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Proposed Regulation Agency Background Document

Agency name	State Water Control Board
Virginia Administrative Code (VAC) Chapter citation(s)	9 VAC25-260-30
VAC Chapter title(s)	Water Quality Standards
Action title	Amendment to the state's Antidegradation Policy by designating a portion of Laurel Fork in Highland County as Exceptional State Waters.
Date this document prepared	December 12, 2017

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 this regulatory change (i.e., new regulation, amendments to an existing regulation, or repeal of an existing regulation). Alert the reader to all substantive matters. If applicable, generally describe the existing regulation.

The State Water Control Board (Board) is proposing amendments to the Antidegradation Policy section (9 VAC 25-260-30) of the State's Water Quality Standards regulation to designate a portion of Laurel Fork in Highland County for special protection as Exceptional State Waters (9 VAC 25-260-30.A.3.c).

Acronyms and Definitions

Define all acronyms used in this form, and any technical terms that are not also defined in the "Definitions" section of the regulation.

DEQ – Department of Environmental Quality
EPA – U.S. Environmental Protection Agency
ESW – Exceptional State Waters

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the General Assembly, the federal government, or a court that requires that a regulation be promulgated, amended, or repealed in whole or part."

The Board received a petition to designate a portion of Laurel Fork as ESW. The Board views ESW nominations as citizen petitions under § 2.2-4007 of the Code of Virginia. Therefore, the Board took action on this petition for a proposed designation of these waters as ESW because the Department of Environmental Quality (DEQ) staff had concluded, based on the information acquired during staff evaluations, that the portions under consideration met the eligibility requirements which a water body must meet before it can be afforded the extra water quality protection provided by such a designation. The factors to be considered in determining whether a nominated water body meets the eligibility decision criteria of exceptional environmental settings and possessing either outstanding recreational opportunities or exceptional aquatic communities are described in DEQ's November 15, 2004 Guidance Memorandum No. 04-2021, "Guidance for Exceptional State Waters Designations in Antidegradation Policy Section of Virginia Water Quality Standards Regulation (9 VAC 25-260-30.A.3)."

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.

Section 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 §1313 mandates the 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, which are use designations, water quality criteria to protect the designated uses and an antidegradation policy. Web address sites where citations can be found:

Federal Regulation web site

<https://www.epa.gov/laws-regulations/regulations>

Clean Water Act web site

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

State Water Control Law (Code of Virginia) web site

<https://law.lis.virginia.gov/vacode/title62.1/chapter3.1/section62.1-44.2/>

<https://law.lis.virginia.gov/vacode/title62.1/chapter3.1/section62.1-44.15/>

The proposed amendments do not exceed the minimum requirements of any legally binding state or federal mandates, nor are they more stringent than federal requirements which require, as a minimum, that states have a process such as this one whereby citizens can nominate waters for the special protection provided by this designation category.

The 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 ESW 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

Explain the need for the regulatory change, including a description of: (1) the rationale or justification, (2) the specific reasons the regulatory change is essential to protect the health, safety or welfare of citizens, and (3) the goals of the regulatory change and the problems it's intended to solve.

The section of Laurel Fork petitioned for Exceptional State Waters designation meets the eligibility criteria required for consideration; i.e., it exhibits high quality waters and unique associated riparian habitat. The proposed amendment is essential to protect the health, safety and welfare of the citizens of the Commonwealth by preserving ESW waters for the enjoyment of future generations through the prohibition of new and/or increased point source discharges.

Substance

Briefly identify and explain the new substantive provisions, the substantive changes to existing sections, or both. A more detailed discussion is provided in the "Detail of Changes" section below.

The proposed amendment to the Antidegradation Policy (9 VAC 25-260-30, part of the state's Water Quality Standards), would designate a portion of Laurel Fork for special protection as Exceptional State Waters (9 VAC 25-260-30.A.3.c).

Upon permanent regulatory designation of a water body as an ESW, 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 as ESW. In addition, no new mixing zones would be allowed in ESW and mixing zones from upstream or tributary waters could not extend into the designated sections.

Issues

Identify the issues associated with the regulatory change, 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, include a specific statement to that effect.

