



Virginia
Regulatory
Town Hall

Notice of Intended Regulatory Action Agency Background Document

Agency Name:	State Water Control Board
VAC Chapter Number:	9 VAC 25-260-5 et seq.
Regulation Title:	Water Quality Standards
Action Title:	Amendment to the state's Antidegradation Policy by designating a section of Bottom Creek as an Exceptional Water
Date:	2/27/03

This information is required prior to the submission to the Registrar of Regulations of a Notice of Intended Regulatory Action (NOIRA) pursuant to the Administrative Process Act § 9-6.14:7.1 (B). Please refer to Executive Order Twenty-Five (98) and Executive Order Fifty-Eight (99) for more information.

Purpose*

Please describe the subject matter and intent of the planned regulation. This description should include a brief explanation of the need for and the goals of the new or amended regulation.

The State Water Board (Board) proposes to amend the state's Antidegradation Policy (9 VAC 25-260-30), part of the Water Quality Standards, by designating a section of Bottom Creek for special protection as an Exceptional Water (9 VAC 25-260-30.A.3.c). The Exceptional 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 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.

The proposed designation is for Bottom Creek in Montgomery and Roanoke Co. from its confluence with Big Laurel Creek downstream to its confluence with Goose Creek to form the South Fork of the Roanoke River.

("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 Waters" for Virginia.)

Basis

Please identify the state and/or federal source of legal authority to promulgate the contemplated regulation. The discussion of this authority should include a description of its scope and the extent to which the authority is mandatory or discretionary. The correlation between the proposed regulatory action and the legal authority identified above should be explained. Full citations of legal authority and, if available, web site addresses for locating the text of the cited authority must be provided.

§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.

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://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 proposed amendment does not exceed the minimum requirements of any legally binding state or federal mandates, nor is it 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 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 Waters.

Need*

Please detail the specific reasons the agency has determined that the proposed regulatory action would be essential to protect the health, safety or welfare of citizens. In addition, a statement delineating any potential issues that may need to be addressed as the regulation is developed shall be supplied

The Department has concluded that the proposed amendment to the regulation is essential to protecting the health, safety and welfare of the citizens of the Commonwealth by protecting the water quality and living resources of this particular water body for human consumption of fish, recreational uses and conservation. Because of the potential impact of an Exceptional Waters designation on permitted discharges to the water body, Section 62.1-44.15:4.B of the State Code requires notification and opportunity for comment from potentially impacted localities and riparian property owners, so the decision by the Board to initiate a rulemaking to amend the water quality standards to designate Bottom Creek as an Exceptional Water was made after providing an opportunity to comment and giving due consideration to their comments.

This proposed amendment is a necessary revision to the State water quality standards regulation. The State Water Control Board views Exceptional Waters nominations as citizen petitions under §9-6.14:7.1 of the Code of Virginia. Therefore, the Board took action on this petition for a proposed designation of Bottom Creek as an exceptional water because Department staff had concluded, based on the information available at the time of the preliminary evaluation, that most of 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 factors to be considered in determining whether a nominated water body meets the eligibility decision criteria of exceptional environmental settings and/or possessing outstanding recreational opportunities 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)."

Approximately two-thirds of the nominated portion of Bottom Creek lies within the Bottom Creek Gorge Preserve that is owned by the Nature Conservancy and open to the public. The remainder flows through private property and access is restricted. Although designated as Class ii wild natural trout stream by the Department of Game and Inland Fisheries (DGIF), fishing is not allowed in the Bottom Creek Gorge Preserve. The preserve does provide exceptional opportunities for recreational activities such as hiking, bird- and wildlife watching, and photography. The majority of the nominated portion of Bottom Creek satisfies all three of the eligibility criteria to be considered for designation as Exceptional Waters. There are concerns that the segment from the upstream boundary of the preserve to the confluence of Big Laurel Creek may not meet the eligibility criteria.

State classification of this water body as an Exceptional Waters will afford an additional layer of protection over that provided by the Antidegradation Policy (9 VAC 25-260-30.A.3.b) in that no water quality degradation at all would be allowed in Exceptional Waters. The only exception would be temporary, limited impact activities. This designation for a water body would protect the exceptional recreational and ecological resources of the water from degradation and avoid the

potential incremental lowering of water quality that could be allowed for some waters as described in 9 VAC 25-260-30.A.3.b(3) if a public decision is made to allow degradation due to local socioeconomic factors. These are waters that are of a very high quality or possess ecological attributes or exceptional recreational usage that need the special protection and maintenance provided by not lowering water quality.

Substance*

Please detail any changes that would be implemented: this discussion should include a summary of the proposed regulatory action where a new regulation is being promulgated; where existing provisions of a regulation are being amended, the statement should explain how the existing regulation will be changed.

The proposed amendment to the Antidegradation Policy (9 VAC 25-260-30), part of the state's Water Quality Standards, would designate Bottom Creek for special protection as an Exceptional Water (9 VAC 25-260-30.A.3.c).

Upon permanent regulatory designation of a water body as an Exceptional 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 an Exceptional Water and mixing zones from upstream or tributary waters could not extend into the Exceptional Waters sections.

Alternatives*

Please describe the process by which the agency has considered, or will consider, less burdensome and less intrusive alternatives for achieving the need. Also describe, to the extent known, the specific alternatives to the proposal that have been considered or will be considered to meet the essential purpose of the action, and the reasoning by which the agency has rejected any of the alternatives considered.

In compliance with the State Water Control Board's Public Participation Guidelines (9 VAC 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 most of the proposed segment of Bottom Creek met the eligibility criteria, based on the information available at the time of the preliminary evaluation.

Public Participation*

Please indicate the agency is seeking comments on the intended regulatory action, to include 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. Also indicate whether a public meeting is to be held to receive comments on this notice. Indicate that 1) the agency is not holding a meeting because the agency has authorized proceeding without holding a meeting or 2) the agency is holding a meeting. If a public

meeting is to be held, indicate where information on the public meeting (i.e., date, time and place) may be found.

The Board is seeking comments on the intended regulatory action, including (i) ideas to assist in the development of a proposal, (ii) the costs and benefits of the alternatives stated in this notice or other alternatives and (iii) impacts of the regulation on farm or forest lands. The Board is also soliciting comment on (iv) whether the upper boundary of the creek as proposed in the initial petition received by the Board should be changed and (v) whether the eligibility decision criteria for exceptional waters designation is met for this water body. Anyone wishing to submit written comments for the public comment file may do so at the public meeting, by mail, or by email to Jean W. Gregory, Office of Water Quality Programs, Department of Environmental Quality, 629 East Main Street, Richmond, VA 23219 or jwgregory@deq.state.va.us. Written comments must include the name and address of the commenter. In order to be considered comments must be received by the close of the comment period.

A public meeting will be held and notice of the meeting 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.

Participatory Approach*

Please indicate the extent to which an ad hoc advisory group will be used in the development of the proposed regulation. Indicate that 1) the agency is not using the participatory approach in the development of the proposal because the agency has authorized proceeding without using the participatory approach; 2) the agency is using the participatory approach in the development of the proposal; or 3) the agency is inviting comment on whether to use the participatory approach to assist the agency in the development of a proposal.

The Board seeks comment from the public on whether to use the participatory approach to assist the agency in the development of a proposal.

Family Impact Statement

Please provide a preliminary analysis of 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.