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Proposed Regulation Agency Background Document

Agency name	State Water Control Board
Virginia Administrative Code (VAC) Chapter citation(s)	9VAC25-260
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	May 15, 2024

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 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.

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 replace the existing aquatic life selenium water quality criteria in the specified watersheds and 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 used in this form, and any technical terms that are not also defined in the "Definitions" section of the regulation.

Board	State Water Control Board
DEQ	Department of Environmental Quality, also referred to as the Department
EPA	U.S. Environmental Protection Agency
VA Energy	Virginia Department of Energy
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. A Notice of Intended Regulatory Action (NOIRA) was published in the Virginia Register on February 26, 2024. The comment period ended March 27, 2024. A regulatory advisory panel (RAP) was formed and one meeting was held with the RAP on April 24, 2024.

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.

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 is intended to solve.

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. The rulemaking is in response to the petition received to amend the WQS regulation to incorporate EPA's 2016 recommended selenium criteria for the specific waterbodies listed in Buchanan County. The proposed criteria are for the protection of aquatic life and are only indirectly related to the health, safety, and welfare of citizens. 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, the substantive changes to existing sections, or both. A more detailed discussion is provided in the "Detail of Changes" section below.

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.

The proposed amendments to the WQS regulation would amend the special standards section of the WQS regulation (9VAC25-260-310) to include site site-specific selenium criterion. Additionally, a notation will be placed in Section 3 of the Big Sandy River basin table (9VAC25-260-490) to indicate the general geographic applicability of the special standard.

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.

The primary advantage to the public is that the proposed selenium criteria are based on updated scientific information to protect aquatic life. The disadvantage is that criteria that become more stringent may result in increased costs to the regulated community. However, the goal is to set realistic, protective goals in water quality management and to maintain the most scientifically defensible criteria in the Water Quality Standards regulation.

The advantage to the agency or the Commonwealth that will result from the adoption of these amendments may be additional flexibility for developing accurate and scientifically defensible permit limits, assessments, and clean-up plans (TMDLs) which ensure protection of the WQS. These are discussed under the “Purpose” section where the goals of the proposal, the environmental benefits, and the problems the proposal is intended to solve are discussed.

The regulated community may find that the amendments pertinent to their operations may require additional capital or operating costs for control in their discharge, particularly where the numerical criteria are more stringent (see Economic Impact). However, it is not known whether the proposed, site-specific criteria will be more, or less, stringent than the current selenium aquatic life criteria contained in the WQS regulation.

The regulatory changes produce indirect benefits through protection of water quality and living resources of Virginia’s waters for the designated uses of aquatic life and wildlife while providing additional options for permittees in the subject watersheds to demonstrate compliance with water quality requirements contained in VPDES permits.

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.

There are no requirements that exceed applicable federal requirements.

Agencies, Localities, and Other Entities Particularly Affected

Consistent with § 2.2-4007.04 of the Code of Virginia, identify any other state agencies, localities, or other entities particularly affected by the regulatory change. Other entities could include local partners such as tribal governments, school boards, community services boards, and similar regional organizations. "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

It is anticipated VA Energy will be particularly affected by these regulations as related to discharge permits. VA Energy is the agency charged with implementing the VPDES program for coal mining operations in Virginia. Accordingly, they would have primary responsibility for implementing the amended criteria. VA Energy has been actively involved in this rulemaking and is aware of the proposed criteria and the need to establish implementation procedures for incorporating the proposed criteria into their VPDES program.

Localities Particularly Affected

In general, Water Quality Standards are developed and implemented for the protection of all designated uses statewide. However, due to the site-specific nature of this amendment, the below localities may bear a disproportionate material impact not experienced by other localities due to the location of these localities relative to the site-specific nature of the proposed amended criteria.

County: Buchanan County

Other Entities Particularly Affected

Due to the limited geographic application of the proposed criteria, staff anticipates this to impact at least one surface coal mining facility. That facility is owned by the petitioner.

Economic Impact

Consistent with § 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 the proposed 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 c) whether any costs or revenue loss can be absorbed within existing resources.</p>	<p>There are no projected direct costs resulting from the proposed regulatory change.</p>
<p><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.</p>	<p>There are no projected costs, savings, fees, or revenues resulting from the proposed regulatory change.</p>
<p><i>For all agencies:</i> Benefits the regulatory change is designed to produce.</p>	<p>The regulatory changes produce indirect benefits through protection of water quality and living resources of Virginia's waters for the designated uses of aquatic life and wildlife while providing additional options for permittees in the subject watersheds to demonstrate compliance with water quality requirements contained in VPDES permits.</p>

Impact on Localities

If this analysis has been reported on the ORM Economic Impact form, indicate the tables (1a or 2) on which it was reported. Information provided on that form need not be repeated here.

See Table 2 of the ORM Economic Impact form.

Impact on Other Entities

If this analysis has been reported on the ORM Economic Impact form, indicate the tables (1a, 3, or 4) on which it was reported. Information provided on that form need not be repeated here.

See Tables 3 and 4 of the ORM Economic Impact form.

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.

If this analysis has been reported on the ORM Economic Impact form, indicate the tables on which it was reported. Information provided on that form need not be repeated here.

Regulatory Flexibility Analysis

Consistent with § 2.2-4007.1 B 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.

