, in order to provide for future replacement or repair to meet the requirements for a sewage disposal system. Expansion of the primary system will require an expansion of this reserve area.

(3) The two alternating drainfields shall be connected by a diversion valve, approved by the local health department, located in the pipe between the septic (aerobic) tank and the distribution boxes. The diversion valve shall be used to alternate the direction of effluent flow to one drainfield or the other at a time. However, diversion valves shall not be used for the following types of treatment systems:

- (a) Sand mounds;
  - (b) Low-pressure distribution systems;
  - (c) Repair situations when installation of a valve is not feasible; and
  - (d) Any other approved system for which the use of a valve would adversely affect the design of the system, as determined by the local health department.
- (4) The diversion valve shall be a three-port, two-way valve of approved materials (i.e., resistant to sewage and leakproof and designed so that the effluent from the tank can be directed to flow into either one of the two distribution boxes).
- (5) There shall be a conduit from the top of the valve to the ground surface with an appropriate cover to be level with or above the ground surface.
- (6) The valve shall not be located in driveways, recreational courts, parking lots, or beneath sheds or other structures.
- (7) In lieu of the aforementioned diversion valve, any device that can be designed and constructed to conveniently direct the flow of effluent from the tank into either one of the two distribution boxes may be approved if plans are submitted to the local health department and found to be satisfactory.
- (8) The local government shall require that the ~~owner(s)~~ owner alternate the drainfields every 12 months to permit the yearly resting of half of the absorption system.
- (9) The local government shall ensure that the ~~owner(s)~~ owner are notified annually of the requirement to switch the valve to the opposite drainfield.

8. Land upon which agricultural activities are being conducted, including ~~but not limited to~~ crop production, pasture, and dairy and feedlot operations, or lands otherwise defined as agricultural land by the local government, shall have a soil and water quality conservation assessment conducted that evaluates the effectiveness of existing practices pertaining to soil erosion and sediment control, nutrient management, and management of pesticides, and, where necessary, results in a plan that outlines additional

practices needed to ensure that water quality protection is being accomplished consistent with the Act and this chapter.

a. Recommendations for additional conservation practices need address only those conservation issues applicable to the tract or field being assessed. Any soil and water quality conservation practices that are recommended as a result of such an assessment and are subsequently implemented with financial assistance from federal or state cost-share programs must be designed, consistent with cost-share practice standards effective in January 1999 in the "Field Office Technical Guide" of the U.S. Department of Agriculture Natural Resource Conservation Service or the June 2000 edition of the "Virginia Agricultural BMP Manual" of the Virginia Department of Conservation and Recreation, respectively. Unless otherwise specified in this section, general standards pertaining to the various agricultural conservation practices being assessed shall be as follows:

(1) For erosion and sediment control recommendations, the goal shall be, where feasible, to prevent erosion from exceeding the soil loss tolerance level, referred to as "T," as defined in the "National Soil Survey Handbook" of November 1996 in the "Field Office Technical Guide" of the U.S. Department of Agriculture Natural Resource Conservation Service. However, in no case shall erosion exceed the soil loss consistent with an Alternative Conservation System, referred to as an "ACS", as defined in the "Field Office Technical Guide" of the U.S. Department of Agriculture Natural Resource Conservation Service.

(2) For nutrient management, whenever nutrient management plans are developed, the operator or landowner must provide soil test information, consistent with the Virginia Nutrient Management Training and Certification Regulations (4VAC50-85).

(3) For pest chemical control, referrals shall be made to the local cooperative extension agent or an Integrated Pest Management Specialist of the Virginia Cooperative Extension Service. Recommendations shall include copies of applicable information from the "Virginia Pest Management Guide" or other Extension materials related to pest control.

b. A higher priority shall be placed on conducting assessments of agricultural fields and tracts adjacent to Resource Protection Areas. However, if the landowner or operator of such a tract also has Resource Management Area fields or tracts in his operation, the assessment for that landowner or operator may be conducted for all fields or tracts in the operation. When such an expanded assessment is completed, priority must return to Resource Protection Area fields and tracts.

c. The findings and recommendations of such assessments and any resulting soil and water quality conservation plans will be submitted to the local Soil and Water Conservation

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# Regulations

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District Board, which will be the plan-approving authority.

