



Exempt Action Final Regulation Agency Background Document

Agency name	State Water Control Board
Virginia Administrative Code (VAC) citation	9 VAC25-720
Regulation title	Water Quality Management Planning Regulation
Action title	Extension of Conditional Nutrient Waste Load Allocations
Final agency action date	October 26-27, 2009
Document preparation date	November 3, 2009

When a regulatory action is exempt from executive branch review pursuant to § 2.2-4002 or § 2.2-4006 of the Virginia Administrative Process Act (APA), the agency is encouraged to provide information to the public on the Regulatory Town Hall using this form.

Note: While posting this form on the Town Hall is optional, the agency must comply with requirements of the Virginia Register Act, the *Virginia Register Form, Style, and Procedure Manual*, and Executive Orders 36 (06) and 58 (99).

Summary

Please provide a brief summary of all regulatory changes, including the rationale behind such changes. Alert the reader to all substantive matters or changes. If applicable, generally describe the existing regulation.

The amendments extend the deadline for securing a Certificate to Operate (CTO) for expanded design flow and associated nutrient waste load allocations for Harrisonburg-Rockingham Regional S.A.-North River STP, Fauquier Co. W&SA-Vint Hill STP and Onancock STP from December 31, 2010 to December 31, 2011.

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 approved amending the deadlines for expanded design flow and nutrient waste load allocations set forth in the Water Quality Management Planning Regulation at its meeting on October 26-27, 2009.

Family impact

Assess the impact of this regulatory action on the institution of the family and family stability.

No direct impact on the institution of the family and family stability is expected from this regulatory action.

Additional information

In late 2005, when nutrient waste load allocations (WLAs) were originally adopted in the Water Quality Management Planning (WQMP) Regulation, several dischargers were given conditional WLAs based on expanded design flow that must be constructed and issued a Certificate To Operate (CTO) by 12/31/10. There were seventeen of these conditional allocations, with accompanying “footnotes” in the Regulation explaining the conditions to be met.

The 2009 General Assembly passed legislation (HB 1074/SB 1022) authorizing the Board to accept petitions through 7/10/09, for the purpose of conducting an expedited rulemaking process involving plants with “footnoted” WLAs. The petitions had to be for the sole purpose of extending the deadline to no later than 12/31/15. Owners that submitted a petition were still required to comply with their nutrient allocations as of 1/01/11, through the Nutrient Credit Exchange Program or by other means. The Board was required by the legislative to either approve or deny any petitions received and adopt any resulting regulation amendments within 180 days of the petition deadline (by 1/06/10). Before making a final decision on the petitions, the Board was required to provide an opportunity for public comment.

DEQ received petitions for seven plants by the deadline:

Petitioner	River Basin	Requested Amendment/<i>Petitioner Comments</i>
Cape Charles	E. Shore	<p><u>Extend deadline to 12/31/15 for expansion to 0.5 MGD.</u></p> <ul style="list-style-type: none"> •0.25 MGD plant being built; complete by Oct. 2011 •Assuming economic recovery by end of 2010, 0.25 MGD viable until 2016 •Site layout, power distribution, and piping designed for future expansion •Wish to avoid prematurely incurring the additional cost of effluent reuse by preserving 0.5 MGD WLA
Culpeper Co.- Mountain Run	Rappahannock	<p><u>Extend deadline to 12/31/15 for construction of new 2.5 MGD Mountain Run STP.</u></p> <ul style="list-style-type: none"> •Need for 2.5 MGD WLAs based on 2005 projections for rapidly growing Co. areas; significant downturn in economy in 2007 caused new home construction to drop to less than 10% of 2006 level •Adopted sewer service area in Town Environs 10/2/07 •Purchased plant site (\$1.1 MM) and spent \$1.4 MM on design; built interim plant (0.1 MGD; \$1.46 MM) •Modified VPDES permit to include 2.5 MGD flow tier •Certificate to Construct issued 4/28/08 •Committed to spend \$0.5 MM in 2010 to design part of sewer system •Dependent on growth revenues to fund construction; can't predict when

