

VIRGINIA ACTS OF ASSEMBLY -- 2005 SESSION

CHAPTER 102

An Act to amend and reenact §§ 2.2-4006, 2.2-4021, 10.1-107, and 10.1-502 of the Code of Virginia and §§ 10.1-603.4 and 10.1-603.12:2 of the Code of Virginia as they shall become effective, and to amend the Code of Virginia by adding a section numbered 10.1-566.1, relating to stormwater management.

[H 2365]

Approved March 20, 2005

Be it enacted by the General Assembly of Virginia:

1. That §§ 2.2-4006, 2.2-4021, 10.1-107, and 10.1-502 of the Code of Virginia and §§ 10.1-603.4 and 10.1-603.12:2 of the Code of Virginia as they shall become effective are amended and reenacted; and that the Code of Virginia is amended by adding a section numbered 10.1-566.1 as follows:

§ 2.2-4006. Exemptions from requirements of this article.

A. The following agency actions otherwise subject to this chapter and § 2.2-4103 of the Virginia Register Act shall be exempted from the operation of this article:

1. Agency orders or regulations fixing rates or prices.
2. Regulations that establish or prescribe agency organization, internal practice or procedures, including delegations of authority.

3. Regulations that consist only of changes in style or form or corrections of technical errors. Each promulgating agency shall review all references to sections of the Code of Virginia within their regulations each time a new supplement or replacement volume to the Code of Virginia is published to ensure the accuracy of each section or section subdivision identification listed.

4. Regulations that are:

a. Necessary to conform to changes in Virginia statutory law or the appropriation act where no agency discretion is involved;

b. Required by order of any state or federal court of competent jurisdiction where no agency discretion is involved; or

c. Necessary to meet the requirements of federal law or regulations, provided such regulations do not differ materially from those required by federal law or regulation, and the Registrar has so determined in writing. Notice of the proposed adoption of these regulations and the Registrar's determination shall be published in the Virginia Register not less than 30 days prior to the effective date of the regulation.

5. Preliminary program permit fees of the Department of Environmental Quality assessed pursuant to subsection C of § 10.1-1322.2.

6. Regulations of the Pesticide Control Board adopted pursuant to subsection B of § 3.1-249.51 or clause (v) or (vi) of subsection C of § 3.1-249.53 after having been considered at two or more Board meetings and one public hearing.

7. Regulations of the regulatory boards served by (i) the Department of Labor and Industry pursuant to Title 40.1 and (ii) the Department of Professional and Occupational Regulation or the Department of Health Professions pursuant to Title 54.1 that are limited to reducing fees charged to regulants and applicants.

8. The development and issuance of procedural policy relating to risk-based mine inspections by the Department of Mines, Minerals and Energy authorized pursuant to §§ 45.1-161.82 and 45.1-161.292:55.

9. General permits issued by the (a) State Air Pollution Control Board pursuant to Chapter 13 (§ 10.1-1300 et seq.) of Title 10.1 or (b) State Water Control Board pursuant to the State Water Control Law (§ 62.1-44.2 et seq.), Chapter 24 (§ 62.1-242 et seq.) of Title 62.1 and Chapter 25 (§ 62.1-254 et seq.) of Title 62.1, (c) *Virginia Soil and Water Conservation Board pursuant to the Virginia Stormwater Management Act* (§ 10.1-603.1 et seq.) of Title 10.1, and (d) the development and issuance of general wetlands permits by the Marine Resources Commission pursuant to subsection B of § 28.2-1307, if the respective Board or Commission (i) provides a Notice of Intended Regulatory Action in conformance with the provisions of subsection B of § 2.2-4007, (ii) following the passage of 30 days from the publication of the Notice of Intended Regulatory Action forms a technical advisory committee composed of relevant stakeholders, including potentially affected citizens groups, to assist in the development of the general permit, (iii) provides notice and receives oral and written comment as provided in subsection F of § 2.2-4007, and (iv) conducts at least one public hearing on the proposed general permit.

10. The development and issuance by the Board of Education of guidelines on constitutional rights and restrictions relating to the recitation of the pledge of allegiance to the American flag in public schools pursuant to § 22.1-202.

