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Regulatory
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Proposed Regulation Agency Background Document

Approving authority name	State Water Control Board
Virginia Administrative Code (VAC) citation	9 VAC 25-260
Regulation title	Water Quality Standards
Action title	Amendment to the State's Antidegradation Policy (9 VAC 25-260-30) by designating Lake Drummond and portions of Brown Mountain Creek, Laurel Fork, North Fork of the Buffalo River, Pedlar River, Ramseys Draft, and Whitetop Laurel Creek as Exceptional State Waters
Document preparation date	December 16, 2003

This information is required for executive review (www.townhall.state.va.us/dpbpages/apaintro.htm#execreview) and the Virginia Registrar of Regulations (legis.state.va.us/codecomm/register/regindex.htm), pursuant to the Virginia Administrative Process Act (www.townhall.state.va.us/dpbpages/dpb_apa.htm), Executive Orders 21 (2002) and 58 (1999) (www.governor.state.va.us/Press_Policy/Executive_Orders/EOHome.html), and the *Virginia Register Form, Style and Procedure Manual* (http://legis.state.va.us/codecomm/register/download/styl8_95.rtf).

Brief Summary

*Please provide a brief summary of the proposed new regulation, proposed amendments to the existing regulation, or the regulation proposed to be repealed. Alert the reader to all substantive matters or changes. If applicable, generally describe the existing regulation. Do **not** state each provision or amendment or restate the purpose and intent of the 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 seven surface waters for special protection as Exceptional State Waters.

Basis

Please identify the state and/or federal source of legal authority to promulgate this proposed regulation, including (1) the most relevant law and/or regulation, including Code of Virginia citation and General

Assembly bill and chapter numbers, if applicable, and (2) promulgating entity, i.e., the agency, board, or person. Describe the legal authority and the extent to which the authority is mandatory or discretionary.

§ 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 303(c) 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. The minimum requirements are use designations, water quality criteria to protect the designated uses and an antidegradation policy. All of the citations mentioned describe mandates for water quality standards.

Web Address sites where citations can be found:

Federal Regulation web site

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

Clean Water Act web site

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

State Water Control Law (Code of Virginia) web site

<http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+62.1-44.2>

<http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+62.1-44.15>

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.

Purpose

Please explain the need for the new or amended regulation. Describe the rationale or justification of the proposed regulatory action. Detail the specific reasons the regulation is essential to protect the health, safety or welfare of citizens. Discuss the goals of the proposal and the problems the proposal is intended to solve.

These proposed amendments are a necessary revision to the State water quality standards regulation. The State Water Control Board took action on these Department initiated candidates for proposed designation because Department staff had concluded, based on the information available at the time of the preliminary evaluation, that the proposed designation 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 Exceptional State Waters 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. Once designated, the Antidegradation Policy provides that no water quality degradation would be allowed in the Exceptional State Waters. The only exception would be temporary, limited impact activities. By ensuring that no water quality degradation is allowed to occur in waters with exceptional environmental settings and either exceptional recreational opportunities or exceptional aquatic communities, the Board is protecting these special waters at their present quality for use and enjoyment by future generations of Virginians.

Substance

Please briefly identify and explain the new substantive provisions, the substantive changes to existing sections, or both where appropriate. (Provide more detail about these changes in the "Detail of changes" section.)

The amendments to the Antidegradation Policy of the Water Quality Standards would designate Lake Drummond and portions of Brown Mountain Creek, Laurel Fork, North Fork of the Buffalo River, Pedlar River, Ramseys Draft, and Whitetop Laurel Creek for special protection as Exceptional State Waters (9 VAC 25-260-30.A.3.c).

Issues

Please identify the issues associated with the proposed regulatory action, 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, please indicate.*

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 the Exceptional State Water and mixing zones from upstream or tributary waters could not extend into the Exceptional State Waters sections.

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 that 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 each of these waters is a federal agency and none of these waters contain any permitted point source discharges nor are any anticipated by the applicable federal agencies.

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.

The factors to be considered in determining whether a nominated water body meets the eligibility decision criteria of exceptional environmental settings and possessing outstanding recreational opportunities and/or exceptional aquatic communities are described in the Department's revised April 25, 2001 "Guidance for Exceptional Surface Waters Designations in Antidegradation Policy Section of Virginia Water Quality Standards Regulation (9 VAC 25-260-30.A.3). Although all of these waters proposed for designation are located on public (federal) land, those localities and businesses located near the designated waters may experience financial benefits through an increase in eco-tourism to the area because of the exceptional nature of the water body that lead to its designation.

There is no disadvantage to the agency or the Commonwealth that will result from the adoption of these amendments.