9. Silvicultural activities in Chesapeake Bay Preservation Areas are exempt from this chapter provided that silvicultural operations adhere to water quality protection procedures prescribed by the Virginia Department of Forestry in the Fifth Edition (March 2011) of "Virginia's Forestry Best Management Practices for Water Quality Technical Manual." The Virginia Department of Forestry will oversee and document installation of best management practices and will monitor in-stream impacts of forestry operations in Chesapeake Bay Preservation Areas.

10. Local governments shall require evidence of all wetlands permits required by law prior to authorizing grading or other onsite activities to begin.

## **9VAC25-830-140. Development criteria for Resource Protection Areas.**

In addition to the general performance criteria set forth in 9VAC25-830-130, the criteria in this section are applicable in Resource Protection Areas.

1. Land development may be allowed in the Resource Protection Area, subject to approval by the local government, only if it (i) is water dependent; (ii) constitutes redevelopment; (iii) constitutes development or redevelopment within a designated Intensely Developed Area; (iv) is a new use established pursuant to subdivision 4 a of this section; (v) is a road or driveway crossing satisfying the conditions set forth in subdivision 1 d of this section; or (vi) is a flood control or stormwater management facility satisfying the conditions set forth in subdivision 1 e of this section.

a. A water quality impact assessment in accordance with subdivision 6 of this section shall be required for any proposed land disturbance.

b. A new or expanded water-dependent facility may be allowed provided that the following criteria are met:

(1) It does not conflict with the comprehensive plan;

(2) It complies with the performance criteria set forth in 9VAC25-830-130;

(3) Any nonwater-dependent component is located outside of Resource Protection Areas; and

(4) Access to the water-dependent facility will be provided with the minimum disturbance necessary. Where practicable, a single point of access will be provided.

c. Redevelopment outside locally designated Intensely Developed Areas shall be permitted in the Resource Protection Area only if there is no increase in the amount of [ ~~imperious~~ impervious ] cover and no further encroachment within the Resource Protection Area, and it shall conform to applicable erosion and sediment control and stormwater management criteria set forth in the

Erosion and Sediment Control Law and the Virginia Stormwater Management Act and their attendant regulations, as well as all applicable stormwater management requirements of other state and federal agencies.

d. Roads and driveways not exempt under subdivision B 1 of 9VAC25-830-150 and which, therefore, must comply with the provisions of this chapter, may be constructed in or across Resource Protection Areas if each of the following conditions is met:

(1) The local government makes a finding that there are no reasonable alternatives to aligning the road or driveway in or across the Resource Protection Area;

(2) The alignment and design of the road or driveway are optimized, consistent with other applicable requirements, to minimize (i) encroachment in the Resource Protection Area and (ii) adverse effects on water quality;

(3) The design and construction of the road or driveway satisfy all applicable criteria of this chapter, including submission of a water quality impact assessment; and

(4) The local government reviews the plan for the road or driveway proposed in or across the Resource Protection Area in coordination with local government site plan, subdivision and plan of development approvals.

e. Flood control and stormwater management facilities that drain or treat water from multiple development projects or from a significant portion of a watershed may be allowed in Resource Protection Areas provided such facilities are allowed and constructed in accordance with the Virginia Stormwater Management Act and its attendant regulations, and provided that (i) the local government has conclusively established that location of the facility within the Resource Protection Area is the optimum location; (ii) the size of the facility is the minimum necessary to provide necessary flood control or stormwater treatment, or both; (iii) the facility must be consistent with a comprehensive stormwater management plan developed and approved in accordance with 9VAC25-870-92 of the Virginia Stormwater Management Program (VSMP) regulations; (iv) all applicable permits for construction in state or federal waters must be obtained from the appropriate state and federal agencies, such as the U.S. Army Corps of Engineers, the department, and the Virginia Marine Resources Commission; (v) approval must be received from the local government prior to construction; and (vi) routine maintenance is allowed to be performed on such facilities to assure that they continue to function as designed. It is not the intent of this subdivision to allow a best management practice that collects and treats runoff from only an individual lot or some portion of the lot to be located within a Resource Protection Area.

2. Exemptions in Resource Protection Areas. The following land disturbances in Resource Protection Areas may be exempt from the criteria of this part provided that they comply with subdivisions a and b of this subdivision 2: (i) water wells; (ii) passive recreation facilities such as boardwalks, trails, and pathways; and (iii) historic preservation and archaeological activities:

- a. Local governments shall establish administrative procedures to review such exemptions.
- b. Any land disturbance exceeding an area of 2,500 square feet shall comply with the erosion and sediment control criteria in subdivision 5 of 9VAC25-830-130.