Upon permanent regulatory designation of a water body as an ESW, 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 as ESW. In addition, no new mixing zones would be allowed in ESW and mixing zones from upstream or tributary waters could not extend into the Exceptional State Waters sections.

The primary advantage to the public is that these waters will be protected at their present high level of quality for the use and enjoyment of current and future generations of Virginians. 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. This 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. However, the only riparian landowner for the stream segment proposed under this regulatory action is the petitioner. There is no disadvantage to the public or the Commonwealth that will result from the adoption of these amendments.

Requirements More Restrictive than Federal

Identify and describe any requirement of the regulatory change which is more restrictive than applicable federal requirements. Include a specific citation for each applicable federal requirement, and a rationale for the need for the more restrictive requirements. If there are no applicable federal requirements, or no requirements that exceed applicable federal requirements, include a specific statement to that effect.

The proposed amendments do not exceed applicable federal minimum requirements.

Agencies, Localities, and Other Entities Particularly Affected

Identify any other state agencies, localities, or other entities particularly affected by the regulatory change. "Particularly affected" are those that are likely to bear any identified disproportionate material impact which would not be experienced by other agencies, localities, or entities. "Locality" can refer to either local governments or the locations in the Commonwealth where the activities relevant to the regulation or regulatory change are most likely to occur. If no agency, locality, or entity is particularly affected, include a specific statement to that effect.

Other State Agencies Particularly Affected
 No other State agencies are particularly affected.

Localities Particularly Affected
 Highland County

Other Entities Particularly Affected
 No other entities are particularly affected.

For purposes of "Locality Particularly Affected" under the Board's statutes, Highland County would not bear a disproportionate material water quality impact not experienced by other localities.

Economic Impact

Pursuant to § 2.2-4007.04 of the Code of Virginia, identify all specific economic impacts (costs and/or benefits), anticipated to result from the regulatory change. When describing a particular economic impact, specify which new requirement or change in requirement creates the anticipated economic impact. Keep in mind that this is change versus the status quo.

Impact on State Agencies

<p><i>For your agency:</i> projected costs, savings, fees or revenues resulting from the regulatory change, including: a) fund source / fund detail; b) delineation of one-time versus on-going expenditures; and</p>	<p>The projected cost to implement and enforce the proposed regulatory amendments should not cause any additional financial impact to the state. These amendments are updates of existing rules and while the staff may have to change the way permit issuance and water quality assessments are conducted, it will not take additional staff or</p>
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c) whether any costs or revenue loss can be absorbed within existing resources	resources to do this. These programs are funded by EPA 106 grants.
<i>For other state agencies:</i> projected costs, savings, fees or revenues resulting from the regulatory change, including a delineation of one-time versus on-going expenditures.	There are no projected costs, savings, fees or revenues resulting from the regulatory change for other state agencies.
<i>For all agencies:</i> Benefits the regulatory change is designed to produce.	Permanent protection of a unique and high quality water body.

Impact on Localities

Projected costs, savings, fees or revenues resulting from the regulatory change.	It is not expected that these Exceptional State Waters designations will impose a cost on the localities.
Benefits the regulatory change is designed to produce.	Permanent protection of a unique and high quality water body.

Impact on Other Entities

Description of the individuals, businesses, or other entities likely to be affected by the regulatory change. If no other entities will be affected, include a specific statement to that effect.	Riparian landowners adjacent to the designated water body segment.
Agency’s best estimate of the number of such entities that will be affected. Include an estimate of the number of small businesses affected. Small business means a business entity, including its affiliates, that: a) is independently owned and operated and; b) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million.	Riparian landowners adjacent to the designated water body segment. For this rulemaking, the petitioner is the only identified landowner adjacent to the segment of Laurel Fork proposed for ESW designation. No small business is impacted.
All projected costs for affected individuals, businesses, or other entities resulting from the regulatory change. Be specific and include all costs including, but not limited to: a) projected reporting, recordkeeping, and other administrative costs required for compliance by small businesses; b) specify any costs related to the development of real estate for commercial or residential purposes that are a consequence of the regulatory change; c) fees; d) purchases of equipment or services; and e) time required to comply with the requirements.	None, unless the alternative to discharging to the designated water body requires some additional financial expenditure. There are no point source discharges to this segment of Laurel Fork.
Benefits the regulatory change is designed to produce.	Permanent protection of a unique and high quality water body.

