# VIRGINIA REGISTER OF REGULATIONS

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# VIRGINIA REGISTER INFORMATION PAGE

**THE VIRGINIA REGISTER OF REGULATIONS** is an official state publication issued every other week throughout the year. Indexes are published quarterly, and are cumulative for the year. The *Virginia Register* has several functions. The new and amended sections of regulations, both as proposed and as finally adopted, are required by law to be published in the *Virginia Register*. In addition, the *Virginia Register* is a source of other information about state government, including petitions for rulemaking, emergency regulations, executive orders issued by the Governor, and notices of public hearings on regulations.

**ADOPTION, AMENDMENT, AND REPEAL OF REGULATIONS**

An agency wishing to adopt, amend, or repeal regulations must first publish in the *Virginia Register* a notice of intended regulatory action; a basis, purpose, substance and issues statement; an economic impact analysis prepared by the Department of Planning and Budget; the agency's response to the economic impact analysis; a summary; a notice giving the public an opportunity to comment on the proposal; and the text of the proposed regulation.

Following publication of the proposal in the Virginia Register, the promulgating agency receives public comments for a minimum of 60 days. The Governor reviews the proposed regulation to determine if it is necessary to protect the public health, safety and welfare, and if it is clearly written and easily understandable. If the Governor chooses to comment on the proposed regulation, his comments must be transmitted to the agency and the Registrar no later than 15 days following the completion of the 60-day public comment period. The Governor's comments, if any, will be published in the *Virginia Register*. Not less than 15 days following the completion of the 60-day public comment period, the agency may adopt the proposed regulation.

The Joint Commission on Administrative Rules (JCAR) or the appropriate standing committee of each house of the General Assembly may meet during the promulgation or final adoption process and file an objection with the Registrar and the promulgating agency. The objection will be published in the *Virginia Register*. Within 21 days after receipt by the agency of a legislative objection, the agency shall file a response with the Registrar, the objecting legislative body, and the Governor.

When final action is taken, the agency again publishes the text of the regulation as adopted, highlighting all changes made to the proposed regulation and explaining any substantial changes made since publication of the proposal. A 30-day final adoption period begins upon final publication in the *Virginia Register*.

The Governor may review the final regulation during this time and, if he objects, forward his objection to the Registrar and the agency. In addition to or in lieu of filing a formal objection, the Governor may suspend the effective date of a portion or all of a regulation until the end of the next regular General Assembly session by issuing a directive signed by a majority of the members of the appropriate legislative body and the Governor. The Governor's objection or suspension of the regulation, or both, will be published in the *Virginia Register*. If the Governor finds that changes made to the proposed regulation have substantial impact, he may require the agency to provide an additional 30-day public comment period on the changes. Notice of the additional public comment period required by the Governor will be published in the *Virginia Register*.

The agency shall suspend the regulatory process for 30 days when it receives requests from 25 or more individuals to solicit additional public comment, unless the agency determines that the changes have minor or inconsequential impact.

A regulation becomes effective at the conclusion of the 30-day final adoption period, or at any other later date specified by the promulgating agency, unless (i) a legislative objection has been filed, in which event the regulation, unless withdrawn, becomes effective on the date specified, which shall be after the expiration of the 21-day objection period; (ii) the Governor exercises his authority to require the agency to provide for additional public comment, in which event the regulation, unless withdrawn, becomes effective on the date specified, which shall be after the expiration of the period for which the Governor has provided for additional public comment; (iii) the Governor and the General Assembly exercise their authority to suspend the effective date of a regulation until the end of the next regular legislative session; or (iv) the agency suspends the regulatory process, in which event the regulation, unless withdrawn, becomes effective on the date specified, which shall be after the expiration of the 30-day public comment period and no earlier than 15 days from publication of the readopted action.

A regulatory action may be withdrawn by the promulgating agency at any time before the regulation becomes final.

**FAST-TRACK RULEMAKING PROCESS**

Section 2.2-4012.1 of the Code of Virginia provides an exemption from certain provisions of the Administrative Process Act for agency regulations deemed by the Governor to be noncontroversial. To use this process, Governor's concurrence is required and advance notice must be provided to certain legislative committees. Fast-track regulations will become effective on the date noted in the regulatory action if no objections to using the process are filed in accordance with § 2.2-4012.1.

**EMERGENCY REGULATIONS**

Pursuant to § 2.2-4011 of the Code of Virginia, an agency, upon consultation with the Attorney General, and at the discretion of the Governor, may adopt emergency regulations that are necessitated by an emergency situation. An agency may also adopt an emergency regulation when Virginia statutory law or the appropriation act or federal law or federal regulation requires that a regulation be effective in 280 days or less from its enactment. The emergency regulation becomes operative upon its adoption and filing with the Registrar of Regulations, unless a later date is specified. Emergency regulations are limited to no more than 18 months in duration; however, may be extended for six months under certain circumstances as provided for in § 2.2-4011 D. Emergency regulations are published as soon as possible in the *Register*.

During the time the emergency status is in effect, the agency may proceed with the adoption of permanent regulations through the usual procedures. To begin promulgating the replacement regulation, the agency must (i) file the Notice of Intended Regulatory Action with the Registrar within 60 days of the effective date of the emergency regulation and (ii) file the proposed regulation with the Registrar within 180 days of the effective date of the emergency regulation. If the agency chooses not to adopt the regulations, the emergency status ends when the prescribed time limit expires.

**STATEMENT**

The foregoing constitutes a generalized statement of the procedures to be followed. For specific statutory language, it is suggested that Article 2 (§ 2.2-4006 et seq.) of Chapter 40 of Title 2.2 of the Code of Virginia be examined carefully.

**CITATION TO THE *VIRGINIA REGISTER***

The *Virginia Register* is cited by volume, issue, page number, and date. **29:5 VA.R. 1075-1192 November 5, 2012,** refers to Volume 29, Issue 5, pages 1075 through 1192 of the *Virginia Register* issued on November 5, 2012.

*The Virginia Register of Regulations* is published pursuant to Article 6 (§ 2.2-4031 et seq.) of Chapter 40 of Title 2.2 of the Code of Virginia.

# PUBLICATION SCHEDULE AND DEADLINES

This schedule is available on the *Register*'s Internet home page (http://register.dls.virginia.gov).

**December 2013 through December 2014**

| Volume: Issue | Material Submitted By Noon* | Will Be Published On |
|---|---|---|
| 30:8 | November 26, 2013 **(Tuesday)** | December 16, 2013 |
| 30:9 | December 11, 2013 | December 30, 2013 |
| 30:10 | December 20, 2013 **(Friday)** | January 13, 2014 |
| 30:11 | January 8, 2014 | January 27, 2014 |
| 30:12 | January 22, 2014 | February 10, 2014 |
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| 31:1 | August 20, 2014 | September 8, 2014 |
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| 31:6 | October 29, 2014 | November 17, 2014 |
| 31:7 | November 12, 2014 | December 1, 2014 |

*Filing deadlines are Wednesdays unless otherwise specified.

## TITLE 18. PROFESSIONAL AND OCCUPATIONAL LICENSING

### BOARD OF NURSING

### Initial Agency Notice

Title of Regulation: **18VAC90-20. Regulations Governing the Practice of Nursing.**

Statutory Authority: § 54.1-2400 of the Code of Virginia.

Name of Petitioner: Donna Pillatsch.

Nature of Petitioner's Request: Adopt some other way for non-direct care RNs to retain their license without having to focus on direct care skills. Suggest the board consider implementing easily achievable competency requirements for those RNs who are working in insurance companies, legal departments, utilization management, and other non-direct care professions.

Agency's Decision: Request denied.

Statement of Reason for Decision: At its meeting on November 20, 2013, the Board of Nursing decided to deny the petition because the current regulations do not differentiate between work in direct client care and other practice settings. There is not even a requirement for an RN to work anywhere to maintain an active license, and there is no requirement that the continuing education hours be focused on direct care skills. Regulations allow a licensee a number of options for fulfilling the continued competency requirements, including obtaining 30 hours of courses "relevant to the practice of nursing."

Agency Contact: Elaine J. Yeatts, Agency Regulatory Coordinator, Department of Health Professions, 9960 Mayland Drive, Suite 300, Richmond, VA 23233, telephone (804) 367-4688, or email elaine.yeatts@dhp.virginia.gov.

VA.R. Doc. No. R13-38; Filed November 20, 2013, 1:49 p.m.

Title of Regulation: **18VAC90-20. Regulations Governing the Practice of Nursing.**

Statutory Authority: § 54.1-2400 of the Code of Virginia.

Name of Petitioner: Gregory J. Huber.

Nature of Petitioner's Request: To revise requirements for continuing competency for nurses reactivating an inactive license or reinstating an expired license so requirements are not weaker than those for renewal of an active license. To reconsider passage of the National Council Licensing Examination as a method for reactivation/reinstatement.

Agency's Decision: Request granted.

Statement of Reason for Decision: At its meeting on November 20, 2013, the Board of Nursing decided to issue a Notice of Intended Regulatory Action (NOIRA) in response to the petition. At the time continuing competency requirements were adopted, the board recognized that there was some inconsistency between regulations for renewal of licensure and those for reactivation and reinstatement. Since those sections were not identified in the original NOIRA, it was determined that the regulation could not be amended as part of that regulatory action at that time. Regulatory language will be developed after publication of this NOIRA.

Agency Contact: Elaine J. Yeatts, Agency Regulatory Coordinator, Department of Health Professions, 9960 Mayland Drive, Suite 300, Richmond, VA 23233, telephone (804) 367-4688, or email elaine.yeatts@dhp.virginia.gov.

VA.R. Doc. No. R14-01; Filed November 26, 2013, 2:10 p.m.

## TITLE 8. EDUCATION

### STATE BOARD OF EDUCATION

#### Notice of Intended Regulatory Action

Notice is hereby given in accordance with § 2.2-4007.01 of the Code of Virginia that the State Board of Education intends to consider amending **8VAC20-720, Regulations Governing Local School Boards and School Divisions.** The purpose of the proposed action is to add provisions regarding procedures school divisions must have in place to address the use of sensitive or controversial instructional materials in the classroom.

The agency intends to hold a public hearing on the proposed action after publication in the Virginia Register.

Statutory Authority: § 22.1-16 of the Code of Virginia.

Public Comment Deadline: January 15, 2014.

Agency Contact: Melissa Luchau, Office of Policy and Communications, Department of Education, P.O. Box 2120, 101 North 14th Street, 25th Floor, Richmond, VA 23219, telephone (804) 225-2924, FAX (804) 225-2524, or email melissa.luchau@doe.virginia.gov.

VA.R. Doc. No. R14-3907; Filed November 15, 2013, 9:20 a.m.

## TITLE 18. PROFESSIONAL AND OCCUPATIONAL LICENSING

### BOARD FOR WASTE MANAGEMENT FACILITY OPERATORS

#### Notice of Intended Regulatory Action

Notice is hereby given in accordance with § 2.2-4007.01 of the Code of Virginia that the Board for Waste Management Facility Operators intends to consider amending **18VAC155-20, Waste Management Facility Operators Regulations.** The purpose of the proposed action is to review the provisions regarding the classes of licensure, changes in the scope of practice allowed those license classes, and, if determined to be necessary, the inclusion of a new license class. The proposed amendments will respond to changes in the industry and address concerns brought to the board by its licensees, staff, and waste management facilities.

The agency intends to hold a public hearing on the proposed action after publication in the Virginia Register.

Statutory Authority: §§ 54.1-201 and 54.1-2211 of the Code of Virginia.

Public Comment Deadline: January 15, 2014.

Agency Contact: Eric L. Olson, Executive Director, Board for Waste Management Facility Operators, 9960 Mayland Drive, Suite 400, Richmond, VA 23233, telephone (804) 367-8511, FAX (866) 430-1033, or email wastemgt@dpor.virginia.gov.

VA.R. Doc. No. R14-3909; Filed November 25, 2013, 9:46 a.m.

## TITLE 22. SOCIAL SERVICES

### STATE BOARD OF SOCIAL SERVICES

#### Notice of Intended Regulatory Action

Notice is hereby given in accordance with § 2.2-4007.01 of the Code of Virginia that the State Board of Social Services intends to consider amending **22VAC40-72, Standards for Licensed Assisted Living Facilities.** The purpose of the proposed action is to implement Chapter 320 of the 2013 Acts of Assembly, which amended §§ 63.2-1805 and 63.2-1808 of the Code of Virginia relating to assisted living facility (ALF) liability insurance disclosure. The regulatory action will establish the minimum amount of liability insurance coverage to be maintained by an ALF for purposes of disclosure. The action also will include changes to the regulations to require an ALF to disclose to any resident, prospective resident, or any resident's legal representative, if any, whether or not it maintains the minimum amount of liability insurance coverage.

The agency does not intend to hold a public hearing on the proposed action after publication in the Virginia Register.

Statutory Authority: §§ 63.2-217, 63.2-1732, 63.2-1805, and 63.2-1808 of the Code of Virginia.

Public Comment Deadline: January 15, 2014.

