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Final Regulation Agency Background Document

Agency name	State Water Control Board
Virginia Administrative Code (VAC) Chapter citation(s)	9VAC25-260
VAC Chapter title(s)	Water Quality Standards
Action title	Rulemaking to adopt site specific selenium aquatic life criteria for four streams which are tributaries to Knox Creek in Buchanan County.
Date this document prepared	February 6, 2025

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.

In response to a petition to amend the Water Quality Standards regulation (WQS), the State Water Control Board proposes to amend the WQS (9VAC25-260) to incorporate site-specific selenium criteria for the protection of freshwater aquatic life in four streams which are tributaries to Knox Creek in Buchanan County, Virginia. The specific streams which are the focus of this rulemaking are:

- 1) Race Fork and tributaries
- 2) Pounding Mill Creek and tributaries
- 3) Right Fork of Lester Fork and tributaries
- 4) Abners Fork and tributaries

The intent of this rulemaking is to establish site-specific selenium aquatic life criteria which protect designated and beneficial uses of state waters by adopting regulations that are technically correct and reasonable. These site-specific criteria will replace the existing aquatic life selenium water quality criteria in the specified watersheds and will be implemented in water quality programs which protect and maintain the WQS, including the Virginia Pollutant Discharge Elimination System (VPDES) permit program and the Clean Water Act 305(b) water quality assessment report and 303(d) listing of impaired waters.

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.

Board	State Water Control Board
CJOD	Clintwood JOD, LLC
DEQ	Department of Environmental Quality, also referred to as the Department
EPA	U.S. Environmental Protection Agency
NOIRA	Notice of Intended Regulatory Action
NOPC	Notice of Public Comment
RAP	Regulatory Advisory Panel
TMDL	Total Maximum Daily Load
VA Energy	Virginia Department of Energy
VPDES	Virginia Pollutant Discharge Elimination System
WQS	Water Quality Standards, 9VAC25-260 et al.

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 March 27, 2025, the State Water Control Board adopted the Water Quality Standards (9VAC25-260) as final regulations.

Mandate and Impetus

List all changes to the information reported on the Agency Background Document submitted for the previous stage regarding the mandate for this regulatory change, and any other impetus that specifically prompted its initiation. If there are no changes to previously reported information, include a specific statement to that effect.

DEQ received correspondence dated April 25, 2023, from Clintwood JOD, LLC (CJOD) petitioning the Board to promulgate site-specific aquatic life criterion for selenium. Specifically, CJOD formally requested that the Board amend the existing surface water quality criteria for selenium to allow a special standard (9VAC25-260-310) incorporating EPA's *Recommended Aquatic Life Ambient Water Quality Criterion for Selenium in Freshwater*, as published in the Federal Register on July 13, 2016 (Vol. 81, No. 134) and revised in August 2021. At its meeting on August 23, 2023, the Board directed DEQ to proceed with initiating a rulemaking to incorporate site specific selenium criteria as a special standard in the WQS regulation (9VAC25-260) consistent with the petition request for the specific tributaries to Knox Creek in Buchanan County. A Notice of Intended Regulatory Action (NOIRA) was published in the Virginia Register on February 26, 2024. The comment period ended March 27, 2024. A regulatory advisory panel (RAP) was formed and one meeting was held with the RAP on April 24, 2024.

At its meeting on July 25, 2024, the Board directed DEQ to proceed to public comment and hearing to incorporate EPA's 2016 freshwater selenium criteria as site-specific criteria in Virginia's Water Quality Standards regulation (9VAC25-260) consistent with the petition request for the 4 tributaries in the Knox Creek drainage in Buchanan County.

A Notice of Public Comment (NOPC) was published in the Virginia Register on October 7, 2024. The comment period ended December 6, 2024. A public hearing was held November 14, 2024 at the Buchanan County Public Library.

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 Clean Water Act authorizes restoration and maintenance of the chemical, physical, and biological integrity of the Nation's waters.

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 of the Code of Virginia 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) of the Code of Virginia 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 are modifications of criteria that will 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 provide an alternative, site-specific criterion for freshwater selenium ensuring the aquatic life designated use is protected with regard to this parameter.

