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Regulatory
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Proposed Regulation Agency Background Document

Approving authority name	State Water Control Board
Virginia Administrative Code (VAC) citation	9 VAC 25-260
Regulation title	Water Quality Standards
Action title	Amendment to the State's Antidegradation Policy (9 VAC 25-260-30) by designating a segment of Bottom Creek in Montgomery and Roanoke Counties as an Exceptional State Water
Document preparation date	December 16, 2003

This information is required for executive review (www.townhall.state.va.us/dpbpages/apaintro.htm#execreview) and the Virginia Registrar of Regulations (legis.state.va.us/codecomm/register/regindex.htm), pursuant to the Virginia Administrative Process Act (www.townhall.state.va.us/dpbpages/dpb_apa.htm), Executive Orders 21 (2002) and 58 (1999) (www.governor.state.va.us/Press_Policy/Executive_Orders/EOHome.html), and the *Virginia Register Form, Style and Procedure Manual* (http://legis.state.va.us/codecomm/register/download/styl8_95.rtf).

Brief Summary

*Please provide a brief summary of the proposed new regulation, proposed amendments to the existing regulation, or the regulation proposed to be repealed.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. Do **not** state each provision or amendment or restate the purpose and intent of the regulation.*

The State Water Control Board (Board) is proposing an amendment to the Antidegradation Policy section (9 VAC 25-260-30) of the State's Water Quality Standards regulation to designate a segment of Bottom Creek in Montgomery and Roanoke Counties for special protection as an Exceptional State Water.

Basis

Please identify the state and/or federal source of legal authority to promulgate this proposed regulation, including (1) the most relevant law and/or regulation, including Code of Virginia citation and General Assembly bill and chapter numbers, if applicable, and (2) promulgating entity, i.e., the 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. All of the citations mentioned describe mandates for water quality standards.

Web Address sites where citations can be found:

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>

The Environmental Protection Agency (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.

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 the regulation 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 proposed amendment is a necessary revision to the State water quality standards regulation. The State Water Control Board views Exceptional State Waters nominations as citizen petitions under § 9-6.14.71 of the Code of Virginia. Therefore, the Board took action on this petition for proposed designation because Department staff had concluded, based on the information available at the time of the preliminary evaluation, that the proposed designation 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 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. 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 or exceptional aquatic communities, the Board is protecting these special waters at their present quality for use and enjoyment by future generations of Virginians.

Substance

Please briefly identify and explain the new substantive provisions, the substantive changes to existing sections, or both where appropriate. (Provide more detail about these changes in the "Detail of changes" section.)

The amendment to the Antidegradation Policy (9 VAC 25-260-30), part of the State's Water Quality Standards, would designate a segment of Bottom Creek in Montgomery and Roanoke Counties for special protection as an Exceptional State Water (9 VAC 25-260-30.A.3.c).

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.*

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 the Exceptional State Water and mixing zones from upstream or tributary waters could not extend into the Exceptional State Water section.

A potential disadvantage to the public may be the prohibition of new or expanded permanent point source discharges imposed within the segment once the regulatory designation is effective that would cause riparian landowners within the designated segment to seek alternatives to discharging to the designated segment and, therefore, to have additional financial expenditures associated with wastewater or storm water treatment. The segment of Bottom Creek under consideration for designation does not currently contain any permitted point source discharges.

The primary advantage to the public is that this waterbody will be protected at its present high level of quality for the use and enjoyment of current and future generations of Virginians.

The factors to be considered in determining whether a nominated water body meets the eligibility decision criteria of exceptional environmental settings and possessing outstanding recreational opportunities and/or exceptional aquatic communities are described in the Department's revised April 25, 2001 "Guidance for Exceptional Surface Waters Designations in Antidegradation Policy Section of Virginia Water Quality Standards Regulation (9 VAC 25-260-30.A.3). Those businesses located near the designated water, as well as the localities where the water body lies, may experience financial benefits through an increase in eco-tourism to the area because of the exceptional nature of the water body that led to its designation.

