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## Fast-Track Regulation Agency Background Document

<b>Agency name</b>	State Water Control Board
<b>Virginia Administrative Code (VAC) citation(s)</b>	9VAC25-260-185
<b>Regulation title(s)</b>	Water Quality Standards
<b>Action title</b>	Amending the Chesapeake Bay nutrient criteria to include 2017 Chesapeake Bay criteria assessment protocols addendum.
<b>Date this document prepared</b>	March 12, 2018

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 17 (2014) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

### Brief summary

*Please provide a brief summary (preferably no more than 2 or 3 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of the proposed new regulation, proposed amendments to the existing regulation, or the regulation proposed to be repealed.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.*

The proposed amendment to the Chesapeake Bay nutrient criteria section (9 VAC 25-260-185) of the State's Water Quality Standards regulation incorporates the Chesapeake Bay Criteria Assessment Protocols Addendum, published by the U. S. Environmental Protection Agency (EPA) on behalf of the Chesapeake Bay Program partnership in November 2017.

### Acronyms and definitions

Please define all acronyms used in the Agency Background Document. Also, please define any technical terms that are used in the document that are not also defined in the "Definition" section of the regulations.

EPA - United States Environmental Protection Agency

### 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 State Water Control Board at its meeting on April 12, 2018 authorized the Department to promulgate the amendment to 9 VAC 25-260-185.D for public comment using the fast-track process established in § 2.2-4012.1 of the Administrative Process Act for regulations expected to be noncontroversial. Further the Board's authorization constituted its adoption of the regulation at the end of the public comment period provided that (i) no objection to use of the fast-track process is received from 10 or more persons, or any member of the applicable standing committee of either house of the General Assembly or of the Joint Commission on Administrative Rules, and (ii) the Department does not find it necessary, based on public comments or for any other reason, to make any changes to the proposal. The Board authorized the Department to set an effective date 15 days after close of the 30-day public comment period provided (i) the proposal completes the fast-track rulemaking process as provided in § 2.2-4012.1 of the Administrative Process Act and (ii) the Department does not find it necessary to make any changes to the proposal.

### Legal basis

Please identify the state and/or federal legal authority to promulgate this proposed regulation, including: 1) the most relevant citations to the Code of Virginia or General Assembly chapter number(s), if applicable; and 2) promulgating entity, i.e., agency, board, or person. Your citation should include a specific provision authorizing the promulgating entity to regulate this specific subject or program, as well as a reference to the agency/board/person's overall regulatory authority.

Section 62.1-44.15(3a) of the Code of Virginia, as amended, mandates and authorizes the State Water Control 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 promulgating entity is the State Water Control Board.

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.

The Environmental Protection Agency (EPA) Water Quality Standards regulation (40 CFR 131.11) is the regulatory basis for the EPA requiring the states to establish water quality criteria to protect designated uses and the criteria are used to assess whether or not a waterbody is meeting those uses.

### Purpose

*Please explain the need for the new or amended regulation. Describe the rationale or justification of the proposed regulatory action. Describe 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.*

The Department has concluded that the proposed amendments to the regulation are essential to protecting the health, safety and welfare of the citizens of the Commonwealth by protecting the water quality and living resources of the Chesapeake Bay and its tidal rivers. EPA has continued to refine the assessment procedures as scientific research and management applications reveal new insights and knowledge about the Chesapeake Bay. The EPA's procedure documents being incorporated into Virginia's regulation by this action replace or otherwise supersede similar criteria assessment procedures published in earlier documents, but not all of them. Therefore, it is necessary for the Virginia water quality standards to refer to each of the addenda published by EPA.

### Rationale for using fast-track process

*Please explain the rationale for using the fast-track process in promulgating this regulation. Why do you expect this rulemaking to be noncontroversial?*

The proposed amendment to section 9VAC25-260-185 B references assessment protocol documents published by U.S Environmental Protection Agency (EPA). These protocols have been developed by EPA through a collaborative process within the Chesapeake Bay Program. There have been several other similar technical addenda incorporated into Virginia's Water Quality Standards Regulation using the fast-track procedure without opposition due to their non-controversial nature, since the Chesapeake Bay water quality criteria were originally adopted by the State Water Control Board in 2005.

