



Final Regulation Agency Background Document

Approving authority name	State Water Control Board
Virginia Administrative Code (VAC) citation	9 VAC 25-260
Regulation title	Water Quality Standards
Action title	Amendment to the State's Antidegradation Policy (9 VAC 25-260-30) by designating a portion of the main stem of Ragged Island Creek in Isle of Wight County as an Exceptional State Water
Document preparation date	December 7, 2004

This information is required for executive review (www.townhall.state.va.us/dpbpages/apaintro.htm#execreview) and the Virginia Registrar of Regulations (legis.state.va.us/codecomm/register/regindex.htm), pursuant to the Virginia Administrative Process Act (www.townhall.state.va.us/dpbpages/dpb_apa.htm), Executive Orders 21 (2002) and 58 (1999) (www.governor.state.va.us/Press_Policy/Executive_Orders/EOHome.html), and the *Virginia Register Form, Style, and Procedure Manual* (http://legis.state.va.us/codecomm/register/download/styl8_95.rtf).

Brief summary

*Please provide a brief summary of the proposed new regulation, proposed amendments to the existing regulation, or the regulation proposed to be repealed. Alert the reader to all substantive matters or changes. If applicable, generally describe the existing regulation. Also alert the reader to changes made to the regulation since publication of the proposed. Do **not** state each provision or amendment or restate the purpose and intent of the regulation.*

The proposed amendment to the Antidegradation Policy section (9 VAC 25-260-30) of the State's Water Quality Standards regulation designates a portion of the main stem of Ragged Island Creek in Isle of Wight County for special protection as an Exceptional State Water (9 VAC 25-260-30.A.3.c).

Statement of final agency action

Please provide a statement of the final action taken by the agency including (1) the date the action was taken, (2) the name of the agency taking the action, and (3) the title of the regulation.

The State Water Control Board adopted at their December 2, 2004 meeting an amendment to the Water Quality Standards regulation to designate as an Exceptional State Water a portion of the main stem of Ragged Island Creek in Isle of Wight County.

Legal basis

Please identify the state and/or federal source of legal authority to promulgate this proposed regulation, including (1) the most relevant law and/or regulation, including Code of Virginia citation and General Assembly bill and chapter numbers, if applicable, and (2) promulgating entity, i.e., the agency, board, or person. Describe the legal authority and the extent to which the authority is mandatory or discretionary.

If the final text differs from the text at the proposed stage, please indicate whether the Office of the Attorney General has certified that the agency has the statutory authority to promulgate the final regulation and that it comports with applicable state and/or federal law.

§ 62.1-44.15(3a) of the Code of Virginia, as amended, mandates and authorizes the Board to establish water quality standards and policies for any State waters consistent with the purpose and general policy of the State Water Control Law, and to modify, amend or cancel any such standards or policies established. The federal Clean Water Act at 303(c) mandates the State Water Control Board to review and, as appropriate, modify and adopt water quality standards. The corresponding federal water quality standards regulation at 40 CFR 131.6 describes the minimum requirements for water quality standards. The minimum requirements are use designations, water quality criteria to protect the designated uses and an antidegradation policy. All of the citations mentioned describe mandates for water quality standards.

Web Address sites where citations can be found:

Federal Regulation web site

<http://www.epa.gov/epahome/cfr40.htm>

Clean Water Act web site

<http://www4.law.cornell.edu/uscode/33/1313.html>

State Water Control Law (Code of Virginia) web site

<http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+62.1-44.2>

<http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+62.1-44.15>

The Environmental Protection Agency (EPA) Water Quality Standards regulation (40 CFR 131.12) is the regulatory basis for the EPA requiring the states to establish within the antidegradation policy the Exceptional State Waters category and the eligibility decision criteria for these waters. EPA retains approval/disapproval oversight, but delegates to the states the election and designation of specific water bodies as Exceptional State Waters.

Purpose

Please explain the need for the new or amended regulation. Describe the rationale or justification of the proposed regulatory action. Detail the specific reasons it is essential to protect the health, safety or welfare of citizens. Discuss the goals of the proposal and the problems the proposal is intended to solve.

