



Virginia
Regulatory
Town Hall

Final Regulation Agency Background Document

Agency Name:	State Water Control Board
VAC Chapter Number:	Primary Action: 9VAC 25-720 Secondary Action: 9 VAC 25-420, 430, 440, 450, 452, 460, 470, 480, 490, 500, 510, 520, 530, 540, 550, 560, 570 and 572
Regulation Title:	Primary Action: Water Quality Management Planning Public Participation Guidelines Regulation Secondary Action: Water Quality Management Plans
Action Title:	Primary Action: Adoption of Water Quality Management Planning Public Participation Guidelines Regulation Secondary Action: Repeal 18 Water Quality Management Plans as state regulations
Date:	July 1, 2002

Please refer to the Administrative Process Act (§ 9-6.14:9.1 *et seq.* of the *Code of Virginia*), Executive Order Twenty-Five (98), Executive Order Fifty-Eight (99), and the *Virginia Register Form, Style and Procedure Manual* for more information and other materials required to be submitted in the final regulatory action package.

Summary

Please provide a brief summary of the new regulation, amendments to an existing regulation, or the regulation being repealed. There is no need to state each provision or amendment; instead give a summary of the regulatory action. If applicable, generally describe the existing regulation. Do not restate the regulation or the purpose and intent of the regulation in the summary. Rather, alert the reader to all substantive matters or changes contained in the proposed new regulation, amendments to an existing regulation, or the regulation being repealed. Please briefly and generally summarize any substantive changes made since the proposed action was published.

The primary action is the adoption of a Water Quality Management Planning Regulation. The regulation will contain Total Maximum Daily Loads (TMDLs), stream segment classifications, effluent limitations including water quality based effluent limitations, and waste load allocations.

The secondary action is the repeal of the existing WQMPs as state regulations. These plans are basinwide or areawide waste treatment or pollution control management plans developed in accordance with sections 208 and 303(e) of the Clean Water Act (CWA), as implemented by 40 CFR 130. These plans serve as repositories for TMDLs, effluent limitations including water quality based effluent limits, waste load allocations, and the recommended pollution control measures needed to attain or maintain water quality standards.

There are currently 18 WQMPs that have been adopted as regulations by the Board during the 1970s and through the early 1990s. These plans no longer reflect current conditions and need to be updated. There are no federal or state statutory or regulatory requirements for the plans to be regulations, but they continue to be carried on the books of the Virginia Register of Regulations. The repeal of these plans as regulations will allow for a more dynamic WQMP update process; reduce potential for conflicts between TMDLs, VPDES permits and the existing WQMPs; and eliminate unnecessary and outdated regulations.

Statement of Final Agency Action

Please provide a statement of the final action taken by the agency: including the date the action was taken, the name of the agency taking the action, and the title of the regulation.

The State Water Control Board unanimously adopted the Water Quality Management Planning Regulation and repealed the existing 18 WQMPs as state regulations.

Basis

Please identify the state and/or federal source of legal authority to promulgate the regulation. The discussion of this statutory authority should: 1) describe its scope and the extent to which it is mandatory or discretionary; and 2) include a brief statement relating the content of the statutory authority to the specific regulation. In addition, where applicable, please describe the extent to which proposed changes exceed federal minimum requirements. Full citations of legal authority and, if available, web site addresses for locating the text of the cited authority, shall be provided. If the final text differs from that of the proposed, please state that the Office of the Attorney General has certified that the agency has the statutory authority to promulgate the final regulation and that it comports with applicable state and/or federal law.

The Clean Water Act, §303(d)(1)(c) and (2), as implemented by the Federal Water Quality Management Regulation, 40 CFR 130, authorize the states to develop Total Maximum Daily Loads (TMDLs). Sections 62.1-44.15 (10), 62.1-44.15(13), and 62.1-44.19:7 of the Code of Virginia give the State Water Control Board the duty and authority to develop and adopt TMDLs and establish programs for effective area-wide and basin-wide water quality control and management. The Code also authorizes the Board to develop pollution abatement and water quality control plans.

Water Quality Management Plans are required by Section 303(e) of the Clean Water Act [33 U.S.C. 1313(e)] as implemented by 40 CFR 130. Federal law does not require that water quality management plans be adopted as regulation.

The Office of the Attorney General has certified that the State Water Control Board has the authority to promulgate the proposed regulation and repeal the Water Quality Management Plans as state regulations under applicable law, including Chapter 3.1 of Title 62.1 of the Code of Virginia.

