



Virginia  
Regulatory  
Town Hall

Notice of Intended Regulatory Action  
Agency Background Document

<b>Agency Name:</b>	Department of Environmental Quality
<b>VAC Chapter Number:</b>	9 VAC 25-260
<b>Regulation Title:</b>	Water Quality Standards
<b>Action Title:</b>	Amendments to Water Quality Standards – Triennial Review
<b>Date:</b>	

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 subject matter of the rulemaking will include updated numerical and narrative criteria, use designations and other policies contained in the Water Quality Standards.

The intent of this rulemaking is to protect designated and beneficial uses of state waters by adopting regulations that are technically correct, necessary and reasonable. These standards will be used in setting Virginia Pollutant Discharge Elimination System Permit limits and for evaluating the waters of the Commonwealth for inclusion in the Clean Water Act 305(b) report and on the 303(d) list. Waters not meeting standards will require development of a Total Maximum Daily Load under the Clean Water Act at 303(e).

This rulemaking is needed because the last triennial review was completed in December 1997 and new scientific information is available to update the water quality standards. Changes to the regulation are also needed to improve permitting and monitoring programs as well as meet EPA priorities for this triennium. In addition, the agency has to fulfill the legal mandates for a three-year review under the Code of Virginia §62.1-44.15(3a) and federal regulations 40 CFR 131.

## 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.*

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Federal and state mandates in the Clean Water Act at 303(c), 40 CFR 131 and the Code of Virginia in §62.1-44.15(3a) require that water quality standards be adopted, modified or cancelled every three years.

The scope and objective of the Clean Water Act is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. The Clean Water Act at 303(c)(1) requires that the states hold public hearings for the purpose of reviewing applicable water quality standards and, as appropriate, modifying and adopting standards.

The scope of the Federal regulations at 40 CFR 131 is to describe the 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 scope and purpose of the State Water Control Law is to protect and to restore the quality of state waters, to safeguard the clean waters from pollution, to prevent and to reduce pollution and to promote water conservation. The State Water Control Law (Code of Virginia) at §62.1-44.15(3a) requires the Board to establish standards of quality and to modify, amend or cancel any such standards or policies. It also requires the Board to hold public hearings from time to time for the purpose of reviewing the water quality standards, and, as appropriate, adopting, modifying or canceling such standards.

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 and criteria and designated uses are requirements of the Water Quality Standards.

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.

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>

### 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*

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The rulemaking is essential to the protection of health, safety or welfare of the citizens of the Commonwealth. Proper water quality standards protect water quality and living resources of Virginia's waters for consumption of fish and shellfish, recreational uses and conservation in general.

Potential issues that may need to be addressed are listed in the alternatives sections. It should be noted that all sections of the regulation are open for comment during this mandated triennial review and a revision, addition or deletion could potentially occur in any section of the regulation. However, major revisions under consideration have been listed in the substance and alternatives sections.

### 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.*

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The existing regulation will be changed to address EPA's national priorities for the states which are described in EPA's *Guidance to States, Tribes, and Regions on Priorities for the Water Quality Standards Program for FY 2000-2002*, January 1999 ([www.epa.gov/OST/standards/2000guid.html](http://www.epa.gov/OST/standards/2000guid.html)). Some of the issues in this EPA document are to complete acceptable antidegradation, mixing zone, narrative criteria and sediment criteria implementation procedures, special protection for endangered and threatened species, updated use designations and biological criteria.

Other issues under consideration for this rulemaking are those items disapproved by EPA under the 1997 triennial review and/or recommended for inclusion in this triennial review. These issues are outlined in a letter from EPA dated August 16, 2000 and include an updated antidegradation policy that applies to all activities and not just those activities under the jurisdiction of the Board. Another issue is that the antidegradation policy must require the highest statutory and regulatory requirements to all new and existing point sources discharges for tier 2 waters rather than all new and increased point sources. Other issues are updated human health and aquatic life criteria (December 10, 1998 Federal Register Vol. 63, No. 237 and April

22, 1999, Federal Register, Vol. 64, No. 77), identification and designation of exceptional state waters and improved protection of special waters by restricting mixing zones.