There is no disadvantage to the agency or the Commonwealth that will result from the adoption of these amendments.

Requirements More Restrictive Than Federal

Please identify and describe any requirement of the proposal which are more restrictive than applicable federal requirements. Include a rationale for the need for the more restrictive requirements. If there are no applicable federal requirements or no requirements that exceed applicable federal requirements, include a statement to that effect.

The proposed amendment does not exceed applicable federal minimum requirements.

Locality Particularly Affected

Please identify any locality particularly affected by the proposed regulation. Locality particularly affected means any locality which bears any identified disproportionate material impact which would not be experienced by other localities.

Counties

Montgomery, Roanoke

Public Participation

Please include a statement that in addition to any other comments on the proposal, the agency is seeking comments on the costs and benefits of the proposal and the impacts of the regulation on farm or forest land preservation.

In addition to any other comments, the Board is seeking comments on the costs and benefits of the proposal and on any impacts of the regulation on farm and forestland preservation.

The Board also seeks comment on whether the eligibility decision criteria for Exceptional State Water designation are met of for this water and whether the upper and lower boundary designations are appropriately delineated for the water body.

Anyone wishing to submit written comments for the public comment file may do so at the public hearing or by mail, email or fax to Jean W. Gregory, Office of Water Quality Programs, Department of Environmental Quality, P.O. Box 10009, Richmond, VA 23240, (804) 698-4113, by fax to (804) 698-4522 , or email jwgregory@deq.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 date established as the close of the comment period.

A public hearing will be held and notice of the public hearing 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.

Financial impact

Please identify the anticipated financial impact of the proposed regulation and at a minimum provide the following information:

Projected cost to the state to implement and enforce the proposed regulation, including (a) fund source / fund detail, and (b) a delineation of one-time versus on-going expenditures	The projected cost to implement and enforce the proposed regulatory amendment should not cause any additional financial impact to the state. These programs are funded by EPA 106 grants.
Projected cost of the regulation on localities	It is not expected that this Exceptional state Water designation will impose a cost on the localities.
Description of the individuals, businesses or other entities likely to be affected by the regulation including specific information on the impact on small businesses as defined in § 2.2-2279	Landowners adjacent to the designated water bodies. For this rulemaking, The Nature Conservancy and thirty-three private landowners have been identified.
Agency’s best estimate of the number of such entities that will be affected	34
Projected cost of the regulation for affected individuals, businesses, or other entities	None, unless the alternative to discharging to the designated waterbody requires some additional financial expenditure.

Alternatives

Please describe any viable alternatives to the proposal considered and the rationale used by the agency to select the least burdensome or intrusive alternative that meets the essential purpose of the action.

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 this waterbody met the eligibility criteria, based on the information available at the time of the preliminary evaluation.

Public comment

Please summarize all public comment received during 30-day period following the publication of the NOIRA, and provide the agency response.

The comment period for this Notice of Intended Regulatory Action ended on July 25, 2003. Below is a summary of public comments received during that comment period.

Commenter	Comment
Robert and Roberta Johnson	Water Body - <u>Bottom Creek</u> Provided oral and written comment at the July 15, 2003 public meeting