### Substance

*Please 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.*

The proposed substantive amendment to section 9VAC25-260-185 B of the State's Water Quality Standards is reference to the November 2017 Chesapeake Bay Criteria Assessment Protocols Addendum. These recently published protocols direct how Chesapeake Bay dissolved oxygen criteria should be assessed. Therefore, it is necessary for the Virginia water quality standards to refer to this document.

### 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.*

There are no primary advantages or disadvantages to the public. The primary advantage to the agency and the Commonwealth is having improved methods for assessing attainment of designated uses in the Chesapeake Bay. There is no disadvantage to the agency or the Commonwealth that will result from the adoption of this amendment.

### Requirements more restrictive than federal

*Please identify and describe any requirement of the proposal which is 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.*

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The proposed amendment does not exceed applicable federal minimum requirements.

### Localities 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.*

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The amendment should have no effect on a particular locality, as it is an update to assessment protocols.

### 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) 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.*

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Analysis not performed as no small businesses are affected and assessment protocols do not have a direct effect on compliance or reporting schedules and/or requirements.

### Public participation

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

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In addition to any other comments, the Board is seeking comments on the costs and benefits of the proposal, the potential impacts on the regulated community and on any impacts of the regulation on farm and forest land preservation. Also, the agency/board is seeking information on impacts on small businesses as defined in § 2.2-4007. 1 of the Code of Virginia. Information may include 1) projected reported, 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 for the public comment file may do so by mail, email or fax to John Kennedy, Office of Ecology, Department of Environmental Quality, P.O. Box 1105, Richmond, VA 23218, email: tish.robertson@deq.virginia.gov, phone: 804-698-4309, fax: 804-698-4116. Comments may also be submitted through the Public Forum feature of the Virginia Regulatory Town Hall web site at: www.townhall.virginia.gov. Written comments must include the name and address of the commenter.

In order to be considered comments must be received by 5:00 p.m. on the date established as the close of the comment period.

A formal hearing will be held on a date and time and at a place to be determined if a request for a formal hearing is received by the contact person listed above within 15 days of publication of the notice of public comment period in the Virginia Register of Regulations.

**Public participation notice**

If an objection to the use of the fast-track process is received within the 30-day public comment period from 10 or more persons, any member of the applicable standing committee of either house of the General Assembly or of the Joint Commission on Administrative Rules; or the Department finds it necessary, based on public comments or for any other reason, to make any changes to the proposal, the agency shall: 1) file notice of the objection/reason with the Registrar of Regulations for publication in the Virginia Register; and 2) proceed with the normal promulgation process with the initial publication of the fast-track regulation serving as the Notice of Intended Regulatory Action.

**Economic impact**

*Please identify the anticipated economic impact of the proposed new regulations or amendments to the existing regulation. When describing a particular economic impact, please specify which new requirement or change in requirement creates the anticipated economic impact.*

<p><b>Projected cost to the state to implement and enforce the proposed regulation, including:</b>  <b>a) fund source / fund detail; and</b>  <b>b) a delineation of one-time versus on-going expenditures</b></p>	<p>The projected cost to implement and enforce the proposed regulatory amendment should not cause any additional financial impact to the state. This amendment is an update of existing rules and while the staff may have to change the way water quality assessments are conducted, it will not take additional staff or resources to do this. The assessment program is funded by EPA 106 grants as well as State general fund budget.</p>
<p><b>Projected cost of the new regulations or changes to existing regulations on localities.</b></p>	<p>It is not expected that this adjustment to assessment protocol will impose a cost on localities.</p>
<p><b>Description of the individuals, businesses, or other entities likely to be affected by the new regulations or changes to existing regulations.</b></p>	<p>Individuals, businesses, or other entities potentially impacted include point source permitted discharges greater than 0.5 million gallons per day (MGD) with</p>