Petitioner	River Basin	Requested Amendment/ <i>Petitioner Comments</i>
Fauquier Co. W&SA- Remington	Rappahannock	<p><i>economy will rebound</i></p> <p><u>Extend deadline to 12/31/15 for expansion to 2.5 MGD.</u></p> <ul style="list-style-type: none"> •Plant currently has CTO for 2.0 MGD •Project underway to add nutrient reduction system without expansion; complete by Oct. 2010 •Both HB 2074 & SB 1022 were introduced by Rapp. River Basin Commission members with FCW&SA in mind re. economic challenges to complete plant expansions in adverse economic climate •Need sufficient treatment capacity for smart-growth in State-mandated Urban Development areas •Est. 90% of infrastructure is in-place that would be needed for 2.5 MGD design capacity •Temporary deferral of expansion consistent with State Policy and WQIF grant funding priorities •Extension helps remedy failed privately-owned onsite drain fields in Catlett and Calverton
Fauquier Co. W&SA-Vint Hill	Shenandoah - Potomac	<p><u>Extend deadline to 12/31/11 for expansion to 0.95 MGD.</u></p> <ul style="list-style-type: none"> •Plant currently has CTO for 0.6 MGD •Construction underway to add nutrient reduction system and expand to 0.95 MGD; scheduled for completion by Aug. 2010 •Both HB 2074 & SB 1022 were introduced by Rapp. River Basin Commission members with FCW&SA in mind re. economic challenges to complete plant expansions in adverse economic climate •Extension would cover potential construction delays •Authority made good-faith effort to initiate and complete expansion by 12/31/10 deadline •Contractually obligated to provide capacity beyond 0.6 MGD to Vint Hill Farms EDA (0.4 MGD) and another developer has paid \$9 MM for sewer availability (982 connections) •Essential project for ongoing economic recovery from closure of Army's Vint Hill Farms Station
Harrisonburg- Rockingham S.A.-North River	Shenandoah- Potomac	<p><u>Extend deadline to 12/31/11 for expansion to 20.8 MGD.</u></p> <ul style="list-style-type: none"> •Construction underway; plant actually being expanded to 22.0 MGD with nutrient reduction system, but Authority accepted WLA for 20.8 MGD capacity; WQIF grant pro-rated with eligibility limited to lower design flow •Schedule has substantial completion by Nov. 2010 •Current project status indicates completion may or may not be achieved by Dec. 2010; contractor has outstanding delay claims (180 days) yet to be resolved •According to payment records, construction about 89% complete to-date •HRRSA commits to complete project expeditiously and even if petition is approved would still strive to meet 12/31/10 deadline
Onancock	E. Shore	<p><u>Extend deadline to 12/31/11 for expansion to 0.75 MGD.</u></p> <ul style="list-style-type: none"> •Plant currently has CTO for 0.25 MGD •Construction underway; behind schedule due to delays in release of funding from VCWRLF and USDA Rural Development (result of lawsuit filed against the Town), and issues with subcontractors. •Substantial completion originally scheduled by 3/1/10; now projected for mid-Oct. 2010 •Working with contractor and subs to address delays, but may not be in time to secure CTO by 12/31/10

Petitioner	River Basin	Requested Amendment/ <i>Petitioner Comments</i>
Shenandoah Co.-N. Fork Regional	Shenandoah-Potomac	<p><u>Extend deadline (assume to 12/31/15; not stated).</u></p> <ul style="list-style-type: none"> • <i>County must secure CTO for 0.75 MGD facility for conditional WLA</i> • <i>0.1 MGD plant exists, but no sewer collection system (permit has flow tiers for 0.25 and 0.75 MGD)</i> • <i>Facility was an industrial discharger that ceased production; County bought facility to create a regional wastewater plant but potential customers opted for another system)</i> • <i>County has under design a pump station and force main to transfer landfill leachate and County-wide septage pump-outs to the plan</i> • <i>County examining options to “bubble” WLA with two other County-owned plants</i>