3. Buffer area requirements. The 100-foot wide buffer area shall be the landward component of the Resource Protection Area as set forth in subdivision B 5 of 9VAC25-830-80. Notwithstanding permitted uses, encroachments, and vegetation clearing, as set forth in this section, the 100-foot wide buffer area is not reduced in width. To minimize the adverse effects of human activities on the other components of the Resource Protection Area, state waters, and aquatic life, a 100-foot wide buffer area of vegetation that is effective in retarding runoff, preventing erosion, and filtering nonpoint source pollution from runoff shall be retained if present and established where it does not exist. Where such buffer must be established, the planting of trees [ ~~should shall~~ ] be [ ~~utilized to the maximum extent practicable and~~ incorporated as ] appropriate to site conditions [ and in such a manner to maximize the buffer function. Inclusion of native species in tree planting is preferred ].

- a. The 100-foot wide buffer area shall be deemed to achieve a 75% reduction of sediments and a 40% reduction of nutrients.
- b. Where land uses such as agriculture or silviculture within the area of the buffer cease and the lands are proposed to be converted to other uses, the full 100-foot wide buffer shall be reestablished. In reestablishing the buffer, management measures shall be undertaken to provide woody vegetation that assures the buffer functions set forth in this chapter. [ ~~Such measures should include to the maximum extent practicable and appropriate to site conditions the planting of trees in reestablishing the buffer. Where such buffer must be reestablished, the planting of trees shall be incorporated as appropriate to site conditions and in such a manner to maximize the buffer function. Inclusion of native species in tree planting is preferred.~~ ]

4. Permitted encroachments into the buffer area.

- a. When the application of the buffer area would result in the loss of a buildable area on a lot or parcel recorded prior to October 1, 1989, encroachments into the buffer area may be allowed through an administrative process in accordance with the following criteria:

(1) Encroachments into the buffer area shall be the minimum necessary to achieve a reasonable buildable area for a principal structure and necessary utilities.

(2) Where practicable, a vegetated area that will maximize water quality protection, mitigate the effects of the buffer encroachment, and is equal to the area of encroachment into the buffer area shall be established elsewhere on the lot or parcel. Such vegetated area where established [ ~~should shall~~ ] include the planting of trees [ as appropriate ] to [ ~~the maximum extent practicable site conditions. Inclusion of native species in tree planting is preferred~~ ].

(3) The encroachment may not extend into the seaward 50 feet of the buffer area.

b. When the application of the buffer area would result in the loss of a buildable area on a lot or parcel recorded between October 1, 1989, and March 1, 2002, encroachments into the buffer area may be allowed through an administrative process in accordance with the following criteria:

- (1) The lot or parcel was created as a result of a legal process conducted in conformity with the local government's subdivision regulations;
- (2) Conditions or mitigation measures imposed through a previously approved exception shall be met;
- (3) If the use of a best management practice (BMP) was previously required, the BMP shall be evaluated to determine if it continues to function effectively and, if necessary, the BMP shall be reestablished or repaired and maintained as required; and
- (4) The criteria in subdivision 4 a of this section shall be met.

5. Permitted modifications of the buffer area.

a. In order to maintain the functional value of the buffer area, existing vegetation may be removed, subject to approval by the local government, only to provide for reasonable sight lines, access paths, general woodlot management, and best management practices, including those that prevent upland erosion and concentrated flows of stormwater, as follows:

(1) Trees may be pruned or removed as necessary to provide for sight lines and vistas, provided that where removed, they shall be replaced with other vegetation that is equally effective in retarding runoff, preventing erosion, and filtering nonpoint source pollution from runoff. Mature trees [ ~~should shall~~ ] be preserved and [ ~~not removed~~ trimmed or pruned in lieu of removal as site conditions permit and any removal should be limited ] to the [ ~~maximum extent practicable under this provision~~ fewest number of trees feasible ]. When trees are removed [ ~~the other vegetation to replace the trees should be to provide for sight lines and vista, they shall be replaced with~~ ] trees as [ ~~well~~ appropriate ] to [ ~~the maximum extent~~

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# Regulations

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practicable site conditions and in such a manner as to maximize the buffer function and to protect the quality of state waters. Inclusion of native species in tree replanting is preferred ].

(2) Any path shall be constructed and surfaced so as to effectively control erosion.

(3) Dead, diseased, or dying trees or shrubbery and noxious weeds (such as Johnson grass, kudzu, and multiflora rose) may be removed and thinning of trees may be allowed pursuant to sound horticultural practice incorporated into locally-adopted standards.