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.

In compliance with the Board's Public Participation Guidelines (9 VAC 25-10-20 C), DEQ will consider all alternatives which are considered to be less burdensome and less intrusive for achieving the essential purpose of the amendment, and any other alternatives presented during the proposed rulemaking. The primary alternative considered to date was to leave the regulation unchanged. This was not the alternative chosen because the proposed water body meets the eligibility criteria based on the information available at the time of the preliminary evaluation.

Regulatory Flexibility Analysis

Pursuant to § 2.2-4007.1B of the Code of Virginia, 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) establishing less stringent compliance or reporting requirements; 2) establishing less stringent schedules or deadlines for compliance or reporting requirements; 3) consolidation or simplification of compliance or reporting requirements; 4) establishing 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 regulatory change.

In compliance with the Board's Public Participation Guidelines (9 VAC 25-10-20 C), DEQ will consider all alternatives which are considered to be less burdensome and less intrusive for achieving the essential purpose of the amendment, and any other alternatives presented during the proposed rulemaking.

The primary alternative considered to date was to leave the regulation unchanged. This was not the alternative chosen because the proposed water body met the eligibility criteria, based on the information available at the time of the preliminary evaluation.

Periodic Review and Small Business Impact Review Report of Findings

If you are using this form to report the result of a periodic review/small business impact review that is being conducted as part of this regulatory action, and was announced during the NOIRA stage, indicate whether the regulatory change meets the criteria set out in Executive Order 14 (as amended, July 16, 2018), e.g., is necessary for the protection of public health, safety, and welfare; minimizes the economic impact on small businesses consistent with the stated objectives of applicable law; and is clearly written and easily understandable.

In addition, as required by § 2.2-4007.1 E and F of the Code of Virginia, discuss the agency's consideration of: (1) the continued need for the regulation; (2) the nature of complaints or comments received concerning the regulation; (3) the complexity of the regulation; (4) the extent to which the regulation overlaps, duplicates, or conflicts with federal or state law or regulation; and (5) the length of time since the regulation has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the regulation. Also, discuss why the agency's decision, consistent with applicable law, will minimize the economic impact of regulations on small businesses.

N/A

Public Comment

Summarize all comments received during the public comment period following the publication of the previous stage, and provide the agency response. Include all comments submitted: including those received on Town Hall, in a public hearing, or submitted directly to the agency. If no comment was received, enter a specific statement to that effect.

Commenter	Comment	Agency response
Lucile Miller	Expressed support for the petition. The requested designation would assist the petitioner’s efforts to protect water quality in an area of particular importance. An ESW designation would carry on the present water quality protections through future generations and the designation of this section of Laurel Fork would significantly increase protection for the downstream area already carrying ESW designation. As a landowner with 5/8 mile Laurel Fork frontage located between the Goodall Property and the National Forest ESW portion, she stated her intent to apply for ESW designation.	N/A
McChesney Goodall, III	Stated designation as ESW would be an important step in preserving an exemplary, high elevation cold-water stream and riparian habitat that, encompasses a landscape and ecological area that is unique to Virginia. Stated that designation will demonstrate how private and public participation (referring to a previously designated segment within George Washington National Forest) can work together to preserve a scenic and ecological treasure. Stated the issue with designating Laurel Fork as ESW from one end of their property to the other is where Tamarack cuts across the stream at Noted Rock. He states that, since Tamarack’s narrow piece of land includes a rocky outcrop (Noted Rock) and swampy bottom land along Laurel Fork, he has difficulty understanding how and why this small area would ever be developed or subject to point source pollution. He hopes the Board will designate this entire length of Laurel Fork as ESW including the short segment that passes through Tamarack and bisects the Rifle Ridge property.	N/A
Sallie Seabury, manager - Tamarack of Highland, LLC	They do not have an issue with what the petitioner does with their property or the designation of the portion of Laurel Fork that is on their property. The managers of Tamarack of Highland, LLC have no desire to have the portion of Laurel Fork adjacent to Tamarack designated ESW or restrictions on how they may use the property now or in the future. Stated that their family has been carefully managing the land for	N/A

