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## Notice of Intended Regulatory Action (NOIRA) Agency Background Document

<b>Agency name</b>	State Water Control Board
<b>Virginia Administrative Code (VAC) citation(s)</b>	9 VAC25-260-30
<b>Regulation title(s)</b>	Water Quality Standards
<b>Action title</b>	Amendment to the state's Antidegradation Policy by designating a portion of Laurel Fork in Highland County as Exceptional State Waters.
<b>Date this document prepared</b>	January 11, 2017

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 17 (2014) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

### Subject matter and intent

*Please describe briefly the subject matter, intent, and goals of the planned regulatory action. Also include a brief explanation of the need for and the goals of the new or amended regulation.*

The State Water Control Board (Board) proposes to amend Virginia's Antidegradation Policy (9 VAC 25-260-30), part of the Water Quality Standards Regulation, by designating a portion of Laurel Fork as Exceptional State Waters ("ESW"; 9 VAC 25-260-30.A.3.c). The ESW category of the Antidegradation Policy allows the Board to designate waters which display exceptional environmental settings and either exceptional aquatic communities or exceptional recreational opportunities for added protection. ("Tier III" is how the public commonly refers to those waters that are protected from water quality degradation through a prohibition on new or increased point source discharges. The equivalent regulatory terms are "Outstanding National Resource Waters" for EPA and "Exceptional State Waters" for Virginia.)

Once designated, the Antidegradation Policy provides that no water quality degradation would be allowed in the ESW (i.e., no new, additional or increased point source discharge of sewage, industrial wastes or other pollution would be allowed into waters designated as ESW). The only exception would be temporary, limited impact activities, with the provision that after a minimal period of time the waters are returned or restored to conditions equal to or better than those existing just prior to the temporary source of pollution. The goal is to protect these special waters at their present quality for use and enjoyment by future generations of Virginians.

The section of Laurel Fork under consideration for possible Exceptional State Waters designation is: Laurel Fork in Highland County, from approximately 0.33 miles upstream of the confluence with Collins Run (Lat. N38.490051, Long. W79.666039) downstream to a point approximately 0.5 miles upstream from the confluence of Mullenax Run (Lat. N38.508322, Long. W79.652757).

### Legal basis

*Please identify (1) the agency (includes any type of promulgating entity) and (2) the state and/or federal legal authority for the proposed regulatory action, including the most relevant citations to the Code of Virginia or General Assembly chapter number(s), if applicable. Your citation should include a specific provision, if any, authorizing the promulgating entity 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 State Water Control 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

<http://www.epa.gov/epahome/cfr40.html>

Clean Water Act web site

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

State Water Control Law (Code of Virginia) web site

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

<http://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 Exceptional State Waters 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.

This proposed amendment is a necessary revision to the State water quality standards regulation. The State Water Control Board views Exceptional State Waters 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 Exceptional State Waters because Department staff had concluded, based on the information acquired during two separate staff evaluations, that the portions under consideration met the eligibility requirements which a water body must meet before it can be afforded the extra point source 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 the Department'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)."

## Purpose

*Please describe the specific reasons why the agency has determined that the proposed regulatory action is essential to protect the health, safety, or welfare of citizens. In addition, please explain any potential issues that may need to be addressed as the regulation is developed.*

The agency has determined that the section of Laurel Fork petitioned for Exceptional State Waters designation meets the eligibility criteria required for consideration and designation is intended to preserve eligible waters for the enjoyment of future generations.

Issues that need to be addressed are concerns of property owners of land abutting the petitioned segment regarding the designation negatively impacting any planned activities such as construction, timber operations, or other activities resulting in point source discharges.

## Substance

*Please 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 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 Exceptional State Water, 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. In addition, no new mixing zones would be allowed in Exceptional State Waters and mixing zones from upstream or tributary waters could not extend into the Exceptional State Waters sections.

## Alternatives

*Please describe any viable alternatives to the proposal considered and the rationale used by the agency to select the least burdensome or intrusive alternative that meets the essential purpose of the action. 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 regulation.*

In compliance with the State Water Control Board's Public Participation Guidelines (9 VAC 25-10-20.C), the Department 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 these waters met the eligibility criteria, based on the information available at the time of the preliminary evaluation. Based on the public comment received following notification of petition receipt, another alternative that may be considered is to modify the coverage of the ESW designation to eliminate riparian areas not owned by the petitioner.

### Public participation

*Please indicate whether the agency is seeking comments on the intended regulatory action, including ideas to assist the agency in the development of the proposal and the costs and benefits of the alternatives stated in this notice or other alternatives.*

The agency is seeking comments on this regulatory action, including but not limited to: (1) ideas to be considered in the development of this proposal; (2) the costs and benefits of the alternatives stated in this background document or other alternatives; (3) potential impacts of the regulation; and, (4) impacts of the regulation on farm and forest land preservation.

The agency is also seeking information on impacts on small businesses as defined in § 2.2-4007.1 of the Code of Virginia. Information may include: projected reporting, recordkeeping and other administrative costs; the probable effect of the regulation on affected small businesses; and the description of less intrusive or costly alternatives for 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](mailto:david.whitehurst@deq.virginia.gov), phone: 804-698-4121, fax: 804-698-4116. Written comments must include the name and address of the commenter. Comments may also be submitted through the Public Forum feature of the Virginia Regulatory Town Hall web site (<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 before midnight on the last day of the public comment period.

### Public hearing at proposed stage

A public hearing will not be held following the publication of the proposed stage of this regulatory action unless requests for a public hearing are received during the NOIRA public comment period from at least 25 persons.

### Regulatory 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 does not intend to establish a panel to assist in the development of the proposal. However, in response to requests received during the NOIRA public comment period the Board will consider establishing a panel. Persons requesting the agency use a panel and interested in assisting in the development of a proposal should notify the department contact person by the end of the comment period and provide their name, address, phone number, email address and their organization (if any). Notification of the composition of the panel will be sent to all applicants.

### Family Impact

*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.*

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The development of water quality standards is for the protection of public health and safety, which has only an indirect impact on families.