Agency Contact: Judith McGreal, Program Consultant, Department of Social Services, 801 East Main Street, Richmond, VA 23219, telephone (804) 726-7157, or email judith.mcgreal@dss.virginia.gov.

VA.R. Doc. No. R14-3906; Filed November 14, 2013, 1:02 p.m.

#### Notice of Intended Regulatory Action

Notice is hereby given in accordance with § 2.2-4007.01 of the Code of Virginia that the State Board of Social Services intends to consider amending **22VAC40-295, Temporary Assistance for Needy Families (TANF).** The purpose of the proposed action is to amend the regulation by adding penalties for persons violating spending restrictions. Section 63.2-621 of the Code of Virginia states that TANF recipients may not access TANF benefits through electronic transactions for the purchase of alcoholic beverages, tobacco products, lottery tickets, or sexually explicit visual materials. In addition, TANF electronic benefit transactions cannot take place in any government store established for the sale of alcoholic beverages, any establishment in which pari-mutuel wagering or charitable gaming is conducted, an establishment in which tattooing or body-piercing is performed, or any establishment that provides adult-oriented entertainment. The

regulation will provide for the imposition of penalties for violation of the provisions of § 63.2-621 of the Code of Virginia.

The agency does not intend to hold a public hearing on the proposed action after publication in the Virginia Register.

Statutory Authority: § 63.2-217 of the Code of Virginia.

Public Comment Deadline: January 15, 2014.

Agency Contact: Mark Golden, Program Manager, Department of Social Services, Division of Benefit Programs, 801 East Main Street, Richmond, VA 23219, telephone (804) 726-7385, FAX (804) 726-7357, or email mark.golden@dss.virginia.gov.

VA.R. Doc. No. R14-3915; Filed November 19, 2013, 8:38 a.m.

# REGULATIONS

For information concerning the different types of regulations, see the Information Page.

**Symbol Key**

Roman type indicates existing text of regulations. Underscored language indicates proposed new text. Language that has been stricken indicates proposed text for deletion. Brackets are used in final regulations to indicate changes from the proposed regulation.

## TITLE 2. AGRICULTURE

### DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES

### Final Regulation

REGISTRAR'S NOTICE: The Commissioner and Board of Agriculture and Consumer Services are claiming an exemption from the Administrative Process Act in accordance with § 2.2-4002 A 13 of the Code of Virginia, which excludes the commissioner and the board when promulgating regulations pursuant to § 3.2-5406, which includes adopting (i) by reference any regulation under the federal acts as it pertains to Chapter 54 (§ 3.2-5400 et seq.) of Title 3.2 of the Code of Virginia, amending it as necessary for intrastate applicability and (ii) any regulation containing provisions no less stringent than those contained in federal regulation. The Department of Agriculture and Consumer Services will receive, consider, and respond to petitions by any interested person at any time with respect to reconsideration or revision.

Title of Regulation: **2VAC5-210. Rules and Regulations Pertaining to Meat and Poultry Inspection under the Virginia Meat and Poultry Products Inspection Act (amending 2VAC5-210-41).**

Statutory Authority: § 3.2-5406 of the Code of Virginia.

Effective Date: December 3, 2013.

Agency Contact: Dr. Richard. C. Hackenbracht, Program Manager, Meat and Poultry Services, Department of Agriculture and Consumer Services, P.O. Box 1163, Richmond, VA 23218, telephone (804) 786-4569, FAX (804) 786-1003, TTY (800) 828-1120, or email richard.hackenbracht@vdacs.virginia.gov.

Summary:

*The U.S. Department of Agriculture consolidated the separate generic label approval regulations for meat and poultry products into new Part 412 of Title 9 of the Code of Federal Regulations. This action adopts the new part, which includes provisions regarding label approval that (i) expand the circumstances for generically approved labels, (ii) combine the generic label approval regulations for meat and poultry products, and (iii) allow inspected establishments to generically approve labels that previously had to be submitted for formal approval.*

**2VAC5-210-41. Regulatory requirements.**

A. Effective January 6, 2014, the Commissioner of the Department of Agriculture and Consumer Services hereby adopts the following provision of Title 9, Chapter III, Subchapter E of the Code of Federal Regulations:

Part 412. Label approval.

B. The Commissioner of the Department of Agriculture and Consumer Services hereby adopts the following provisions of Title 9, Chapter III, Subchapter E of the Code of Federal Regulations as described in 2VAC5-210-10:

Subchapter E. Regulatory requirements under the federal Meat Inspection Act and the Poultry Products Inspection Act.

Part 416. Sanitation.

Part 417. Hazard analysis and critical control point (HACCP) systems.

Part 418. Recalls.

Part 424. Preparation and processing operations.

Part 430. Requirements for specific classes of product.

Part 441. Consumer protection standards: raw products.

Part 442. Quantity of contents labeling and procedures and requirements for accurate weights.

Part 500. Rules of practice.

VA.R. Doc. No. R14-3913; Filed December 2, 2013, 9:20 a.m.

### BOARD OF AGRICULTURE AND CONSUMER SERVICES

### Proposed Regulation

Title of Regulation: **2VAC5-440. Rules and Regulations for Enforcement of the Virginia Pest Law - Cotton Boll Weevil Quarantine (amending 2VAC5-440-10, 2VAC5-440-40, 2VAC5-440-50, 2VAC5-440-110).**

Statutory Authority: § 3.2-703 of the Code of Virginia.

Public Hearing Information: No public hearings are scheduled.

Public Comment Deadline: February 14, 2014.

Agency Contact: Erin Williams, Policy and Planning Coordinator, Department of Agriculture and Consumer Services, P.O. Box 1163, Richmond, VA 23218, telephone (804) 786-1308, FAX (804) 371-7479, TTY (800) 828-1120, or email erin.williams@vdacs.virginia.gov.

Basis: Section 3.2-109 of the Code of Virginia authorizes the Board of Agriculture and Consumer Services to adopt regulations in accordance with Title 3.2 of the Code of Virginia regarding agriculture, animal care, and food.

Section 3.2-703 of Virginia's Tree and Crop Pests Law (§ 3.2-700 et seq. of the Code of Virginia) authorizes the board to quarantine the Commonwealth or any portion thereof when

the board determines such action is necessary to prevent or slow the spread of a pest into, within, or from the Commonwealth. The cotton boll weevil quarantine was promulgated under this authority of the board.

On December 6, 2012, the board adopted proposed amendments to Rules and Regulations for Enforcement of the Virginia Pest Law - Cotton Boll Weevil Quarantine (2VAC5-440) and authorized staff to take all actions necessary to publish the proposed amendments in the Virginia Register of Regulations.

Purpose: The substance of this regulation was last amended in 2004. The agency has determined that this regulation should be amended to more accurately reflect current practices and procedures related to the Boll Weevil Eradication and Exclusion Program as well as the agency's current cotton boll weevil quarantine enforcement activities. The program and the cotton boll weevil quarantine assist in preventing the reinfestation of Virginia's cotton growing areas by the boll weevil, thereby protecting the economic welfare of citizens.

Substance: The regulation is amended to more accurately reflect current practices and procedures related to the program as well as the agency's current cotton boll weevil quarantine enforcement activities.

The regulation currently includes an outdated mailing address for the agency. The proposed amendments remove this information. The regulation currently requires that fees to participate in the program must be paid by cotton producers prior to July 1 of each year and directs that the fees will be collected by the federal Farm Service Agency (FSA). FSA no longer collects these payments. The proposed amendments to the regulation reflect this change in the program and replace the payment due date of July 1 with a more general due date of 30 days from the date of the invoice that the agency now generates. Additionally, the agency intends to revise the penalties for late payments and acreage underreporting. Currently, the penalties in the regulation are $5.00 per acre. The agency believes this penalty is excessive, particularly in light of the fact that the fees for 2011 and 2012 were $1.00 per acre and $0.50 per acre, respectively. The proposed amendments eliminate the current requirement that a grower submit a financial statement when requesting authorization to delay payment of the program fees he owes. The proposed amendments also eliminate the subsection regarding refunds in the event of emergency or hardship as this subsection was relevant when the program fee was collected prior to harvest. Currently, growers now pay the program fee at or near the time of harvest, thereby eliminating the need for a refund provision.

Issues: The proposed amendments update provisions to reflect the program's current operation. Additionally, the proposed amendments clarify provisions of the current regulation that are difficult to understand. As such, one advantage to the public and the Commonwealth of the proposed regulatory action is a regulation that is easier to read and understand.

The proposed amendments reduce the penalties for late payments and acreage underreporting from prescribed amounts that are excessive in light of the current program fees to a percentage of the program fee. This reduction in penalties is another advantage to the public.

This regulatory action poses no disadvantage to the public or the Commonwealth.

Department of Planning and Budget's Economic Impact Analysis:

Summary of the Proposed Regulation. The Virginia Board of Agriculture and Consumer Services (Board) proposes to amend its regulations for the quarantine of cotton boll weevils to change the penalty for non-reporting and underreporting of cotton acreage.

Result of Analysis. Benefits likely outweigh costs for this regulatory action.

Estimated Economic Impact. Current regulations for the quarantine of boll weevils require cotton farmers to pay a per acre fee to cover the costs of the boll weevil eradication program. Farmers who underreport their acreage or do not report their acreage at all must currently pay a $5.00 penalty for each acre not reported. The Board now proposes to eliminate this $5.00 per acre penalty and instead charge farmers that underreport or fail to report their cotton acreage a penalty equal to 10% of the per acre fee that these farmers must pay. The fee per acre for the eradication program is currently 50 cents per acre so the penalty under these proposed regulations would be 5 cents per unreported acre which is considerably lower than the $5.00 per acre penalty that cotton farmers are subject to now. The fee per acre for this eradication program varies from year to year and is set at a level that is projected to cover the cost of the program. The Virginia Department of Agriculture and Consumer Services (VDACS) reports that the costs of this program have generally decreased over time due to 1) the improved efficiency in program operations and 2) the reduction of cotton boll weevil trap density as the cotton boll weevil infestations move farther from Virginia.

Cotton farmers will benefit from these changes as the penalty that they have to pay will decrease by several orders of magnitude. VDACS reports that the average cotton acreage for a cotton producing farm is 308 acres. A farmer with an average number of acres who fails utterly to report his acreage to VDACS would have to pay a penalty of $1,540 under current regulations; under these proposed regulations, that farmers penalty would fall to $15.40. This farmer will be better off at all program fee levels below $50.00 per acre (the point at which the 10% penalty would be equal to the current penalty of $5.00 per acre). Since program costs show a long term decreasing trend, farmers are likely to continue benefiting from the proposed new penalty structure. Since the program fees are set each year to cover the projected cost of

the program, the integrity of the eradication program is unlikely to be adversely effected by the proposed new penalty structure.

Businesses and Entities Affected. VDACS reports that there are approximately 375 cotton growers in Virginia. All of these entities will be affected by these proposed changes.

Localities Particularly Affected. Localities in which cotton grows are likely to be particularly affected by these proposed regulations.

Projected Impact on Employment. This proposed regulatory action is unlikely to have an impact on employment in the Commonwealth.

Effects on the Use and Value of Private Property. Cotton farms in Virginia are likely to see a very marginal increase in the value on account of these proposed regulations that decrease the effect of one regulatory burden that farmers are subject to.

Small Businesses: Costs and Other Effects. Small business farmers are unlikely to incur any costs on account of these regulatory changes.

Small Businesses: Alternative Method that Minimizes Adverse Impact. Small business farmers are unlikely to incur any costs on account of these regulatory changes.

Real Estate Development Costs. These proposed regulations will likely have no effect on real estate development costs in the Commonwealth.

Legal Mandate. The Department of Planning and Budget (DPB) has analyzed the economic impact of this proposed regulation in accordance with § 2.2-4007.04 of the Administrative Process Act and Executive Order Number 14 (10). Section 2.2-4007.04 requires that such economic impact analyses include, but need not be limited to, the projected number of businesses or other entities to whom the regulation would apply, the identity of any localities and types of businesses or other entities particularly affected, the projected number of persons and employment positions to be affected, the projected costs to affected businesses or entities to implement or comply with the regulation, and the impact on the use and value of private property. Further, if the proposed regulation has adverse effect on small businesses, § 2.2-4007.04 requires that such economic impact analyses include (i) an identification and estimate of the number of small businesses subject to the regulation; (ii) the projected reporting, recordkeeping, and other administrative costs required for small businesses to comply with the regulation, including the type of professional skills necessary for preparing required reports and other documents; (iii) a statement of the probable effect of the regulation on affected small businesses; and (iv) a description of any less intrusive or less costly alternative methods of achieving the purpose of the regulation. The analysis presented above represents DPB's best estimate of these economic impacts.

Agency's Response to Economic Impact Analysis: The agency concurs with the analysis of the Department of Planning and Budget.

Summary:

*The proposed amendments (i) clarify definitions and certain provisions, (ii) update the regulation to reflect the current operation of the Boll Weevil Eradication and Exclusion Program and the department's enforcement activities, and (iii) reduce the penalty for late payments and acreage underreporting.*

**2VAC5-440-10. Definitions.**

The following words and terms when used in this chapter shall have the following meanings unless the context clearly indicates otherwise:

"Authorized inspector" means any person employed by a state or federal regulatory plant pest agency and trained to inspect for and identify boll weevil in any living stage.