The WQS regulation does not establish compliance or reporting requirements. The proposed changes in the WQS regulation would be implemented through established DEQ programs, including the VPDES permitting program, the water quality monitoring and assessment programs, and the TMDL program. Additionally, the VPDES permitting authority for coal mining operations is VA Energy. The water quality programs responsible for ensuring protection of the WQS have the flexibility to implement the proposed amendments to provide for flexibility in demonstrating regulatory compliance as there are multiple end-points to the proposed criteria. It is DEQ's understanding that support for the proposed amendments by the petitioner and VA Energy is because they provide greater flexibility in ensuring protection of the water quality standards and designated uses of the subject waterbodies through the VPDES regulatory program.

If this analysis has been reported on the ORM Economic Impact form, indicate the tables on which it was reported. Information provided on that form need not be repeated here.

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 EO 19 and the ORM procedures, 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.

This NOPC is not being used to announce a periodic review or a small business impact review. This regulatory action is the result of the Board directive to staff to initiate this rulemaking in response to a petition requesting that the WQS be amended to include site-specific selenium criteria for the waters described in the Substance section. This regulatory action is necessary for the protection of the Commonwealth's surface waters and aquatic life. The Water Quality Standards regulation forms the basis upon which effluent discharge limits are set and upon which it is determined whether waters are attaining applicable designated uses. All comment received during the Notice Of Intended Regulatory Action were supportive of the amendments.

Public Comment

Summarize all comments received during the public comment period following the publication of the previous stage, and provide the agency’s 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.

See Attachment 1 for a summary of public comments received from the NOIRA comment period.

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.

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, (iii) the potential impacts of the regulation, and (iv) the agency's regulatory flexibility analysis stated in that section of this background document. 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 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 to 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.

A public hearing will be held following the publication of this stage, and notice of the hearing will be posted on the Virginia Regulatory Town Hall website (<https://townhall.virginia.gov>) and on the Commonwealth Calendar website (<https://commonwealthcalendar.virginia.gov/>). Both oral and written comments may be submitted at that time.

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.

If an existing VAC Chapter(s) is being amended or repealed, use Table 1 to describe the changes between the existing VAC Chapter(s) and the proposed regulation. If the existing VAC Chapter(s) or sections are being repealed and replaced, ensure Table 1 clearly shows both the current number and the new number for each repealed section and the replacement section.

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
9VAC25-260-310		Currently no Special Standard "jj".	Adds Special Standard "jj" which is a site-specific freshwater selenium criterion for the protection of aquatic life. This Special Standard replaces the statewide selenium criteria for Race Fork, Pounding Mill Creek, Right Fork of Lester Fork, Abner's Fork, and their respective tributaries.
9VAC25-260-490		Currently no notation for "jj".	Adds the notation "jj" to the Special Standards column for section 3 of the Big Sandy River basin table.

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.

It is not anticipated that this regulation will have a direct impact on the institution of the family and family stability.

ATTACHMENT 1

Summary of Comments from the Site-Specific Selenium Criteria Notice of Intended Regulatory Action

Comment period February 26, 2024 – March 27, 2024

Commenter	Comment Summary	Agency Response
<ul style="list-style-type: none"> ◦ Clintwood JOD (petitioner) ◦ Aquatic Resources Management ◦ Auger Coal ◦ Bellamy Engineering ◦ Metallurgical Coal Producers Association (MCPA) ◦ Wellmore ◦ Cleveland Cliffs ◦ Environmental Design Consultants ◦ SynTerra, Environmental Monitoring Inc. 	<p>Common themes for all individual comments received:</p> <ul style="list-style-type: none"> • EPA issued recommended fish tissue criteria for selenium in 2016, and the proposed site-specific criteria are consistent with EPA's recommendations and its latest implementation guidance. • The criteria are protective of downstream waters in West Virginia and Kentucky. • Both downstream states have already adopted criteria modeled after EPA's recommendations. • They urge DEQ to proceed with the next steps in the rulemaking without delay, and they are willing to participate and provide further support however needed. 	<p>Agency staff acknowledge the comments.</p>
<p>337 form letters from Clintwood JOD employees</p>	<ul style="list-style-type: none"> • Support the rulemaking for site-specific selenium criteria. • Note that the petition requested that DEQ support using implementation guidance modeled after West Virginia guidance which has been reviewed and approved by EPA Region 3 and is currently in effect for downstream waters. They also note that mention of the implementation guidance was not provided in the NOIRA as published. • Commenters state health of the Virginia coal industry has a substantial impact on the continued operation of their employer's business. 	<p>Agency staff acknowledge the comments.</p>
<p>6 letters from Aquatic Resources Management, LLC employees</p>	<p>Same comments as noted above</p>	<p>Agency staff acknowledge the comments.</p>
<p>2 letters from Environmental Monitoring, Inc. employees</p>	<p>Same comments as noted above</p>	<p>Agency staff acknowledge the comments.</p>
<p>2 letters from SynTerra employees</p>	<p>Same comments as noted above</p>	<p>Agency staff acknowledge the comments.</p>
<p>Virginia Dept. of Energy</p>	<p>VA Energy Mined Land Repurposing Division (MLRD) supports the rulemaking. Establishment of the proposed ambient criterion would provide their agency greater flexibility in permit writing. They request that DEQ continue to consider the petitioner's proposal to model implementation after existing</p>	<p>Agency staff acknowledge the comments.</p>

Commenter	Comment Summary	Agency Response
	guidance available from West Virginia and Kentucky as a large portion of the coalfield counties drain to the Tug Fork or Upper Levisa watersheds, which flow into these states.	