	many years and will continue to be good caretakers of the property.	
Charles Seabury, co-manager - Tamarack of Highland, LLC	It is not their intent to develop the property near Laurel Fork and they have no intention of any direct point source discharge into the nominated segment. As owners of a very small segment of the nominated portion, they have concerns that ESW designation could be an issue for them at some point in the future. He has concerns related to upstream activities. They want assurance that ESW designation would not result in the need for additional permitting or in them held liable for disturbances. Stated they do not intend to pollute the waters but being a steward of the land also involves respectfully using the land as a financially sustainable property and wants to ensure designation would not interfere with the ability to develop the land further upstream from the nominated segment.	Upstream activities that do not require a permit for a permanent point source discharge would be allowed.
Highland New Wind Development (HNWD) – Tal McBride	They assert the petition fraudulently claims the petitioner owns all the land that is the subject of the petition. It is their opinion the petitioner has filed the petition as part of an effort to 'block' the (now former) route of the Atlantic Coast Pipeline (ACP) across their land. They believe the claims by the petitioner are 'fatal flaws' in the petition and as such requires the State Water Control Board to disqualify their petition from consideration.	The original petition nominated a segment of the stream entirely within the petitioner's property. It was subsequently amended to include a small portion at the upstream end that meanders out of, and then back onto their property. The segment proposed by the Board for designation does not include that portion of the stream adjacent to the Tamarack property

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 to any other comments, the Board is seeking comments on the costs and benefits of the proposal, the potential impacts of this regulatory proposal and any impacts of the regulation on farm and forest land preservation. Also, the Board is 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) probable effect of the regulation on affected small businesses, and 3) description of less intrusive or costly alternative methods of achieving the purpose of the regulation.

Anyone wishing to submit written comments for the public comment file may do so by mail, email or fax to: David C. Whitehurst, Office of Ecology, Department of Environmental Quality, P.O. Box 1105, Richmond, VA 23218, email: david.whitehurst@deq.virginia.gov, phone: 804-774-9180, fax: 804-698-4116.

Comments may also be submitted through the Public Forum feature of the Virginia Regulatory Town Hall web site at: <http://www.townhall.virginia.gov>. Written comments must include the name and address of the

commenter. In order to be considered, comments must be received by 11:59 pm on the last day of the public comment period.

A public hearing will not be held following the publication of this stage of this regulatory action.

A formal hearing will be held on a date and time and at a place to be determined, if a request for a formal hearing is received by the contact person listed above within 30 days of publication of the notice of public comment period in the Virginia Register of Regulations.

Detail of Changes

List all regulatory changes and the consequences of the changes. Explain the new requirements and what they mean rather than merely quoting the text of the regulation. For example, describe the intent of the language and the expected impact. Describe the difference between existing requirement(s) and/or agency practice(s) and what is being proposed in this regulatory change. Use all tables that apply, but delete inapplicable tables.

Table 1: Changes to Existing VAC Chapter(s)

Current chapter-section number	New chapter-section number, if applicable	Current requirements in VAC	Change, intent, rationale, and likely impact of new requirements
9 VAC 25-260-30	N/A	<p>(30) North River in Augusta County from the Staunton Reservoir dam to the first crossing with National Forest lands boundary (near Girl Scout Camp May Flather).</p> <p>(31) "<u>Laurel Fork in Highland County, from the Rifle Ridge Farm property line near Collins Run (N38.49270, W79.66611) downstream to a point approximately 0.5 miles upstream from the confluence of Mullenax Run (N38.508322, W79.652757).</u>"</p>	The addition of a 2.03 mile segment of Laurel Fork to 9 VAC 25-260-30.A.3.c. This water body meets the eligibility criteria necessary to be designated as Exceptional State Waters. The designation is intended to protect high quality waters from degradation through the prohibition of new and/or expanded point source discharges.

Family Impact

In accordance with § 2.2-606 of the Code of Virginia, please assess the potential 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.