



Exempt Action Final Regulation Agency Background Document

Agency name	State Water Control Board
Virginia Administrative Code (VAC) citation	9VAC25-720-50 C
Regulation title	Water Quality Management Planning Regulation
Action title	Frederick-Winchester S.A.-Opequon WRF - Nutrient Waste Load Allocations
Final agency action date	December 9, 2010
Document preparation date	November 10, 2010

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 14 (2010) 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 Waste Load Allocation for the Frederick-Winchester Service Authority: Opequon Wastewater Treatment Facility (Opequon WRF - VA0065552) found in 9VAC25-720-50 C is being amended based on the advice of legal council as settlement of Case No. CL090004007-00, Frederick-Winchester Service Authority (FWSA) v. State Water Control Board and Department of Environmental Quality. Settlement of the case establishes allocations for the Opequon Wastewater Treatment Facility based on 3.0 mg/l nitrogen and 0.30 mg/l phosphorus at a design flow of 12.6 MGD which would result in an allocation of 115,122 lbs/year nitrogen, with an additional 6,792 lbs/year nitrogen for the landfill leachate consolidation, for a total of 121,851 lbs/year nitrogen, and a total of 11,512 lbs/year phosphorus.

In 2005, the State Water Control Board (Board) adopted amendments to the Water Quality Management Planning Regulations, 9VAC25-720, to establish waste load allocations (WLA) for discharges of total nitrogen (TN) and total phosphorus (TP) by some 125 significant discharges

including the Opequon Water Reclamation Facility (Opequon WRF) based on the design capacity of each plant.

In the 2005 rulemaking, the Frederick-Winchester Service Authority (FWSA) which operates the Opequon WRF requested TN and TP WLAs for the Opequon WRF based on a design flow of 12.6 million gallons per day (MGD) and the Board adopted final WLAs based on a design flow of 8.4 MGD.

Following the submittal of a rulemaking petition by FWSA in 2006, the Board initiated and conducted a rulemaking from 2007 through 2009 to consider revising the TN and TP WLAs under the regulation for the Opequon WRF. This rulemaking culminated in a Board public meeting begun on December 4, 2008, and completed on April 27, 2009, at which the Board denied FWSA's request. Following this Board action, the FWSA filed a Notice of Appeal with the Board and DEQ in May 2009 and a Petition for Appeal with the Circuit Court of the City of Winchester in June 2009 seeking increased WLAs for the Opequon WRF based on the 12.6 MGD design flow, amounting to an increase of 51,091 pounds per year (lbs/yr) of TN and 3,831 lbs/yr of TP.

Following the filing of Motions of Summary Judgment and supporting briefs by both FWSA and the Board before the Court, the Court encouraged the parties to consider settlement, because it presented complex regulatory issues and the Court believed that it would be in the parties' respective best interests and the public interest for the parties to attempt to resolve the case by negotiation. The FWSA and the Board, with the Board acting on the advice of DEQ and legal counsel, reached a compromise which requires stringent treatment by the Opequon WRF while also allowing FWSA the full use of the facility's recently completed expansion to 12.6 MGD design flow.

The Board, at its meeting on September 27-28, 2010, based on the advice of legal counsel, approved a settlement of the case which would establish allocations for the Opequon WRF based on 3.0 mg/l nitrogen and 0.30 mg/l phosphorus at a design flow of 12.6 MGD. The Board also authorized DEQ to public notice the approved settlement and to receive comments. DEQ received comments from the Chesapeake Bay Foundation (CBF) related to the approved settlement. Copies of the comments made by CBF have been distributed previously to the Board; the FWSA and to the Court.

Upon consideration of the pleadings, the arguments of counsel, the comments of the Chesapeake Bay Foundation, and the purposes of the State Water Control Law, the Court found that the proposed settlement, approved by the Board, is fair, adequate, and reasonable and that it is not illegal, a product of collusion, or against the public interest. The Court also found that the proposed decree is a reasoned compromise that considered the legitimate interests of FWSA and the public it serves, and implements the duty of the Board to protect the quality of State waters.

In a Consent Decree dated October 19, 2010, the Court decreed that:

"Notwithstanding the 2005 and 2009 Rulemakings and the typical concentration basis for 4 milligrams per liter (mg/l) for TN WLAs in the Opequon WRF's river basin, the TN and TP WLAs allocations for the Opequon WRF shall be increased to credit the WRF for its current 12.6 MGD design capacity while applying more stringent, state-of-the-art treatment, as follows:

- a. The TN WLA based on the Opequon WRF's design capacity shall be increased from 102,311 lbs/yr to 115,122 lbs/yr (derived based on 3 mg/l of TN and 12.6 MGD).
- b. The TP WLA based on the Opequon WRF's design capacity shall be increased from 7,675 lbs/yr to 11,512 lbs/yr (derived based on 0.3 mg/l of TP and 12.6 MGD).
- c. Such increases result in the stated final WLAs for the Opequon WRF, which shall be in addition to any allocations or increases acquired or which may be acquired by the Opequon WRF in accordance with applicable laws and regulations pertaining to nutrient credit exchanges or offsets. As of the date of this decree, the Opequon WRF has acquired additional allocation for TN in the amount of 6,729 lbs/yr by means of a landfill leachate consolidation and treatment project. Thus upon entry of this decree, the Opequon WRF's TN WLA shall be 121,851 lbs/yr.
- d. The Board shall forthwith amend the Regulation pursuant to CODE § 2.2-4006.A.4.b to conform to the WLAs required by subparagraphs a through c of this decree."

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.

Based on the advice of legal counsel, the State Water Control Board at its meeting of December 9, 2010, approved as an Exempt Final Action the amendments to 9VAC25-720-50 C which revise the waste load allocation for the Opequon WRF to 121,851 lbs/year nitrogen (115,122 lbs/year plus the already allocated 6,729 lbs/year for the landfill leachate consolidation) and 11,512 lbs/year phosphorus.

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
50 C		Opequon WRF Waste Load Allocation - 102,336 lbs/year nitrogen & 7,675 lbs/year phosphorus	Opequon WRF Waste Load Allocation - 121,851 lbs/year nitrogen & 11,512 lbs/year phosphorus. Settlement of Court Case - Based on advice of legal council
50 C			Addition of Footnote (11) - Waste Load Allocations revised to conform with Consent Decree.

Regulatory flexibility analysis

Please describe the agency's analysis of alternative regulatory methods, consistent with health, safety, environmental, and economic welfare, that will accomplish the objectives of applicable law while minimizing the adverse impact on small business. Alternative regulatory methods include, at a minimum: 1) the establishment of less stringent compliance or reporting requirements; 2) the establishment of less stringent schedules or deadlines for compliance or reporting requirements; 3) the consolidation or simplification of compliance or reporting requirements; 4) the establishment of performance standards for small businesses to replace design or operational standards required in the proposed regulation; and 5) the exemption of small businesses from all or any part of the requirements contained in the proposed regulation.

This action is being taken at the advice of legal council as settlement of a court case. There are no other viable alternative regulatory methods available.

Family impact

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

The development of water quality management planning regulations and waste load allocations is for the protection of public health and safety which has only an indirect impact on the family.