	<p>in support of the designation. They state that failure to designate the proposed segment will result in a lost opportunity to protect the exceptional quality of Bottom Creek. The preservation of the creek will help maintain the extraordinary setting of the surrounding area, preserve the flora and fauna of the streamshed for future generations, have no negative impacts on farms and forests, and is consistent with Roanoke County's Comprehensive Plan. As a challenge to erroneous comments submitted to the Board regarding a lack of an exceptional aquatic community, the Johnsons state they have personally observed rich diversity in the creek that can be corroborated by DEQ staff. To address comments regarding a lack of recreational opportunity, they cite personal observation of countless visitors utilizing trails within the Nature Conservancy's Bottom Creek Gorge Preserve and that the creek is well known and utilized by kayakers. They also comment that the boundaries of the nominated section should remain as proposed or even extended and that other public comment suggesting that the upper boundary be restricted are unsubstantiated, unsupported, and should not be considered.</p>
<p>Andrea Krochalis, Bent Mountain Civic League</p>	<p>Ms. Krochalis, representing one of the co-petitioners, provided oral and written comment at the July 15, 2003 public meeting in support of the designation. She states her conviction that the designation is essential to the protection of the health, safety, and welfare of the citizens of the Commonwealth and a Tier III designation would provide long term protection of endangered species of fish and the quality of the watershed. She also states that she is not aware of any farms or other land use along Bottom Creek that do not already comply with the requirements of a Tier III designation.</p>
<p>Bill Tanger, FORVA</p>	<p>Mr. Tanger, representing one of the co-petitioners, provided oral comment at the July 15, 2003 public meeting in support of the designation and requested that the following letters of support included in the petition be included in this opportunity for comment:</p>
<p>Vann Stancil</p>	<p>1) Vann Stancil, formerly of Dept. Fisheries and Wildlife Science, Virginia Tech supports the designation as a mechanism to provide additional protection for threatened and rare and endemic fish species.</p>
<p>Brett Albanese</p>	<p>2) Brett Albanese, Dept. Fisheries and Wildlife Science, Virginia Tech supports the designation and states that the aquatic fauna of Bottom Creek is exceptional and worthy of any conservation efforts.</p>
<p>Juanita Callis, Friends of the Roanoke River</p>	<p>3) Juanita Callis, representing Friends of the Roanoke River and co-petitioner, supports the designation.</p>
<p>Jay Turner, Roanoke Chapter Trout Unlimited</p>	<p>4) Jay Turner, president of the Roanoke chapter Trout Unlimited, supports the designation and states that Bottom Creek meets all three criteria to be considered as Exceptional Waters. Mr. Turner also provided oral comment at the July 15, 2003 public meeting in support of the designation as an effort to preserve the stream's exceptional qualities and trout habitat.</p>
<p>Bill Tanger, FORVA</p>	<p>5) Friends of the Rivers of Virginia (FORVA) support the designation as an effort to preserve Bottom Creek's near pristine qualities and outstanding recreational opportunities.</p>

<p>Frank A. Deviney, Jr., VA Council of Trout Unlimited Joseph Maroon, Director, Dept. Conservation and Recreation</p>	<p>Commented on behalf of the Virginia Council of Trout Unlimited in support of the designation. Supports the designation and states that the designation will serve to recognize the existing high quality of the stream and assist in maintaining that level of quality.</p>
<p>Eric E. Zicht</p>	<p>States that he is philosophically opposed to any designation of Exceptional State Waters and given the permanent nature of the designation, cautions the members of the Water Control Board to be very careful when designating any water body as "Exceptional".</p>

AGENCY RESPONSE: The agency response to the public comments is that staff have determined that the portion of Bottom Creek in Montgomery and Giles County proposed for Exceptional State Waters designation meets the required eligibility criteria necessary for consideration as Exceptional State Waters.

Impact on family

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

Detail of changes

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

If the proposed regulation is intended to replace an emergency regulation, please list separately (1) all changes between the pre-emergency regulation and the proposed regulation, and (2) only changes made since the publication of the emergency regulation.

For changes to existing regulations, use this chart:

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change and rationale
9 VAC 25-260-30	N/A	North Creek in Botetourt County from the first bridge above the United States Forest Service North Creek Camping Area to its headwaters is designated under 9 VAC 25-260-30.A.3.c as an Exceptional	The addition of a segment of Bottom Creek to 9 VAC 25-260-30.A.3.c. This water body meets all criteria necessary to be designated as Tier III or Exceptional State Waters.

		State Water.	
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In 9 VAC 25-260-30 the following amendment is proposed:

(2) Bottom Creek in Montgomery and Roanoke County from its confluence with Big Laurel Creek downstream to its confluence with Goose Creek to form the South Fork of the Roanoke River.