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Fast-Track Regulation Agency Background Document

Agency name	State Water Control Board
Virginia Administrative Code (VAC) Chapter citation(s)	9 VAC25-260-185
VAC Chapter title(s)	Water Quality Standards
Action title	Modification of Implementation Requirements for Criteria Specific to the Chesapeake Bay and Its Tidal Tributaries (9VAC25-260-185)
Date this document prepared	May 28, 2024 (revised August 22, 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.

To determine if the quality of Virginia's waters is clean enough to support the designated uses established in 9VAC25-260, Water Quality Standards (WQS), the Department of Environmental Quality (DEQ) analyzes the available monitoring data and biennially performs a water quality assessment which is contained in Virginia's 305(b)/303(d) Water Quality Assessment and Integrated Report. Whenever assessments indicate that a waterbody does not meet one or more water quality criteria, the waters are considered "impaired" and added to the state impaired waters list.

The proposed amendment pertains to the implementation of water quality criteria specific to the Chesapeake Bay and the tidal portions of its tributaries. Among these criteria are eleven dissolved oxygen criteria that protect the following four designated uses: Migratory Fish Spawning Nursery, Open Water, Deep Water, and Deep Channel. 9 VAC 25-260-185.D.3 of the WQS regulation describes how to perform the water quality assessment of criteria established to protect water quality in the Chesapeake

Bay and its tidal tributaries. Currently, the text stipulates that the criteria shall be assessed “through comparison of the generated cumulative frequency distribution of the monitoring data to the applicable criteria reference curve for each designated use”, also known as a Cumulative Frequency Distribution (CFD) methodology. The CFD approach has been used by the Chesapeake Bay Program Office since the early 2000s to assess water quality thresholds and criteria in the Chesapeake Bay and its tidal tributaries. This statistical tool allows criteria nonattainment to be expressed in terms of space and time, rather than just in time as more conventional tools do. However, the existing language in the WQS regulation limits which methods DEQ can use to assess criteria for dissolved oxygen, which are enumerated in 9 VAC 25-260-185.A

(<https://law.lis.virginia.gov/admincode/title9/agency25/chapter260/section185/>). One limitation of this existing regulatory language is that it limits Chesapeake Bay assessments to using only discrete datasets, excluding other types of available data collected from being applied to assessments. For example, water quality data collected using continuous monitoring instrumentation to collect high-frequency data are not compatible with the currently established CFD procedures. This limitation means that current CFD approach only allows for the assessment of four of the 11 applicable dissolved oxygen criteria applicable in the Chesapeake Bay and its tidal tributaries. Data currently exists to allow assessment of these additional criteria using well-established assessment procedures.

The proposed revised language specifies that Chesapeake Bay criteria can be assessed using currently utilized CFD method, but also allows using alternative scientifically defensible methods. This proposed change is prompted by DEQ staff who believe that the proposed revision will provide greater flexibility for criteria implementation and make additional datasets available for Chesapeake Bay water quality assessments. This rulemaking is using a fast-track process because it is considered noncontroversial.

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.

DEQ – Department of Environmental Quality
EPA - Environmental Protection Agency
WQS – Water Quality Standards 9 VAC 25-260
CFD – Cumulative Frequency Distribution

Statement of Final Agency Action

Provide a statement of the final action taken by the agency including: 1) the date the action was taken; 2) the name of the agency taking the action; and 3) the title of the regulation.

On June 25, 2024, the State Water Control Board:

1. Authorized DEQ to promulgate the proposal for public comment using the fast-track process established in § 2.2-4012.1 of the Administrative Process Act for regulations expected to be non-controversial. The Board's authorization constituted its adoption of the regulation at the end of the public comment period provided that (i) no objection to use of the fast-track process is received from 10 or more persons, or any member of the applicable standing committee of either house of the General Assembly or of the Joint Commission on Administrative Rules, and (ii) DEQ does not find it necessary, based on public comments or for any other reason, to make any changes to the proposal.
2. Authorized DEQ to set an effective date 15 days after close of the 30-day public comment period provided (i) the proposal completes the fast-track rulemaking process as provided in § 2.2-4012.1 of the Administrative Process Act and (ii) DEQ does not find it necessary to make any changes to the proposal.

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."

Consistent with Virginia Code § 2.2-4012.1, also explain why this rulemaking is expected to be noncontroversial and therefore appropriate for the fast-track rulemaking process.

