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Notice of Intended Regulatory Action (NOIRA) Agency Background Document

Agency name	State Water Control Board
Virginia Administrative Code (VAC) Chapter citation(s)	9 VAC25-260
VAC Chapter title(s)	Water Quality Standards
Action title	Triennial Review Rulemaking to adopt new, update or cancel existing water quality standards as required by § 62.1-44.15 of the Code of Virginia and the federal Clean Water Act, 33 U.S.C. §§ 1251
Date this document prepared	October 15, 2020

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Order 14 (as amended, July 16, 2018), the Regulations for Filing and Publishing Agency Regulations (1VAC7-10), and the *Form and Style Requirements for the Virginia Register of Regulations and Virginia Administrative Code*.

Brief Summary

Provide a brief summary (preferably no more than 2 or 3 paragraphs) of the subject matter, intent, and goals of this regulatory change (i.e., new regulation, amendments to an existing regulation, or repeal of an existing regulation).

The subject matter of the rulemaking will include updated numerical and narrative criteria, use designations and other policies contained in the Water Quality Standards Regulation (9 VAC 25-260).

The intent of this rulemaking is to protect designated and beneficial uses of state waters by adopting regulations that are technically correct, necessary and reasonable. These standards will be used in setting Virginia Pollutant Discharge Elimination System Permit limits and for evaluating the waters of the Commonwealth for inclusion in the Clean Water Act 305(b) report and on the 303(d) list. Waters not meeting standards will require development of a Total Maximum Daily Load, effluent limitations, or further analysis of use removal under the Clean Water Act at 303(e) and Code of Virginia [§ 62.1-44.19:7](#).

This rulemaking is needed because the last triennial review was completed in July 2017 and new scientific information is available to update the water quality standards. Changes to the regulation are also needed to improve permitting, monitoring and assessment programs. In addition, the State Water Control Board

(Board) must fulfill the legal mandates for a three-year review under the Code of Virginia, per §62.1-44.15(3a), and federal regulations at 40 CFR 131.

Acronyms and Definitions

Define all acronyms or technical definitions used in this form.

BLM	Biotic Ligand Model
Board	State Water Control Board
CAS	Chemical Abstracts Service
Department	Virginia Department of Environmental Quality (or DEQ)
DWR	Virginia Department of Wildlife Resources
EPA	U.S. Environmental Protection Agency
PWS	Public Water Supply

Mandate and Impetus

Identify the mandate for this regulatory change and any other impetus that specifically prompted its initiation (e.g., new or modified mandate, petition for rulemaking, periodic review, or board decision). For purposes of executive branch review, “mandate” has the same meaning as defined in Executive Order 14 (as amended, July 16, 2018), “a directive from the General Assembly, the federal government, or a court that requires that a regulation be promulgated, amended, or repealed in whole or part.”

Federal and state mandates in the Clean Water Act at 303(c), 40 CFR 131 and the Code of Virginia in §62.1-44.15(3a) require that water quality standards be adopted, modified or cancelled every three years. These are the most relevant laws and regulations.

Legal Basis

Identify (1) the promulgating agency, and (2) the state and/or federal legal authority for the regulatory change, including the most relevant citations to the Code of Virginia and Acts of Assembly chapter number(s), if applicable. Your citation must include a specific provision, if any, authorizing the promulgating agency to regulate this specific subject or program, as well as a reference to the agency’s overall regulatory authority.

The promulgating entity is the State Water Control Board (Board).

The Clean Water Act authorizes restoration and maintenance of the chemical, physical, and biological integrity of the Nation’s waters. The Clean Water Act at 303(c) (1) requires that the states hold public hearings for the purpose of reviewing applicable water quality standards and, as appropriate, modifying and adopting standards.

The Federal regulations at 40 CFR 131 authorize requirements and procedures for developing, reviewing, revising and approving water quality standards by the States as authorized by section 303(c) of the Clean Water Act. 40 CFR 131 specifically requires the states to adopt criteria to protect designated uses.

The State Water Control Law authorizes protection and restoration of the quality of state waters, safeguarding the clean waters from pollution, prevention and reduction of pollution and promotion of water conservation. The State Water Control Law (Code of Virginia) at §62.1-44.15(3a) requires the Board to establish standards of quality and to modify, amend or cancel any such standards or policies. It

also requires the Board to hold public hearings from time to time for the purpose of reviewing the water quality standards, and, as appropriate, adopting, modifying or canceling such standards.