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 subject to some discretion by EPA and 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.

The purpose of this rulemaking is to establish site-specific selenium aquatic life criteria which protect designated and beneficial uses of state waters by adopting regulations that are technically correct and reasonable. The rulemaking is in response to the petition received to amend the WQS regulation to incorporate EPA's 2016 recommended selenium criteria for the specific waterbodies listed in Buchanan County. The proposed criteria are for the protection of aquatic life and are indirectly related to the health, safety, and welfare of citizens. Proper water quality standards protect water quality and living resources of Virginia's waters for the designated uses of aquatic life, wildlife, recreation, public water supply, shellfish consumption, and fish consumption.

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.

This rulemaking is to amend the WQS regulation to include a site-specific freshwater aquatic life selenium criterion in Section 9VAC25-260-310 for several tributaries to Knox Creek in Buchanan County. Those tributaries are:

- 1) Race Fork and tributaries
- 2) Pounding Mill Creek and tributaries
- 3) Right Fork of Lester Fork and tributaries
- 4) Abners Fork and tributaries

The site-specific criteria for consideration under this rulemaking reflect EPA's recommended selenium water quality criterion for protection of aquatic life for the streams noted above in the Knox Creek watershed. EPA's recommended criterion was first published on July 13, 2016.

EPA's recommended freshwater criterion is a chronic criterion expressed in terms of both fish tissue concentration (egg/ovary, whole body, and muscle) and two different water concentrations. The criterion elements are hierarchical with fish tissue values taking precedence should sufficient fish tissue data be available. This is EPA's first aquatic life criterion utilizing fish tissue as a direct expression of the recommended criterion. Accordingly, implementation of these criteria is substantially different from established Clean Water Act water quality programs, including the VPDES program and the water quality assessment program.

The proposed amendments to the WQS regulation would amend the special standards section of the WQS regulation (9VAC25-260-310) to include site site-specific selenium criterion. Additionally, a notation will be placed in Section 3 of the Big Sandy River basin table (9VAC25-260-490) to indicate the general geographic applicability of the special standard.

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 of this action to the public is that the proposed selenium criteria are based on updated scientific information to protect aquatic life. The disadvantage is that criteria that become more stringent may result in increased costs to the regulated community. However, the goal is to set realistic,

protective goals in water quality management and to maintain the most scientifically defensible criteria in the Water Quality Standards regulation.

The advantage to the agency or the Commonwealth that will result from the adoption of these amendments may be additional flexibility for developing accurate and scientifically defensible permit limits, assessments, and clean-up plans (Total Maximum Daily Loads or TMDLs) which ensure protection of the WQS. These are discussed under the "Purpose" section where the goals of the proposal, the environmental benefits, and the problems the proposal is intended to solve are discussed.

The regulated community may find that the amendments pertinent to their operations may require additional capital or operating costs for control in their discharge, particularly where the numerical criteria are more stringent (see Economic Impact). However, it is not known whether the proposed, site-specific criteria will be more, or less, stringent than the current selenium aquatic life criteria contained in the WQS regulation.

The regulatory changes produce indirect benefits through protection of water quality and living resources in the subject watersheds for the designated uses of aquatic life and wildlife while providing additional options for permittees in these watersheds to demonstrate compliance with water quality requirements contained in VPDES permits.

Requirements More Restrictive than Federal

List all changes to the information reported on the Agency Background Document submitted for the previous stage regarding any requirement of the regulatory change which is more restrictive than applicable federal requirements. If there are no changes to previously reported information, include a specific statement to that effect.

There are no requirements that exceed applicable federal requirements.

Agencies, Localities, and Other Entities Particularly Affected

List all changes to the information reported on the Agency Background Document submitted for the previous stage regarding any other state agencies, localities, or other entities that are particularly affected by the regulatory change. If there are no changes to previously reported information, include a specific statement to that effect.

There are no changes to previously reported information.