The Department's staff has also provided many needs to be considered for amendments to the regulation. Some of the needs presented include updated definitions, surface water human health and aquatic life criteria, biological criteria, general criteria, groundwater criteria, groundwater standards, groundwater policies, surface water use designations, "Special Standards" and stream descriptions in the river basin section tables. Also needed are clarified language in the antidegradation section, disinfection policy, temperature criteria, shellfish criteria, variance procedures and water effect ratio procedures. DEQ is also considering new nutrient enriched waters designations, wetlands criteria and uses, whole effluent toxicity criteria, seasonal uses for trout streams, wet weather standards, a copper exemption for reservoirs, a site specific copper criterion for Hampton Roads Harbor and procedural requirements for sampling and monitoring. Other revisions for consideration are the mixing zone policy, halogen ban narrative criterion, saltwater/freshwater delineation and river basin numbering system. A complete reformat of the regulation is also an option being considered.

### 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.*

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The following are alternatives for consideration but DEQ staff will work in conjunction with other state and federal agencies to find other alternatives. Alternatives provided by the public will also be considered.

The Department has not accepted or rejected any alternatives as of yet. Some alternatives being considered by the agency now include, but are not limited to, the following:

- whether definitions such as, but not limited to, "acute lethality", "mixing zone concepts", "passing and drifting organisms", "toxic substances" and "beneficial uses" should be included in the regulation,
- whether the narrative biological criteria (General Criteria with corresponding Use Designations) should be expanded or at least returned to the 1992 water quality standards general standard language to ensure that the intent is to maintain state waters at such quality to protect all existing beneficial uses and support the propagation and growth of all aquatic life and/or whether specific biological criteria are needed,
- whether the antidegradation policy needs to add clarifications such as inserting the words "at least" in front of "the level of water quality" in Tier 1 language so that projects that would increase water quality would be allowed, to remove the word "instream" in Tier 1 so that

offstream uses are protected, to reconstruct the Tier 2 language so that high quality waters will not only be maintained when the board has the power to authorize a project or when a change has been socio-economically demonstrated and to define Tiers 1, 2 and 3 better by placing the different permitting requirements in the regulation,

- whether whole effluent toxicity criteria (narrative or numerical) should be added to the regulation and/or replace the narrative acute and chronic toxicity criteria,
- whether mixing zones should be restricted or prohibited for bioaccumulative substances or substances with sediment loading concerns and/or whether mixing zones policy should be clarified in any way (for example, to address tidal mixing, to allow the Board's staff to provide demonstrations for the waiver of the mixing zone requirements in 9 VAC 25-260-20.B.4.b., whether the general criteria and use designations can/cannot apply in mixing zones, whether the mixing zone policy should be expanded beyond the acute and chronic criteria),
- whether the narrative general criteria should apply at all flows (i.e. even below 7Q10) and/or inside mixing zones,
- whether wetlands should be specifically listed in the regulation or just referenced to an accepted source (National Wetlands Inventory) or procedure for delineation, how many different types of wetlands should be recognized and what alternative criteria should apply in wetlands (e.g. dissolved oxygen, pH, temperature and total suspended solids),
- whether specific uses to be protected in wetlands should be listed and what these uses should be (for example: hydrologic functions and conditions, flood control, storage or filtration of sediment, nutrients and other pollutants, erosion protection, habitat for flora and fauna),
- whether language should be added which clarifies that the temperature criteria apply outside mixing zones and/or whether it should be clarified that the rise above natural temperature and the maximum hourly temperature change criteria apply to streams, and/or whether the determination of "natural temperature" should continue to be that temperature due solely to natural conditions without the influence of point-sources,
- whether EPA's new information for mercury, selenium and arsenic should be incorporated into the criteria and what other new or updated criteria are needed (e.g. atrazine, boron, cobalt, diazinon, diquat, iron, nitroglycerine, nitrophenols, nitrotoluenes, nonylphenol, solids, sulfate, petroleum products, and other criteria published in the December 10, 1998 Federal Register Vol. 63, No. 237 pages 68354-68364),
- whether CAS numbers should be included in the "Table of Parameters" (9 VAC 25-260-140.B),
- whether we should change the duration, frequency and recurrence interval for the aquatic life criteria (currently listed as four year and one hour averages not to be exceeded more than once every three years on the average),
- whether the steady state design default flows for the dioxin criteria should be the harmonic mean flow or the mean annual flow and whether the words "average effluent limit" should be deleted from this criterion,
- whether groundwater criteria, standards and antidegradation policy should be updated, what values should these concentration levels be based on (MCL's, health advisories, etc.) and how existing groundwater remediation and monitoring programs would be affected,
- whether groundwater criteria, standards and policies should be deleted from the water quality standards and adopted as a separate regulation,

