



Final Regulation Agency Background Document

Agency name	State Water Control Board
Virginia Administrative Code (VAC) citation	9VAC25-260
Regulation title	Water Quality Standards
Action title	Add requirements for an analysis of wastewater treatment alternatives for proposed point source discharges to waters on the Eastern Shore to protect clams and oysters
Date this document prepared	February 23, 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*.

Brief summary

Please provide a brief summary (no more than 2 short paragraphs) of the proposed new regulation, proposed amendments to the existing regulation, or the regulation proposed to be repealed. Alert the reader to all substantive matters or changes. If applicable, generally describe the existing regulation. Also, please include a brief description of changes to the regulation from publication of the proposed regulation to the final regulation.

The substantive changes to the regulation are to include a new section, 9 VAC 25-260-275 that is initiated when applications for new or expanded VPDES discharges to Eastern Shore waters are not denied pursuant to 9 VAC 25-260-270. If these discharges result in shellfish condemnations, then the applicant must analyze whether wastewater management alternatives other than a discharge would be feasible, produce less of an environmental impact, and not result in significant social and economic impacts to beneficial uses and to the locality and its citizens. If the analysis demonstrates that an alternative meets these criteria, then that alternative must be pursued for approval prior to the board taking action on the discharge alternative. No changes were proposed to 9 VAC 25-260-270 of the Water Quality Standards or to the Policy for the Protection of Water Quality in Virginia's Shellfish Growing Waters at 9 VAC 25-370.

Statement of final agency action

Please 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.

The Board adopted the amendments at its April 2009 meeting.

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 numbers, 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.

Federal and state legal authority to promulgate this proposed regulation exist in the Clean Water Act at 303(c), 40 CFR 131 and the Code of Virginia in §62.1-44.15(3a). The most relevant law is the Code of Virginia at §62.1-44.15(3a). The promulgating entity is the State Water Control Board.

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 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.

Purpose

Please explain the need for the new or amended regulation. Describe the rationale or justification of the proposed regulatory action. Detail the specific reasons it is essential to protect the health, safety or welfare of citizens. Discuss the goals of the proposal and the problems the proposal is intended to solve.

This amended regulation 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 shellfish, recreational uses and conservation in general.

The goals of the proposal are to provide additional water quality protection for clams and oysters in waters on the Eastern Shore of Virginia and to ensure that the wastewater management disposal alternative chosen for that area has less of an environmental impact than another alternative. The proposal is intended to reduce condemnations on the Eastern Shore so more waters may be protected for clam and oyster production.

Substance

Please identify and explain the new substantive provisions, the substantive changes to existing sections, or both where appropriate. A more detailed discussion is required under the "All changes made in this regulatory action" section.

The substantive provisions to the regulation include a new section, 9 VAC 25-260-275 that applies to new or expanding individual VPDES permit applications discharging to or affecting waters on the Eastern Shore. This section is initiated when applications for new or expanded VPDES discharges to Eastern Shore waters are not denied pursuant to 9 VAC 25-260-270 but still result in a shellfish condemnation. These applications must have an analysis that shows if a wastewater management alternative other than a surface water discharge would be feasible, produce less of an environmental impact, and not result in significant social and economic impacts to beneficial uses and to the locality and its citizens.

Section 275 also inserts an allowable phased approach to the analysis to help reduce costs to the localities and other applicants. First the feasibility of each alternative can be analyzed. If technically feasible, then the environmental, socio-economic impacts can be analyzed.

Section 275 also describes the three scenarios that can result from the analysis and how each scenario proceeds. The first scenario is that the VPDES surface water discharge is the 'best' option (the only technically feasible option or the best option for the environment). In that case, the VPDES application proceeds. The second scenario is that an alternative proves to be the best option for the environment but results in adverse socio-economic impact. In that case, the VPDES application proceeds. The third scenario is that an alternative to VPDES is the best option for the environment and causes no significant adverse socio-economic impact. In that case, a good faith effort must be made to pursue the alternative. If the alternative is disapproved by the appropriate regulatory authority, then the VPDES application proceeds.

Issues

Please identify the issues associated with the proposed regulatory action, 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, please indicate.*

The primary advantages to all aspects of the public are to help ensure protection of good water quality and reduce condemnations in Eastern Shore waters to promote clam and oyster growth for commercial and recreational uses. The primary disadvantage to the public, specifically businesses or localities applying for new or expanded discharges, is in the cost or impact of having to do an alternatives analysis if they fall under the requirements of this new section.

There are no advantages to the agency or Commonwealth. The disadvantage is that it will expend additional staff resources to implement this new requirement.