Note: The full texts of the legal authorities can be found at the following web site addresses:

<http://www.vipnet.org/vipnet/government/code-of-virginia.html>

<http://www4.law.cornell.edu/uscode/33/1251.html>

Purpose

Please provide a statement explaining the need for the new or amended regulation. This statement must include the rationale or justification of the final regulatory action and detail the specific reasons it is essential to protect the health, safety or welfare of citizens. A statement of a general nature is not acceptable, particular rationales must be explicitly discussed. Please include a discussion of the goals of the proposal and the problems the proposal is intended to solve.

There are currently 18 WQMPs that have been adopted as regulations by the Board during the 1970s and through the early 1990s. These plans no longer reflect current conditions and need to be updated. There are no federal or state statutory or regulatory requirements for the plans to be regulations, but they continue to be carried on the books of the Virginia Register of Regulations. The repeal of these plans as regulations will allow for a more dynamic WQMP update process; reduce potential for conflicts between TMDLs, VPDES permits and the existing WQMPs; and eliminate unnecessary and outdated regulations.

The regulatory actions are necessary to protect the health, safety or welfare of the citizens of the Commonwealth because they will provide a more dynamic planning process thereby improving the process for water quality management planning.

Substance

Please identify and explain the new substantive provisions, the substantive changes to existing sections, or both where appropriate. Please note that a more detailed discussion is required under the statement of the regulatory action's detail.

The primary action, Water Quality Management Planning Regulation will contain Total Maximum Daily Loads (TMDLs), stream segment classifications, effluent limitations including water quality based effluent limitations, and wasteload allocations. The secondary action is the repeals the existing WQMPs as state regulations.

Issues

Please provide a statement identifying the issues associated with the final regulatory action. The term "issues" means: 1) the advantages and disadvantages to the public of implementing the new provisions; 2) the 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, please include a sentence to that effect.

The advantages of the primary proposal, the WQMP regulation, is that the TMDLs, stream segment classifications, effluent limitations including water quality based effluent limitations, and waste load allocations will be contained in one regulation. Virginia has over 600 TMDLs to adopt as regulations by the year 2010.

The advantages of the repeal of the 18 existing WQMPs as regulations are allowing for a more dynamic WQMP development/update process; reducing potential for conflicts between TMDLs, VPDES permits and the existing WQMPs; and eliminating unnecessary and outdated regulations.

There are no federal or state requirements that WQMPs be adopted as regulations.

There is no potential disadvantage to the public, agency, or the Commonwealth resulting from the adoption of the WQMPPPG regulation or the repeal of the 18 WQMPs as state regulations.

Statement of Changes Made Since the Proposed Stage

Please highlight any changes, other than strictly editorial changes, made to the text of the proposed regulation since its publication.

The concept of the secondary action, repeal of the existing 18 WQMPs as state regulations is unchanged. The concept of the primary action, a public participation regulation, was revised to provide that the public participation procedures water quality management planning be established by Board-approved guidance and a water quality management planning regulation be adopted that include the regulatory components of water quality management plans; i.e. TMDLs, stream classifications, effluent limitations including water quality based effluent limitations and waste load allocations. The substance of the new water quality management planning regulation moves the existing regulatory stream classifications, effluent limitations including water quality based effluent limitations and waste load allocations from the existing 18 WQMPs into a single regulation and establishes a repository for TMDLS.

Public Comment

Please summarize all public comment received during the public comment period and provide the agency response. If no public comment was received, please include a statement indicating that fact.

A summary of the comments received follows. However, it is important to note that the comments were submitted on the concept of the proposed public participation regulation that is no longer under consideration.

The regulation should contain provisions for a public hearing for all actions covered in the regulation. The public participation regulations require public meetings on the actions covered in the regulation. The only difference in the public hearing and the public meeting is that a Board member is present at the public hearing. Also, State Water Control Law allows an owner to request a hearing on a TMDL after the Board approves the TMDL submitted to EPA.

The regulation should contain a provision for the public comment period remaining open for at least a week after a public hearing. This provision will be added to the guidance.

The regulation should contain a provision for a DEQ written response to any comment made on any action contained in the regulation. The public participation guidance provides that all relevant comments are provided to the Board for consideration and a summary response prepared and made available to the public.

9 VAC 25-720-40 A 3 states that “when the Director determines that a major update of a WQMP is needed.” The term “major” should be defined as “anytime a 10% or greater increase is proposed for a WLA, LA, or the assimilative capacity of a stream.” To quantify a trigger point for a major WQMP update is difficult and could result in unneeded revisions in some cases. As contained in the guidance, having the DEQ Director review the WQMPs every 5 years and make a decision on the need to make updates is probably the most effective way to deal with update decisions. The term “major”, describing revision, has been taken out of the guidance.