(4) For shoreline erosion control projects, trees and woody vegetation may be removed, necessary control techniques employed, and appropriate vegetation established to protect or stabilize the shoreline in accordance with the best available technical advice and applicable permit conditions or requirements. Mature trees [ should shall ] be [ preserved to the maximum extent practicable removed only as necessary for the installation and maintenance of the projects ] consistent with the best available technical advice [ project plans, ] and [ applicable ] permit conditions or requirements [ and trees should. Trees shall ] be utilized in the [ projects to the maximum extent practicable project when vegetation is being established as appropriate to the site conditions and the project specifications. Inclusion of native species in tree planting is preferred ].

b. On agricultural lands the agricultural buffer area shall be managed to prevent concentrated flows of surface water from breaching the buffer area and appropriate measures may be taken to prevent noxious weeds (such as Johnson grass, kudzu, and multiflora rose) from invading the buffer area. Agricultural activities may encroach into the buffer area as follows:

(1) Agricultural activities may encroach into the landward 50 feet of the 100-foot wide buffer area when at least one agricultural best management practice which, in the opinion of the local soil and water conservation district board, addresses the more predominant water quality issue on the adjacent land—erosion control or nutrient management—is being implemented on the adjacent land, provided that the combination of the undisturbed buffer area and the best management practice achieves water quality protection, pollutant removal, and water resource conservation at least the equivalent of the 100-foot wide buffer area. If nutrient management is identified as the predominant water quality issue, a nutrient management plan, including soil tests, must be developed consistent with the ~~Virginia~~ Nutrient Management Training and Certification Regulations ~~(4VAC5-15)~~ (4VAC50-85) administered by the ~~Virginia Department of Soil and Water Conservation and Recreation Board~~.

(2) Agricultural activities may encroach within the landward 75 feet of the 100-foot wide buffer area when

agricultural best management practices which address erosion control, nutrient management, and pest chemical control, are being implemented on the adjacent land. The erosion control practices must prevent erosion from exceeding the soil loss tolerance level, referred to as "T," as defined in the "National Soil Survey Handbook" of November 1996 in the "Field Office Technical Guide" of the U.S. Department of Agriculture Natural Resource Conservation Service. A nutrient management plan, including soil tests, must be developed, consistent with the ~~Virginia~~ Nutrient Management Training and Certification Regulations ~~(4VAC5-15)~~ (4VAC50-85) administered by the ~~Virginia Department of Soil and Water Conservation and Recreation Board~~. In conjunction with the remaining buffer area, this collection of best management practices shall be presumed to achieve water quality protection at least the equivalent of that provided by the 100-foot wide buffer area.

(3) The buffer area is not required to be designated adjacent to agricultural drainage ditches if at least one best management practice which, in the opinion of the local soil and water conservation district board, addresses the more predominant water quality issue on the adjacent land—either erosion control or nutrient management—is being implemented on the adjacent land.

(4) If specific problems are identified pertaining to agricultural activities that are causing pollution of the nearby water body with perennial flow or violate performance standards pertaining to the vegetated buffer area, the local government, in cooperation with soil and water conservation district, shall recommend a compliance schedule to the landowner and require the problems to be corrected consistent with that schedule. This schedule shall expedite environmental protection while taking into account the seasons and other temporal considerations so that the probability for successfully implementing the corrective measures is greatest.

(5) In cases where the landowner or ~~his~~ the landowner's agent or operator has refused assistance from the local soil and water conservation district in complying with or documenting compliance with the agricultural requirements of this chapter, the district shall report the noncompliance to the local government. The local government shall require the landowner to correct the problems within a specified period of time not to exceed 18 months from their initial notification of the deficiencies to the landowner. The local government, in cooperation with the district, shall recommend a compliance schedule to the landowner. This schedule shall expedite environmental protection while taking into account the seasons and other temporal considerations so that the probability for successfully implementing the corrective measures is greatest.

6. Water quality impact assessment. A water quality impact assessment shall be required for any proposed development within the Resource Protection Area consistent with this part and for any other development in Chesapeake Bay Preservation Areas that may warrant such assessment because of the unique characteristics of the site or intensity of the proposed use or development.

a. The purpose of the water quality impact assessment is to identify the impacts of proposed development on water quality and lands in the Resource Protection Areas consistent with the goals and objectives of the Act, this chapter, and local programs, and to determine specific measures for mitigation of those impacts. The specific content and procedures for the water quality impact assessment shall be established by each local government. Local governments should notify the board of all development requiring such an assessment.

b. The water quality impact assessment shall be of sufficient specificity to demonstrate compliance with the criteria of the local program.

