



Notice of Intended Regulatory Action (NOIRA) Agency Background Document

Agency name	State Water Control Board
Virginia Administrative Code (VAC) citation	9 VAC 25-720-10
Regulation title	Water Quality Management Planning Regulation (WQMPR)
Action title	Regulating Stormwater Flow through the Total Maximum Daily Load (TMDL) Process
Date this document prepared	May 18, 2009

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 36 (2006) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

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 purpose of this rulemaking is to consider amending the Water Quality Management Planning Regulation to include the concept of regulating flow or other qualities of a point source that cause or contribute to pollutants or pollution downstream of point sources.

The intent of this rulemaking is to protect state waters by taking limited regulatory action to amend existing definitions or adding new definitions. This action will clearly state the State Water Control Board purpose to correct or reduce the alteration of the physical, chemical or biological properties of any state waters due to flow.

Legal basis

Please identify the state and/or federal legal authority to promulgate this proposed regulation, including (1) the most relevant law and/or regulation, including Code of Virginia citation and General Assembly chapter number(s), if applicable, and (2) promulgating entity, i.e., agency, board, or person. Describe the legal authority and the extent to which the authority is mandatory or discretionary.

The scope and objective of the federal Clean Water Act (CWA) is to restore and maintain the chemical, physical and biological integrity of the Nation's waters. Sections 101(g) and 304(a)(2), (f)(2)(F) of the CWA authorizes states to allocate quantities of waters in order to restore and maintain the chemical, physical and biological integrity of waters and to control pollution resulting from changes in the movement or flow of such waters.

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. Section 62.1-44.15(10) authorizes the Board to adopt regulations necessary to implement a water quality management program. Further, §62.1-44.15(3a) and 5 mandate and authorize 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. Section 62.1-44.2 provides for the restoration of waters to support aquatic life; safeguard waters from pollution while preventing increased pollution and reduce existing pollution. Pollution as defined (§62.1-44.3) includes alternation of the physical, chemical or biological properties of any state waters as will or is likely to create a nuisance or render such waters injurious to aquatic life. The Board has authority under state law to establish standards and policies for stormwater flow when proper factual findings indicate that such flow produces sediment that impairs a designated use or otherwise causes pollution.

Web Address sites where citations can be found:

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+62.1-44.5>

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

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.

This rulemaking is needed to provide additional water quality protection for waters in developed watersheds to protect aquatic life and that are used or could be used for recreational purposes.

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. This action provides for the inclusion of the concept of regulating flow or other qualities or quantities of a point source discharge that cause or contribute to pollutants or pollution of state waters downstream of the point source discharge.

Potential issues that may need to be addressed are listed in the Alternatives section.

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.

The federal Clean Water Act and the U. S. Environmental Protection Agency’s enabling regulation 40 CFR §130.7 require that the TMDL restoration process result in attainment of the designated uses for impaired waters. In addition, the Code of Virginia requires the TMDL remediation process to restore the designated use of the impaired waters in the Commonwealth. However, the aquatic life use impairment in some urban watersheds with large amounts of impervious cover is caused by the excessive stormwater runoff from the watershed rather than by the conventional transport of pollutants from the watershed. The exacerbated stream flows (volume & velocity) caused by the excessive stormwater runoff produce bottom scour, sediment re-suspension, and bank erosion that cause the aquatic life impairment.

Although the State Water Control Board has statutory authority to address excessive flow as a primary stressor in the TMDL process, the proposed amendment to the Water Quality Management Planning Regulation (9 VAC 25-720-10) will provide additional clarity and specificity for flow caused impairments. The additional clarification will be made by amending existing definitions and / or adding new definitions to the regulation. This action has the potential to impact localities since the provisions of the flow TMDL are implemented through the stormwater permitting process.

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, please describe the process by which the agency has considered or will consider other alternatives for achieving the need in the most cost-effective manner.

The following are alternatives for consideration. Alternatives provided by the public will also be considered.

The Department has not accepted or rejected any alternatives at this time. Alternatives being considered by the agency now include, but are not limited to, amendments to existing regulatory definitions or adding new definitions to one or more of the following:

- Virginia’s Water Quality Management Planning Regulation
- Virginia’s Pollution Discharge Elimination System Permit Program Regulation
- Virginia’s Water Quality Standards

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 hearing is to be held to receive comments on this notice.

The agency is seeking comments on the intended regulatory action, including but not limited to 1) ideas to assist in the development of a proposal, 2) the costs and benefits of the alternatives stated in this background document or other alternatives, 3) potential impacts of the regulation and 4) impacts of the regulation on farm and forest land preservation. The agency is also seeking information on impacts on small businesses as defined in § 2.2-4007.1 of the Code of Virginia. Information may include 1) projected reporting, 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 may do so at the public meeting or by mail, email or fax to Arthur Butt, Department of Environmental Quality, P.O. Box 1105, Richmond, VA 23218 or 629 E. Main Street, Richmond, VA 23219. Phone: (804) 698-4314. Email: arthur.butt@deq.virginia.gov FAX (804) 698-4116. Comments may also be submitted through the Public Forum feature of the Virginia Regulatory Town Hall web site at: www.townhall.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 last day of the public comment period.

A NOIRA public meeting will be held and notice of the meeting may be found on the Virginia Regulatory Town Hall website (www.townhall.virginia.gov). Both oral and written comments may be submitted at that time.]

Public Hearing at Proposed Stage

A public hearing will be held after publication of the proposed stage of the regulatory action.

Regulatory Panel

Please indicate, to the extent known, if advisers (e.g., regulatory advisory panel or negotiated rulemaking panel) will be involved in the development of the proposed regulation. Indicate that 1) the agency is not using a panel in the development of the proposal; 2) the agency is using a panel in the development of the proposal; or 3) the agency is inviting comment on whether to use a panel to assist the agency in the development of a proposal.

The Board is using a panel to develop a proposal. Persons interested in assisting in the development of a proposal should notify the department contact person by the end of the comment period and provide their name, address, phone number, email address and the organization you represent (if any). The primary function of the panel is to develop recommended regulation amendments for Department consideration through the collaborative

approach of regulatory negotiation and consensus. Multi-applications from a single company, organization, group or other entity count as one for purposes of making the decision specified in the preceding sentence. Notification of the composition of the panel will be sent to all applicants.

Family impact

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.

The direct impact resulting from an amendment to any of the regulations listed under the Alternatives section is the protection of aquatic life. No direct impact on the institution of the family and family stability is expected from this rulemaking.