The correlation between the proposed regulatory action and the legal authority identified above is that the amendments being considered are modifications of criteria that will protect designated uses and criteria and designated uses are requirements of the Water Quality Standards.

The authority to adopt standards as provided by the provisions in the previously referenced citations is mandated, although the specific standards to be adopted or modified are discretionary to the Environmental Protection Agency and the state.

Purpose

Describe the specific reasons why the agency has determined that this regulation is essential to protect the health, safety, or welfare of citizens. In addition, explain any potential issues that may need to be addressed as the regulation is developed.

The rulemaking is essential to the protection of health, safety or welfare of the citizens of the Commonwealth because proper water quality standards protect water quality and living resources of Virginia's waters for the designated uses of aquatic life, wildlife, recreation, public water supply, shellfish consumption, and fish consumption.

The intent of this rulemaking is to protect designated and beneficial uses of state waters by adopting a regulation that is technically correct, necessary, and reasonable. Potential issues that may need to be addressed are listed in the "Substance" section. It should be noted that all sections of the regulation are open for comment during this mandated triennial review and a revision, addition or deletion could potentially occur in any section of the regulation. However, revisions under consideration to date have been listed in the "Substance" section.

Substance

Briefly identify and explain the new substantive provisions that are being considered, the substantive changes to existing sections that are being considered, or both.

The existing regulation may be proposed for amendment(s) to reflect new scientific information and to clarify the regulation. Changes may also be proposed to improve implementation of these standards in Virginia Pollutant Discharge Elimination System permits and in monitoring and assessments of surface waters. Some of the changes may be to numerical and narrative criteria, use designations, classifications, site specific or special standards, stream descriptions, antidegradation and implementation procedures such as mixing zones, variances and assessment procedures.

The following are issues under consideration but the Department staff will work in conjunction with other state and federal agencies and the public to include other amendments deemed necessary.

The Department has not accepted or rejected any of these issues as of yet. Some issues under consideration by the agency now include, but are not limited to, the following:

Water Quality Standards 9 VAC 25-250-5 et seq.

Modify, add or delete any section, criteria, use designation, standard, and policy to conform to EPA guidance, clarify state intent, implement state programs (e.g., permitting, monitoring and assessments), and improve water quality or protect beneficial uses.

Table of Parameters (9VAC25-260-140):

- a) Add aluminum criteria for the protection of aquatic life according to the 2018 EPA nationally recommended criteria.
- b) Correction of identified errors:
 - i) Ammonia CAS number is formatted with dashes, all other CAS numbers do not have dashes
 - ii) Ammonia CAS number is incorrect 766414; should be 7664417
 - iii) Chlordane CAS number 57749 is for mixed isomers; EPA RSL uses 12789036 for Chlordane, this is not wrong but inconsistent
 - iv) Nickel CAS number is incorrect 744002; should be 7440020
 - v) Tributyltin CAS number is incorrect 60105 (no such CAS number); EPA RSL uses E1790678
 - vi) Copper BLM Language – Edit for clarity and accuracy (Section 140.G) specifically, criteria development for effluent-dominated streams and seasonal criteria development
- c) Update 21 human health criteria to reflect updated exposure factors recommended by EPA in 2011.

Addition of Lake Mooney in 9VAC25-260-187:

DEQ staff recommend application of lake nutrient criteria to a relatively recently constructed water supply reservoir in the Rappahannock River basin (Lake Mooney)

River Basin Issues (9VAC25-260-360 through 540):

- a) Add, modify or delete trout waters as appropriate.
- b) Add, modify or delete public water supplies designations as appropriate.
- c) Adjust temperature criteria or application of temperature criteria to waters stocked with trout by DWR in the winter with the intent of supplying the public with seasonal trout fishing opportunities only in the winter but not in the summer.
- d) Add or correct Class designations as appropriate.
- e) Corrections to section descriptions in river basin tables for clarity and/or accuracy.

Miscellaneous Issues:

- a) Address stakeholder comment received that submerged aquatic vegetation acreages for the Chesapeake Bay segments in 9VAC25-260-185.B be amended to reflect EPA's most recent assessment recommendations for the Bay.
- b) Add a benthic chlorophyll-a threshold as outlined in Virginia's recent 305(b)/303(d) Water Quality Assessment Integrated Reports that protects the recreational use from nuisance filamentous algae in certain main-stem sections of the North Fork Shenandoah River and South Fork Shenandoah River.