A public comment period on the petitions began on July 24, 2009 and closed on August 28, 2009. A summary of the comments follows:

1. Chesapeake Bay Foundation, Joe Tannery/VA Deputy Director:
 - Acknowledges rationale used to assign several conditionally increased WLAs during development of original WQMP allocations in 2005.
 - Emphasized that DEQ Final Regulation Agency Background Document (7/5/05) stated: *“Consideration has been given to plants that **are actively involved in plant expansion**, with a reasonable assurance that the increased capacity would be in-place and certified for operation in the year 2010.”* (emphasis added)
 - CBF did not directly object to footnotes based on DEQ’s assurances that expansions would be complete within 5 years. Also believed that WLAs would be adjusted to ensure water quality standards compliance whenever it was discovered that assigned WLAs failed to meet the standards (i.e., 9 VAC 25-720-40.D.).
 - Regulations are very clear that failure to obtain a CTO by 12/31/10 invokes the authority and duty of the SWCB to act in accordance with 9 VAC 25-720-40.D. (i.e., adjust WLAs).
 - CBF understands the 2009 legislation allows “footnoted facilities” to seek an extension beyond the 12/31/10 deadline, but also clearly indicates that the Board retains its discretionary authority to either approve or deny the petitions. The legislation, however, does not remove DEQ and the Board’s legal requirement under the Clean Water Act, the State Water Control Law, and attendant regulations to ensure water quality standards compliance when reviewing the petitions.
 - Based on recent (preliminary) EPA Bay Program modeling, the previous Tributary Strategy levels of nutrient reduction will be more difficult to achieve; to meet water quality standards there is an estimated gap of 70 million pounds of nitrogen and 8 million pounds of phosphorus.
 - Inherent in this finding, and recently released draft Federal Executive Order reports on Bay clean-up, is that point source WLAs may have to be reduced further.
 - Petitioners have several options available to meet lower WLAs, including forgoing a portion of excess capacity, accommodate future growth using the Nutrient Credit Exchange Program, “bubble” WLAs, or seek allocation offsets from other plants.
 - CBF requests that the Board deny all petitions for the following reasons:
 - Culpeper Co.-Mountain Run: Town of Culpeper and County plants both have footnotes, creating at a minimum 1 MGD of excess capacity in overlapping service areas. Failure by the localities to reach agreement on a regional approach is self-inflicted and not beyond the control of petitioner. Seeking extension to await new growth is not valid grounds for approval and contradicts original intent of footnote.
 - Fauquier Co. W&SA-Remington: although 90% of infrastructure for expanded design flow is already in-place, Authority provides no reason why project hasn’t progressed between 2005

- and 2009. Failure to complete construction on a project that was 90% complete four years ago is the antithesis of DEQ's definition of "*actively involved in plant expansion.*"
- Shenandoah Co.-North Fork Regional: a related rulemaking currently underway classifies this facility as a potential for "unused allocations" that can be transferred to other dischargers, such as Merck. If this plant moves forward to secure the expanded flow CTO, it would be more appropriate to classify as a new discharger and require the complete offset of any additional loading.
 - Fauquier Co. W&SA-Vint Hill and Cape Charles: Unrealized development projections since 2005 obviate the need to retain higher WLAs and don't provide a valid rationale for an extension. If higher density redevelopment occurs, the Nutrient Credit Exchange Program provides a viable means of compliance with the lower WLAs in the footnotes.
 - Harrisonburg-Rockingham Regional S.A.-North River: a precautionary extension for security against any unforeseen delays over the next 18 months shouldn't be considered grounds for extension. Moreover, DEQ and the Board must consider whether approval of the higher WLA will ensure water quality standards compliance even if CTO is obtained by 12/31/10.
 - Onancock: recent newspaper articles indicate Onancock STP has excess and unneeded capacity, and the Town is considering taking on a larger service area in Accomack County. This action indicates that facility expansion will award the Town with capacity in excess what is actually needed to serve its current customer base. The "footnote policy" wasn't intended to allow acquisition of excess capacity to support non-existent development.
2. Piedmont Environmental Council, Dan Holmes/Director of State Policy - specific to the Culpeper Co.-Mountain Run petition:
- The County's petition acknowledges the deadline, and failure to obtain the CTO by 12/31/10 would result in a forfeiture of the additional capacity.
 - The County is relying on questionable growth projections and has presented a false need in their original pursuit of 2.5 MGD capacity. PEC contends the County is attempting to bank future capacity which is inconsistent with State policy. Growth projections from 2005, based on a period of unprecedented growth in the Northern Virginia region, are outdated given recent drops in construction due to the current economic crisis.
 - Suggest that the original projections be reconsidered, especially when supported by additional evidence of high foreclosure rates and bankruptcies of companies controlling residentially zoned land. Evidence would suggest the high growth rates seen earlier this decade are unlikely to return within the expected service life of the proposed facility.
 - The County has failed to demonstrate significant progress in the construction of the facility; expenditures do not represent a significant investment in the 2.5 MGD capacity.
 - The Town of Culpeper and Culpeper County are requesting capacity to service the same area.