7. Buffer area requirements for Intensely Developed Areas. In Intensely Developed Areas the local government may exercise discretion regarding whether to require establishment of vegetation in the 100-foot wide buffer area. However, while the immediate establishment of vegetation in the buffer area may be impractical, local governments shall give consideration to implementing measures that would establish vegetation in the buffer in these areas over time in order to maximize water quality protection, pollutant removal, and water resource conservation. In considering such measures, [ the ] local [ government—should governments shall ] consider the planting of trees as a [ part component ] of any such [ measures measure. Inclusion of native species in tree planting is preferred ].

## **[ 9VAC25-830-190. Land development ordinances, regulations, and procedures.**

A. Local governments shall review and revise their land development regulations, as necessary, to comply with § 62.1-44.15:74 of the Act. To achieve this:

1. Local zoning ordinances shall ensure that the uses permitted by the local zoning regulations are consistent with the Act and this chapter;

2. Local land development ordinances and regulations shall incorporate either explicitly or by direct reference the performance criteria in Part IV (9VAC25-830-120 et seq.) of this chapter. Specific development standards that implement the performance criteria from subdivisions 1, 2 and 4 of 9VAC25-830-130 (minimizing land disturbance and impervious cover and preserving existing vegetation) shall be included;

3. Local land development ordinances and regulations shall protect the integrity of Chesapeake Bay Preservation Areas

by incorporating standards to ensure (i) the protection of water quality; (ii) the preservation of Resource Protection Area land categories, as set forth in 9VAC25-830-80, including the 100-foot wide buffer area; and (iii) the compatibility of development with Resource Management Area land categories, as set forth in 9VAC25-830-90;

4. Local land development ordinances and regulations shall provide for (i) depiction of Resource Protection Area and Resource Management Area boundaries on plats and site plans, including a notation on plats of the requirement to retain an undisturbed and vegetated 100-foot wide buffer area, as specified in subdivision 3 of 9VAC25-830-140; (ii) a plat notation of the requirement for pump-out and 100% reserve drainfield sites for onsite sewage treatment systems, when applicable; and (iii) a plat notation of the permissibility of only water dependent facilities or redevelopment in Resource Protection Areas, including the 100-foot wide buffer area; and

5. Local governments shall require, during the plan of development review process, the delineation of the buildable areas that are allowed on each lot. The delineation of buildable areas shall be based on the performance criteria specified in Part IV (9VAC25-830-120 et seq.) of this chapter, local front and side yard setback requirements, and any other relevant easements or limitations regarding lot coverage.

B. Local governments shall undertake the following as necessary, to comply with § 62.1-44.15:74 of the Act:

1. Local governments shall evaluate the relationship between the submission requirements, performance standards, and permitted uses in local land development ordinances and regulations to identify any obstacles to achieving the water quality goals of the Act and this chapter as set forth in § 62.1-44.15:74 B of the Act, 9VAC25-830-50 and 9VAC25-830-120. Local governments shall revise these ordinances and regulations, as necessary, to eliminate any obstacles identified in the submission requirements or development standards.

2. Local governments shall review and revise their land development ordinances and regulations adopted pursuant to § 62.1-44.15:74 and Articles 1 (§ 15.2-2200 et seq.), 2 (§ 15.2-2210 et seq.), 4 (§ 15.2-2233 et seq.), 5 (§ 15.2-2239), 6 (15.2-2240 et seq.), and 7 (§ 15.2-2280 et seq.) of Chapter 22 of Title 15.2 of the Code of Virginia to assure that their subdivision ordinances, zoning ordinances, and all other components of their local Chesapeake Bay Preservation Act programs are consistent in promoting and achieving the protection of state waters. In addition, local governments shall identify and resolve any conflicts among the components of the local programs and with other local ordinances, regulations and administrative policies, to assure that the intent of the Act and this chapter is fulfilled.

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# Regulations

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3. Local governments shall review and revise their land development ordinances and regulations to ensure consistency with the water quality protection goals, objectives, policies, and implementation strategies identified in the local comprehensive plan.

C. Local governments shall update and amend their ordinances and regulations to adopt and incorporate updated performance criteria requirements in Part IV (9VAC25-830-120 et seq.) of this chapter, based upon statutory revisions to § 62.1-44.15:72 of the Code of Virginia, by September 29, 2024. ]

VA.R. Doc. No. R21-6648; Filed July 30, 2021, 1:22 p.m.