"Board" means the Board of the Virginia Department of Agriculture and Consumer Services.

"Boll weevil" means the live insect, "Anthonomus grandis grandis" Boheman, in any stage of development.

"Boll Weevil Eradication and Exclusion Program" or "program" means the program conducted by the Virginia Department of Agriculture and Consumer Services and the Southeastern Boll Weevil Eradication Foundation, Inc., to eradicate the boll weevil and subsequently prevent its reintroduction into areas where it has been eradicated.

"Certificate" means a document issued or authorized by an inspector to be issued under this chapter to allow the movement of regulated articles to any destination.

"Commissioner" means the Commissioner of the Virginia Department of Agriculture and Consumer Services or his designee.

"Compliance agreement" means a written agreement between a grower, dealer, or mover of regulated articles, and the Virginia Department of Agriculture and Consumer Services, United States Department of Agriculture, or both, wherein the former agrees to comply with the requirements of the compliance agreement.

"Cotton" means parts and products of plants of the genus "Gossypium," before processing.

"Cottonseed" means cottonseed from which the lint has been removed.

"Department" means the Virginia Department of Agriculture and Consumer Services.

"FSA" means the United States Department of Agriculture, Farm Service Agency.

"Gin trash" means all of the material produced during the cleaning and ginning of seed cotton, bollies, or snapped cotton, except for the lint, cottonseed, and gin waste.

"Grower" means a farm operator or producer, whether the owner of the land or not.

"Infestation" means the presence of the boll weevil, or the existence of circumstances that make it reasonable to believe that boll weevil is present.

"Inspector" means any employee of the Virginia Department of Agriculture and Consumer Services, or other person authorized by the commissioner to enforce the provisions of the quarantine and regulations.

"Limited permit" means a document issued by an inspector to allow the movement of noncertifiable regulated articles to a specified destination for limited handling, use, processing, or treatment.

"Lint" means all forms of raw ginned cotton, either baled or unbaled, except linters and waste.

~~"Moved (movement, move)"~~ "Move," "moved," or "movement" means shipped; offered for shipment to a common carrier; received for transportation or transported by a common carrier; or carried, transported, moved, or allowed to be moved by any means.

"NASS" means the U.S. Department of Agriculture, National Agricultural Statistics Service.

"Person" means any individual, corporation, company, society, or association or other organized group.

"Regulated area" means any state or country in which the boll weevil is known to exist or areas where circumstances make it reasonable to believe that the boll weevil is present.

"Scientific permit" means a document issued by the Virginia Department of Agriculture and Consumer Services to authorize movement of regulated articles to a specified destination for scientific purposes.

"Seed cotton" means cotton as it comes from the field prior to ginning.

"Used cotton harvesting equipment" means equipment previously used to harvest, strip, transport or destroy cotton.

"Waybill" means a document containing the details of a shipment of goods.

**2VAC5-440-40. Requirements for program participation.**

A. All cotton farm operators in Virginia are hereby required to participate in the ~~eradication/exclusion program~~ Boll Weevil Eradication and Exclusion Program. Participation shall include timely reporting of acreage and field locations, compliance with regulations, and payment of fees. ~~Farm operators within the Commonwealth shall be notified through either the extension offices, the department, FSA, or newspapers of their program costs on a per acre basis on or before April 1 of each year.~~ The department shall notify farm operators of their program costs on a per acre basis. The following procedures are required for participation in the program:

1. ~~Completing a Cotton Acreage Reporting Form at~~ Report cotton acreage and cotton field location or locations to the FSA office by July 1 of the current growing season for which participation is required. ~~At this time the farm operator shall pay a nonrefundable fee in an amount sufficient to cover estimated program costs as determined by the commissioner. The commissioner shall set this fee following consultation with state, federal, and private organizations responsible for implementation and funding of boll weevil eradication/exclusion programs conducted in the Commonwealth. Such fee shall be based upon prior year's expenses and projected cotton acreage for the current growing season. Those farm operators not reporting their acreage by July 1 will not be considered as program participants and will be subject to a penalty.~~ Any farm operator who does not report his cotton acreage and cotton field location or locations by July 1 will not be considered a program participant and may be subject to a penalty of 10% of the fee due for his unreported cotton acreage.

2. ~~All fees shall be paid by the farm operator.~~ A farm operator shall pay a nonrefundable fee in an amount sufficient to cover estimated program costs as determined by the commissioner. Fees shall be made payable to Treasurer of Virginia ~~and collected by FSA~~ and must be paid within 30 days of the invoice date. The commissioner shall set this fee following consultation with state, federal, and private organizations responsible for the implementation and funding of the Boll Weevil Eradication and Exclusion Program conducted in the Commonwealth.

3. ~~Noncommercial cotton~~ Cotton grown for noncommercial purposes shall not be planted in Virginia unless the grower applies for and receives an exemption to grow cotton from the commissioner. Applications~~, in writing,~~ shall be made in writing to the ~~Program Manager, Office of Plant and Pest Services, 1100 Bank Street, Room 703, Richmond, VA 23219~~ commissioner, stating the conditions under which the grower requests such exemption. The decision whether all or part of these requirements shall be exempted shall be based on the following:

a. Location of growing area;

b. Size of growing area;

c. Pest conditions in the growing area;

d. Accessibility of growing area;

e. Any stipulations set forth in a compliance agreement between the individual and the ~~Department of Agriculture and Consumer Services~~ department that are necessary for the effectuation of the program.

B. ~~Farm operators~~ A farm operator whose ~~FSA measured~~ acreage, as determined by FSA, exceeds the ~~grower reported~~ acreage that was reported by the farm operator by more than 10%, shall be assessed ~~an additional $5.00 per acre~~ a penalty of 10% of the fee due on that acreage in excess of the reported acreage.

C. A farm operator may apply for a waiver requesting delayed payment under conditions of financial hardship. Any farm operator applying for a waiver shall make application in writing to the ~~Program Manager, Office of Plant and Pest Services, 1100 Bank Street, Richmond, VA 23219~~ commissioner stating the reason a waiver is necessary. ~~This request must be accompanied by a financial statement from a state or federally chartered bank or lending agency supporting such request. The decision of whether to waive all or part of these additional assessments or payment dates shall be made by the program manager and notification given to the farm operator within two weeks after receipt of such application.~~ The commissioner's decision whether to delay payment shall be based on, but not limited to, the following: (i) meteorological conditions, (ii) economic conditions, and (iii) any other uncontrollable destructive forces. If a waiver is granted, payment shall be due at the time the cotton is sold, or ~~by December 1~~ within 30 days of the invoice date, whichever is ~~sooner~~ later.

D. Failure to pay all fees ~~on or before July 1~~ within 30 days of the invoice date will result in a penalty of ~~$5.00 per acre~~ 10% of the total fee due. Failure by a farm operator to pay all program costs ~~by August 1~~ within 30 days of the invoice date shall be a violation of ~~The Virginia Cotton Boll Weevil Quarantine~~ this chapter. If such farm operator fails to comply with ~~these regulations~~ this chapter, the ~~Commissioner of Agriculture and Consumer Services~~ commissioner, through his duly authorized agents, may proceed to trap all cotton acreage found in violation and initiate actions to recover all trapping program costs through established policies and procedures identified in the Virginia Debt Collection Act (§ 2.2-4800 et seq. of the Code of Virginia).

~~E. Acreage subject to emergency or hardship conditions after all the growers' share of the program have been paid and prior to the initiation of field operations may be considered for a refund. The refund amount will be determined by the actual program cost per acre up to the time of emergency or hardship.~~

~~F.~~ E. The commissioner may purchase growing cotton when he deems it in the best interest of the program, provided that the funding necessary to purchase the cotton is available. Purchase price shall be based on ~~the FSA farm established yield for the current year~~ an average of the previous five years of cotton yield figures, as determined by NASS, for the locality in which the growing cotton that may be purchased by the commissioner is located.

~~G.~~ F. If necessary to prevent boll weevil reinfestation of the Commonwealth, the farm operator, upon notification by the commissioner, shall completely destroy all cotton ~~determined to threaten~~ that the commissioner deems to pose a threat to the safety of Virginia's cotton industry. If such farm operator fails to comply with ~~these regulations~~ this chapter, the ~~Commissioner of Agriculture and Consumer Services~~ commissioner, through his duly authorized agents, shall proceed to destroy such cotton and shall compute the actual costs of labor and materials used, and the farm operator shall pay to the commissioner such assessed costs. No ~~damage~~ damages shall be awarded the grower of such cotton for entering ~~thereon~~ his cotton field and destroying any cotton when done by the order of the commissioner.

**2VAC5-440-50. Conditions governing the issuance of certificates and permits to allow the movement of regulated articles.**

A. Certificates shall be issued by an authorized inspector for movement of the regulated articles designated in 2VAC5-440-30 under any of the following conditions when:

1. In the judgment of the authorized inspector, they have not been exposed to boll weevil in any living stage.

2. They have been examined by the authorized inspector and found to be free of boll weevil in any living stage.

3. They have been treated to destroy boll weevil, under the observation of the authorized inspector, according to methods selected by him from procedures known to be effective under the conditions in which applied.

4. Grown, produced, stored, or handled in such manner that, in the judgment of the authorized inspector, no boll weevil would be transmitted.

B. Limited permit. Limited permits may be issued by an authorized inspector for the movement of noncertified regulated articles specified under 2VAC5-440-30 to specified destinations for limited handling, use, processing, or treatment, when he determines that no hazard of spread of the boll weevil exists.

C. Special permits. Special permits may be issued by the ~~Virginia Department of Agriculture and Consumer Services~~ department to allow the movement of boll weevil in any living stage and any other regulated articles for scientific purposes, under conditions prescribed in each specific case.

D. Compliance agreement. Compliance agreements for the movement of regulated articles may be issued by an authorized inspector. ~~As a condition of receiving a certificate or limited permit for the movement of regulated articles,~~ A compliance agreement may be issued to any person engaged in purchasing, assembling, exchanging, handling, processing, utilizing, treating, or moving ~~such~~ a regulated article ~~may be required to sign a compliance agreement~~. ~~The~~ A compliance agreement shall ~~stipulate that~~ include the required safeguards against the establishment and spread of infestation ~~will be maintained~~ and ~~will comply with~~ the conditions governing the maintenance of identity, the handling, and the subsequent movement of ~~such~~ regulated articles, and the cleaning and treatment of means of conveyance and containers.

E. Use of certificates or permits with shipments. If a certificate or permit is required for the movement of regulated articles, the regulated articles are required to have a certificate or permit attached when offered for movement. If a certificate or permit is attached to the invoice or ~~way-bill~~ waybill, and

the articles are adequately described on the certificate, the attachment of a certificate or limited permit to the regulated article will not be required. Certificates or permits attached to the invoice, ~~way bill~~ waybill, or other shipping document~~,~~ shall be given by the carrier to the consignee at the destination of the shipment~~,~~ or to an inspector when requested.

F. Assembly of articles for inspection. Persons intending to move any regulated articles shall apply for inspection as far in advance as possible. They shall safeguard the articles from infestation. The articles shall be assembled at a place and in a manner designated by the inspector to facilitate inspection.

G. Disposition of certificates and permits. In all cases, certificates and permits shall be furnished by the carrier to the consignee at the destination of the shipment.

**2VAC5-440-110. Determination of reasonableness of costs for services, products, or articles.**

The commissioner, pursuant to § 3.2-711 of the Code of Virginia, may determine that costs for services, products, or articles ~~that~~ shall be paid by the persons affected when the commissioner determines that those services, products, or articles are beyond the reasonable scope of administering the ~~law~~ Virginia Tree and Crop Pests Law (§ 3.2-700 et seq. of the Code of Virginia).

FORMS (2VAC5-440)

~~Cotton Acreage Reporting Form (rev. 3/99).~~

VA.R. Doc. No. R12-3186; Filed November 25, 2013, 12:13 p.m.

# TITLE 3. ALCOHOLIC BEVERAGES

## ALCOHOLIC BEVERAGE CONTROL BOARD

### Final Regulation

Title of Regulation: **3VAC5-40. Requirements for Product Approval (amending 3VAC5-40-10, 3VAC5-40-20, 3VAC5-40-30; repealing 3VAC5-40-40, 3VAC5-40-50).**

Statutory Authority: §§ 4.1-103 and 4.1-111 of the Code of Virginia.

Effective Date: January 15, 2014.

Agency Contact: W. Curtis Coleburn III, Chief Operating Officer, Department of Alcoholic Beverage Control, 2901 Hermitage Road, Richmond, VA 23220, telephone (804) 213-4409, FAX (804) 213-4411, TTY (804) 213-4687, or email curtis.coleburn@abc.virginia.gov.