Requirements More Restrictive Than Federal

Please identify and describe any requirement of the proposal which are more restrictive than applicable federal requirements. Include 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 statement to that effect.

The proposed amendments do not exceed applicable federal minimum requirements.

Locality Particularly Affected

Please identify any locality particularly affected by the proposed regulation. Locality particularly affected means any locality which bears any identified disproportionate material impact which would not be experienced by other localities.

Counties

Amherst, Augusta, Highland, Washington

Cities

Chesapeake, Suffolk

Public Participation

Please include a statement that in addition to any other comments on the proposal, the agency is seeking comments on the costs and benefits of the proposal and the impacts of the regulation on farm or forest land preservation.

In addition to any other comments, the Board is seeking comments on the costs and benefits of the proposal and on any impacts of the regulation on farm and forestland preservation.

The Board also seeks comment on whether the eligibility decision criteria for Exceptional State Water designation are met for each of these waters and whether the upper and lower boundary designations are appropriately delineated for each water body.

Anyone wishing to submit written comments for the public comment file may do so at the public hearing or by mail, email or fax to Jean W. Gregory, Office of Water Quality Programs, Department of Environmental Quality, P.O. Box 10009, Richmond, VA 23240, (804) 698-4113, by fax to (804) 698-4522 , or email jwgregory@deq.virginia.gov. Written comments must include the name and address of the commenter. In order to be considered comments must be received by 5:00 p.m. on the date established as the close of the comment period.

A public hearing will be held and notice of the public hearing can be found in the Calendar of Events section of the Virginia Register of Regulations. Both oral and written comments may be submitted at that time.

Financial impact

Please identify the anticipated financial impact of the proposed regulation and at a minimum provide the following information:

Projected cost to the state to implement and enforce the proposed regulation, including (a) fund source / fund detail, and (b) a delineation of one-time versus on-going expenditures	The projected cost to implement and enforce the proposed regulatory amendments should not cause any additional financial impact to the state.
Projected cost of the regulation on localities	It is not expected that these Exceptional State Waters designations will impose a cost on the localities, as these waters are all located on federal lands.
Description of the individuals, businesses or other entities likely to be affected by the regulation including specific information on the impact on small businesses as defined in § 2.2-2279	Riparian landowners adjacent to the designated water bodies. For this rulemaking, the US Forest Service and the US Fish and Wildlife Service are the only identified landowners. No small business is impacted.
Agency’s best estimate of the number of such entities that will be affected	2
Projected cost of the regulation for affected individuals, businesses, or other entities	None, unless the alternative to discharging to the designated water body requires some additional financial expenditure.

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.

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 seven water bodies met the eligibility criteria, based on the information available at the time of the preliminary evaluation.

Public comment

Please summarize all public comment received during 30-day period following the publication of the NOIRA, and provide the agency response.

The comment period for this Notice of Intended Regulatory Action ended on July 25, 2003. Below is a summary of public comments received during that comment period.

Commenter	Comment
Joseph Maroon, Director, Dept. Conservation and Recreation	<p>Water Body - <u>Lake Drummond</u></p> <p>Supports the designation and states that the designation will serve to recognize the existing high quality of the stream and assist in maintaining that level of quality.</p>
Eric E. Zicht	<p>States that he is philosophically opposed to any designation of Exceptional State Waters and given the permanent nature of the designation, cautions the members of the Water Control Board to be very careful when designating any water body as "Exceptional".</p>
John Bellemore, George Washington & Jefferson National Forests	<p>Water Body - <u>Brown Mountain Creek</u></p> <p>Stated at the July 15, 2003 public meeting that we were capturing the "best of the best" of their waters and he mentioned that the USFS fully supported the designation of the candidate waters on their lands and he explained how EPA and the state had worked with them to resolve the Gypsy Moth treatment issue.</p>
Joseph Maroon, Director, Dept. Conservation and Recreation	<p>Supports the designation and states that the designation will serve to recognize the existing high quality of the stream and assist in maintaining that level of quality.</p>
Jay Turner, Roanoke Chapter Trout Unlimited	<p>Provided oral comment at the July 15, 2003 public meeting in support of the DEQ candidates that are trout streams on USFS land.</p>
Frank A. Deviney, Jr., VA Council of Trout Unlimited	<p>Commented on behalf of the Virginia Council of Trout Unlimited in support of the designation.</p>
Eric E. Zicht	<p>States that he is philosophically opposed to any designation of Exceptional State Waters and given the permanent nature of the designation, cautions the members of the Water Control Board to be very careful when designating any water body as "Exceptional".</p>
John Bellemore, George Washington & Jefferson National Forests	<p>Water Body - <u>North Fork of the Buffalo River</u></p> <p>Stated at the July 15, 2003 public meeting that we were capturing the "best of the best" of their waters and he mentioned that the USFS fully supported the designation of the candidate waters on their lands and he explained how EPA and the state had worked with them to resolve the Gypsy Moth treatment issue.</p>
Joseph Maroon, Director, Dept. Conservation and Recreation	<p>Supports the designation and states that the designation will serve to recognize the existing high quality of the stream and assist in maintaining that level of quality.</p>
Jay Turner, Roanoke Chapter	<p>Provided oral comment at the July 15, 2003 public meeting in support of</p>