This proposed regulatory action is a necessary revision to the State water quality standards regulation. The State Water Control Board views Exceptional State Waters nominations as citizen petitions under § 9-6.14.71 of the Code of Virginia. Therefore, the Board took action on this petition for proposed designation because Department staff had concluded, based on the information available at the time of the preliminary evaluation, that the proposed designation met the eligibility requirements which a water body must meet before it can be afforded the extra point source protection provided by such a designation. The Exceptional State Waters category of the Antidegradation Policy allows the Board to designate waters which display exceptional environmental settings and either exceptional aquatic communities or exceptional recreational opportunities for added protection. Once designated, the Antidegradation Policy provides that no water quality degradation would be allowed in the Exceptional State Waters. The only exception would be temporary, limited impact activities. By ensuring that no water quality degradation is allowed to occur in waters with exceptional environmental settings and either exceptional recreational opportunities or exceptional aquatic communities, the Board is protecting these special waters at their present quality for use and enjoyment by future generations of Virginians.

Substance

Please identify and explain the new substantive provisions, the substantive changes to existing sections, or both where appropriate. A more detailed discussion is required under the "All changes made in this regulatory action" section.

The amendment to the Antidegradation Policy (9 VAC 25-260-30), part of the State's Water Quality Standards regulation, designates a portion of the main stem of Ragged Island Creek in Isle of Wight County for special protection as an Exceptional State Water (9 VAC 25-260-30.A.3.c).

Issues

Please identify the issues associated with the proposed regulatory action, including:

- 1) the primary advantages and disadvantages to the public, such as individual private citizens or businesses, of implementing the new or amended provisions;*
- 2) the primary advantages and disadvantages to the agency or the Commonwealth; and*
- 3) other pertinent matters of interest to the regulated community, government officials, and the public.*

If there are no disadvantages to the public or the Commonwealth, please indicate.

Upon permanent regulatory designation of a water body as an Exceptional State Water, the quality of that water body will be maintained and protected by not allowing any degradation except on a very short-term basis. No new, additional or increased point source discharge of sewage, industrial wastes or other pollution would be allowed into waters designated. In addition, no new mixing zones would be allowed in

the Exceptional State Water and mixing zones from upstream or tributary waters could not extend into the Exceptional State Water section.

A potential disadvantage to the public may be the prohibition of new or expanded permanent point source discharges imposed within the segment once the regulatory designation is effective that would cause riparian landowners within the designated segment to seek alternatives to discharging to the designated segment and, therefore, to have additional financial expenditures associated with wastewater or storm water treatment. The portion of Ragged Island Creek under consideration for designation does not currently contain any permitted point source discharges.

The primary advantage to the public is that this waterbody will be protected at its present high level of quality for the use and enjoyment of current and future generations of Virginians.

The factors to be considered in determining whether a nominated water body meets the eligibility decision criteria of exceptional environmental settings and possessing outstanding recreational opportunities and/or exceptional aquatic communities are described in the Department's revised April 25, 2001 "Guidance for Exceptional Surface Waters Designations in Antidegradation Policy Section of Virginia Water Quality Standards Regulation (9 VAC 25-260-30.A.3). The locality where the water body lies may experience financial benefits through an increase in eco-tourism to the area because of the exceptional nature of the water body that led to its designation.

There is no disadvantage to the agency or the Commonwealth that will result from the adoption of this amendment.

Changes made since the proposed stage

Please describe all changes made to the text of the proposed regulation since the publication of the proposed stage. For the Registrar's office, please put an asterisk next to any substantive changes.

Section number	Requirement at proposed stage	What has changed	Rationale for change
9 VAC 25-260-30		NA	

Public comment

Please summarize all public comment received during the 60-day period following the publication of the proposed stage, and provide the agency response. If no public comment was received, please so indicate.