Summary:

*The amendments (i) consolidate and standardize product approval requirements for wine and beer; (ii) remove vague and unenforceable language relating to lewd or indecent labels on wine or beer; (iii) allow for combining previously approved items into a gift package; and (iv) provide standards and definitions for certain beer containers.*

Summary of Public Comments and Agency's Response: A summary of comments made by the public and the agency's response may be obtained from the promulgating agency or viewed at the office of the Registrar of Regulations.

**3VAC5-40-10. Spirits; labels, definitions and standards of identity.**

Spirits sold in the Commonwealth shall conform with regulations adopted by the appropriate federal agency, relating to labels, definitions ~~and~~, standards of identity, and standards of fill. In addition, the prior approval of the board must be obtained as to the spirits, containers and labels. Applicants shall furnish the board a certified copy of the approval of the label by such federal agency.

Subsequent sales under an approved label shall conform to the analysis of the spirits originally approved by the board, and be packaged in approved types and sizes of containers.

**3VAC5-40-20. ~~Wines~~ Wine and beer; qualifying procedures; disqualifying factors; samples; exceptions.**

A. Except as provided in subsection F of this section, all ~~wines~~ wine and beer sold in the Commonwealth shall be first approved by the board as to content, container, and label.

~~1. An application acceptable to the board or on a form prescribed by the board describing the merchandise shall be submitted for each new brand and type of wine offered for sale in the Commonwealth. A registration fee in such amounts as may be established by the board shall be included with each application.~~

~~2.~~ 1. All wine and beer sold in this Commonwealth shall conform with regulations adopted by the appropriate federal agency, relating to labels, definitions and standards of identity. An application acceptable to the board or on a form prescribed by the board describing the merchandise shall be submitted for each new brand and type of wine or beer offered for sale in the Commonwealth. Applicants shall submit a ~~certified~~ copy of the approval of the label by such federal agency. A registration fee in such amount as may be established by the board shall be included with each application.

2. A gift package containing wine or beer for which label approval has been granted may be sold without additional approval by the board.

B. While not limited thereto, the board shall withhold approval of any wine if the alcoholic content exceeds 21% by volume.

C. While not limited thereto, the board may withhold approval of any label:

1. Which implies or indicates that the product contains spirits;

2. Which contains the word "fortified" or implies that the contents contain spirits, except that the composition and

alcoholic content may be shown if required by regulations of an appropriate federal agency;

3. Which contains any obscene subject matter or illustration ~~of a lewd, obscene or indecent nature~~;

4. Which contains subject matter designed to induce minors to drink, or is suggestive of the intoxicating effect of wine or beer;

5. Which contains any design or statement which is likely to mislead the consumer~~.~~;

6. Which implies or indicates that the product is government (federal, state, or local) endorsed; or

7. Which implies the product enhances athletic prowess or includes any reference to any athlete, former athlete, or athletic team except that references to athletes or athletic teams shall be allowed to the extent such references are permitted in point-of-sale advertising pursuant to 3VAC5-20-10.

D. A person holding a license as a winery, farm winery, brewery, or a wine or beer wholesaler shall upon request furnish the board without compensation a reasonable quantity of such brand sold by him for chemical analysis.

E. ~~Any wine whose content, label or container does not comply with all requirements of this section shall be exempt therefrom provided that such wine was sold at retail in this Commonwealth as of December 1, 1960, and remains the same in content, label and container.~~ Any wine or beer sold only by direct shipment to consumers by holders of wine or beer shippers' licenses shall be approved upon compliance with subdivision A ~~2~~ 1 of this section.

F. If the board has not approved a wine or beer for sale within 30 days after receipt by the board of a complete application and registration fee, the wine or beer may be sold in the Commonwealth pending a decision from the board on the application. If the application for approval is rejected, the manufacturer or importer shall discontinue sales of the rejected product upon notice from the board. Any wholesale or retail licensee may continue sales until any inventory on hand at the time of notice from the board is depleted.

**3VAC5-40-30. Wine and beer containers; sizes and types; on-premises and off-premises limitations; cooler-dispensers; novel containers; carafes and decanters.**

A. Wine ~~may be sold at retail only in or from the original containers of the sizes of 1.7 ounces (50 ml. if in a metric-sized package) or above which have been approved by the appropriate federal agency~~ and beer may be sold at retail only in or from the original containers of the sizes that have been approved by the appropriate federal agency, except that farm winery licensees may conduct barrel tastings at the winery, at which samples of wine not yet bottled may be sold to visitors to the winery. Each farm winery conducting a barrel tasting shall measure the wine withdrawn for the tasting, maintain full and complete records, and remit the taxes imposed by § 4.1-234 of the Code of Virginia.

B. Wine sold for on-premises consumption shall not be removed from the licensed premises except in the original container with closure. Beer dispensed for on-premises consumption shall not be removed from authorized areas upon the premises. No wine or beer shall be sold for off-premises consumption in any container upon which the original closure has been broken, except for a growler. A "growler" is defined as a reusable glass, ceramic, or metal container having a capacity of not more than 64 fluid ounces [ (or two liters if a metric-sized container) ] that has a resealable closure [ ~~and is labeled with (i) the manufacturer's name or trade name; (ii) the place of production; (iii) the net contents in fluid ounces; and (iv) if sold by a retailer other than the manufacturer, the name and address of the retailer~~ ]. Growlers may only be used by persons licensed to sell beer or wine for both on-premises and off-premises consumption, or by gourmet shop licensees. [ Growlers sold by gourmet shop licensees must be labeled with (i) the manufacturer's name or trade name; (ii) the place of production; (iii) the net contents in fluid ounces; and (iv) the name and address of the retailer. ]

~~C. Wine shall not be sold for off-premises consumption in any container upon which the original closure has been broken.~~

~~D. The sale of wine from cooler dispensers is prohibited unless the device is designed so that the original container becomes a part of the equipment, except that frozen drink dispensers or containers used in automatic dispensing may be used if approved by the board.~~

~~E.~~ C. Novel or unusual containers are prohibited except upon special permit issued by the board. In determining whether a container is novel or unusual, the board may consider, but is not limited to, the following factors: (i) nature and composition of the container; (ii) length of time it has been employed for the purpose; (iii) the extent to which it is designed or suitable for those uses; (iv) the extent to which the container is a humorous representation; and (v) whether the container is dutiable for any other purpose under customs laws and regulations.

~~F.~~ D. Wine may be served for on-premises consumption in carafes or decanters not exceeding 52 fluid ounces (1.5 liters) in capacity. Beer may be served for on-premises consumption in pitchers not exceeding [ ~~64~~ 80 ] fluid ounces in capacity.

**3VAC5-40-40. ~~Beer containers; sizes; off- and on-premises limitations; novel containers; opening devices.~~ (Repealed.)**

~~A. Beer may be sold at retail only in or from the original containers of the sizes which have been approved by the appropriate federal agency.~~

~~B. No beer shall be sold by licensees for off-premises consumption in any container upon which the original closure has been broken, except for a growler or reusable container that is federally approved to hold a malt beverage, has a resealable closure and is properly labeled. Growlers may only be used by persons licensed to sell beer for both on- and off-~~

~~premises consumption. Further, licensees shall not allow beer dispensed for on-premises consumption to be removed from authorized areas upon the premises.~~

~~C. Novel or unusual containers are prohibited except upon special permit issued by the board. In determining whether a container is novel or unusual the board may consider, but is not limited to, the factors set forth in 3VAC5-40-30.~~

~~D. No retail beer licensee shall sell at retail any beer packaged in a metal container designed and constructed with an opening device that detaches from the container when the container is opened in a manner normally used to empty the contents of the container.~~

**3VAC5-40-50. ~~Beer; qualifying procedures; samples; exceptions; disqualifying label factors.~~ (Repealed.)**

~~A. Except as provided in subsection E of this section, beer sold in the Commonwealth shall be first approved by the board as to content, container and label.~~

~~1. An application acceptable to the board or on a form prescribed by the board describing the merchandise shall be submitted for each new brand and type of beer offered for sale in the Commonwealth. A registration fee in such amounts as may be established by the board shall be included with each application.~~

~~2. All beer sold in the Commonwealth shall conform with regulations adopted by the appropriate federal agency, relating to labels, definitions and standards of identity. Applicants shall submit a certified copy of the approval of the label by such federal agency.~~

~~B. A brewery licensee or a wholesale beer licensee shall upon request furnish the board without compensation a reasonable quantity of each brand of beer sold by him for chemical analysis.~~

~~C. Any beer whose contents, label or container does not comply with all requirements of this section shall be exempt therefrom provided that such beer was sold at retail in this Commonwealth as of December 1, 1960, and remains the same in content, label and container. Any beer sold only by direct shipment to consumers by holders of beer shippers' licenses shall be approved upon compliance with subdivision A 2 of this section.~~

~~D. While not limited thereto, the board may withhold approval of any label which contains any statement, depiction or reference that:~~

~~1. Implies or indicates that the product contains wine or spirits;~~

~~2. Implies the product contains above average alcohol for beer;~~

~~3. Is suggestive of intoxicating effects;~~

~~4. Would tend to induce minors to drink;~~

~~5. Would tend to induce persons to consume to excess;~~

~~6. Is obscene, lewd or indecent;~~

~~7. Implies or indicates that the product is government (federal, state or local) endorsed;~~

~~8. Implies the product enhances athletic prowess or implies such by any reference to any athlete, former athlete or athletic team except that references to athletes or athletic teams shall be allowed to the extent such references are permitted in point of sale advertising pursuant to 3VAC5-20-10.~~

~~E. If the board has not approved a beer for sale within 30 days after receipt by the board of a complete application and registration fee, the beer may be sold in the Commonwealth pending a decision from the board on the application. If the application for approval is rejected, the manufacturer or importer shall discontinue sales of the rejected product upon notice from the board. Any wholesale or retail licensee may continue sales until any inventory on hand at the time of notice from the board is depleted.~~

VA.R. Doc. No. R12-3237; Filed November 14, 2013, 5:09 p.m.

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# TITLE 8. EDUCATION

## STATE COUNCIL OF HIGHER EDUCATION FOR VIRGINIA

### Final Regulation

Title of Regulation: **8VAC40-31. Regulations Governing Certification of Certain Institutions to Confer Degrees, Diplomas and Certificates (amending 8VAC40-31-10, 8VAC40-31-30 through 8VAC40-31-60, 8VAC40-31-100 through 8VAC40-31-200, 8VAC40-31-220, 8VAC40-31-260, 8VAC40-31-280, 8VAC40-31-310, 8VAC40-31-320; adding 8VAC40-31-165, 8VAC40-31-193, 8VAC40-31-195; repealing 8VAC40-31-300).**

Statutory Authority: § 23-276.3 of the Code of Virginia.

Effective Date: February 3, 2014.

Agency Contact: Sylvia Rosa-Casanova, Compliance Manager, Private and Out-of-State Postsecondary Education,, State Council of Higher Education for Virginia, James Monroe Building, 101 North 14th Street, 9th Floor, Richmond, VA 23219, telephone (804) 225-3399, FAX (804) 225-2604, or email sylviarosacasanova@schev.edu.

Summary:

*The amendments (i) exempt certain programs from State Council of Higher Education action, (ii) provide specific expectations of faculty and administrator qualifications, (iii) require schools to use generally accepted accounting principles in financial reporting, (iv) clarify actions that may result in the suspension or revocation of a school's certificate to operate, and (v) describe requirements of a teach-out arrangement in the event of the closure of a certified school.*

Summary of Public Comments and Agency's Response: A summary of comments made by the public and the agency's response may be obtained from the promulgating agency or viewed at the office of the Registrar of Regulations.

Part I

Definitions; Prohibitions; Advertising

**8VAC40-31-10. Definitions.**

The following words and terms when used in this chapter shall have the following meanings unless the context clearly indicates otherwise:

"Academic credit" means the measure of the total time commitment an average student is expected to devote to learning per week of study. Generally, one unit of credit represents a total of three hours per week of in-class and out-of-class work (Carnegie Unit of Credit). In this context, an hour is defined as 50 minutes. Emerging delivery methodologies may necessitate determining a unit of undergraduate or graduate credit with nontime-based methods. These courses shall use demonstration of competency, demonstration of proficiency, or fulfillment of learning outcomes to ensure these courses are equivalent to traditionally delivered courses.

"Academic-vocational" refers to a noncollege degree school that offers degree and nondegree credit courses at a site in Virginia or via telecommunications equipment located in Virginia.

"Accreditation" means a process of external quality review used by higher education to scrutinize colleges, universities and educational programs for quality assurance and quality improvement. This term applies to those accrediting organizations recognized by the United States Department of Education.

"Adjunct faculty" means professional staff members of businesses, industries and other agencies and organizations who are appointed by institutions and schools on a part-time basis to carry out instructional, research or public service functions.

"Administrative capability" means a branch (i) maintains or has access to all records and accounts; (ii) ~~designates a named site director~~ has an administrator; (iii) ~~maintains a local mailing address; and (iv)~~ offers courses that consist of a large number of unit subjects that comprise a program of education or a set curriculum large enough to allow pursuit on a continuing basis; and (iv) provides student services, including but not limited to financial aid, admissions, career placement assistance, or registration.