Trout Unlimited	the DEQ candidates that are trout streams on USFS land.
Frank A. Deviney, Jr., VA Council of Trout Unlimited	Commented on behalf of the Virginia Council of Trout Unlimited in support of the designation.
Eric E. Zicht	States that he is philosophically opposed to any designation of Exceptional State Waters and given the permanent nature of the designation, cautions the members of the Water Control Board to be very careful when designating any water body as "Exceptional".
John Bellemore, George Washington & Jefferson National Forests	<p>Water Body - <u>Pedlar River</u></p> <p>Stated at the July 15, 2003 public meeting that we were capturing the "best of the best" of their waters and he mentioned that the USFS fully supported the designation of the candidate waters on their lands and he explained how EPA and the state had worked with them to resolve the Gypsy Moth treatment issue.</p>
Joseph Maroon, Director, Dept. Conservation and Recreation	Supports the designation and states that the designation will serve to recognize the existing high quality of the stream and assist in maintaining that level of quality.
Jay Turner, Roanoke Chapter Trout Unlimited	Provided oral comment at the July 15, 2003 public meeting in support of the DEQ candidates that are trout streams on USFS land.
Frank A. Deviney, Jr., VA Council of Trout Unlimited	Commented on behalf of the Virginia Council of Trout Unlimited in support of the designation.
Eric E. Zicht	States that he is philosophically opposed to any designation of Exceptional State Waters and given the permanent nature of the designation, cautions the members of the Water Control Board to be very careful when designating any water body as "Exceptional".
John Bellemore, George Washington & Jefferson National Forests	<p>Water Body - <u>Laurel Fork</u></p> <p>Stated at the July 15, 2003 public meeting that we were capturing the "best of the best" of their waters and he mentioned that the USFS fully supported the designation of the candidate waters on their lands and he explained how EPA and the state had worked with them to resolve the Gypsy Moth treatment issue.</p>
Joseph Maroon, Director, Dept. Conservation and Recreation	Supports the designation and states that the designation will serve to recognize the existing high quality of the stream and assist in maintaining that level of quality.
McChesney Goodall, III	Supports the designation and states that, while a firm believer of property rights, land ownership carries a responsibility of good environmental stewardship.

J. Clifford Miller, III	Commented in support of the designation.
Jay Turner, Roanoke Chapter Trout Unlimited	Provided oral comment at the July 15, 2003 public meeting in support of the DEQ candidates that are trout streams on USFS land.
Frank A. Deviney, Jr., VA Council of Trout Unlimited	Commented on behalf of the Virginia Council of Trout Unlimited in support of the designation.
L.M. Schwartz, Chairman, VLRC	Wrote on behalf of the Virginia Land Rights Coalition in opposition to the designation because, in their opinion, the stream is adequately protected by the National Forest Service and because of possible detrimental impact to the economic potential of the area (lumber and natural gas), and what they perceive as a part of a definite long term plan of the federal government to take control of, lock up and/or highly regulate all natural resources.
Rick Webb	Supports the designation and states that Laurel Fork meets all three eligibility criteria.
Eric E. Zicht	States that he is philosophically opposed to any designation of Exceptional State Waters and given the permanent nature of the designation, cautions the members of the Water Control Board to be very careful when designating any water body as "Exceptional".
Clifton A. Rexrode	Opposes the designation citing restriction of private land use and a reduction of property values. Further states that the actual agenda of supporters for the designation is to private landowner property use and to gain Congressional designation of the area as a wilderness area.
Lucile S. Miller	Commented in support of the designation and states that Laurel Fork is a stream worthy of the highest protection the state can provide. As a riparian landowner adjacent to the proposed segment, she is interested in nominating the 5/8 - mile section that runs through her property for Tier III designation.
Walter L. Williams	Commented in support of the designation for Laurel Fork and Ramseys Draft. Water Body - <u>Ramseys Draft</u>
John Bellemore, George Washington & Jefferson National Forests	Stated at the July 15, 2003 public meeting that we were capturing the "best of the best" of their waters and he mentioned that the USFS fully supported the designation of the candidate waters on their lands and he explained how EPA and the state had worked with them to resolve the Gypsy Moth treatment issue.
Joseph Maroon, Director, Dept. Conservation and Recreation	Supports the designation and states that the designation will serve to recognize the existing high quality of the stream and assist in maintaining that level of quality.
Jay Turner, Roanoke Chapter Trout Unlimited	Provided oral comment at the July 15, 2003 public meeting in support of the DEQ candidates that are trout streams on USFS land.

