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

<b>Agency name</b>	State Water Control Board
<b>Virginia Administrative Code (VAC) citation</b>	9 VAC 25-260-5 et seq.
<b>Regulation title</b>	Water Quality Standards
<b>Action title</b>	Amendment to the State's Antidegradation Policy by designating a portion of Bull Run as Exceptional State Waters.
<b>Date this document prepared</b>	August 30, 2011

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 14 (2010) 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 State Water Board (Board) is considering amending the state's Antidegradation Policy (9 VAC 5-260-30), part of the Water Quality Standards, by designating as Exceptional State Waters (9 VAC 25-260-30.A.3.c) a segment of Bull Run from the confluence of Little Bull Run (locally known as Catharpin Run) downstream to the crossing of Interstate 66. 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, including storm water, 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.

("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 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.*

§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 sites where citations can be found:

Federal Regulation web site

<http://www.gpoaccess.gov/cfr/>

Clean Water Act web site

[http://www.law.cornell.edu/uscode/html/uscode33/usc\\_sec\\_33\\_00001313----000-.html#c](http://www.law.cornell.edu/uscode/html/uscode33/usc_sec_33_00001313----000-.html#c)

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.

Exceptional State Waters nominations are citizen petitions under §2.2-4007 of the Code of Virginia. Therefore, the Board took action on this petition for a proposed designation of these waters as Exceptional State Waters because Department staff had concluded, based on the information acquired through staff evaluations, that the portion under consideration 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 November 15, 2004 Guidance Memorandum No. 04-2021, "Guidance for Exceptional State Waters Designations in Antidegradation Policy Section of Virginia Water Quality Standards Regulation (9 VAC 25-260-30.A.3)."

## 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 amendment to the regulation that is being considered is beneficial 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. 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 to potentially impacted localities and riparian property owners, giving due consideration to their comments and considering the report of the Department that the nominated segment met the criteria for designation as an Exceptional State Water.

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.

Regulatory impacts of an Exceptional State Waters designation on this segment of Bull Run may impact future transportation expansions, maintenance, and/or upgrades due to prohibition of new or increased permitted stormwater discharges. A regulatory advisory panel will be involved in the development of the proposed regulation to address these issues.

**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 proposed amendment to the Antidegradation Policy (9 VAC 25-260-30), part of the state’s Water Quality Standards, would designate a segment of Bull Run 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, 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.*

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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 these waters 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 hearing is to be held to receive comments on this notice.*

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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 by mail, email or fax to David C. Whitehurst, VA Department of Environmental Quality, P.O. Box 1105, Richmond, VA 23218; Phone: 804-698-4121; Fax: 804-698-4116; Email: [David.Whitehurst@deq.virginia.gov](mailto:David.Whitehurst@deq.virginia.gov). Comments may also be submitted through the Public Forum feature of the Virginia Regulatory Town Hall web site at: [www.townhall.virginia.gov](http://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 DEQ by the close of the public comment period.

**Public Hearing at Proposed Stage**

A public hearing will not be held after publication of the proposed stage of the regulatory action unless requests for a public hearing are received during the NOIRA public comment period from at least 25 persons.

**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.*

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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.*

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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 the institution of the family and family stability.