"Agent" means a person who is employed by any institution of higher education or noncollege degree school, whether such institution or school is located within or outside this Commonwealth, to act as an agent, solicitor, procurer, broker or independent contractor to procure students or enrollees for any such institution or school by solicitation in any form at any place in this Commonwealth other than the office or principal location of such institution or school.

"Avocational" means instructional programs that are not intended to prepare students for employment but are intended solely for recreation, enjoyment, personal interest, or as a hobby or courses or programs that prepare individuals to teach such pursuits.

"Branch" means an additional location, operated by a school with an approved existing site. A branch campus must have administrative capability exclusive of the main campus and adequate resources to ensure that the objectives of its programs can be met.

"Career-technical school" means a school that does not offer courses for degree credit at a site in Virginia or via telecommunication equipment located in Virginia; same as academic-vocational school.

"Certificate" ~~or "diploma"~~ means ~~an award that represents a level of educational attainment at or below the associate degree level and that is given for successful completion of a curriculum comprised of two or more courses~~ the credential awarded by a school upon the successful completion of a program that consists of one or more technical courses, usually completed in less than 26 weeks, normally with a single skill objective.

"Certification" means the process of securing authorization to operate a private or out-of-state postsecondary school or institution of higher education and/or degree, certificate, or diploma program in the Commonwealth of Virginia.

"Change of ownership" means the change in power within a school. Change of ownership may include, but is not limited to, the following situations: (i) sale of the school; (ii) merger of two or more schools if one of the schools is nonexempt; or (iii) change from profit to nonprofit or collective.

"CIP code" means the six-digit number assigned to each discipline specialty in the Classification of Instructional Programs (CIP) taxonomy maintained by the National Center for Education Statistics.

"Clock (or contact) hour" means a minimum of 50 minutes of supervised or directed instruction and appropriate breaks.

"College" means any institution of higher education that offers degree programs.

"Conditional certification" means a status that may be granted by the council to a school certified to operate in Virginia to allow time for the correction of major deficiencies or weaknesses identified in the school's administration that are of such magnitude that, if not corrected, may result in the suspension or revocation of the school's certificate to operate. During a period of conditional certification, a school may not enroll new students or confer any degrees, diplomas, or certificates.

"Council" means the State Council of Higher Education for Virginia.

"Course for degree credit" means a single course whose credits are applicable to the requirements for earning a degree, diploma, or certificate.

"Course registration materials" means any official documents provided to students for the purpose of formal enrollment into the school, a specific program, or a certain course.

"Credit" means (i) the quantitative measurement assigned to a course generally stated in semester hours, quarter hours, or clock hours or (ii) the recognition awarded upon successful completion of coursework.

"Credit hour" means a unit by which a school may measure its coursework. The number of credit hours assigned to a traditionally delivered course is usually defined by a combination of the number of hours per week in class, the number of hours per week in a laboratory, and/or the number of hours devoted to externship multiplied by the number of hours in the term. One unit of credit is usually equivalent to, at a minimum, one hour of classroom study and outside preparation, two hours of laboratory experience, or three hours of internship or practicum, or a combination of the three multiplied by the number of weeks in the term. Emerging delivery methodologies may necessitate determining a unit of undergraduate or graduate credit with nontime-based methods. These courses shall use demonstration of competency, demonstration of proficiency, or fulfillment of learning outcomes to ensure these courses are equivalent to traditionally delivered courses.

"Degree" means any earned award at the associate, baccalaureate, master's, first professional, or doctoral level that represents satisfactory completion of the requirements of a program or course of study or instruction beyond the secondary school level and includes certificates and specialist degrees when such awards represent a level of educational attainment above that of the associate degree level.

"Degree program" means a curriculum or course of study that leads to a degree in a discipline or interdisciplinary specialty and normally is identified by a six-digit CIP code number.

"Diploma" ~~or "certificate"~~ means an award that represents a level of educational attainment at or below the associate degree level and that ~~is given for successful completion of a curriculum comprised of two or more courses~~ normally consists of up to (i) 1,500 clock hours, (ii) 90 quarter hours, or (iii) 60 semester hours.

"Distance education" means education that uses the Internet, one-way transmission and two-way transmission through open broadcast, closed circuit, cable, microwave, broadband lines, fiber optics, satellite, or wireless communications; audio conferencing; or video cassettes, DVDs, and CD-ROMs to deliver instruction to students who are separated from the instructor and to support regular and substantive interaction between student and instructor.

"Existing institution" or "existing postsecondary school" means any postsecondary school that either (i) has been in operation in Virginia for two or more calendar years as of July 1, 2004, and has been certified to operate continuously during that period or (ii) has been approved to operate as a postsecondary school in another state, is accredited by an accrediting agency recognized by the United States Department of Education, and is certified to operate in Virginia.

"Full-time faculty" means a person whose: (i) employment is based upon an official contract, appointment, or agreement with a school; (ii) principal employment is with that school; and (iii) major assignments are in teaching and research. A full-time administrator who teaches classes incidental to administrative duties is not a full-time faculty member.

"Graduate credit hours" means credits hours earned for successful completion of courses beyond the baccalaureate level, generally awarded at the 500 series and above.

"Gross tuition collected" means all fees collected or received on either a cash or accrual accounting method basis for all instructional programs or courses, except for nonrefundable registration and application fees and charges for materials, supplies, and books that have been purchased by, and are the property of, the student.

"In-state institution" means an institution of higher education that is formed, chartered or established within Virginia. An out-of-state institution shall be deemed an in-state institution for the purposes of certification as a degree-granting institution if (i) the institution has no instructional campus in the jurisdiction in which it was formed, chartered, established, or incorporated and (ii) the institution produces clear and convincing evidence that its main or principal campus is located in Virginia.

"Institution of higher education" or "institution" means any person, firm, corporation, association, agency, institute, trust, or other entity of any nature whatsoever offering education beyond the secondary school level that has received certification from the council and either: (i) offers courses or programs of study or instruction that lead to, or that may reasonably be understood to be applicable to, a degree; (ii) operates a facility as a college or university or other entity of whatever kind that offers degrees or other indicia of level of educational attainment beyond the secondary school level; ~~or~~ (iii) uses the term "college" or "university," or words of like meaning, in its name or in any manner in connection with its academic affairs or business; or (iv) offers approved courses of degree credit or programs of study leading to a degree or offers degrees either at a site in Virginia or via telecommunications equipment located within Virginia.

"Instructional faculty" means a person employed by a school who is engaged in instructional, research, or related activities.

[ "Instructional site" means a location in Virginia where a postsecondary school (i) offers one or more courses on an established schedule and (ii) lacks administrative capability. ]

"Multistate compact" means any agreement involving two or more states to offer jointly postsecondary educational opportunities, pursuant to policies and procedures set forth by such agreement and approved by council.

"New institution" or "new postsecondary school" means any postsecondary school that seeks certification and has been in operation in Virginia for less than two calendar years as of July 1, 2004, and has neither operated in another state as a postsecondary institution nor has been approved to operate in another state as a postsecondary institution.

"Noncollege degree school" means any postsecondary school that offers courses or programs of study that do not lead to an associate or higher level degree at a site in Virginia or via telecommunications equipment located within Virginia. Such schools may be academic-career-technical or career-technical.

"Out-of-state institution" means an institution of higher education that is formed, chartered, established or incorporated outside Virginia.

"Part-time faculty" means a person whose: (i) annual employment is based upon an official contract, appointment, or agreement with a school and (ii) courseload of teaching assignments is of lesser quantity than that expected of a full-time faculty member and/or is of lesser quantity than the school's definition of a full load of courses.

"Postsecondary education" means the provision of formal instructional programs with a curriculum designed primarily for students who have completed the requirements for a high school diploma or equivalent or who are beyond the age of compulsory high school attendance. It includes programs of an academic, career-technical, and continuing professional education purpose, and excludes avocational and adult basic education programs.

"Postsecondary education activities" means researching, funding, designing, and/or conducting instructional programs, classes, or research opportunities, designed primarily for students who have completed the requirements for a high school diploma or its equivalent or who are beyond the age of compulsory high school attendance.

"Postsecondary school" or "school" means any entity offering formal instructional programs with a curriculum designed primarily for students who have completed the requirements for a high school diploma or its equivalent or who are beyond the age of compulsory high school attendance, and for which tuition or a fee is charged. Such schools include programs of academic, career-technical, and continuing professional education, and exclude avocational and adult basic education programs. For the purposes of this chapter, a "postsecondary school" shall be classified as either an institution of higher education as defined in this section or a noncollege degree school, as defined in this section.

"Private postsecondary career school" means any for-profit or nonprofit postsecondary career entity maintaining a physical presence in Virginia providing education or training for tuition or a fee that (i) augments a person's occupational skills [ ~~,~~ ; ] (ii) provides a certification [ ~~,~~ ; ] or (iii) fulfills a training or education requirement in one's employment, career, trade, profession, or occupation. Any entity that offers programs beyond the secondary school level, including programs using alternate modes of delivery, shall be included in this definition so long as tuition and fees from such programs constitute any part of its revenue.

"Program" means a curriculum or course of study in a discipline or interdisciplinary area that leads to a degree, certificate, or diploma.

"Program area" means a general group of disciplines in which one or more degree programs, certificates, or diplomas may be offered.

"Program of study" means a curriculum of two or more courses that is intended or understood to lead to a degree, diploma, or certificate. It may include all or some of the courses required for completion of a degree program.

~~"Proprietary school" means a privately owned and managed, profit-making institution of higher education or noncollege degree school.~~

"Provisional certification" means a preliminary approval status granted by the council to a new school applicant that has demonstrated substantial compliance with the provisions of this chapter pursuant to § 23-276 of the Code of Virginia. Such a status may include any conditions imposed by the council to ensure compliance with the provisions of this chapter. The provisionally certified school must demonstrate compliance with all conditions within one calendar year of the initial grant of provisional certification.

[ ~~"Site" means a location in Virginia where a postsecondary school (i) offers one or more courses on an established schedule and (ii) enrolls two or more persons who are not members of the same household. A site may or may not be a branch, and may or may not have administrative capability.~~ ]

"Surety instrument" means a surety bond or a clean irrevocable letter of credit issued by a surety company or banking institution authorized to transact business in Virginia adequate to provide refunds to students for the unearned non-Title IV portion of tuition and fees for any given semester, quarter or term and to cover the administrative cost associated with filing a claim against the instrument.

"Teach-out agreement" means the process whereby a closed or closing school undertakes to fulfill its educational and contractual obligations to currently enrolled students.

"Telecommunications activity" means any course offered by a postsecondary school or consortium of postsecondary schools where the primary mode of instructional delivery ~~to a site~~ is by television, videocassette or disc, film, radio, computer, or other telecommunications devices.

"Unearned tuition" means the portion of tuition charges billed to the student but not yet earned by the institution; the

unearned tuition represents future educational services to be rendered to presently enrolled students.

"University" means any institution offering programs leading to degrees or degree credit beyond the baccalaureate level.

"Vocational" [ ~~refers to~~ means ] a noncollege degree school that offers only noncollege credit courses. Such schools have programs of instruction offering a sequence of courses that are directly related to the preparation of individuals for paid or unpaid employment in current or emerging occupations requiring other than a baccalaureate or advanced degree. Vocational education shall not include instructional programs intended solely for recreation, enjoyment, personal interest, or as a hobby, or courses or programs that prepare individuals to teach such pursuits.

**8VAC40-31-30. Advertisements, announcements, and other promotional materials.**

A. A school certified to operate by the council in accordance with this chapter shall include in any print and electronic catalogs ~~and course registration materials~~ (i) a clear statement that the council has certified the school to operate in Virginia and (ii) a complete address of the main campus and all branch locations within Virginia.

B. A school certified to operate by council in accordance with this chapter shall include in all publicity, advertisement, and promotional materials distributed to current or prospective students (i) a clear statement that the council has certified the school to operate in Virginia, (ii) the school's complete name as indicated on the [ ~~Certificate~~ certificate ] to [ ~~Operate~~ operate ], and (iii) the address of at least one branch campus located in Virginia.

C. A school with its main campus not located in Virginia that has a physical presence in Virginia shall state in its ~~course registration materials~~ print and electronic catalog distributed in Virginia that:

1. Each course or degree, diploma, or certificate program offered in Virginia is approved by the governing body of the school; and

2. The appropriate state agency, if any, in the state where the main campus of the school is located has granted whatever approval may be necessary for the school to:

a. Offer courses or degree, diploma, or certificate programs at the level for which credit is being awarded for those courses or programs in Virginia; and

~~b. Offer courses or degree programs outside its state;~~

~~c. Offer each course or degree, diploma, or certificate program being offered in Virginia; and~~

~~d.~~ b. Ensure that any credit earned for coursework offered by the school in Virginia may be transferred to another of the school's ~~principal location~~ locations outside Virginia as part of an existing degree, diploma, or certificate program offered by the school.

D. No advertisement, announcement, or any other material produced by or on behalf of a postsecondary school shall in any way indicate that the school is supervised, recommended, endorsed, or accredited by the Commonwealth of Virginia, by the State Council of Higher Education, or by any other state agency in Virginia.

