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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	Rulemaking to adopt site specific selenium aquatic life criteria for four streams which are tributaries to Knox Creek in Buchanan County.
Date this document prepared	October 30, 2023

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Order 19 (2022) (EO 19), any instructions or procedures issued by the Office of Regulatory Management (ORM) or the Department of Planning and Budget (DPB) pursuant to EO 19, the Regulations for Filing and Publishing Agency Regulations (1 VAC 7-10), 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).

In response to a petition to amend the Water Quality Standards regulation (WQS), the State Water Control Board proposes to amend the WQS (9VAC25-260) to incorporate site-specific selenium criteria for the protection of freshwater aquatic life in four streams which are tributaries to Knox Creek in Buchanan County, Virginia. The specific streams which are the focus of this rulemaking are:

- 1) Race Fork and tributaries
- 2) Pounding Mill Creek and tributaries
- 3) Right Fork of Lester Fork and tributaries
- 4) Abners Fork and tributaries

The intent of this rulemaking is to establish site-specific selenium aquatic life criteria which protect designated and beneficial uses of state waters by adopting regulations that are technically correct and reasonable. These site-specific criteria will be implemented in water quality programs which protect and maintain the WQS, including the Virginia Pollutant Discharge Elimination System permit program and the Clean Water Act 305(b) water quality assessment report and 303(d) listing of impaired waters.

Acronyms and Definitions

Define all acronyms or technical definitions used in this form.

Board	State Water Control Board
DEQ	Department of Environmental Quality, also referred to as the Department
EPA	U.S. Environmental Protection Agency
VPDES	Virginia Pollutant Discharge Elimination System
WQS	Water Quality Standards, 9VAC25-260 et al.

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 the ORM procedures, "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."

DEQ received correspondence dated April 25, 2023, from Clintwood JOD, LLC (CJOD) petitioning the Board to promulgate site-specific aquatic life criterion for selenium. Specifically, CJOD formally requested that the Board amend the existing surface water quality criteria for selenium to allow a special standard (9VAC25-260-310) incorporating EPA's *Recommended Aquatic Life Ambient Water Quality Criterion for Selenium in Freshwater*, as published in the Federal Register on July 13, 2016 (Vol. 81, No. 134) and revised in August 2021.

At its meeting on August 23, 2023, the Board directed DEQ to proceed with initiating a rulemaking to incorporate site specific selenium criteria as a special standard in the WQS regulation (9VAC25-260) consistent with the petition request for the specific tributaries to Knox Creek in Buchanan County.

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 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 purpose of the State Water Control Law (Code of Virginia) is established in §62.1-44.2 and includes protection and restoration of the quality of state waters, safeguarding clean waters from pollution, prevention and reduction of pollution and promotion of water conservation. The State Water Control Law at §62.1-44.15(3a) also requires the Board to establish standards of quality consistent with its purpose and to modify, amend or cancel any such standards or policies.

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. The WQS regulation identifies the uses to be made of surface waters, referred to as designated uses, and establishes water quality criteria to protect the designated uses. The amendments to the WQS under consideration will provide an alternative, site-specific criterion for freshwater selenium ensuring the aquatic life designated use is protected with regard to this parameter.

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.

As allowed by Code of Virginia section §2.2-4007, any person may petition an agency to request the agency to develop a new regulation or amend an existing regulation.

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 purpose of this rulemaking is to establish site-specific selenium aquatic life criteria which protect designated and beneficial uses of state waters by adopting regulations that are technically correct and reasonable. 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.

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.

This rulemaking is to amend the WQS regulation to include a site-specific freshwater aquatic life selenium criterion in Section 9VAC25-260-310 for several tributaries to Knox Creek in Buchanan County. Those tributaries are:

- 1) Race Fork and tributaries
- 2) Pounding Mill Creek and tributaries
- 3) Right Fork of Lester Fork and tributaries
- 4) Abners Fork and tributaries

The site-specific criteria for consideration under this rulemaking reflect EPA's recommended selenium water quality criterion for protection of aquatic life for the streams noted above in the Knox Creek watershed. EPA's recommended criterion was first published on July 13, 2016.

EPA’s recommended freshwater criterion is a chronic criterion expressed in terms of both fish tissue concentration (egg/ovary, whole body, and muscle) and two different water concentrations. The criterion elements are hierarchical with fish tissue values taking precedence should sufficient fish tissue data be available. This is EPA’s first aquatic life criterion utilizing fish tissue as a direct expression of the recommended criterion. Accordingly, implementation of these criteria is substantially different from established Clean Water Act water quality programs, including the VPDES program and the water quality assessment program.

In addition to the site-specific criterion, a notation will be placed in the Big Sandy River basin table (9VAC25-260-490) to indicate the geographic applicability of the special standard.

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 WQS regulation unchanged. This was not selected as the Board has directed the Department to initiate a rulemaking.

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 the ORM procedures), and a small business impact review (§ 2.2-4007.1 of the Code of Virginia) of this regulation, keep the following text. Modify it 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.”

This NOIRA is not being used to announce a periodic review or a small business impact review.

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 providing an opportunity for comments on this regulatory proposal, including but not limited to (i) the costs and benefits of the regulatory proposal, (ii) any alternative approaches, and (iii) 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.

This NOIRA is not being used to announce a periodic review or a small business impact review.

Anyone wishing to submit written comments for the public comment file may do so through the Public Comment Forums feature of the Virginia Regulatory Town Hall web site at: <https://townhall.virginia.gov>. Comments may also be submitted by mail or email David C. Whitehurst, Virginia Department of Environmental Quality, P.O. Box 1105, Richmond, VA 23218; Phone: 804-774-9180; Email: David.Whitehurst@deq.virginia.gov. In order to be considered, comments must be received by 11:59 pm 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.

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. Multiple 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.