No specific mandates exist for this regulatory change. However, the proposed amendments to the regulation are necessary to allow the Department to apply scientifically valid assessment methodologies to underutilized water quality datasets and provide for greater flexibility and improved assessment capabilities when assessing Chesapeake Bay waters. Applying appropriate and scientifically based methods to assessments supports programs to improve water quality that protects human health and aquatic life in the Bay and its tidal tributaries, resulting healthier fisheries, safer and reliable public water supplies, and contribute to economic benefits from tourism, economic development, and commercial and recreational fishing industries utilized and enjoyed by their citizens.

The proposed revised language specifies that Chesapeake Bay criteria can be assessed using currently utilized CFD method, but also allows using alternative scientifically defensible methods. This proposed change is prompted by DEQ staff who believe that the proposed revision will provide greater flexibility for criteria implementation and make additional datasets available for Chesapeake Bay water quality assessments. This rulemaking is using a fast-track process because it is considered noncontroversial.

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 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 pertain to implementation of established criteria to 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 allow greater use of existing and future water quality monitoring data to evaluate the health of the Chesapeake Bay and its tidal tributaries in meeting the existing designated uses.

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 as well as procedures for implementing the WQS are discretionary for 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.

DEQ staff have identified a need for greater flexibility to utilize scientifically defensible water quality criteria assessment methodologies for the Chesapeake Bay and its tidal tributaries. DEQ analyzes available monitoring data and biennially performs a water quality assessment. Whenever assessments indicate that a waterbody does not meet one or more water quality criteria, according to established DEQ guidelines, or fails to support a designated use, the waters are considered “impaired” and are added to the state impaired waters list.

The proposed amendment pertains to 9 VAC 25-260-185.D.3 of the WQS regulation, which describes how to perform the water quality assessment of criteria established to protect water quality in the Chesapeake Bay and its tidal tributaries. Currently, the text stipulates that the criteria shall be assessed “through comparison of the generated cumulative frequency distribution of the monitoring data to the applicable criteria reference curve for each designated use”. This existing regulatory language limits Chesapeake Bay dissolved oxygen criteria assessments to using only discrete datasets, excluding available monitoring datasets composed of state-of-the-art automated, continuous, and high frequency data collection from being applied to assessments. The proposed revised language would specify that Chesapeake Bay criteria can be assessed using the currently utilized method, but also allowing for alternate scientifically defensible methods. DEQ publishes a Water Quality Assessment Guidance Manual biannually for public review which would outline the methods chosen for Chesapeake Bay assessments. This proposed change is prompted by DEQ staff who believe that the proposed revision will provide greater flexibility for criteria implementation and make additional datasets available for Chesapeake Bay water quality assessments. Applying appropriate and scientifically based methods contribute to improved water quality assessment procedures which will protect human health and aquatic life in the Bay and its tidal tributaries, resulting healthier fisheries, safer and reliable public water supplies, and contribute to economic benefits from tourism, economic development, and commercial and recreational fishing industries utilized and enjoyed by their citizens.

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.

The proposed substantive amendment to section 9VAC25-260-185.D.3 of the State’s Water Quality Standards is the addition of language that allows for the criteria for the Chesapeake Bay and its tidal tributaries to be assessed using alternative scientifically defensible methods other than the CFD methodology. Language that specifies that only the CFD methodology must be used for assessment purposes has been removed.

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 this amendment allows DEQ to improve its capabilities for assessing attainment of designated uses and water quality to protect human health and aquatic life in the Chesapeake Bay and its tidal waters. There are no primary disadvantages to the public. The primary advantage to the agency and the Commonwealth is the ability to efficiently utilize already available data and apply improved methods for assessing attainment of designated uses in the Chesapeake Bay. There is no disadvantage to the agency or the Commonwealth that will result from the adoption of this amendment.

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.

The proposed amendment does not exceed applicable federal minimum 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.

There is no agency, locality, or entity particularly affected by the incorporation of the assessment protocols.

