



COMMONWEALTH of VIRGINIA

DEPARTMENT OF ENVIRONMENTAL QUALITY

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SUMMARY MEMORANDUM

TO: David K. Paylor

FROM: Carol Wampler

DATE: December 2, 2011

SUBJECT: **Decision Regarding Necessity to Develop Water Related Permit by Rule Regulations**

BACKGROUND AND STATUS

Pursuant to the Small Renewable Energy Projects Act of 2009 (§10.1-1197.5 et seq. of the Code of Virginia), the Department is directed to develop one or more permits by rule “if it is determined by the Department that one or more such permits by rule are necessary for the construction and operation of small renewable energy projects.” DEQ filed a Notice of Intended Regulatory Action (NOIRA) for each renewable energy resource (or group of related resources). Based on expressions of interest by members of the public, DEQ also established a Regulatory Advisory Panel (RAP) of stakeholders to consider potential PBR’s for each renewable energy resource and to make recommendations to DEQ’s Director. Pursuant to the respective RAP’s recommendations, the Director has approved a proposed PBR regulation for Wind projects, Solar projects, and Combustion energy projects (biomass, energy from waste, municipal solid waste). The Water Related NOIRA (9VAC15-80) was posted on August 15, 2011, and stated in pertinent part, “[t]he purpose of this regulatory action is to implement 2009 state legislation requiring the Department of Environmental Quality to develop one or more permits-by-rule for water-related energy projects with rated capacity not exceeding 100 megawatts, if the Department determines that a permit-by-rule is necessary.”

The Water Related RAP was established in September 2011 to consider a potential PBR for the water related renewable resources that are listed in the 2009 statute; *i.e.*, falling water, wave motion, tides, and geothermal power. The Water Related RAP considered all of the public comments that were submitted during the NOIRA public comment period (August 15 – September 14, 2011) when the RAP met on September 27 and October 21, 2011. No members of the public came to speak at the public forum available at each RAP meeting.

After careful consideration of the issues, it was the consensus recommendation of the Water Related RAP that it is **not necessary** or appropriate, under current conditions, for DEQ to develop a PBR regulation for renewable energy projects that generate electricity from **falling water, wave motion, tides, or geothermal power**. The RAP further recommended that DEQ re-evaluate the potential need for a PBR regulation concerning these water related renewable energy resources in 2014, or sooner if circumstances or public requests so indicate.

The Department, with concurrence of the RAP, determined that it would be appropriate to conduct a 30-day informal public comment period concerning the RAP's recommendations. The RAP remained an active public body so that it might address any comments submitted during the public comment period, if needed. Although this informal public comment is not required by law, the Department wanted to afford the public an opportunity to comment on the RAP's recommendations prior to the Director's making a final determination. Notice of the informal public comment period was posted on the Regulatory Town Hall. The Town Hall notice directed interested persons to the Department's Renewable Energy website, where additional information was made available. Information posted on the website included the following: a list of Water Related RAP members; the RAP's consensus recommendations and rationale; minutes of RAP meetings on September 27 and October 21; compilation of research and input from experts (September 23, 2011; updated October 20, 2011); *First Iowa Hydro-Elec. Co-op. v. Federal Power Com'n*, 328 U.S. 152 (1946); and a memorandum written by law student intern Connor Kain (July 13, 2011). This information is likewise appended to this memorandum, along with a copy of the public notice of the informal public comment period.

The informal public comment period ended on November 28, 2011, and no comments were received.

STAFF DISCUSSION AND RECOMMENDATIONS

After the close of the Water Related RAP's deliberations on October 21, 2011, a summary of the RAP's consensus-based recommendations and rationale was submitted to the Director, so that he was apprised of the subject matter of the upcoming public comment period. Staff concurred in the RAP's recommendations and rationale. Since no public comment was received during the public comment period, staff believes that there is no reason to modify these original recommendations. Accordingly, they are set forth here, as follows:

RAP Recommendations:

It is not necessary or appropriate, under current conditions, for DEQ to develop a PBR regulation for renewable energy projects that generate electricity from falling water, wave motion, tides, or geothermal power.