Other State Agencies Particularly Affected

It is anticipated VA Energy will be particularly affected by these regulations as related to discharge permits. VA Energy is the agency charged with implementing the VPDES program for coal mining operations in Virginia. Accordingly, VA Energy would have primary responsibility for implementing the amended criteria. VA Energy has been actively involved in this rulemaking and is aware of the proposed criteria and the need to establish implementation procedures for incorporating the proposed criteria into its VPDES program.

Localities Particularly Affected

In general, WQS are developed and implemented for the protection of all designated uses statewide. However, due to the site-specific nature of this amendment, the below localities may bear a

disproportionate material impact not experienced by other localities due to the location of these localities relative to the site-specific nature of the proposed amended criteria.

County: Buchanan County

Other Entities Particularly Affected

Due to the limited geographic application of the proposed criteria, staff anticipates this to impact at least one surface coal mining facility. That facility is owned by the petitioner that sought this regulatory change.

Public Comment

Summarize all comments received during the public comment period following the publication of the previous stage, and provide the agency's response. Include all comments submitted: including those received on Town Hall, in a public hearing, or submitted directly to the agency. If no comment was received, enter a specific statement to that effect.

See Attachment A for a summary of public comments received from the NOPC comment period.

Detail of Changes Made Since the Previous Stage

*List all changes made to the text since the previous stage was published in the Virginia Register of Regulations and the rationale for the changes. 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. Explain the new requirements and what they mean rather than merely quoting the text of the regulation. * Put an asterisk next to any substantive changes.*

The table below identifies the changes made to what was published in the proposed regulation during the Notice of Public Comment.

Current chapter-section number	New chapter-section number, if applicable	New requirement from previous stage	Updated new requirement since previous stage	Change, intent, rationale, and likely impact of updated requirements
9VAC25-260-310	N/A	Adds Special Standard "jj" which is a site-specific freshwater selenium criterion for the protection of aquatic life. The criterion is taken from EPA's nationally recommended <i>Aquatic Life Ambient Water Quality Criterion for Selenium-Freshwater</i> (EPA 822-R-16-006). This Special Standard replaces the statewide selenium criteria for Race Fork, Pounding	Footnote 4 of the criteria was modified to reflect minor changes EPA made to the nationally recommended selenium criteria (<i>Aquatic Life Ambient Water Quality Criterion for Selenium-Freshwater</i> ; EPA 822-R-21-006, August 2021). "4. Water column values are based	This is in response to EPA comment indicating the proposed language does not reflect updates made in 2021 to the recommendation. The change is not considered to substantively change the intent or application of the recommended criterion. The language EPA added to Footnote 4 is indicated by underlined text below: <u>When selenium inputs are increasing, water column values are the applicable</u>

		Mill Creek, Right Fork of Lester Fork, Abner's Fork, and their respective tributaries.	on dissolved total selenium in water and are derived from fish tissue values via bioaccumulation modeling. <u>When selenium inputs are increasing, water column values are the applicable criterion element in the absence of steady-state condition fish tissue data.</u> Footnotes 2 and 3 are modified to add "... <u>except as noted in footnote 4 below.</u>" To reference the change to Footnote 4.	<u>criterion element in the absence of steady-state condition fish tissue data.</u>" The underlined language is added to the proposed amendment in Footnote 4. Language has also been added to Footnote 4 to state that compliance may be assessed using methods consistent with EPA's 2021 selenium criterion recommendation. Footnotes 2 and 3 are modified to reference the added language to Footnote 4. The change is made to conform with EPA's most recent iteration of the nationally recommended selenium criterion. Impacts resulting from the modification are not anticipated.
9VAC25-260-310	N/A	Adds Special Standard "jj" which is a site-specific freshwater selenium criterion for the protection of aquatic life. The criterion is taken from EPA's nationally recommended <i>Aquatic Life Ambient Water Quality Criterion for Selenium-Freshwater</i> (EPA 822-R-16-006). This Special Standard replaces the statewide selenium criteria for Race Fork, Pounding Mill Creek, Right Fork of Lester Fork, Abner's Fork, and their respective tributaries.	Footnote 4 of the criteria is modified to reflect minor changes EPA made to the nationally recommended selenium criteria (<i>Aquatic Life Ambient Water Quality Criterion for Selenium-Freshwater</i>; EPA 822-R-21-006, August 2021). Footnote 4 to Table 4.1 now reads: "4. <i>Water column values are based on dissolved total selenium in water and are derived from fish tissue values via bioaccumulation modeling. <u>When selenium inputs are increasing, water column values are the applicable criterion element in</u></i>	This is in response to EPA comment indicating the proposed language does not reflect updates made in 2021 to the recommendation. The change is not considered to substantively change the intent or application of the recommended criterion. The language EPA added to Footnote 4 is indicated by underlined text below: <u>When selenium inputs are increasing, water column values are the applicable criterion element in the absence of steady-state condition fish tissue data.</u>" The underlined language is added to the proposed amendment in Footnote 4. Language has also been added to Footnote 4 to state that compliance may be assessed using methods consistent with EPA's 2021 selenium criterion recommendation.