- whether reservoirs should be exempt from the copper criteria because of the need to use copper to control algae to protect the drinking water use,
- whether we should modify the saltwater copper criterion to reflect a water effect ratio that has been developed in the Hampton Roads area,
- whether water effect ratio implementation procedures should be changed (e.g. is it reasonable to implement water effect ratios as permit case decisions) and their application to criteria should be clarified (e.g. currently it is not clear that the WER factor also applies to saltwater metals criteria),
- whether variances to water quality standards should be reworded to match the “use removal” language in 9 VAC 25-260-10.G (e.g. variances granted where conditions limit the attainment of the designated use rather than the attainment of the water quality criteria),
- whether tidal water sampling at slack tide is still appropriate for toxics and if the regulation should define how monitoring and analytical procedures for toxics should be conducted,
- whether language in the disinfection policy should be clarified (e.g if tidal cycle and “upstream of shellfish waters” should be revised or defined and/or if disinfection waiver procedures need to be clarified, and/or should the policy be moved to Part VII “Special Standards”),
- whether seasonal uses for trout streams and naturally occurring temperature violations should be recognized and what different criteria should apply in the different seasons and/or whether the variance allowance for temperature violations in stockable trout waters in Part VI “Procedural Requirements” would be easier to apply if written as a footnote to 9 VAC 25-260-50 and whether DGIF’s subclassifications are needed in this regulation and/or whether upstream trout waters should be classified at the same quality as the downstream trout waters,
- whether the halogen ban has been an effective regulatory tool to protect endangered and threatened species and trout and whether it would be more effective to update the chlorine standard to protect these species or include a dechlorination requirement to these waters and if any other clarifications are needed in this section, particularly the variance implementation and review procedures,
- whether all “Special Standards” should be updated (e.g. Chickahominy River Effluent Standards, Rappahannock River effluent standards (Salem Church Dam), pH standards in the Shenandoah Valley and James River Basin),
- whether both the median fecal coliform criterion for shellfish waters and the “not more than 10%” fecal coliform criterion for shellfish waters should both apply to a data set,
- whether a public hearing is needed when the Board must deny a proposal that results in shellfish bed condemnation or if any clarifications or changes to the requirements in 9 VAC 25-260-270 are needed,
- whether new waters should be added to the “nutrient enriched waters designation” and/or whether existing nutrient enriched waters designations should be clarified,
- whether we should update use designations (e.g. public water supplies, trout streams, recreation, shellfish),
- whether we should reformat the regulation so that the reader can easily identify a stream segment and the uses and criteria that apply there,
- whether the river basin numbering system and the saltwater/freshwater delineation should be revised to match the numbering system in the 305(b) report,

- whether the stream classifications (e.g. non-tidal Class III or mountainous zone Class IV) are correct or if these classifications are needed,
- whether wet weather conditions and/or standards should be addressed,
- whether to include the outstanding EPA issues provided to the Department in a letter dated August 16, 2000 from the Regional Administrator of EPA III. These issues include an updated antidegradation policy that applies to all activities and not just those activities under the jurisdiction of the Board, an antidegradation policy that requires the highest statutory and regulatory requirements to all new and existing point sources discharges for tier 2 waters rather than all new and increased point sources, updated human health and aquatic life criteria (December 10, 1998 Federal Register Vol. 63, No. 237 and April 22, 1999, Federal Register, Vol. 64, No. 77), an identification and designation of exceptional state waters and an improved protection of special waters by restricting mixing zones.

### 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.*

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The Board is seeking comments on the intended regulatory action, including ideas to assist in the development of a proposal and the costs and benefits of the alternatives stated in this notice or other alternatives. Anyone wishing to submit written comments for the public comment file may do so at the public meeting, by mail, or by email to [emdaub@deq.state.va.us](mailto:emdaub@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.*

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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.*

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The direct impact resulting from the development of water quality standards is for the protection of public health and safety which has only an indirect impact on families.