<p>Frank A. Deviney, Jr., VA Council of Trout Unlimited</p>	<p>Commented on behalf of the Virginia Council of Trout Unlimited in support of the designation.</p>
<p>Eric E. Zicht</p>	<p>States that he is philosophically opposed to any designation of Exceptional State Waters and given the permanent nature of the designation, cautions the members of the Water Control Board to be very careful when designating any water body as "Exceptional".</p>
<p>Rick Webb</p>	<p>Supports the designation and states that Laurel Fork meets all three eligibility criteria.</p>
<p>Walter L. Williams</p>	<p>Commented in support of the designation for Laurel Fork and Ramseys Draft.</p>
<p>John Bellemore, George Washington & Jefferson National Forests</p>	<p>Water Body - <u>Whitetop Laurel Creek</u> Stated at the July 15, 2003 public meeting that we were capturing the "best of the best" of their waters and he mentioned that the USFS fully supported the designation of the candidate waters on their lands and he explained how EPA and the state had worked with them to resolve the Gypsy Moth treatment issue.</p>
<p>Joseph Maroon, Director, Dept. Conservation and Recreation</p>	<p>Supports the designation and states that the designation will serve to recognize the existing high quality of the stream and assist in maintaining that level of quality.</p>
<p>Jay Turner, Roanoke Chapter Trout Unlimited</p>	<p>Provided oral comment at the July 15, 2003 public meeting in support of the DEQ candidates that are trout streams on USFS land.</p>
<p>Frank A. Deviney, Jr., VA Council of Trout Unlimited</p>	<p>Commented on behalf of the Virginia Council of Trout Unlimited in support of the designation.</p>
<p>Eric E. Zicht</p>	<p>States that he is philosophically opposed to any designation of Exceptional State Waters and given the permanent nature of the designation, cautions the members of the Water Control Board to be very careful when designating any water body as "Exceptional".</p>

AGENCY RESPONSE: The agency response to the public comments is that staff have determined that these seven waters proposed for designation meet the required eligibility criteria necessary for consideration as Exceptional State Waters and, to the best determination of agency staff, are wholly located on publicly owned land.

Impact on family

Please assess the 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.

Detail of changes

Please detail all changes that are being proposed and the consequences of the proposed changes. Detail all new provisions and/or all changes to existing sections.

If the proposed regulation is intended to replace an emergency regulation, please list separately (1) all changes between the pre-emergency regulation and the proposed regulation, and (2) only changes made since the publication of the emergency regulation.

For changes to existing regulations, use this chart:

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change and rationale
9 VAC 25-260-30	N/A	North Creek in Botetourt County from the first bridge above the United States Forest Service North Creek Camping Area to its headwaters is designation under 9 VAC 25-260-30.A.3.c as Exceptional State Water.	The addition of seven water bodies to 9 VAC 25-260-30.A.3.c. These waters meet the eligibility criteria necessary to be designated as Exceptional State Waters.

In 9 VAC 25-260-30 the following amendments are proposed under 9 VAC 25-260-30.A.3.c:

Lake Drummond, located on U.S. Fish and Wildlife Service property, in its entirety within the cities of Chesapeake and Suffolk excluding any ditches and/or tributaries.

Brown Mountain Creek, located on U.S. Forest Service land in Amherst County, from the City of Lynchburg property boundary upstream to the first crossing with the national forest property boundary.

Laurel Fork, located on U.S. Forest Service land in Highland County, from the national forest property boundary below Route 642 downstream to the Virginia/West Virginia state line.

North Fork of the Buffalo River, located on U.S. Forest Service land in Amherst County, from its confluence with Rocky Branch upstream to its headwaters.

Pedlar River, located on U.S. Forest Service land in Amherst County, from where the river crosses FR 39 upstream to the first crossing with the national forest property boundary.

Ramseys Draft, located on U.S. Forest Service land in Augusta County, from its headwaters (which includes Right and Left Prong Ramseys Draft) downstream to the Wilderness Area boundary.

Whitetop Laurel Creek, located on U.S. Forest Service land in Washington County, from the national forest boundary immediately upstream from the second railroad trestle crossing the creek above Taylors Valley upstream to the confluence of Green Cove Creek.