11. Regulations of the Board of the Virginia College Savings Plan adopted pursuant to § 23-38.77.
12. Regulations of the Marine Resources Commission.
13. Regulations adopted by the Board of Housing and Community Development pursuant to subsection D of § 36-99.

B. Whenever regulations are adopted under this section, the agency shall state as part thereof that it will receive, consider and respond to petitions by any interested person at any time with respect to reconsideration or revision. The effective date of regulations adopted under this subsection shall be in accordance with the provisions of § 2.2-4015, except in the case of emergency regulations, which shall become effective as provided in subsection B of § 2.2-4012.

C. A regulation for which an exemption is claimed under this section or § 2.2-4002, or § 2.2-4011 and that is placed before a board or commission for consideration shall be provided at least two days in advance of the board or commission meeting to members of the public that request a copy of that regulation. A copy of that regulation shall be made available to the public attending such meeting.

§ 2.2-4021. Timetable for decision; exemptions.

A. In cases where a board or commission meets to render (i) an informal fact-finding decision or (ii) a decision on a litigated issue, and information from a prior proceeding is being considered, persons who participated in the prior proceeding shall be provided an opportunity to respond at the board or commission meeting to any summaries of the prior proceeding prepared by or for the board or commission.

B. In any informal fact-finding or formal proceeding in which a hearing officer is not used or is not empowered to recommend a finding, the board, commission, or agency personnel responsible for rendering a decision shall render that decision within ~~ninety~~ 90 days from the date of the informal fact-finding or formal proceeding or from a later date agreed to by the named party and the agency. If the agency does not render a decision within ~~ninety~~ 90 days, the named party to the case decision may provide written notice to the agency that a decision is due. If no decision is made within ~~thirty~~ 30 days from agency receipt of the notice, the decision shall be deemed to be in favor of the named party. The preceding sentence shall not apply to case decisions before (i) the State Water Control Board or the Department of Environmental Quality to the extent necessary to comply with the federal Clean Water Act, ~~or~~ (ii) the State Air Pollution Control Board or the Department of Environmental Quality to the extent necessary to comply with the federal Clean Air Act, *or (iii) the Virginia Soil and Water Conservation Board or the Department of Conservation and Recreation to the extent necessary to comply with the federal Clean Water Act.* An agency shall provide notification to the named party of its decision within five days of the decision.

C. In any informal fact-finding or formal proceeding in which a hearing officer is empowered to recommend a finding, the board, commission, or agency personnel responsible for rendering a decision shall render that decision within ~~thirty~~ 30 days from the date that the agency receives the hearing officer's recommendation. If the agency does not render a decision within ~~thirty~~ 30 days, the named party to the case decision may provide written notice to the agency that a decision is due. If no decision is made within ~~thirty~~ 30 days from agency receipt of the notice, the decision is deemed to be in favor of the named party. The preceding sentence shall not apply to case decisions before (i) the State Water Control Board or the Department of Environmental Quality to the extent necessary to comply with the federal Clean Water Act, ~~or~~ (ii) the State Air Pollution Control Board or the Department of Environmental Quality to the extent necessary to comply with the federal Clean Air Act, *or (iii) the Virginia Soil and Water Conservation Board or the Department of Conservation and Recreation to the extent necessary to comply with the federal Clean Water Act.* An agency shall provide notice to the named party of its decision within five days of the decision.

D. The provisions of subsection B notwithstanding, if the board members or agency personnel who conducted the informal fact-finding or formal proceeding are unable to attend to official duties due to sickness, disability, or termination of their official capacity with the agency, then the timeframe provisions of subsection B shall be reset and commence from the date that either new board members or agency personnel are assigned to the matter or a new proceeding is conducted if needed, whichever is later. An agency shall provide notice within five days to the named party of any incapacity of the board members or agency personnel that necessitates a replacement or a new proceeding.

§ 10.1-107. General powers and duties of the Board.

A. The Board shall advise the Governor and the Director on activities of the Department. Upon the request of the Governor, or the Director, the Board shall institute investigations and make recommendations.