Commenter	Comment
Stan Clark	As Chairman for the Isle of Wight County Board of Supervisors, Mr. Clark commented on behalf of the Board in support of the nomination. He also supports the nomination as a private citizen of Carrollton where Ragged Island Creek is located.

Pat Anderson	Stated the importance of Ragged Island Creek as a nursery for many different species and that designation of the creek as a Tier III waterbody is a first and important step for Virginia to say "no" to polluted waters.
Richard L. Bowie, President, Terry Peterson Residential Neighborhoods	Wrote on behalf of Terry-Peterson Residential, which is developing several tracts of land associated with Eagle Harbor and has a storm water discharge to Ragged Island Creek. Terry-Peterson opposes the designation because they do not feel Ragged Island Creek meets any of the criteria necessary to be considered for an Exceptional Waters designation. They are concerned the designation will result in severe restrictions in their ability to develop their property. They feel the nomination was made solely as an effort to limit or stop the development of their, and surrounding properties.
Sadie Boyer	Commented in favor of the nomination and stated the creek's function as animal habitat, fish habitat, and educational tool for local primary and higher educational institutions as reasons it deserves of Exceptional State Waters status.
Albert Burckard	Commented at the August 16, 2004 public hearing as a representative of the Isle of Wight Historical Society in support of the nomination and stated the importance of Ragged Island Creek's recreational, historical, and educational aspects. He also reminded those present that the first battle between Civil War Ironclad warships occurred in the immediate vicinity of the creek.
Pat Clark	Spoke at the August 16, 2004 public hearing in support of the nomination and stated that Ragged Island Creek is an excellent, popular, and frequently utilized educational tool in its current state.
Elizabeth Coburn	Provided written comment in support of the nomination and stated that the peace, beauty, and tranquility of the creek and its environs are deserving of the protection that will be provided by a Tier III designation.
Lt. Col. Herbert W. DeGroft, USMC (Ret.)	Wrote in support of the proposed designation and stated that past and future development within the area has and will continue to degrade this environmentally sensitive waterway. He also remarked that Ragged Island Creek is already exceptional in its vital ecological role it forms the "backbone" of the neighboring wildlife management area's recreational aspects.
Robert Duckett, Director of Public Affairs, Peninsula Housing and Builders Association	Wrote on behalf of the Peninsula Housing and Builders Association in opposition to the designation due to concerns of the permanent nature of the designation, the potential loss of local control over property rights, and possible restriction of the locality's ability to manage property in the locality's best interests. He states that the urban surroundings and lack of exceptionality of Ragged Island Creek do not make it a likely candidate for Tier III designation. He also comments that a Tier III designation could be disastrous for riparian properties with a multi-year, multi-phase build-out.
Mark A. Edwards, Senior Vice President, East West Partners	Wrote to express concerns that designating Ragged Island Creek as Tier III could cause substantial problems for Tidewater residents and communities as this would set a benchmark or precedent for other urban waterways to be designated. This, in turn, could result in a substantial dollar loss due to higher development costs associated with point and non-point source discharges.
Charles Fredrickson, Riverkeeper,	Spoke at the August 16, 2004 public hearing on behalf of the James River Association and stated their support of the nomination. He stated that the designation is deserved in light of encroaching development and that coastal waters are just as