The principal reason for amending the WQMP Regulation in late 2005 by assigning nutrient WLAs was the future achievement and maintenance of newly adopted water quality standards for Chesapeake Bay and its tidal tributaries. The conditional ("footnoted") WLAs were not intended to grandfather future capacity needs of the dischargers. The primary factor used to assess requests for conditionally increased nutrient WLAs was whether or not a discharger documented a "reasonable assurance" that the CTO would be secured by the 12/31/10 deadline. Consideration was given to plants with an imminent need for additional capacity and actively involved in plant expansion, with supporting documentation (in most cases taken in combination) including:

- Capital investments already made to facilities

- Schedules for planning, design and construction
- Generic compliance schedules and milestones for other plant expansion/upgrades that routinely span 4 years, and cannot exceed the life of the discharge permit (5 years)
- Compliance Orders
- Provision for tiered design flows in current permits

Dischargers with footnoted WLAS that have made a good-faith, bona fide effort to complete construction by the deadline merit consideration for modest extensions due to extenuating circumstances. This rationale would apply to the petitions from HRRSA-North River, FCW&SA-Vint Hill and Onancock. The other petitioners have not progressed to the construction phase in the four years since the Board adopted the WLAs, thus contradicting the “reasonable assurance” given to DEQ at the time of the rulemaking.

While DEQ is sympathetic to petitioners facing a tough economy and dependent on new development to finance expansions, their situation is not unique – all Virginia localities are impacted by the recession, including 15 dischargers denied “footnoted” WLAs in 2005.. The 15 dischargers in 2005 denied “footnoted” WLAs could not assure DEQ that construction would be complete by 12/31/10, or the projected timing of the demand for expansion was beyond the deadline. To consider a deadline extension to the current petitioners not yet under construction, without affording a similar opportunity to other “non-footnoted” dischargers with future capacity needs, would be inequitable.

Based on the above, the Board approved the following staff recommendations:

1. Approve amendments to 9 VAC 25-720, Water Quality Management Planning Regulation, extending the deadline for securing a CTO for expanded design flow and associated nutrient waste load allocations to December 31, 2011, for the following dischargers.
 - a. In 9 VAC 25-720-50. Potomac, Shenandoah River Basin, Section C NOTE: (2) **Harrisonburg-Rockingham Regional S.A.-North River STP**
 - b. In 9 VAC 25-720-50. Potomac, Shenandoah River Basin, Section C NOTE: (8) **Fauquier Co. W&SA-Vint Hill STP**
 - c. In 9 VAC 25-720-110. Chesapeake Bay - Small Coastal - Eastern Shore River Basin, Section C (2) **Onancock STP**
2. Deny the deadline extension petitions for Culpeper County-Mountain Run, Fauquier County Water & Sanitation Authority-Remington, Shenandoah County-North Fork Regional, and Cape Charles.