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

<b>Approving authority name</b>	State Water Control Board
<b>Virginia Administrative Code (VAC) citation</b>	9 VAC 25-260
<b>Regulation title</b>	Water Quality Standards
<b>Action title</b>	Amendment to the state's Antidegradation Policy by designating portions of the Cowpasture River and Simpson Creek as Exceptional State Waters
<b>Document preparation date</b>	July 27, 2004

This information is required for executive review ([www.townhall.state.va.us/dpbpages/apaintro.htm#execreview](http://www.townhall.state.va.us/dpbpages/apaintro.htm#execreview)) and the Virginia Registrar of Regulations ([legis.state.va.us/codecomm/register/regindex.htm](http://legis.state.va.us/codecomm/register/regindex.htm)), pursuant to the Virginia Administrative Process Act ([www.townhall.state.va.us/dpbpages/dpb\\_apa.htm](http://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](http://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](http://legis.state.va.us/codecomm/register/download/styl8_95.rtf)).

### Purpose

*Please describe the subject matter and intent 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 Board (Board) proposes to amend the state's Antidegradation Policy (9 VAC 25-260-30), part of the Water Quality Standards, by designating portions of the Cowpasture River and Simpson Creek as Exceptional State Waters (9 VAC 25-260-30.A.3.c). 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 (i.e., no new, additional or increased point source discharge of sewage, industrial wastes or other pollution would be allowed into waters designated 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 and/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 waters under consideration for possible Exceptional State Waters designation are:

- 1) those portions of the main stem of Simpson Creek and its tributaries that meet the exceptional environmental setting criterion, and
- 2) approximately 15 miles of the Cowpasture River in Alleghany County and Botetourt County, beginning at the Bath County - Alleghany County line and extending downstream to the confluence of the Cowpasture River with the Jackson 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 State Waters" for Virginia.)

## Legal 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.

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 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 amendments are a necessary revision to the State water quality standards regulation. The State Water Control Board views Exceptional State 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 portions of the Cowpasture River and Simpson Creek as Exceptional State Waters because Department staff had concluded, based on the information available at the time of the preliminary evaluation, that the portions under consideration for the Cowpasture River and most of Simpson Creek 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 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)."

The consensus of the Department's site visit team was that the Cowpasture River met the exceptional environmental setting and exceptional aquatic community eligibility criteria. The site visit team found that the tributaries of Simpson Creek which they visited met all three eligibility criteria (exceptional environmental setting, exceptional aquatic community, and exceptional recreational opportunities) but that sections of the main stem of Simpson Creek did not meet the exceptional environmental setting criterion.

## Need

*Please detail 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, delineate any potential issues that may need to be addressed as the regulation is developed.*

The Department has concluded that the proposed amendments to the regulation are essential to protecting the health, safety and welfare of the citizens of the Commonwealth by protecting the water quality and living resources of these particular water bodies for human consumption of fish, recreational uses and conservation. Because of the potential impact of an Exceptional State Waters designation on permitted discharges to the water body, §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 these waters as Exceptional State Waters was made after providing an opportunity to comment and giving due consideration to their comments.

State classification of these waters as Exceptional State 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 State 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 will be proposed. For new regulations, include a summary of the proposed regulatory action. Where provisions of an existing regulation are being amended, explain how the existing regulation will be changed.*

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The proposed amendment to the Antidegradation Policy (9 VAC 25-260-30), part of the state's Water Quality Standards, would designate portions of the Cowpasture River and Simpson Creek 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 all viable alternatives to the proposed regulatory action that have been or will be considered to meet the essential purpose of the action. Also, describe the process by which the agency has considered or will consider, other alternatives for achieving the need in the most cost-effective manner.*

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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 the Cowpasture River and most of Simpson 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 public 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 that the date, time and place of the meeting may be found in the calendar of events section of the Virginia Register of Regulations.*

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 eligibility decision criteria for exceptional state waters designation are met for each of these waters, (v) whether the upper and lower designation boundaries are appropriately delineated for the Cowpasture River, and (vi) which tributaries and sections of the main stem of Simpson Creek should be proposed for designation. 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.virginia.gov](mailto: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 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.

### Impact on family

*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.