James River Association	deserving of Tier III protection as remote streams in mountainous regions. He also stated that he applauds the Isle of Wight Citizens Association for their initiative and dedication to this nomination.
Jerianne Gardner	Spoke at the August 16, 2004 public hearing as a representative of the Isle of Wight Citizens Association in support of the nomination and reminded those present of the length of the Tier III designation process and also of the individuals/groups that support Tier III designation of Ragged Island Creek. She also urged the State Water Control Board to not encourage an opportunity for degradation of the creek.
Amy Geabhart	Wrote in opposition to the nomination on the grounds that a Tier III designation could result in a substantial dollar loss to due to higher development costs associated with point and non-point source discharges. It is her opinion that the nomination was derived solely from an anti-growth and anti-development stand and a Tier III designation for Ragged Island Creek could open the door for more anti-growth groups to petition other waters within the Commonwealth.
Horace A. Gray, III Vice President, GrayCo	Opposes the designation stating that the water body does not possess an exceptional environmental setting nor exceptional recreational opportunities and still has concerns about federal control over private property and localities' and the Commonwealth's ability to regulate the use of lands fairly and in the public interest.
Nancy Guill	Spoke at the August 16, 2004 public hearing as a representative of the Carrollton Civic League and expressed their support for the nomination.
William Hayes	Commented at the August 16, 2004 public hearing and stated that maintaining Ragged Island Creek in its current condition is a good idea and that a Tier III designation would be a better mechanism to accomplish that end than the Chesapeake Bay Preservation Act which has little to no affect and no consequences for failing to adhere to the Act's guidelines. He also stated the importance of not making decisions based entirely on economics.
Sharon Hart	Spoke at the August 16, 2004 public hearing in support of the Ragged Island Creek and Lake Drummond nominations. She cited the importance of Ragged Island Creek as a nursery and refuge area for many species as reasons for her support. She also stated that most of the developable shoreline has already been developed and that houses must connect to the HRSD sewer system as is the normal locality practice. She reiterated that a Tier III designation will not hinder VDOT road maintenance in the area. To address statements regarding lack of access to the creek she mentioned the canoe access ramps within the DGIF Wildlife Management Area and at the end of Dogwood Lane.
Thomas Henderson	Commented at the August 16, 2004 public hearing in favor of the nomination. He stated the historical importance in light of known Native American sites on and around Ragged Island Creek and also stated the creek provides many exciting educational opportunities for students. He feels that a Tier III designation would be a boon to land sales and developers and such a designation is more sensible for a waterbody threatened by encroaching development than for a waterbody already protected within the boundaries of a national park or forest.
C. Andrew Herr	Commented at the August 16, 2004 public hearing as a representative of Terry Peterson Residential Neighborhoods, a developer of property adjacent to the creek, and stated concerns regarding perceived ambiguity of mixing zone and storm water discharge regulations as they apply in a Tier III situation.

John W. Iuliano, President, Tidewater Builders Association	Provided comment on behalf of the Tidewater Builders Association in opposition to the designation because they object to a federal program that places local land use matters in the hands of the federal government and the possibility of significant future impacts on the property rights of the Commonwealth and private riparian property owners. They also oppose the designation because the nomination was made with the intent of making the development of their neighborhoods more difficult, the creek does not meet Tier III criteria, and the designation would be inconsistent with earlier agency antidegradation decisions.
Theresa Johnson	Spoke at the August 16, 2004 public hearing and provided written comment in support of the nomination and stated that the abundance and diversity of life associated with Ragged Island Creek is deserving of Tier III protection. She also stressed the importance of the creek as a nursery for a multitude of species both aquatic and non-aquatic and as an environmental education tool for a number of educational institutions.
Grace Keen, President, IOW Citizens Ass'n	Wrote on behalf of the Isle of Wight Citizens Association to convey their continued support for the nomination and stated the creek's beauty and function as a fish hatchery area as reasons for their support.
David Kovacs, Executive Director, Virginia Conservation Network	Wrote on behalf of the over 100 member Virginia Conservation Network in support of the nomination and stated that Ragged Island Creek is a valuable resource for recreation and local primary and higher education institutions. It is also valuable as a habitat for wildlife, fish hatchery, and possesses Revolutionary War and Native American historical sites.
Mike Lane	Spoke at the August 16, 2004 public hearing and stated his support for the Ragged Island Creek and Lake Drummond Tier III nominations.
Branch Lawson, President, Eagle Management Corp.	Wrote on behalf of Eagle Management Corp., which manages the Eagle Harbor development on the southwest shore of Ragged Island Creek and asked that their previous comments in a letter dated July 25, 2003 be re-entered into the record of comment. They oppose the nomination because they feel that designation of the creek would prevent further development of the site.
Matthew Letchworth, Boy Scout Troop 36, Carrollton	Wrote in support of the nomination and stated that if the Ragged Island Creek is not protected by a Tier III designation it will be at risk for destruction by encroaching development. He also stated that the creek qualifies for Tier III protection because of its exceptional beauty, wildlife, and recreational opportunities.
Barbara Lindley	Wrote in support of the nomination and stated that Ragged Island Creek is viewed as a landmark and gateway to Isle of Wight County. The creek has withstood the pressures of time and development and is deserving of Tier III protection. To do less will undermine Virginia's commitment to protect wetlands from encroachment by developers and special interest groups.
Jane March	Provided written comment in support of the nomination and stated that Ragged Island Creek needs to be preserved in the face of extreme developmental pressures.
Jon May, Sales Manager, Eagle Harbor	Commented at the August 16, 2004 public hearing that he believes protecting Ragged Island Creek would benefit his job as a sales manager for properties adjacent to the creek although a Tier III designation is not be the appropriate vehicle for that protection and suggests other options such as a Scenic River designation. It is his opinion that the current Tier III nomination is an effort to halt growth and development in the area. He views the current designation process as an opportunity to work