Part II
Exemptions

**8VAC40-31-40. State-supported institutions.**

This chapter shall not apply to the institutions named in §§ 23-9.5 and 23-14 of the Code of Virginia, including their branches, divisions, or colleges, or to any state-supported institution of higher education that may be established by the Commonwealth of Virginia in the future.

**8VAC40-31-50. Religious institutions.**

A. The council shall exempt from the provisions of Chapter 21.1 (§ 23-276.1 et seq.) of Title 23 of the Code of Virginia any school whose primary purpose is to provide religious training or theological education, provided that the school:

1. Awards only degrees, diplomas, or certificates that (i) carry titles that indicate the school's primary purpose plainly upon their face and (ii) state that the school is excluded from the requirement of state certification; and

2. States plainly in its catalogs and other publications that (i) the school's primary purpose is to provide religious training or theological education; (ii) the school's degrees, diplomas, or certificates are so titled and worded; and (iii) the school is exempt from the requirement of state certification.

B. The title of each degree, diploma, or certificate awarded by a school that claims an exemption under the provisions of this section must reflect that the school's primary purpose is religious education.

1. The titles of religious degrees that may be awarded include, but are not limited to, (i) Bachelor of Education in a specific religion, (ii) Master of Divinity, and (iii) Doctor of Sacred Theology.

2. ~~The titles of secular~~ Secular degrees ~~that~~ may not be awarded in any discipline, including religion, religious education, and biblical studies~~,~~. Titles of secular degrees that may not be awarded include, but are not limited to, (i) Associate of Arts, (ii) Associate of Science, (iii) Associate of Applied Science, (iv) Associate of Occupational Science, (v) Bachelor of Arts, (vi) Bachelor of Science, (vii) Master of Arts, (viii) Master of Science, (ix) Doctor of Philosophy, and (x) Doctor of Education.

C. Exemptions granted after July 1, 2002, will be for a maximum of five years. A school wishing to maintain an exempt status must reapply to council at least six months prior to the expiration of the exemption period. An exempt school shall not make claims of "approval," "endorsement," or other such terms by the council in any of its promotional materials. An exempt school shall clearly state in its catalogs

and promotional materials that it is exempt from the requirements of state regulation and oversight.

D. A school that awards secular degrees in addition to religious degrees, certificates or diplomas, as defined in subsections A and B of this section, must comply with the provisions for certification for all nonreligious degree programs.

E. Each school requesting ~~full or partial~~ religious exemption must apply on forms provided by and in a manner prescribed by the council.

F. The council, on its own motion, may initiate formal or informal inquiries to confirm that this chapter is not applicable to a religious school if the council has reason to believe that the school may be in violation of the provisions of this section.

1. Any school that claims an exemption under subsections A and B of this section on the basis that its primary purpose is to provide religious training or theological education shall be entitled to a rebuttable presumption of the truth of that claim.

2. It shall be the council's responsibility to show that a school is not exempt under subsections A and B of this section.

3. The council assumes no jurisdiction or right to regulate religious beliefs under this chapter.

G. A school whose claim for exemption under subsections A and B of this section is denied by the council shall have the opportunity to appeal the council's action in accordance with 8VAC40-31-70.

**8VAC40-31-60. Schools, programs, degrees, diplomas, and certificates exempt from council action.**

A. The following activities or programs offered by schools and not leading to a degree [ , ] ~~diploma or certificate~~ otherwise subject to this chapter shall be exempt from its provisions:

1. Any school subject to the provisions of Chapter 16 (§ 22.1-319 et seq.) of Title 22.1 of the Code of Virginia.

2. Any honorary degree conferred or awarded by a school, as long as the degree (i) does not represent the satisfactory completion of all or any part of the requirements of a program or course of study and (ii) is normally regarded as one that is intended to be commemorative in nature in recognition of an individual's contributions to society. Such degree must state on its face that it is honorary in nature.

3. Any nursing education program offered by a school to the extent that the program is regulated by the Virginia Board of Nursing.

a. The Virginia Board of Nursing is the state agency authorized to license registered nurses and to approve nursing programs with regard to the adequacy of the curricula and resources for preparing students to take the licensing examination.

b. In order to offer a degree in nursing, a school must obtain council certification prior to seeking approval from the Virginia Board of Nursing.

4. Any professional program for professional or occupational training offered by a school to the extent that the program is (i) subject to approval by a regulatory board pursuant to Title 54.1 of the Code of Virginia; or (ii) subject to approval by any other state or federal agency; and (iii) offered by a school that is not seeking degree-granting status such that it would be required to obtain prior council certification.

5. Any course or program of study given by or approved by any professional body, fraternal organization, civic club, or benevolent order principally for continuing or professional education or similar purpose and for which no certificate, degree, or degree credit is awarded.

6. Any course or program of study conducted on a not-for-profit basis by firms or organizations for the training of their own employees only, provided that such instruction is offered at no charge to such employees and with no advertising for open enrollment.

~~6.~~ 7. Courses or programs offered through approved multistate compacts, including but not limited to the Southern Regional Education Board's Electronic Campus.

~~7.~~ 8. Those courses offered and delivered by a postsecondary school that is accredited by an entity recognized by the U.S. Department of Education (USDOE) for accrediting purposes, if such courses are provided solely on a contractual basis for which no individual is charged tuition and for which no advertising has been made for open enrollment.

~~8.~~ 9. Any school, institute or course of instruction offered by any trade association or any nonprofit affiliate of a trade association on subjects related to the trade, business or profession represented by such association.

~~9.~~ 10. Any public or private high school accredited or recognized by the Virginia Board of Education that has offered or may offer one or more courses cited in this chapter if any tuition, fees and charges made by the school are collected as may be permitted by Title 22.1 of the Code of Virginia, in the case of a public school, or pursuant to regulations prescribed by the relevant governing body of such private school.

~~10.~~ 11. Tutorial instruction delivered and designed to supplement regular classes for students enrolled in any public or private school or to prepare an individual for an examination for professional practice or higher education.

~~11.~~ 12. Schools of fine arts or other avocational courses that are conducted solely to further artistic appreciation, talent, or for personal development or information and programs that prepare individuals to teach such pursuits.

B. Notwithstanding the provisions of this section, if a school offers any nonexempt programs, the school as a whole, including all of its programs, is subject to the provisions of certification.

~~B.~~ C. Notwithstanding the exemptions provided in this section, a school may seek certification for an otherwise exempt activity or program.

**8VAC40-31-100. Role of the council staff.**

A. The council staff shall:

1. Provide oversight and administration for purposes of compliance with Chapter 21.1 (§ 23-276.1 et seq.) of Title 23 of the Code of Virginia.

2. Review initial and annual certification requirements for all schools.

3. Perform random and periodic ~~site~~ school visits to review, inspect and investigate school compliance.

4. Investigate as necessary all noncertified postsecondary school activities operating in the Commonwealth of Virginia.

5. Monitor the accreditation activities of all nonaccredited postsecondary schools operating in the Commonwealth of Virginia.

6. Investigate all written and signed complaints or adverse publicity or any situation that may adversely affect students or consumers.

7. Share with state or federal agencies and appropriate accrediting bodies information regarding the operation or closure of postsecondary schools operating in Virginia.

B. The executive director may delegate other responsibilities as deemed appropriate.

Part IV
Schools for which Certification is Required

**8VAC40-31-110. Certain existing approvals and exemptions continued.**

A. An institution of higher education that was approved or authorized to confer degrees at a particular level or to offer one or more degree programs or program areas may continue to confer those degrees and to offer those programs until and unless the school's approval or authorization is revoked by the council in accordance with ~~8VAC40-31-200~~ § 23.276.4 of the Code of Virginia.

B. ~~A Virginia institution that is approved or authorized to confer degrees by the council, the Virginia Board of Education, or act of the General Assembly of Virginia and is subject to the conditions of § 23-276.4 C of the Code of Virginia shall be subject to whatever conditions or stipulations may have been imposed at the time the approval or authorization was granted~~ If authorization to grant or confer academic or professional degrees is revoked for an institution otherwise exempt from the requirements of certification, pursuant to § 23-276.4 C of the Code of Virginia, the institution will be subject to the provisions of certification in place at the time of the revocation.

**8VAC40-31-120. Certification required for new and existing postsecondary schools.**

A. Unless otherwise exempted from these regulations, all instructional offerings of a new or existing postsecondary school in Virginia are subject to this chapter, even when the credit awarded for those offerings may be transferred to a location outside Virginia.

B. A new postsecondary school must become certified to operate prior to engaging in activities related to postsecondary education via telecommunications activity, mail correspondence courses, or at a ~~site~~ location within the Commonwealth.

1. The determination for certification of telecommunications activities or mail correspondence courses may be based upon, but not limited to, physical presence.

2. With the exception of degree programs, academic credit and other courses offered exclusively from outside the Commonwealth of Virginia through individual and private interstate communication, all telecommunications activities and mail correspondence courses are subject to the certification criteria required for all postsecondary schools.

C. Existing postsecondary schools must recertify compliance with certification criteria on an annual basis in order to continue offering postsecondary courses and programs.

D. Postsecondary schools operating branches in Virginia must certify each separately.

E. Noncertified postsecondary schools that seek to establish a postsecondary education consortium, agreement, partnership, or other similar arrangement with an existing certified postsecondary school must meet all requirements for certification as set forth in these regulations and must become certified to operate prior to engaging in postsecondary education activities within the Commonwealth of Virginia.

Part V
Certification Criteria

**8VAC40-31-130. Application of certification criteria.**

A. The certification criteria shall include, but not be limited to (i) procedures by which a postsecondary school may apply for certification and (ii) criteria designed to ensure that all postsecondary schools that are subject to this chapter meet minimal academic or career-technical standards.

B. Postsecondary schools, by notarized signature of the chief executive officer, will be responsible for certifying total compliance with certification criteria on an initial and annual basis.

C. Postsecondary schools must be in compliance with all local, state, and federal statutes, laws, and codes.

D. Initial site visit. Council staff shall conduct an initial site visit prior to certification. The school shall demonstrate that the facilities conform to all federal, state, and local building codes and that it is equipped with classrooms, instructional and resource facilities, and laboratories adequate for the size of the faculty and student body and adequate to support the education programs offered by the school.

E. Provisional certification. An initial certification applicant may be granted provisional certification for a period not to exceed one year during which time the institution shall meet all conditions established by council for provisional certification. During the period of provisional certification, the school:

1. May advertise, provided that all advertisements and promotional materials state that the school is Provisionally Certified to Operate by the State Council of Higher Education [ for Virginia ];

2. May recruit and register students, however, may not collect more than an initial nonrefundable fee of $100 from each student;

3. May recruit and hire faculty and staff; and

4. May not offer postsecondary instruction [ ~~,~~ ] or confer certificates, diplomas or degrees.

F. If the institution has not complied with all necessary standards and conditions within the period specified by the provisional certification, a new application for certification must be submitted.

**8VAC40-31-140. Certification criteria for institutions of higher education.**

A. This section shall apply to each institution of higher education for which certification is required.

B. In order to award a degree, the institution's programs must meet the following generally accepted minimum number of semester/quarter credit hours required to complete a standard college degree.

1. An associate degree shall be granted only after the successful completion of at least 60 semester hour or 90 quarter credit hours of collegiate level study.

2. A bachelor's degree shall be granted only after the successful completion of at least 120 semester hours or 180 quarter credit hours of collegiate level study.

3. A master's degree shall be granted only after the successful completion of the requirements for a bachelor's degree and at least 30 semester hours or 45 quarter credit hours of collegiate level study.

4. The doctoral degree shall be granted only after the successful completion of a minimum of three years of full-time graduate study or equivalent (90 semester hours or 135 quarter credit hours) beyond the bachelor's degree, including dissertation credits or research study.

5. Exceptions to these standards must be approved by the council. Proposed programs will be evaluated by the standards of similar programs in public or private postsecondary institutions.

6. A student shall complete a minimum of 30% of course work at the institution in order to be granted a degree from that institution.

7. An institution that awards life or work experience credit shall have its related transfer policy approved by the council. No more than 30% of the credit in a student's degree program may be awarded for life or work experience.

~~B.~~ C. The course, program, curriculum and instruction must be of quality, content and length to adequately achieve the stated objective. ~~Administrators and faculty must be qualified and appropriately credentialed as follows~~ [ ~~:~~ ]

1. For terminal occupational/technical programs leading to the Associate of Occupational Science (A.O.S.) degree, general education courses must compose at least 15% of the total credit hours required for the degree.

2. For terminal occupational/technical programs leading to the Associate of Applied Science (A.A.S.) degree, general education courses shall compose at least 25% of the total credit hours required for the degree.

~~3. All instructional faculty teaching in a terminal occupational/technical program leading to the Associate of Applied Science (A.A.S.) or Associate of Occupational Science (A.O.S.) degree shall:~~

~~a. If teaching general education courses, hold a baccalaureate degree from an accredited college or university, plus at least 18 graduate credit hours in the discipline being taught.~~

~~b. If teaching occupational/technical courses, hold either (i) an associate degree or (ii) qualify for a faculty appointment by virtue of scholarly or professional achievements.~~

~~4.~~ 3. For all university parallel associate degree programs, general education courses shall compose at least 25% of the total credit hours required for the degree, and required courses in the major field of study shall compose no more than 50% of the total credit hours required for the degree in a specific discipline.