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

<i>For your agency:</i> projected costs, savings, fees or revenues resulting from the regulatory change, including:	The proposed regulatory amendment should not cause any additional financial impact to the state. This amendment is an update of existing rules
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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	and it will not take additional staff or resources to apply different water quality assessments protocols. The assessment program is funded by EPA 106 grants as well as State general fund budget.
<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.	It is not expected that this adjustment to assessment protocol will impose a cost on other state agencies.
<i>For all agencies:</i> Benefits the regulatory change is designed to produce.	The benefits related to properly assessing water quality in the Chesapeake Bay are indirectly related to state agencies.

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.

Projected costs, savings, fees or revenues resulting from the regulatory change.	It is not expected that this adjustment to assessment protocol will impose a cost on localities.
Benefits the regulatory change is designed to produce.	Enhanced ability to report on progress towards meeting water quality standards in Chesapeake Bay and its tidal tributaries.

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.

Description of the individuals, businesses, or other entities likely to be affected by the regulatory change. If no other entities will be affected, include a specific statement to that effect.	It is not expected that this adjustment to assessment protocol will impose a cost on other entities.
Agency's best estimate of the number of such entities that will be affected. Include an estimate of the number of small businesses affected. Small business means a business entity, including its affiliates, that: a) is independently owned and operated and; b) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million.	
All projected costs for affected individuals, businesses, or other entities resulting from the regulatory change. Be specific and include all costs including, but not limited to: a) projected reporting, recordkeeping, and other administrative costs required for compliance by small businesses; b) specify any costs related to the development of real estate for commercial or residential purposes that are a consequence of the regulatory change; c) fees; d) purchases of equipment or services; and	

e) time required to comply with the requirements.	
Benefits the regulatory change is designed to produce.	Enhanced ability to report on progress towards meeting water quality standards in Chesapeake Bay and its tidal tributaries.

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.

This analysis was reported on Tables 1b and 1c of the ORM Economic Impact form and is not reported here.

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.

This analysis was reported on Tables 1b and 1c of the ORM Economic Impact form and is not reported here.

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.

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.

Consistent with § 2.2-4011 of the Code of Virginia, if an objection to the use of the fast-track process is received within the 30-day public comment period from 10 or more persons, any member of the applicable standing committee of either house of the General Assembly or of the Joint Commission on Administrative Rules, the agency shall: 1) file notice of the objections with the Registrar of Regulations for publication in the Virginia Register and 2) proceed with the normal promulgation process with the initial publication of the fast-track regulation serving as the Notice of Intended Regulatory Action.

If you are objecting to the use of the fast-track process as the means of promulgating this regulation, please clearly indicate your objection in your comment. Please also indicate the nature of, and reason for, your objection to using this process.

The State Water Control 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) the potential impacts of the regulation, and (iii) the agency's regulatory flexibility analysis stated in this background document. Also, the agency/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 reported, 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 Tish Robertson, Department of Environmental Quality, P.O. Box 1105, Richmond, VA 23218, email: tish.robertson@deq.virginia.gov, phone: (804)659-1295. In order to be considered, comments must be received by 11:59 pm on the last day of the public comment period.

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 existing VAC Chapter(s) and the proposed regulation. If 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
9VAC25-260-185.D.3		This existing regulatory language limits Chesapeake Bay dissolved oxygen criteria assessments to using only discrete datasets, excluding available monitoring datasets composed of state-of-the-art automated, continuous, and high frequency data collection from being applied to assessments.	The proposed revised language would specify that Chesapeake Bay criteria can be assessed using the currently utilized method, but also allowing for alternate scientifically defensible methods. DEQ publishes a Water Quality Assessment Guidance Manual biannually for public review which would outline the methods chosen for Chesapeake Bay assessments. This proposed change is prompted by DEQ staff who believe

			<p>that the proposed revision will provide greater flexibility for criteria implementation and make additional datasets available for Chesapeake Bay water quality assessments. Applying appropriate and scientifically based methods contribute to improved water quality assessment procedures which will protect human health and aquatic life in the Bay and its tidal tributaries, resulting healthier fisheries, safer and reliable public water supplies, and contribute to economic benefits from tourism, economic development, and commercial and recreational fishing industries utilized and enjoyed by their citizens.</p>

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.

No impact on the institution of the family and family stability is anticipated because of the incorporation of the protocols. Improved water quality is expected to improve the institution of the family by protecting human health and aquatic life, resulting healthier fisheries, safer and reliable public water supplies, and contribute to economic benefits from tourism, economic development, and producing edible and marketable natural resources, such as by commercial and recreational fishing industries.