	towards a solution that would be beneficial to proponents and opponents to the designation.
Karl Mertig	Opposes the designation due to shellfish closures and the opinion that Ragged Island Creek is not functionally, ecologically, aesthetically, or recreationally more remarkable than many other creeks and rivers of the lower James River basin.
Aarron Millikin	Stated at the August 16, 2004 public hearing that the angst felt by many in the development community is caused by too many unknowns associated with a Tier III designation. He also stated concerns over whether designation of what he considers an urban waterway is feasible or a good idea and stated concerns of whether or not the creek truly qualifies for Tier III designation.
Mary Ann Moore	Provided written comment in support of the nomination. She stated that it is the responsibility of all to preserve as much of Virginia's remaining natural area as possible.
Peter Munsell	Spoke at the August 16, 2004 public hearing in support of the nomination. He stated that the mission of the Isle of Wight Water Watchers citizen monitoring group, of which he is a member, is to preserve the water quality within Isle of Wight County and he believes a Tier III designation will enhance their mission.
Eric J. Sasser, President, Sasser Construction	Wrote on behalf of Sasser Construction, L.C. in opposition to the nomination on the grounds that they believe it is an effort on the part of the proponents of the Tier III designation to curb development along the Route 17 corridor and that an Exceptional Waters designation for Ragged Island Creek is not appropriate or applicable. He stated they (Sasser Construction) have a vested interest, as builders selected to build in the Founders Pointe residential project that borders Ragged Island Creek, in defeating the nomination.
Katherine E. Slaughter, Senior Attorney, SELC	Wrote on behalf of the Southern Environmental Law Center in support of all proposed designations. She stated that all meet the eligibility criteria and all are located in areas used by either boaters, hunters, anglers, or wildlife observers and therefore are important to tourism, one of Virginia's most important industries.
Jeff Smith	Wrote to strongly support all proposed designations.
Bill Tanger, FORVA	Mr. Tanger, representing Friends of the Rivers of Virginia, provided oral comment at the August 11, 2004 public hearing in support of all waters currently proposed for Tier III designation.
Betty Byrne Ware	Strongly supports all proposed designations and hopes more designations will be added in the future.
Eric E. Zicht	He states his concern that Virginia may be relinquishing some state powers when placing water bodies in this category and given the permanent nature of the designation, cautions the members of the Water Control Board to be very careful when designating any water body as "Exceptional".

Agency response

- Issue: Concerns of severe restrictions to property development due to prohibition of wastewater and storm water discharges.

Response: Because of issues raised during the earlier Notice of Intended Regulatory Action comment

period regarding the proposed boundary descriptions for Ragged Island Creek and the restrictions such a designation would place on the issuance of storm water permits, the Department implemented the participatory approach and convened a technical advisory committee to advise staff on issues regarding the amendment such as this one. Department staff altered the originally proposed boundaries for the Exceptional State Water designation by truncating the boundary to the main stem of the creek and moving the upper boundary line downstream from Route 17. These changes more clearly state the petitioner's intent to not include wetlands or impounded areas and avoid storm water permitting issues along the Route 17 corridor. Once a waterbody is designated an Exceptional State Water, new or increased discharges such as wastewater treatment plant discharges are prohibited, but Isle of Wight County already requires subdivisions to connect to the Hampton Roads Sanitation District regional sewer system rather than discharge to Ragged Island Creek.