DEQ should re-evaluate the potential need for a PBR regulation concerning these water related renewable energy resources in 2014, or sooner if circumstances or public requests so indicate.

Rationale:

Falling Water

- According to research and advice from a representative of the Federal Energy Regulatory Commission (FERC), Virginia is pre-empted by FERC on the issues addressed by the 2009 statute and therefore does not have legal authority to develop a PBR for falling water/hydroelectric projects. *cf. First Iowa Hydro-Elec. Co-op. v. Federal Power Com'n, 328 U.S. 152 (1946)*
- It does not appear likely that a hydroelectric project will be developed in Virginia that does not come under FERC's jurisdiction, especially a project large enough to exceed the five megawatts of rated capacity "de minimis" standard adopted in DEQ's other renewable energy PBR's and under previous law by the State Corporation Commission.
- FERC's license requirements include all of the substantive issues addressed by Virginia's 2009 statute.

Wave Motion & Tides

- Based on conversations a representative of FERC, it is also likely that DEQ is pre-empted by FERC from developing a PBR for any other type of hydrokinetic project, including projects that generate electricity from wave motion or tides. FERC appears to be taking the lead for license decisions regarding these projects in other states.
- According to information provided by a number of experts in the field, Virginia lacks sufficient hydrokinetic resources to support development of these projects with current electricity-generation technology.

In addition, it was noted in the October 21 memorandum to the Director that the chapter number 9VAC15-80 would be retained on the Regulatory Town Hall in case the Department later determined that a permit by rule regulation is necessary for one or more of these renewable energy sources (falling water, wave motion, tides, or geothermal power).

RECOMMENDATION

Based on your consideration of the foregoing comments, the deliberations of the Water Related RAP, and the attached documents, you will be deciding whether it is necessary for the Department to develop a PBR at the present time for projects that generate electricity from falling water, wave motion, tides, or geothermal power.

As stated above, staff recommends that you approve the consensus-based recommendations of the Water Related RAP.

Staff also recommends that chapter number 9VAC15-80 be retained on the Regulatory Town Hall in case the Department later determines that a permit by rule regulation is necessary for one or more of these renewable energy sources (falling water, wave motion, tides, or geothermal power).

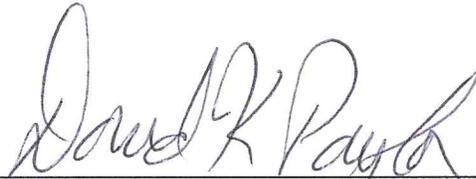
DIRECTOR DECISION

I hereby accept the staff recommendations and render the following decisions:

It is not necessary or appropriate, under current conditions, for DEQ to develop a PBR regulation for renewable energy projects that generate electricity from falling water, wave motion, tides, or geothermal power.

DEQ will re-evaluate the potential need for a PBR regulation concerning these water related renewable energy resources in 2014, or sooner if circumstances or public requests so indicate.

Chapter number 9VAC15-80 will be retained on the Regulatory Town Hall in case the Department later determines that a permit by rule regulation is necessary for one or more of these renewable energy sources (falling water, wave motion, tides, or geothermal power).



David K. Paylor, Director, DEQ

December 2, 2011

Date

ATTACHMENTS:

1. Water Related RAP Membership
2. RAP's consensus recommendations and rationale
3. Minutes of RAP meeting on September 27, 2011
4. Minutes of RAP meeting on October 21, 2011
5. Compilation of research and input from experts (September 23, 2011; updated October 20, 2011)
6. *First Iowa Hydro-Elec. Co-op. v. Federal Power Com'n*, 328 U.S. 152 (1946)
7. Memorandum written by law student intern Connor Kain (July 13, 2011)
8. Notice of informal public comment period