Alternatives to Regulation

Describe any viable alternatives to the regulatory change that were considered, and the rationale used by the agency to select the least burdensome or intrusive alternative that meets the essential purpose of the regulatory change. Also, include discussion of less intrusive or less costly alternatives for small businesses, as defined in § 2.2-4007.1 of the Code of Virginia, of achieving the purpose of the regulatory change.

One alternative is to keep the current water quality standard regulation unchanged or to delay the triennial review. This was not chosen since the state is mandated to review the water quality standards regulation every three years and another review is due. Also, many issues have been identified by the Department's monitoring, assessments and permitting staff that need to be addressed. These issues are included in the 'Substance' section above. Each issue listed may have a more cost effective alternative or any individual issue may be accepted or rejected. The Department will solicit public input during the review and consider other alternatives and issues presented by the public which also meet the goals of the regulation and of the Department.

Periodic Review and Small Business Impact Review Announcement

If you wish to use this regulatory action to conduct, and this NOIRA to announce, a periodic review (pursuant to § 2.2-4017 of the Code of Virginia and Executive Order 14 (as amended, July 16, 2018)), and a small business impact review (§ 2.2-4007.1 of the Code of Virginia) of this regulation, keep the following text. Modify as necessary for your agency. Otherwise, delete the paragraph below and insert "This NOIRA is not being used to announce a periodic review or a small business impact review."

In addition, pursuant to Executive Order 14 (as amended, July 16, 2018) and § 2.2-4007.1 of the *Code of Virginia*, the agency is conducting a periodic review and small business impact review of this regulation to determine whether this regulation should be terminated, amended, or retained in its current form. Public comment is sought on the review of any issue relating to this regulation, including whether the regulation (i) is necessary for the protection of public health, safety, and welfare; (ii) minimizes the economic impact on small businesses consistent with the stated objectives of applicable law; and (iii) is clearly written and easily understandable.

Public Participation

Indicate how the public should contact the agency to submit comments on this regulation, and whether a public hearing will be held, by completing the text below. In addition, as required by § 2.2-4007.02 of the Code of Virginia describe any other means that will be used to identify and notify interested parties and seek their input, such as regulatory advisory panels or general notices.

The Board is seeking comments on this regulation, including but not limited to: ideas to be considered in the development of this regulation, the costs and benefits of the alternatives stated in this background document or other alternatives, and the potential impacts of the regulation. The Board is also seeking information on impacts on small businesses as defined in § 2.2-4007.1 of the *Code of Virginia*. Information may include: 1) projected reporting, recordkeeping, and other administrative costs; 2) the probable effect of the regulation on affected small businesses; and 3) the description of less intrusive or costly alternatives for achieving the purpose of the regulation.

In addition, please see the periodic review/small business impact review announcement section above for details on specific comments requested for the periodic review.

Anyone wishing to submit written comments may do so by mail or email to David C. Whitehurst, VA Department of Environmental Quality, P.O. Box 1105, Richmond, VA 23218; Phone: 804-698-4121; Email: David.Whitehurst@deq.virginia.gov. Comments may also be submitted through the Public Forum feature of the Virginia Regulatory Town Hall (<http://www.townhall.virginia.gov>). Written comments must include the name and address of the commenter. In order to be considered, comments submitted by mail must be received by close of business and comments submitted by email must be received by 11:59 p.m. on the last day of the public comment period.

Public Hearing at Proposed Stage

A public hearing will be held following the publication of the proposed stage of this regulatory action and notice of the hearing will be posted on the Virginia Regulatory Town Hall (<http://www.townhall.virginia.gov>) and on the Commonwealth Calendar (<https://www.virginia.gov/connect/commonwealth-calendar>).

Regulatory Advisory Panel

Please indicate, to the extent known, if advisers (e.g., regulatory advisory panel or negotiated rulemaking panel) will be involved in the development of the proposed regulation. Indicate that 1) the agency is not using a panel in the development of the proposal; 2) the agency is using a panel in the development of the proposal; or 3) the agency is inviting comment on whether to use a panel to assist the agency in the development of a proposal.

The Board is using a panel to develop a proposal. Persons interested in assisting in the development of a proposal should notify the Department's contact person by the end of the comment period and provide their name, address, phone number, email address and the organization you represent (if any). The primary function of the panel is to develop recommended regulation amendments for Department consideration through the collaborative approach of regulatory negotiation and consensus. Multi-applications from a single company, organization, group or other entity count as one for purposes of making the decision specified in the preceding sentence. Notification of the composition of the panel will be sent to all applicants.