## Final Regulation

**REGISTRAR'S NOTICE:** The State Water Control Board is claiming an exemption from Article 2 of the Administrative Process Act in accordance with § 2.2-4006 A 4 a of the Code of Virginia, which excludes regulations that are necessary to conform to changes in Virginia statutory law or the appropriation act where no agency discretion is involved. The board will receive, consider, and respond to petitions by any interested person at any time with respect to reconsideration or revision.

**Title of Regulation:** 9VAC25-840. Erosion and Sediment Control Regulations (adding 9VAC25-840-45).

**Statutory Authority:** § 62.1-44.15:52 of the Code of Virginia.

**Effective Date:** September 29, 2021.

**Agency Contact:** Andrew Hammond, Department of Environmental Quality, 1111 East Main Street, Suite 1400, P.O. Box 1105, Richmond, VA 23218, telephone (804) 698-4101, FAX (804) 698-4178, or email [andrew.hammond@deq.virginia.gov](mailto:andrew.hammond@deq.virginia.gov).

### Summary:

*Chapter 497 of the 2021 Acts of Assembly, Special Session I, amends the State Water Control Law (§ 62.1-44.2 et seq. of the Code of Virginia) to provide that any local Virginia Erosion and Sediment Control Program (VЕСP) authority that does not operate a regulated municipal separate storm sewer system and for which the department did not administer a Virginia Stormwater Management Program as of July 1, 2020, shall notify the department if it decides to have the department provide the local VЕСP authority with (i) review of the Erosion and Sediment Control (ESC) Plan required by the Erosion and Sediment Control Law (§ 62.1-44.15:51 et seq. of the Code of Virginia) and the Erosion and Sediment Control Regulations (9VAC25-840) and (ii) a recommendation on the ESC Plan's compliance with the requirements of the law and regulations for any solar project and its associated infrastructure with a rated electrical generation capacity exceeding five megawatts. Chapter 497 also established timeframes within which the local VЕСP authority must forward any newly submitted or resubmitted ESC Plan to the department for review and timeframes within which the department must review and respond. The*

*amendments add a new section to the regulation aligning it with statute.*

## **9VAC25-840-45. Department review of erosion and sediment control plans for solar projects.**

A. Any VЕСP authority that does not operate a regulated municipal separate storm sewer system and for which the department did not administer a Virginia Stormwater Management Program as of July 1, 2020, shall notify the department if it decides to have the department provide the VЕСP authority with (i) review of the erosion and sediment control plan required by § 62.1-44.15:55 A of the Code of Virginia and (ii) a recommendation on the plan's compliance with the requirements of this chapter for any solar project and its associated infrastructure with a rated electrical generation capacity exceeding five megawatts.

B. Any VЕСP authority that notifies the department pursuant to this section shall within five days of receiving the erosion and sediment control plan forward the plan to the department for review. If the plan forwarded to the department is incomplete, the department shall return the plan to the VЕСP authority immediately, and the application process shall start over. If the plan forwarded to the department is complete, the department shall review the plan for compliance with the requirements of this chapter and provide a recommendation to the VЕСP authority. The VЕСP authority shall then (i) grant written approval of the plan or (ii) provide written notice of disapproval of the plan in accordance with § 62.1-44.15:55 B of the Code of Virginia.

C. Any VЕСP authority that notifies the department pursuant to this section shall within five days of receiving the resubmittal of a previously disapproved erosion and sediment control plan forward the resubmitted plan to the department for review. The department shall review the resubmitted plan for compliance with the requirements of this chapter and provide a recommendation to the VЕСP authority. The VЕСP authority shall then (i) grant written approval of the plan or (ii) provide written notice of disapproval of the plan in accordance with § 62.1-44.15:55 B of the Code of Virginia.

VA.R. Doc. No. R22-6796; Filed July 30, 2021, 2:19 p.m.

## Final Regulation

**REGISTRAR'S NOTICE:** The State Water Control Board is claiming an exemption from Article 2 of the Administrative Process Act in accordance with § 2.2-4006 A 4 a of the Code of Virginia, which excludes regulations that are necessary to conform to changes in Virginia statutory law or the appropriation act where no agency discretion is involved. The board will receive, consider, and respond to petitions by any interested person at any time with respect to reconsideration or revision.

**Title of Regulation:** 9VAC25-840. Erosion and Sediment Control Regulations (amending 9VAC25-840-100).