- Issue: Concerns of federal government control over local land use matters.

Response: Representatives from the homebuilding community were concerned that future changes to the storm water program might require mixing zones for storm water construction permits that would not be allowed in Tier III designated areas because of agency guidance saying that mixing zones upstream of a Tier III designated area or in an undesignated tributary could not extend into the designated area. Although Department staff can not predict the future, there are no current plans for the federal government to institute mixing zone requirements for storm water permits. Even if this does occur in the future, the Department's recent amendments to the mixing zone section of the water quality standards regulation would limit sizing of mixing zones in estuaries such that mixing zones from storm water discharges from current and planned development would not extend into the revised proposed boundaries of the Ragged Island main stem Tier III designation.

- Issue: The creek does not meet the exceptional environmental setting or exceptional recreational opportunity eligibility criteria necessary for consideration for Tier III designation.
- Response: The State Water Control Board's decision to initiate the regulatory process for Ragged Island Creek was based upon staff findings made during a site visit to the creek to verify the eligibility criteria documented in the citizen petition that the water body satisfies two of the eligibility criteria (exceptional environmental setting and exceptional recreational opportunities) necessary for consideration for Exceptional State Waters status. The waterbody was not considered to possess an exceptional aquatic community. The basis for the exceptional recreational opportunities was hiking, canoeing/kayaking, fishing, hunting, birding, and photography within the Virginia Department of Game and Inland Fisheries wildlife management area.
- Issue: Designation of Ragged Island Creek would be inconsistent with prior DEQ decisions on nominated waterways.

Response: Perhaps the commenter is referring to the fact that Ragged Island Creek is the first estuarine water to be considered for designation and that many of the waters under consideration for designation are trout streams. However, neither the section of the water quality standards regulation governing Exceptional State Waters eligibility criteria nor the Department's guidance on Tier III waters exclude estuaries from consideration. The eligibility criteria apply to all surface waters of the Commonwealth.

All changes made in this regulatory action

Please detail all changes that are being proposed and the consequences of the proposed changes. Detail new provisions and/or all changes to existing sections.

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change and rationale
9 VAC 25-260-30	N/A	North Creek in Botetourt County from the first bridge above the United States Forest Service North Creek Camping Area to its headwaters is designated under 9 VAC 25-260-30.A.3.c as an Exceptional State Water.	The addition of a portion of the main stem of Ragged Island Creek in Isle of Wight County to 9 VAC 25-260-30.A.3.c. This water body meets the eligibility criteria requirements for designation as an Exceptional State Water.

In 9 VAC 25-260-30 the following amendment was adopted by the State Water Control Board:

(11) Ragged Island Creek in Isle of Wight County from its confluence with the James River at a line drawn across the creek mouth at N36°56.306'/W76°29.136' to N36°55.469'/W76°29.802' upstream to a line drawn across the main stem of the creek at N36°57.094'/W76°30.473' to N36°57.113'/W76°30.434', excluding wetlands and impounded areas and including only those tributaries completely contained within the Ragged Island Creek Wildlife Management Area on the northeastern side of the creek.

Impact on family

Please assess the impact of the proposed regulatory action on the institution of the family and family stability including to what extent the regulatory action will: 1) strengthen or erode the authority and rights of parents in the education, nurturing, and supervision of their children; 2) encourage or discourage economic self-sufficiency, self-pride, and the assumption of responsibility for oneself, one's spouse, and one's children and/or elderly parents; 3) strengthen or erode the marital commitment; and 4) increase or decrease disposable family income.

The development of water quality standards is for the protection of public health and safety, which has only an indirect impact on families.