The Board shall formulate recommendations to the Director concerning:

1. Requests for grants or loans pertaining to outdoor recreation.
2. Designation of recreational and historical sites eligible for recreational access road funds.
3. Designations proposed for scenic rivers, scenic highways, and Virginia byways.
4. Acquisition of real property by fee simple or other interests in property for the Department including, but not limited to, state parks, state recreational areas, state trails, greenways, natural areas and natural area preserves, and other lands of biological, environmental, historical, recreational or

scientific interest.

5. Acquisition of bequests, devises and gifts of real and personal property, and the interest and income derived therefrom.

6. Stage one and stage two plans, master plans, and substantial acquisition or improvement amendments to master plans as provided in § 10.1-200.1.

B. The Board shall have the authority to promulgate regulations necessary for the execution of the ~~Virginia Stormwater Management Act, Article 1-1 (§ 10.1-603.1 et seq.) of Chapter 6 of this title and for the execution of the Public Beach Conservation and Development Act, Article 2 (§ 10.1-705 et seq.) of Chapter 7 of this title.~~

C. The Board shall assist the Department in the duties and responsibilities described in Subtitle I (§ 10.1-100 et seq.) of Title 10.1.

D. The Board is authorized to conduct fund-raising activities as deemed appropriate and will deposit such revenue into the State Parks Projects Fund pursuant to subsection D of § 10.1-202.

§ 10.1-502. Soil and Water Conservation Board; composition.

The Virginia Soil and Water Conservation Board is continued and shall perform the functions conferred upon it in this chapter. The Board shall consist of 10 voting members. The Director of the Department of Conservation and Recreation, or his designee, shall be a member of the Board. Three at-large members of the Board shall be appointed by the Governor ~~to serve at the pleasure of the Governor, for a term coincident with that of the appointing Governor; vacancies in the office of such appointed members shall be filled by the Governor. After the initial staggering of terms, nonlegislative citizen members shall be appointed for a term of four years.~~ At least two of the three at-large members should have a demonstrated interest in natural resource conservation with a background or knowledge in dam safety, soil conservation, water quality protection, or urban point or nonpoint source pollution control. ~~Four~~ *Additionally, four* members shall be farmers and two members shall be farmers or district directors, appointed by the Governor from a list of two qualified nominees for each vacancy submitted by the Board of Directors of the Virginia Association of Soil and Water Conservation Districts and the Soil and Water Conservation Board in joint session, each for a term of four years. *All* appointed members shall not serve more than two consecutive full terms. Appointments to fill vacancies shall be made in the same manner as described above, except that such appointments shall be for the unexpired terms only. The Board may invite the Virginia State Conservationist, Natural Resources Conservation Service, to serve as an advisory nonvoting member. The Board shall keep a record of its official actions, shall adopt a seal and may perform acts, hold public hearings, and promulgate regulations necessary for the execution of its functions under this chapter.

§ 10.1-566.1. Reporting.

Each locality's plan-approving authority shall report to the Department, in a method and on a time schedule established by the Department, a listing of each land-disturbing activity in the locality for which a plan has been approved under this article.

§ 10.1-603.4. Development of regulations.

The Board is authorized to adopt regulations that specify minimum technical criteria and administrative procedures for stormwater management programs in Virginia. The regulations shall:

1. Establish standards and procedures for delegating the authority for administering a stormwater management program to localities;

2. Establish minimum design criteria for measures to control nonpoint source pollution and localized flooding, and incorporate the stormwater management regulations adopted pursuant to the Virginia Erosion and Sediment Control Law (§ 10.1-560 et seq.), as they relate to the prevention of stream channel erosion. These criteria shall be periodically modified as required in order to reflect current engineering methods;

3. Require the provision of long-term responsibility for and maintenance of stormwater management control devices and other techniques specified to manage the quality and quantity of runoff;

4. Require as a minimum the inclusion in local programs of certain administrative procedures which include, but are not limited to, specifying the time period within which a local government that has adopted a stormwater management program must grant permit approval, the conditions under which approval shall be granted, the procedures for communicating disapproval, the conditions under which an approved permit may be changed and requirements for inspection of approved projects;