	nutrients and oxygen demanding substances in their discharge. This includes sewage treatment plants, food processing (poultry and seafood), chemical and pulp and paper industries. However, the agency does not expect changes in assessment protocol to have an effect on these entities.
<b>Agency's best estimate of the number of such entities that will be affected. Please include an estimate of the number of small businesses affected.</b> Small business means a business entity, including its affiliates, that: a) is independently owned and operated and; b) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million.	None. The agency does not expect changes in assessment protocol to have an effect on small businesses.
<b>All projected costs of the new regulations or changes to existing regulations for affected individuals, businesses, or other entities. Please be specific and include all costs including:</b> a) the projected reporting, recordkeeping, and other administrative costs required for compliance by small businesses; and b) specify any costs related to the development of real estate for commercial or residential purposes that are a consequence of the proposed regulatory changes or new regulations.	N/A
<b>Beneficial impact the regulation is designed to produce.</b>	Enhanced ability to report on progress towards meeting water quality standards in Chesapeake Bay and its tidal tributaries.

## 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. Also, include discussion of less intrusive or less costly alternatives for small businesses, as defined in § 2.2-4007.1 of the Code of Virginia, of achieving the purpose of the regulation.*

The primary alternative considered to date was to leave the regulation unchanged. This was not the alternative chosen because the updated assessment protocols were developed by EPA through a collaborative process within the Federal- Interstate Chesapeake Bay Program. These recently published protocols are being used by EPA in its reporting of criteria attainment in the Chesapeake Bay. Therefore, it is necessary for the Virginia standards to refer to this addendum.

## Family impact

*Please assess the impact of this 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 list all changes that are being proposed and the consequences of the proposed changes; explain the new requirements and what they mean rather than merely quoting the proposed text of the regulation. If the proposed regulation is a new chapter, describe the intent of the language and the expected impact. Please describe the difference between existing regulation(s) and/or agency practice(s) and what is being proposed in this regulatory action. If the proposed regulation is intended to replace an emergency regulation, please list separately: (1) all differences between the **pre-emergency** regulation and this proposed regulation; and 2) only changes made since the publication of the emergency regulation.*

For changes to existing regulation(s), use this chart:

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change, intent, rationale, and likely impact of proposed requirements
9VAC25-260-185 D 3		3. Attainment of these criteria shall be assessed through comparison of the generated cumulative frequency distribution of the monitoring data to the applicable criteria reference curve for each designated use. If the monitoring data cumulative frequency curve is completely contained inside the reference curve, then the segment is in attainment of the designated use. The reference curves and procedures to be followed are published in the USEPA, Ambient Water Quality Criteria for Dissolved Oxygen, Water Clarity and Chlorophyll a for the Chesapeake Bay and Its Tidal Tributaries, EPA 903-R-03-002, April 2003 and the 2004 (EPA 903-R-03-002 October 2004), 2007 (CBP/TRS 285-07, EPA 903-R-07-003), 2007 (CBP/TRS 288/07, EPA 903-R-07-005), 2008 (CBP/TRS 290-08, EPA	Amending section 9VAC25-260-185 D.3. to include reference to Chesapeake Bay Criteria Assessment Protocols Addendum 2017 (CBP/TRS 320-17, EPA903-R-17-002). These recently published protocols are being used by EPA to assess Chesapeake Bay dissolved oxygen criteria. It is necessary for the VA standards to refer to each of the addenda published by EPA.

		<p>903-R-08-001), and 2010 (CBP/TRS 301-10, EPA 903-R-10-002) addenda. An exception to this requirement is in measuring attainment of the SAV and water clarity acres, which are compared directly to the criteria.</p>	
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If a new regulation is being promulgated, use this chart:

Section number	Proposed requirements	Other regulations and law that apply	Intent and likely impact of proposed requirements