Eastern Shore localities must be aware of these requirements and consider these when planning for increased sewage disposal.

Changes made since the proposed stage

Please describe all changes made to the text of the proposed regulation since the publication of the proposed stage. For the Registrar’s office, please put an asterisk next to any substantive changes.

Section number	Requirement at proposed stage	What has changed	Rationale for change
9VAC25-260-275	Subsection C defines condemnation for Part VI to ensure clarity.	The Food and Drug Administration, Guide for the Control of Molluscan Shellfish, citation has been updated.	It is preferable to have the most recent version cited.

Public comment

Please summarize all comments received during the public comment period following the publication of the proposed stage, and provide the agency response. If no comment was received, please so indicate.

Commenter	Comment	Agency response
Thomas Cooper	Supports. Grew up collecting quahog clams on Long Island. Nobody can do that now. One of the only parts of the bay where the bottom was privately held (leased) was at mouth of the largest river and the watershed for that river was largely protected from development. Waterfront property and areas near the water are often times more densely populated, with a higher percentage of impervious surfaces. These areas generate larger amounts of waste water and potentially contaminated runoff. Restricting the discharge of effluent and limiting the proximity of development to the shoreline is not only good for the quality of the environment, it is critical for aquaculture and the long term health of coastal marine life.	DEQ acknowledges the support.
Linda Henderson Gordon	Supports and looks forward to a moratorium on any overboard disposal of wastewater &/or other pollutants. Accomack and Northampton waters and adjoining lands, provide our citizenry and visitors with delicious seafood, bountiful agricultural products, and much of the poultry consumed by our citizenry. Concerned that socio-economic opt-out will result in a gutting of the intent of this state proposal. Developers need to make sure they can afford to dispose of (in an environmentally acceptable way), or contain their own wastes generated by their plans. Most intend to squeeze as many profitable lots into their plans and the resulting storm water run-off and waste products by the most cost effective (for them) method and later the environmental and financial costs are placed on the public. The land and water belong to our citizens not developers. Please continue to do everything in your power to responsibly protect this unique area.	DEQ acknowledges the support.
June Swan	Supports. Appreciates everything we do to keep our coasts clean.	DEQ acknowledges the support.
Billy Graham	For successful clam and oyster harvest, there must be enough water in the creeks. The bays and creeks are filling with silt to the point of becoming non-navigable. If these areas are not dredged sufficiently to promote tidal flow (reduce siltation) and waters deep enough to maneuver fishing craft in these same waters, the attempt to promulgate these regulations is futile.	DEQ thinks this concern does not render this regulation futile. This regulation addresses a different problem affecting shellfish (condemnations)