D. Faculty must be qualified and appropriately credentialed as follows:

1. All instructional faculty teaching in a terminal occupational/technical program leading to the Associate of Applied Science (A.A.S.) or Associate of Occupational Science (A.O.S.) degree shall:

a. If teaching general education courses, hold a baccalaureate degree from an accredited college or university, plus at least 18 graduate credit hours in the discipline being taught.

b. If teaching occupational/technical courses, hold either (i) an associate degree from an accredited college or

university in the discipline being taught or (ii) qualify for a faculty appointment by virtue of scholarly or professional achievements.

~~5.~~ 2. All instructional faculty teaching in a college-transfer program at the associate level shall:

a. If teaching general education courses or in programs in the liberal arts and sciences, hold a baccalaureate degree from an accredited college or university, plus at least 18 graduate credit hours in the discipline being taught.

b. If teaching occupational/technical courses, hold a baccalaureate degree from an [ ~~accredtied~~ accredited ] college or university in the discipline being taught or qualify by virtue of professional or scholarly achievement.

~~6.~~ 3. All instructional faculty members who teach in programs at the baccalaureate level shall:

a. Hold a master's degree in the discipline being taught or hold a master's degree in an area other than that being taught with at least 18 graduate semester hours in the teaching discipline from an accredited college or university.

b. Exception to academic preparation requirements for instructional faculty may be made in instances where substantial documentation of professional and scholarly achievements and/or demonstrated competences in the discipline can be shown. The institution must document and justify any such exception.

~~7.~~ 4. All instructional faculty teaching in a program at the master's level or higher shall hold a doctoral or other terminal degree [ in the discipline being taught ] from an accredited college or university. Exception to academic preparation requirements for instructional faculty may be made in instances where substantial documentation of professional and scholarly achievements and/or demonstrated competences in the discipline can be shown. The institution must document and justify any such exception.

~~C.~~ E. In addition to the instructor qualifications in subsection ~~B~~ D of this section, the institution must certify that:

1. All instructional courses for degree credit require a minimum of 15 contact hours for each semester credit hour or a minimum of 10 contact hours for each quarter credit hour, or the equivalent, and an expectation for additional assignments beyond scheduled instructional activities.

2. The elective and required courses for each program are offered on a schedule and in a sequence that enables both full-time and part-time students to complete the program in a reasonable period of time.

3. The institution's instructional faculty at each ~~site~~ location holds either full-time, part-time, or adjunct appointments.

4. The institution's academic programs shall ensure that: (i) a properly credentialed and course qualified instructor teaches each course; (ii) a credentialed and course qualified academic advisor is available to meet the concerns of the student, and that a student contact by any method will elicit a response from the advisor within a reasonable timeline; (iii) continual curriculum development and oversight for each major and concentration/track is maintained; and (iv) a program director is named and designated to oversee each program area.

5. A plan is in place that ensures interaction between student and faculty, and among students.

F. All senior administrators must be individually qualified by education, experience, and record of conduct to assure effective management, ethical practice, and the quality of degrees and services offered. The term "senior administrator" generally encompasses individuals who have administrative or managerial authority within an institution. This includes by function, but is not limited to titles of Chief Executive Officer, President, Chancellor, Dean, Provost, or Owner. Boards must collectively demonstrate financial, academic, managerial, and any necessary specialized knowledge, but individual members need not have all of these characteristics. Any controlling organization or owner is subject to this standard.

1. The senior administrators shall hold at least an earned baccalaureate degree from an accredited college or university and shall have sufficient experience to qualify for the position.

2. Each branch of the institution certified to operate in Virginia must designate one person as the branch/campus director.

a. The director must hold a baccalaureate degree from an accredited college or university with at least one year of experience in administration or institutional management.

b. Exception to academic preparation requirements for director may be made in instances where substantial documentation of professional and scholarly achievements and/or demonstrated competences in administration/institutional management can be shown. The institution must document and justify any such exception.

3. Duties of the director include, but are not limited to:

a. Be available at the school location for at least 50% of the operational time each week the school has students present unless an assistant director is available. If the school operates a site in Virginia, a director must be assigned to manage the site's operation; however, the director may designate a person at the site to handle day-to-day administrative matters in his absence.

b. Be responsible for the institution's program or programs, organization of classes, maintenance of the institutional facilities, maintenance of proper

administrative records, signing documents pertaining to certification, and all other administrative matters related to certification.

c. Implicitly accepts knowledge of and responsibility for compliance with the Code of Virginia and its implementing regulations including, but not limited to, advertising, records maintenance, annual deadlines, and fee payments.

4. Senior administrators in the positions described in this section must be of good reputation and character. A person is considered of good reputation and character if:

a. The person has no felony convictions related to the operation of a school;

b. The person has not been convicted or pleaded guilty to a crime of fraud or theft under state or federal law within the previous 10 years [ : ] and has not had a judgment entered against him or her in his or her individual capacity in a civil action based upon any theory of fraudulent activity within the previous 10 years [ ; ]

c. The person has not controlled or managed a postsecondary educational institution that has ceased operation during the past five years without providing for the completion of programs by its students or without providing tuition refunds; and

d. The person has not knowingly falsified or withheld information from the council.

5. Administrative personnel must be appropriately experienced, and educated in the field for which they are hired, or receive documented, relevant training within the first year of employment. Administrative personnel generally encompasses individuals that oversee areas as outlined in operational and administrative standards. This includes by function, but is not limited to, titles of financial aid administrator; director of admissions; director of education; business officer or manager; director of student services (including counseling and placement), and the registrar.

**8VAC40-31-150. Certification criteria for career-technical schools.**

A. The criteria in this section shall apply to each career-technical school for which certification is required.

B. The course, program, curriculum and instruction must be of quality, content and length to adequately achieve the stated objective.

~~Administrators and faculty~~ C. Faculty, if teaching technical courses for career-technical programs not leading to a degree and not offered as degree credit, must either (i) hold an associate degree ~~related to the area of instruction~~ from an accredited college or university in the discipline being taught or (ii) possess a minimum of two years of technical/occupational experience in the area of teaching responsibility or a related area. The instructor must hold the appropriate certificate or license in the field, if certification or licensure is required to work in the field.

~~C.~~ D. In addition to the instructor qualifications in subsection ~~B~~ C of this section, the career-technical school must certify that:

1. Courses of study conform to state, federal, trade, or manufacturing standards of training for the occupational fields in which such standards have been established or conform to recognized training practices in those fields.

2. A plan is in place that ensures interaction between student and faculty, and among students.

E. Administrators must demonstrate their qualifications for their particular responsibilities through educational background, relevant work experience, or record of accomplishments in previous educational work settings. Owners and administrators must be of good reputation and character. A person is considered of good reputation and character if:

1. The person has no felony convictions related to the operation of a school;

2. The person has not been convicted or pleaded guilty to a crime of fraud or theft under state or federal law within the previous 10 years [ : ] and has not had a judgment entered against him in his individual capacity in a civil action based upon any theory of fraudulent activity within the previous 10 years;

3. The person has not controlled or managed a postsecondary educational institution that has ceased operation during the past five years without providing for the completion of programs by its students or without providing refunds; and

4. The person has not knowingly falsified or withheld information from the council.

**8VAC40-31-160. Certification criteria for all postsecondary schools.**

A. The criteria in this section shall apply to all postsecondary schools for which certification is required. With regard to postsecondary schools that are accredited by an accrediting agency recognized by the U.S. Department of Education, the council may apply a presumption of compliance with criteria in this section if the school has complied with an accreditation standard directed to the same subject matter as the criteria. The council need not apply this presumption if the accreditation standard is deficient in satisfying an identifiable goal of the council. The council shall articulate reasons that the accreditation standard is deficient.

B. The postsecondary school shall have a clear, accurate, and comprehensive written statement, which shall be available to the public upon request. The statement minimally shall include the following items:

1. The history and development of the postsecondary school;

2. An identification of any persons, entities, or institutions that have a controlling ownership or interest in the postsecondary school;

3. The purpose of the postsecondary school, including a statement of the relative degree of emphasis on instruction, research, and public service as well as a statement demonstrating that the school's proposed offerings are consistent with its stated purpose;

4. A description of the postsecondary school's activities including telecommunications activities away from its principal location, and a list of all program areas in which courses are offered away from the principal location;

5. A list of all locations in Virginia at which the postsecondary school offers courses and a list of the degree and nondegree programs currently offered or planned to be offered in Virginia;

6. For each Virginia location, and for the most recent academic year, the total number of students who were enrolled as well as the total number and percentage of students ~~claiming Virginia residence~~ who were enrolled in each program offered;

7. For each Virginia location, the total number of students that completed/graduated from the school as of the end of the last academic year and the total number and percentage of students ~~claiming Virginia residence~~ who completed/graduated from each program offered by the school as of the end of the last academic year;

8. For unaccredited institutions of higher education and career-technical schools only, the total number of students ~~claiming Virginia residence~~ who report employment in their field of study within (i) six months of graduation/completion and (ii) one year of graduation/completion.

C. The postsecondary school or branch shall have a current, written document available to students and the general public upon request that accurately states the powers, duties, and responsibilities of:

1. The governing board or owners of the school;

2. The chief operating officer, president, or director at that ~~site~~ branch in Virginia;

3. The principal administrators and their credentials at that ~~site~~ branch in Virginia; and

4. The students, if students participate in school governance.

D. The postsecondary school shall have, maintain, and provide to all applicants a policy document accurately defining the minimum requirements for eligibility for admission to the school and for acceptance at the specific degree level or into all specific degree programs offered by the postsecondary school that are relevant to the school's admissions standards. In addition, the document shall explain:

1. The standards for academic credit or course completion given for experience;

2. The criteria for acceptance of transfer credit where applicable;

3. The criteria for refunds of tuition and fees;

4. Students' rights, privileges, and responsibilities; and

5. The established grievance process of the school, which shall indicate that students should follow this process and may contact council staff to file a complaint about the school as a last resort. The written policy shall include a provision that students will not be subjected to adverse actions by any school officials as a result of initiating a complaint.

E. The postsecondary school shall maintain records on all enrolled students. At a minimum, these records shall include:

1. Each student's application for admission and admissions records containing information regarding the educational qualifications of each regular student admitted that are relevant to the postsecondary school's admissions standards. Each student record must reflect the requirements and justification for admission of the student to the postsecondary school. Admissions records must be maintained by the school, its successors, or its assigns for a minimum of three years after the student's last date of attendance.

2. A transcript of the student's academic or course work at the school, which shall be retained permanently in either hard copy forms or in an electronic database with backup by the school, its successors, or its assigns.

3. A record of student academic or course progress at the school including programs of study, dates of enrollment, courses taken and completed, grades, and indication of the student's current status (graduated, probation, etc.) must be retained permanently. Any changes or alterations to student records must be accurately documented and signed by an appropriate school official.

4. A record of all financial transactions between each individual student and the school including payments from the student, payments from other sources on the student's behalf, and refunds. Fiscal records must be maintained for a minimum of three years after the student's last date of attendance. When tuition and fees are paid by the student in installments, a clear disclosure of truth-in-lending statement must be provided to and signed by the student.

5. ~~A written, binding agreement transacted with another school or records maintenance organization with which the school is not corporately connected for the preservation of students' transcripts by another institution or agency, as well as for access to the transcripts, in the event of school closure or revocation of certification in Virginia. State-supported, public schools originating in a state other than~~

~~Virginia and operating a campus within Virginia may choose to enter into a written, binding agreement regarding student records with the university system of which they are a part~~ The school shall make the documents referenced in subdivisions 1 through 4 of this subsection available to the student upon request. Academic transcripts shall be provided upon request if the student is in good financial standing.

F. Each school shall provide or make available to students, prospective students, and other interested persons a catalog, bulletin, brochure, or electronic media containing, at a minimum, the following information:

1. The number of students ~~claiming Virginia residency~~ enrolled in each program offered.

2. For each Virginia location, the total number of students that completed/graduated from the school as of the end of the last academic year and the total number and percentage of students ~~claiming Virginia residence~~ who completed/graduated from each program offered by the school as of the end of the last academic year.

3. A description of any financial aid offered by the school including repayment obligations, standards of academic progress required for continued participation in the program, sources of loans or scholarships, the percentage of students receiving federal financial aid (if applicable) and the average student indebtedness at graduation.

4. A broad description, including academic and/or career-technical objectives of each program offered, the number of hours of instruction in each subject and total number of hours required for course completion, course descriptions, and a statement of the type of credential awarded.

5. A statement of tuition and fees and other charges related to enrollment, such as deposits, fees, books and supplies, tools and equipment, and any other charges for which a student may be responsible.