			<i>the absence of steady-state condition fish tissue data.” Footnotes 2 and 3 are modified to add “..., <u>except as noted in footnote 4 below.</u>” to reference the change to Footnote 4.</i>	Footnotes 2 and 3 are modified to reference the added language to Footnote 4. The change is made to conform with EPA’s most recent iteration of the nationally recommended selenium criterion. Impacts resulting from the modification are not anticipated.
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Detail of All Changes Proposed in this Regulatory Action

*List all changes proposed in this action and the rationale for the changes. 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. Explain the new requirements and what they mean rather than merely quoting the text of the regulation. * Put an asterisk next to any substantive changes.*

EPA’s recommended freshwater aquatic life criterion is a chronic criterion expressed in terms of both fish tissue concentration (egg/ovary, whole body, and muscle) and two different water concentrations. The criterion elements are hierarchical with fish tissue values taking precedence should sufficient fish tissue data be available. This is EPA’s first aquatic life criterion utilizing fish tissue as a direct expression of the recommended criterion. The current aquatic life criteria for selenium are expressed as acute and chronic water column concentrations. Accordingly, implementation of these criteria is substantially different from established Clean Water Act water quality programs, including the VPDES program and the water quality assessment program. The intent of the amendments is to provide greater flexibility in ensuring protection of the water quality standards and designated uses of the subject waterbodies through the VPDES regulatory program.

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 updated requirements
9VAC25-260-310		Currently no Special Standard “jj”.	Adds Special Standard “jj” which is a site-specific freshwater selenium criterion for the protection of aquatic life. This Special Standard replaces the statewide selenium criteria with the criterion recommended by the EPA document EPA 822-R-21-006, August 2021 for Race Fork, Pounding Mill Creek, Right Fork of Lester Fork, Abner’s Fork, and their respective tributaries. Virginia’s current water quality criteria for selenium are based on nationally recommended criteria published by EPA in 1987. EPA’s

			current recommended criterion reflects the latest scientific knowledge and provide a more updated method of evaluating selenium impacts to surface waters and aquatic life and provides the basis for permit determinations. The likely impact is the protection of water quality and living resources of Virginia's waters. Footnote 4 of the criteria was modified to reflect minor changes EPA made to the nationally recommended selenium criteria (<i>Aquatic Life Ambient Water Quality Criterion for Selenium-Freshwater</i>; EPA 822-R-21-006, August 2021). "4. Water column values are based on dissolved total selenium in water and are derived from fish tissue values via bioaccumulation modeling. <u>When selenium inputs are increasing, water column values are the applicable criterion element in the absence of steady-state condition fish tissue data.</u>" Footnotes 2 and 3 are modified to add "..., <u>except as noted in footnote 4 below.</u>" To reference the change to Footnote 4.
9VAC25-260-490		Currently no notation for "jj".	Adds the notation "jj" to the Special Standards column for section 3 of the Big Sandy River basin table to indicate the waterbody segments containing those waters to which the criterion applies.
9VAC25-260-310		Currently no Special Standard "jj".	Adds Special Standard "jj" which is a site-specific freshwater selenium criterion for the protection of aquatic life. This Special Standard replaces the statewide selenium criteria with the criterion recommended by the EPA document EPA 822-R-21-006, August 2021 for Race Fork, Pounding Mill Creek, Right Fork of Lester Fork, Abner's Fork, and their respective tributaries. Virginia's current water quality criteria for selenium are based on nationally recommended criteria published by EPA in 1987. EPA's current recommended criterion reflects the latest scientific knowledge and provide a more updated method of evaluating selenium impacts to surface waters and aquatic life and provides the basis for permit determinations. The likely impact is the protection of water quality and living resources of Virginia's waters.