		and believes there will be some waters that will be protected by the new standard.
Phyllis Stoudt	Supports because the regulation will result in long term positive economic impact for the Eastern Shore; provide important environmental protection now and for the future; protect the existing tourism and all fisheries such as commercial, recreational, sport including rental boats; will promote the continued rapid growth of ecotourism and aquaculture; protect our high water quality by ensuring that the waste water disposal option chosen will have the least negative environmental impact possible and allow suitable shellfish growth and safe consumption of shellfish. Also believes the overall impact to small business will be very positive and the resulting revenues will far outweigh the added costs for alternative discharge analysis to businesses.	DEQ acknowledges the support.
J.W. Stoudt	The costs required to analyze waste water options will pale in comparison to the positive financial impact to the many large and growing industries that will be protected and supported by utilizing the option that will have the minimum environmental impact on water quality. One of the many benefits will be to protect and restore Eastern Shore's, greatest asset, our water quality. The overall economic impact to small businesses will be overwhelmingly positive. Adopt as soon as possible.	DEQ acknowledges the support.
Denard Spady, Executive Director Citizens for a Better Eastern Shore	Supports. Shellfish aquaculture is important to the Eastern Shore and local economy. Successful clam culture requires clean, high quality tidal waters. The regulation is a step in the right direction and a valuable addition to the tools available for such protections. Questions will arise about how the feasibility and socio-economic impacts of effluent disposal alternatives and how that will be quantified and evaluated. Other uses of tidal waters such as boating, fishing and swimming should be considered as additional beneficial uses and are important to the local economy. The State Department of Planning and Budget stated that the benefits likely exceed the costs for all the proposed changes.	DEQ acknowledges the support.
Paul Driscoll, President Citizens for a Better Eastern Shore (CBES)	Supports. CBES is a 501(c)(3) non-profit organization interested in environmental and public affairs. CBES has approximately 1000 members, most of whom live on the Virginia Eastern Shore, and a governing board of 19 members. CBES echoed the comments heard from Denard Spady. In addition, they believe that questions about the social and economic studies will help frame the debate on future project proposals, and it is fortunate that the new regulation requires that they be aired. They look forward to seeing the particulars of how this will be implemented, the new regulation is a substantial step toward better protection of our tidal waters, and we hope that it will be approved.	DEQ acknowledges the support.
Webtide Partners (Gerard Esposito, President, Tidewater Utilities, Inc.)	Webtide is a joint public-private venture. They are proposing to fund, design, build, and operate a zero discharge water and wastewater facility for the lower Eastern Shore have submitted preliminary plans to the Towns and County. They believe it is affordable and the area is in need of this facility due to the age of existing infrastructure or lack thereof and will improve the quality of life on the Eastern Shore. Believes their proposal is consistent with this regulation.	No response necessary.
Steve Parker, Director, Nature Conservancy, VA Coast Reserve	Supports. The mission of the Nature Conservancy is to protect natural systems by preservation. Thanked DEQ staff for their rigorous and thorough approach in preparing the regulation and conducted a fair, transparent and professional process. This amendment reflects a bottoms-up need to protect these unique, valuable, high quality waters. The amendment provides clarity and guidance for permit applicants and is a reasonable and much needed.	DEQ acknowledges the support.
Dave Burden VA Eastern Shore River Keeper	Supports. Agrees with what Steve Parker said and urges the DEQ to adopt the amendment.	DEQ acknowledges the support.
Steve Bunce, Partner, Shooting Point Seafood	Supports. Raises clams in Nassawadox Creek. Supports the requirements for new discharges but believes the rules for renewals should be just as strict. This is an excellent time to have old discharges land based as there is an abundance of land and it is easy to do. Many of these systems have been installed on the Maryland Eastern Shore and they do not cause problems to shellfish. The Northampton Board of Supervisors will not approve new surface water discharges. Complimented and thanked staff for making the information available and explaining the possibilities of cleaning up some of the discharges.	DEQ acknowledges the support and the suggestion that the renewals be subject to the same requirements. Staff does not believe this is a change that can be made at this time since the technical advisory committee did not consider existing discharges in their discussions.

<p>Mary E. Miller</p>	<p>Aquaculture and tourism brings millions of dollars to the local business base. Aquaculture and tourism are interconnected from the visitors' point of view and interdependent from the business owner perspective. Visitors come to enjoy what the Shore offers, including an abundance of clean, safe seafood and waters. The aquaculture industry is compromised by the point-source discharge of low-salinity treated wastewater. This rulemaking will provide a significant contribution toward safeguarding the region's economic engine of aquaculture and an incentive for responsible, land-based disposal of treated wastewater.</p>	<p>DEQ acknowledges the support.</p>
<p>Anthony C. Picardi, Ph.D.</p>	<p>Enthusiastically and unequivocally supports the regulation as a creator of wildlife habitat on his 66 acre farm and an educator to citizen groups about wildlife habitat and global warming. The economic comparative advantage and the key to jobs for the next generation lies with agriculture and this includes all forms of aquaculture. Aquaculture supports the open space that will also support eco-tourism and outdoor hunting and fishing. Every dollar earned directly in aquaculture generates two dollars of ancillary economic activity on the Eastern Shore. Please do not let the real estate developers hijack our economic future like they have done all up and down the East Coast.</p> <p>Protecting and maintaining pristine tidal waters makes economic sense, it makes environmental sense, and the hundreds of people he has talked to are unanimous in their opinion that this type of regulation is needed.</p>	<p>DEQ acknowledges the support.</p>
<p>Tom Wescott</p>	<p>Supports. Believes it is common sense and the potential effect of development pressure on the Shore is clearly indicated by water quality problems in the states to our North. Hopes the regulation is strong enough and timely enough to protect our waters. The cost if it does not is great - and ever so permanent. Problems inflicted on unprotected water resources are rarely, if ever, reversed. It makes no sense to lose the economic advantages of aquaculture, commercial fishing, tourism, etc. Even though an increasing population is inevitable, with proper regulation that increase can take place without eliminating the resource.</p>	<p>DEQ acknowledges the support.</p>
<p>Bowdoin Lusk, Jr.</p>	<p>Supports. Appreciate the hard work of DEQ and the TAC in developing the proposed regulation, and I am glad to see recognition of the value of shellfish to the Eastern Shore community. Protection of the waters where he grows clams allows him to be a part of the community with reasonable assurance that he will be able to afford to stay on the Eastern Shore.</p> <p>Beyond protecting the immensely important economic value of shellfish, the proposed regulations help protect other sources of local income. Proper wastewater treatment benefits commercial fishermen, crabbers, the local tourism industry, and recreational fishermen. By helping prevent the formation of hypoxic "dead zones" and maintaining water clarity necessary for seagrass habitat, the proposal supports all of the above sources to our economy. I hope that the all of the economic benefits to our community will be considered when looking at the proposal, not solely the benefits to shellfish.</p>	<p>DEQ acknowledges the support.</p>