9 VAC 25-720-110 should include an additional Board action for permit actions resulting from a “WLA study.” Board actions on permits are contained in other regulations, and it would

be duplicative to include it in this regulation. WLAs will be contained in the Water Quality Management Planning Regulation.

Board adopted TMDLs should contain the allocations. A decision on TMDL adoption will be made when the contents and impacts of EPA's revision to the 303(d) regulation are known.

WLA studies should be legally binding. The WLA studies from the existing WQMPs are included in the water quality management planning regulation. WLA studies, that are not covered by a TMDL and may result in modification or limitation of the allocation of more than one discharger in a stream segment, will be subject to all the provisions of the APA including Article 2.

All actions covered by the regulation should be submitted to a Board action (approval). TMDLs are the only action in the regulation that will be adopted by the Board as regulation. There is no state or federal statutory mandate for adopting 303(d) Lists and 303(e) WQMPs as regulations. WLA studies are addressed in #7 above.

There were a number of comments regarding judicial review. Following are some representative comments: (a) **The proposed regulation is silent to judicial review. It is recommended that a section be added to the regulation that provides a right for review in state circuit court before submission to EPA. Stakeholders need one forum to challenge an inadequate TMDL. They should not have to challenge EPA approval in federal court and the state approval in a separate action in a state court.** (b) **TMDL public participation process as presented in the proposed regulation is inadequate in providing stakeholders opportunity to protect their rights in court if the TMDL is inadequate.** Judicial review is established by the legislature and not by regulation.

There are several comments concerning the Article 2 exemption for TMDLs: (a) **TMDLs are state regulations and not federal regulations. Therefore, they are not exempted from Article 2 of the APA.** (b) **DEQ has exempted the TMDL process from Article 2 of the APA on the basis that it is a federal regulation. A TMDL is a state requirement – developed by the state and based on state water quality standards. Therefore, the process proposed by DEQ is inadequate.** The APA regulation does contain an exemption from the provisions of Article 2 provided the state regulation is essentially the same as the federal regulation. Since we will be adopting EPA approved TMDLs, we are adopting a federal document. Also, it takes between 18 and 24 months to adopt a regulation in accordance with the provisions of the full APA. Considering the number of TMDLs (600) to be developed by 2010 and the schedule contained in the Consent Decree, it would be nearly impossible to adopt TMDLs in accordance with the time requirements of Article 2 of the APA. The proposed water quality management planning public participation guidance document provides the opportunity for public outreach and comment during the TMDL process.

The proposed regulation should have a provision for amending the TMDL and WLA. The amendment process to a state's adopted TMDL and associated WLA are being considered in EPA's current revision to their 303(d) regulations. DEQ recognizes that conditions change and

TMDLs will have to be amended. They will go through essentially the same process as the original adoption: public notice, public meeting, EPA approval and Board adoption.

DEQ's water quality management planning process needs a statutory modification to fit the process within the provisions of Article 2 of the APA. A statutory modification could specifically state that TMDLs are exempt from the provisions of Article 2 of the APA. However, all exceptions to the APA must be granted by the legislature.

Detail of Changes

Please detail any changes, other than strictly editorial changes, that are being proposed. Please detail new substantive provisions, all substantive changes to existing sections, or both where appropriate. This statement should provide a section-by-section description - or crosswalk - of changes implemented by the proposed regulatory action. Include citations to the specific sections of an existing regulation being amended and explain the consequences of the changes.

The concept of the secondary action, repeal of the existing 18 WQMPs as state regulations is unchanged. However, the concept of the primary action, a public participation regulation, was revised to provide that the public participation procedures water quality management planning would be established by Board-approved guidance and a water quality management planning regulation would be adopted which would contain the regulatory components of water quality management plans; i.e. TMDLs, stream classifications, effluent limitations including water quality based effluent limitations and waste load allocations. The substance of the new water quality management planning regulation moves the existing regulatory stream classifications, effluent limitations including water quality based effluent limitations and waste load allocations from the existing 18 WQMPs into a single regulation and establishes a repository for TMDLS.

Family Impact Statement

Please provide an analysis of the regulatory action that assesses the impact on the institution of the family and family stability including the extent to which 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 Management Planning programs is for the reduction of amount of pollutants entering the Commonwealth's waterways and the attainment and maintain the designated uses of Virginia's waters and has no direct impact on family institution and stability.