9VAC25-260-490		Currently no notation for "jj".	Adds the notation "jj" to the Special Standards column for section 3 of the Big Sandy River basin table to indicate the waterbody segments containing those waters to which the criterion applies.
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Regulatory Flexibility Analysis

Pursuant to § 2.2-4007.1B of the Code of Virginia, please 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.

The WQS regulation does not establish compliance or reporting requirements. The proposed changes in the WQS regulation would be implemented through established programs, including the VPDES permitting program, the water quality monitoring and assessment programs, and the TMDL program. The VPDES permitting authority for coal mining operations is VA Energy. The water quality programs responsible for ensuring protection of the WQS have the flexibility to implement the proposed amendments to provide for flexibility in demonstrating regulatory compliance as there are multiple end-points to the proposed criteria. It is DEQ's understanding that support for the proposed amendments by the petitioner and VA Energy is because they provide greater flexibility in ensuring protection of the water quality standards and designated uses of the subject waterbodies through the VPDES regulatory program.

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.

It is not anticipated that this regulation will have a direct impact on the institution of the family and family stability.

ATTACHMENT 1

Summary of Comments from the Site-Specific Selenium Criteria Notice of Public Comment

Comment period October 7, 2024 – December 6, 2024

Commenter: Appalachian Voices, Southern Appalachian Mountain Stewards, and The Sierra Club
Virginia Chapter

Comment Summary:

The commenters state their respective groups are very familiar with the impacts from selenium pollution from mines and other sources and they have been the primary drivers of enforcement of selenium pollution limits from mines across the region. The commenters reaffirm their arguments and opposition to this rulemaking as previously stated during the petition comment period (June 5 – June 26, 2023). The commenters offer the following additional feedback regarding the use of fish tissue for measuring selenium in coal mine discharge in the Knox Creek watershed:

1. Coal mine effluent should be considered noncompliant with state water quality standards whenever an exceedance of selenium limits is detected in either ovarian tissue, or whole-body tissue, or water column measurements taken from the outfall being evaluated. They would not oppose a requirement that mine operators submit fish tissue analysis in addition to water column analysis for selenium, but the proposal that fish tissue take precedence over water column would make the regulation less protective of water quality than the current rule, and less protective of a scenario where an exceedance of any one of the three parameters qualifies as a violation. They strongly oppose any language that would allow mining companies to choose which one among these three different selenium parameters they would prefer to apply to a given mine or outfall.
2. The commenters urge DEQ to go above and beyond the methodologies found in EPA-822-R-16-006, Appendix K (Translation of a Fish Tissue Criterion Element to a Site-Specific Water Column Value) by requiring that all fish tissue collection occur within the immediate receiving streams of the point sources being evaluated, and not to allow mining companies to instead substitute fish tissue collected in far downstream waters.

The commenters state the concentration of selenium found in fish tissue in downstream portions of Knox Creek cannot be illustrative of the impacts to aquatic life in the individual tributaries to which the criteria would apply. Substituting downstream fish tissue for fish tissue in the waterways that directly receive mining runoff would designate those smaller waterways as sacrifice zones where ecologically damaging levels of selenium are simply tolerated by the state. If these waterways are found to be without fish, water column measurements taken directly from point source outfalls should determine compliance with water quality standards.

Agency Response:

EPA recommends that fish tissue data, if deemed sufficient, take precedence over water column data for permit compliance and assessment purposes for the following reasons: 1) fish tissue is considered a reliable integrator of long-term water column concentrations of selenium and 2) the toxicity information used to develop the criterion is reflected only in the fish tissue elements, with the water column elements being derived from these values via modeling. Footnote 4 of Table 4.1 of the criterion document was updated in 2021 and now reads, “*Water column values are based on dissolved total selenium in water and are derived from fish tissue values via bioaccumulation modeling. When selenium inputs are increasing, water column values are the applicable criterion element in the absence of steady-state condition fish tissue data.*” The underlined text is language added in 2021 to emphasize the requirement that fish tissue concentrations must be in a steady-state condition relative to selenium concentrations in the water column.