No changes were made in response to public comment. However, the Virginia Department of Health, Division of Shellfish Sanitation agreed with DEQ staff the reference to the Guide for the Control of Molluscan Shellfish, 2005 should be updated to reflect the 2007 version as follows:

US Food and Drug Administration, National Shellfish Sanitation Program, Guide for the Control of Molluscan Shellfish, 2007 Revision, Section II. Model Ordinance, Definitions and Chapter 4. Classification of Shellfish Growing Areas.

This update is reflected in the paragraph C of 9VAC25-260-275.

All changes made in this regulatory action

Please detail all changes that are being proposed and the consequences of the proposed changes. Detail new provisions and/or all changes to existing sections.

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change and rationale
	9 VAC 25-260-275	There is no current requirement for a wastewater management alternatives analysis. There currently is a process for a public hearing and possible permit denial under existing section 270.	<p>In subsection A and B of this section, the proposal specifies that the provisions apply to new or expanding individual VPDES permit applications discharging to or affecting waters on the Eastern Shore. This section is initiated when applications for new or expanded VPDES discharges to Eastern Shore waters are not denied pursuant to 9 VAC 25-260-270 but still result in a shellfish condemnation. These applications must have an analysis that shows if a wastewater management alternative other than a surface water discharge would be feasible, produce less of an environmental impact, and not result in significant social and economic impacts to beneficial uses and to the locality and its citizens. The rationale of this subsection is to specifically identify the type of VPDES permits affected by the rule and impart the criteria that must be included in the impacts analysis.</p> <p>Subsection C defines condemnation for Part VI and the rationale is to ensure clarity.</p> <p>Subsection D inserts an allowable phased approach to the analysis and the rationale is to help reduce costs to the localities and other applicants. First the feasibility of each alternative can be analyzed. If technically feasible, then the analysis proceeds to include the environmental, socio-economic and opportunities to mitigate any adverse impacts.</p> <p>Subsection E describes the three scenarios that can result from the analysis and how each scenario proceeds. The first scenario is that the VPDES surface water discharge is the best option (the only technically feasible option or the best option for the environment). In that case, the VPDES application proceeds. The second scenario is that an alternative proves to be the best environmental option but results in adverse socio-economic impact. In that case, the VPDES application proceeds. The third scenario is that an alternative is the best environmental option and causes no significant adverse socio-economic impact. In that case, a good faith effort must be made to pursue the alternative. If the alternative is disapproved by the appropriate regulatory authority, then the VPDES application proceeds. The rationale is to ensure clarity so applicants know all possible outcomes.</p> <p>The rationale for including this entire section is to provide additional water quality protection for clams and oysters in waters on the Eastern Shore of Virginia and to ensure that the wastewater management disposal alternative chosen for that area has less of an environmental impact than another alternative. The problem is intended to reduce condemnations on the Eastern Shore so more waters may be protected for clam and oyster production.</p>

Regulatory flexibility analysis

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) the establishment of less stringent compliance or reporting requirements; 2) the establishment of less stringent schedules or deadlines for compliance or reporting requirements; 3) the consolidation or simplification of compliance or reporting requirements; 4) the establishment of 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 proposed regulation.

The goals of the proposal are to provide additional water quality protection for clams and oysters in waters on the Eastern Shore of Virginia and to ensure that the wastewater management disposal alternative chosen for that area has less of an environmental impact than another alternative. The analysis itself is necessary to ensure the best environmental waste disposal option is chosen. Adverse impacts on small businesses or any business or locality has been minimized by providing for a phased approach in conducting the alternatives analysis so that technically infeasible alternatives need not be analyzed. In addition, general permit holders have been exempted from the requirement and many general permit holders are small businesses. One goal of the requirement is to provide protection for clams and oysters; this will promote sustainable industries on the Eastern Shore, one of which is the culture of clams and oysters (aquaculture). The aquaculture industries on the Eastern Shore are small businesses.

Family impact

Please assess the 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 proposed regulatory action may decrease disposal family income if a wastewater management alternative is chosen that results in increased sewer rates; however, this may occur regardless of this proposal.