5. Establish, with the concurrence of the Director, a statewide permit fee schedule for stormwater management related to land disturbing activities of one acre or greater. The fee schedule ~~may~~ *shall* also include a provision for a reduced fee for land disturbing activities between 2,500 square feet and up to 1 acre in Chesapeake Bay Preservation Act (§ 10.1-2100 et seq.) localities. The regulations shall be governed by the following:

a. The revenue generated from the statewide stormwater permit fee shall be collected and remitted to the State Treasurer for deposit in the Virginia Stormwater Management Fund established pursuant to § 10.1-603.4:1. However, whenever the Board has delegated a stormwater management program to a locality or is required to do so under this article, no more than 30 percent of the total revenue generated by the statewide stormwater permit fees collected within the locality shall be remitted to the State

Treasurer, for deposit in the Virginia Stormwater Management Fund.

b. Fees collected pursuant to this section shall be in addition to any general fund appropriation made to the Department; however, the fees shall be set at a level sufficient for the Department to carry out its responsibilities under this article;

6. Establish statewide standards for stormwater management from land disturbing activities of one acre or greater, except as specified otherwise within this article, and allow for the consolidation in the permit of a comprehensive approach to addressing stormwater management and erosion and sediment control, consistent with the provisions of the Erosion and Sediment Control Law (§ 10.1-560 et seq.) and this article. However, such standards shall also apply to land disturbing activity exceeding an area of 2500 square feet in all areas of the jurisdictions designated as subject to the Chesapeake Bay Preservation Area Designation and Management Regulations (9 VAC 10-20 et seq.) adopted pursuant to the Chesapeake Bay Preservation Act (§ 10.1-2100 et seq.);

7. Require that stormwater management programs maintain after-development runoff rate of flow and characteristics that replicate, as nearly as practicable, the existing predevelopment runoff characteristics and site hydrology, or improve upon the contributing share of the existing predevelopment runoff characteristics and site hydrology if stream channel erosion or localized flooding is an existing predevelopment condition; ~~and~~

8. Encourage low impact development designs, regional and watershed approaches, and nonstructural means for controlling stormwater; *and*

9. *Establish, with the concurrence of the Director, a statewide permit fee schedule for stormwater management related to municipal separate storm sewer system permits.*

§ 10.1-603.12:2. Information to be furnished.

The Board, the Department, or the permit issuing authority may require every permit applicant or permittee to furnish when requested such application materials, plans, specifications, and other pertinent information as may be necessary to determine the effect of his discharge on the quality of state waters, or such other information as may be necessary to accomplish the purposes of this article. Any personal information shall not be disclosed except to an appropriate official of the Board, Department, *US EPA*, or permit issuing authority or as may be authorized pursuant to the Virginia Freedom of Information Act (§ 2.2-3700 et seq.). However, disclosure of records of the Department, the Board, or the permit issuing authority relating to (i) active federal environmental enforcement actions that are considered confidential under federal law, ~~and~~ (ii) enforcement strategies, including proposed sanctions for enforcement actions, *and (iii) any secret formulae, secret processes, or secret methods other than effluent data used by any permittee or under that permittee's direction* is prohibited. Upon request, such *enforcement* records shall be disclosed after a proposed sanction resulting from the investigation has been determined by the Department, the Board, or the permit issuing authority. This section shall not be construed to prohibit the disclosure of records related to inspection reports, notices of violation, and documents detailing the nature of any land disturbing activity that may have occurred, or similar documents.

2. That the Governor shall make new appointments for each of the three at-large members of the Board in accordance with the provisions of this act on July 1, 2005. The new appointments of the at-large members of the Board shall go into effect upon the expiration of the current members' terms in January 2006, and the terms shall be staggered as follows: one member for a term of two years; one member for a term of three years; and one member for a term of four years. The Governor shall designate the term to be served by each appointee at the time of appointment and may reappoint the existing at-large members of the Board.

3. That the Director of the Department of Conservation and Recreation shall amend the Stormwater Management Regulations by removing the out-of-date Best Management Practices (BMP) nutrient removal efficiency information and adding it into the Virginia Stormwater Management Handbook guidance document where it shall be more effectively updated for public use.