Commenter: US Environmental Protection Agency (EPA)

Comment Summary:

EPA states that Virginia's proposal is not fully consistent with EPA's recommendations, but only in that it does not reflect corrections made to EPA's recommended selenium criterion in 2021. EPA corrected footnote 4 for Table 4.1 of the revised 2021 criteria document that summarizes EPA's recommended freshwater selenium ambient chronic water quality criterion for protection of aquatic life. Corrected footnote 4 now states: "4. Water column values are based on dissolved total selenium in water and are derived from fish tissue values via bioaccumulation modeling. *When selenium inputs are increasing*, water column values are the applicable criterion element in the absence of steady-state condition fish tissue data." Footnotes 2 and 3 also reflect that footnote 4 was corrected. EPA recommends that DEQ should consider revising the proposed site-specific selenium criterion to reflect EPA's current recommendation.

Agency Response:

EPA's comments are acknowledged, and agency staff intend to modify the proposed language for Footnotes 2, 3, and 4 to reflect EPA's 2021 updates to its selenium criteria document. These edits do not change the nature or extent of the criteria from the proposed regulation and are not considered substantive.

Commenter: Virginia Department of Energy (VA Energy)

Comment Summary:

Jared Worley provided comment at the November 14 public hearing on behalf of the VA Energy Mine Land Repurposing (MLR) program and stated VA Energy's support for the proposed amendments. MLR is tasked with establishing permit conditions with the intent of protecting receiving waters while also facilitating mining operations. He stated that it is VA Energy's goal to establish National Pollutant Discharge Elimination System (NPDES) permit implementation that is both protective of the environment and reasonably and feasibly implemented as well as consistent with neighboring state counterparts located downstream from the subject watersheds for this rulemaking. Establishment of the proposed criterion would provide the agency greater flexibility in permit writing.

Agency Response:

Agency staff acknowledge the comments.

Commenter: Krystal Nelson – Biologist, Clintwood JOD, LLC

Comment Summary:

Ms. Nelson provided comment at the November 14 public hearing. She stated that she has worked as a field, laboratory, and consulting biologist in the coal industry for 13 years and she now serves as the in-house biologist for Clintwood JOD, LLC. She stated her support for the adoption of EPA's 2016 selenium criteria recommendation as it is scientifically sound and has been successfully adopted and implemented in surrounding states. She recommended that Virginia review the Kentucky Department for Environmental Protection's 2019 Methods for the Collection of Selenium Residue in Fish Tissue Used to Determine KPDES Permit Compliance. She has confidence that Virginia will be able to use the surrounding states' implementation to develop plans that are perfect for the Commonwealth. It is her opinion that the fish tissue element of the criterion is a more telling and valuable metric than simply monitoring water column values in a facility's effluent.

Agency Response:

Agency staff acknowledge the comments. VA Energy is the state agency responsible for implementing the criterion into the permitting processes and are aware of the petitioner's request that Virginia model implementation after the methodologies utilized by neighboring states.

Commenter: Mark Coleman, Environmental Manager, Clintwood JOD, LLC

Comment Summary:

Mr. Coleman provided comment at the November 14 public hearing on behalf of the petitioner, Clintwood JOD, LLC. He stated that he is the environmental manager for Clintwood JOD and that they pride themselves regarding environmental stewardship. Prior to working for Clintwood JOD, he worked for the state of Kentucky as an environmental scientist and modeling specialist. The proposed site-specific selenium criterion is consistent with EPA-issued recommended criterion issued in 2016. The criterion is protective of downstream waters in West Virginia and Kentucky through which downstream portions of Knox Creek flows. Both states have already adopted criteria modeled after EPA's recommendations. Clintwood JOD urges DEQ to proceed with the next steps in the rulemaking without delay.

Agency Response:

Agency staff acknowledge the comments.