6. The school's refund policy for tuition and fees pursuant to subsection N of this section ~~and the~~.

7. The school's procedures for handling complaints, including procedures to ensure that a student will not be subject to unfair actions as a result of his initiation of a complaint proceeding.

~~7.~~ 8. The name and address of the school's accrediting body, if applicable.

~~8.~~ 9. The minimum requirements for satisfactory completion of each degree level and degree program, or nondegree certificates/diplomas.

~~9.~~ 10. A statement that ~~all school officials~~ accurately ~~represent~~ describes the transferability of any courses ~~or programs and that indicates whether any of the associate degrees offered by the school are considered terminal degrees~~.

~~10.~~ 11. A statement that ~~ensures that all school officials~~ accurately ~~represent~~ represents the transferability of any diplomas ~~or,~~ certificates, or degrees offered by the school.

~~11.~~ 12. If the institution offers programs leading to the Associate of Applied Science or Associate of Occupational Science degree, a statement that these programs are terminal occupational/technical programs and that credits generally earned in these programs are not applicable to other degrees.

~~12.~~ 13. The academic or course work schedule for the period covered by the publication.

~~13.~~ 14. A statement that accurately details the type and amount of career advising and placement services offered by the school.

~~14.~~ 15. The name, location, and address of the main campus, branch [ , ] or instructional site operating in Virginia.

G. The school must have a clearly defined process by which the curriculum is established, reviewed and evaluated. Evaluation of school effectiveness must be completed on a regular basis and must include, but not be limited to:

1. An explanation of how each program is consistent with the mission of the school.

2. An explanation of the written process for evaluating each degree level and program, or career-technical program, once initiated and an explanation of the procedures for assessing the extent to which the educational goals are being achieved.

3. Documented use of the results of these evaluations to improve the degree and career-technical programs offered by the school.

H. Pursuant to § 23-276.3 B of the Code of Virginia, the school must maintain records that demonstrate it is financially sound; exercises proper management, financial controls and business practices; and can fulfill its commitments for education or training. The school's financial resources should be characterized by stability, which indicates the school is capable of maintaining operational continuity for an extended period of time. The stability indicator that will be used is the USDOE Financial Ratio (composite score).

1. Institutions of higher education shall provide the results of an annual audited, reviewed or compiled financial statement. Career-technical schools shall provide the results of an annual audited, reviewed or compiled financial statement or the school may elect to provide financial information on forms provided by council staff. The financial report shall be prepared in accordance with generally accepted accounting principles (GAAP) currently in effect. The financial report shall cover the most recent annual accounting period completed.

2. The USDOE composite score range is -1.0 to 3.0. Schools with a score of 1.5 to 3.0 meet fully the stability requirement in subsection I of this section; scores between

1.0 and 1.4 meet the minimum expectations; and scores less than 1.0 do not meet the requirement and shall be immediately considered for audit.

I. Pursuant to § 23-276.3 B of the Code of Virginia, the school shall have and maintain a surety instrument issued by a surety company or banking institution authorized to transact business in Virginia that is adequate to provide refunds to students for the unearned non-Title IV portion of tuition and fees for any given semester, quarter or term and to cover the administrative cost associated with the instrument claim. The instrument shall be based on the non-Title IV funds that have been received from students or agencies for which the education has not yet been delivered. This figure shall be indicated in an audited ~~or reviewed~~ financial ~~statements~~ statement as a Current (non-Title IV) Tuition Liability. A school certified under this regulation shall be exempt from the surety instrument requirement if it can demonstrate a USDOE composite financial responsibility score of 1.5 or greater on its current financial statement; or if it can demonstrate a composite score between 1.0 and 1.4 on its current financial statement and has scored at least 1.5 on a financial statement in either of the prior two years. The school's eligibility for the surety waiver shall be determined annually, at the time of recertification.

1. Public postsecondary schools originating in a state other than Virginia that are operating a branch campus or instructional site in the Commonwealth of Virginia are exempt from the surety bond requirement.

2. New schools and unaccredited existing schools must complete at least ~~two~~ five calendar years of academic instruction and/or certification to qualify for the surety waiver/exemption.

3. Existing schools seeking a waiver of the surety instrument requirement must submit an audited financial statement for the most recent fiscal year end [ , ] that reflects the appropriate composite score as indicated in this subsection.

J. The school shall have a current written policy on faculty accessibility that shall be distributed to all students. The school shall ensure that instructional faculty are accessible to students for academic or course advising at stated times outside a course's regularly scheduled class hours at each ~~site~~ branch and throughout the period during which the course is offered.

K. All recruitment personnel must provide prospective students with current and accurate information on the school through the use of written and electronic materials and in oral admissions interviews:

1. The school shall be responsible and liable for the acts of its admissions personnel.

2. No school, agent, or admissions personnel shall knowingly make any statement or representation that is false, inaccurate or misleading regarding the school.

L. All programs offered via telecommunications or distance education must be comparable in content, faculty, and resources to those offered in residence, and must include regular student-faculty interaction by computer, telephone, mail, or face-to-face meetings. Telecommunication programs and courses shall adhere to the following minimum standards:

1. The educational objectives for each program or course shall be clearly defined, simply stated, and of such a nature that they can be achieved through telecommunications.

2. Instructional materials and technology methods must be appropriate to meet the stated objectives of the program or course. The school must consider and implement basic online navigation of any course or program, an information exchange privacy and safety policy, a notice of minimum technology specification for students and faculty, proper system monitoring, and technology infrastructure capabilities sufficient to meet the demands of the programs being offered.

3. The school shall provide faculty and student training and support services specifically related to telecommunication activities.

4. The school shall provide for methods for timely interaction between students and faculty.

5. The school shall develop standards that ensure that accepted students have sufficient background, knowledge, and technical skills to successfully undertake a telecommunications program.

M. The school shall maintain and ensure that students have access to a library with a collection, staff, services, equipment and facilities that are adequate and appropriate for the purpose and enrollment of the school. Library resources shall be current, well distributed among fields in which the institution offers instructions, cataloged, logically organized, and readily located. The school shall maintain a continuous plan for library resource development and support, including objectives and selections of materials. Current and formal written agreements with other libraries or with other entities may be used. Institutions offering graduate work shall provide access to library resources that include basic reference and bibliographic works and major journals in each discipline in which the graduate program is offered. Career-technical schools shall provide adequate and appropriate resources for completion of course work.

N. In accordance with § 23-276.3 B of the Code of Virginia, the school shall establish a tuition refund policy and communicate it to students. ~~Accredited institutions shall adhere to the tuition refund requirements of their accrediting body, if required, and if those requirements describe specific refund terms. Otherwise, accredited institutions, as well as all other schools, shall adhere to the following tuition refund requirements:~~ Each school shall establish, disclose, and utilize a system of tuition and fee charges for each program of instruction. These charges shall be applied uniformly to all [ ~~similarly circumstanced~~ similarly circumstanced ] students.

This requirement does not apply to group tuition rates to business firms, industry, or governmental agencies that are documented by written agreements between the school and the respective organization.

1. The school shall adopt a minimum refund policy relative to the refund of tuition, fees, and other charges. All fees and payments, with the exception of the nonrefundable fee described in subdivision 2 of this subsection, remitted to the school by a prospective student shall be refunded if the student is not admitted, does not enroll in the school, does not begin the program or course, withdraws prior to the start of the program, or is dismissed prior to the start of the program.

2. A school may require the payment of a reasonable nonrefundable initial fee, not to exceed $100, to cover expenses in connection with processing a student's enrollment, provided it retains a signed statement in which the parties acknowledge their understanding that the fee is nonrefundable. No other nonrefundable fees shall be allowed prior to enrollment.

3. The school shall provide a period of at least three business days, excluding weekends and holidays, during which a student applicant may cancel his enrollment without financial obligation other than the nonrefundable fee described in subdivision 2 of this subsection.

4. Following the period described in subdivision 3 of this subsection, a student applicant (one who has applied for admission to a school) may cancel, by written notice, his enrollment at any time prior to the first class day of the session for which application was made. When cancellation is requested under these circumstances, the school is required to refund all tuition paid by the student, less a maximum tuition fee of 15% of the stated costs of the course or program or $100, whichever is less. A student applicant will be considered a student as of the first day of classes.

5. ~~An individual's status as a student shall be terminated by the school not later than seven consecutive instructional days after the last day on which the student actually attended the school. Termination may be effected earlier by written notice.~~ The date of the institution's determination that the student withdrew should be no later than 14 calendar days after the student's last date of attendance as determined by the institution from its attendance records. The institution is not required to administratively withdraw a student who has been absent for 14 calendar days. However, after 14 calendar days, the institution is expected to have determined whether the student intends to return to classes or to withdraw. In addition, if the student is eventually determined to have withdrawn, the end of the [ ~~12-day~~ 14-day ] period begins the timeframe for calculating the refunds. In the event that a written notice is submitted, the effective date of termination ~~will~~ shall be the date ~~the student last attended classes~~ of the written notice. The school may require that written notice be transmitted via registered or certified mail, or by electronic transmission provided that such a stipulation is contained in the written enrollment contract. ~~The school may require that the parents or guardians of students under 18 years of age submit notices of termination on behalf of their children or wards.~~ The school is required to submit refunds to individuals who have terminated their status as students within 45 days after receipt of a written request or the date the student last attended classes whichever is sooner. An institution that provides the majority of its program offerings through distance learning shall have a plan for student termination, which shall be provided to council staff for review with its annual or recertification application.

6. In the case of a prolonged illness or accident, death in the family, or other special circumstances that make attendance impossible or impractical, a leave of absence may be granted to the student if requested in writing by the student or designee. No monetary charges or accumulated absences may be assessed to the student during a leave of absence. A school need not treat a leave of absence as a withdrawal if it is an approved leave of absence. A leave of absence is an approved leave of absence if:

a. The school has a formal, published policy regarding leaves of absence;

b. The student followed the institution's policy in requesting the leave of absence and submits a signed, dated request with the reasons for the leave of absence;

c. The school determines that there is a reasonable expectation that the student will return to the school;

d. The school approved the student's request in accordance with the published policy;

e. The school does not impose additional charges to the student as a result of the leave of absence;

f. The leave of absence does not exceed 180 days in any 12-month period; and

g. Upon the student's return from the leave of absence, the student is permitted to complete the coursework he began prior to the leave of absence;

7. If a student does not resume attendance at the institution on or before the end of an approved leave of absence, the institution must treat the student as a withdrawal and the date that the leave of absence was approved should be considered the last date of attendance for refund purposes.

~~6.~~ 8. The minimum refund policy for a school that financially obligates the student for a quarter, semester, trimester or other period not exceeding 4-1/2 calendar months shall be as follows:

a. For schools that utilize an add/drop period, a student who withdraws during the add/drop period shall be entitled to 100% refund for the period.

b. For unaccredited schools and schools that do not utilize an add/drop period:

~~a.~~ (1) A student who enters school but withdraws during the first 1/4 (25%) of the period is entitled to receive as a refund a minimum of 50% of the stated cost of the course or program for the period.

~~b.~~ (2) A student who enters a school but withdraws after completing 1/4 (25%), but less than 1/2 (50%) of the period is entitled to receive as a refund a minimum of 25% of the stated cost of the course or program for the period.

~~c.~~ (3) A student who withdraws after completing 1/2 (50%), or more than 1/2 (50%), of the period is not entitled to a refund.

~~7.~~ 9. The minimum refund policy for a school that financially obligates the student for the entire amount of tuition and fees for the entirety of a program or course shall be as follows:

a. A student who enters the school but withdraws or is terminated during the first quartile (25%) of the program shall be entitled to a minimum refund amounting to 75% of the cost of the program.

b. A student who withdraws or is terminated during the second quartile (more than 25% but less than 50%) of the program shall be entitled to a minimum refund amounting to 50% of the cost of the program.

c. A student who withdraws or is terminated during the third quartile (more than 50% but less than 75%) of the program shall be entitled to a minimum refund amounting to 25% of the cost of the program.

d. A student who withdraws after completing more than three quartiles (75%) of the program shall not be entitled to a refund.

~~8.~~ 10. The minimum refund policy for a school that offers its programs completely via telecommunications or distance education shall be as follows:

a. For a student canceling after the 5th calendar day following the date of enrollment but prior to receipt by the school of the first completed lesson assignment, all moneys paid to the school shall be refunded, except the nonrefundable fee described in subdivision 2 of this subsection.

b. If a student enrolls and withdraws or is discontinued after submission of the first completed lesson assignment, but prior to the completion of the program, minimum refunds shall be calculated as follows:

(1) A student who starts the program but withdraws up to and including completion of the first quartile (25%) of the program is entitled to receive as a refund a minimum of 75% of the stated cost of the course or program for the period.

(2) A student who starts the program but withdraws after completing up to the second quartile (more than 25%, but less than 50%) of the program is entitled to receive as a refund a minimum of 50% of the stated cost of the course or program for the period.

(3) A student who starts the program but withdraws after completing up to the third quartile (more than 50%, but less than 75%) of the program is entitled to receive as a refund a minimum of 25% of the stated cost of the course or program for the period.

(4) A student who withdraws after completing the third quartile (75%) or more of the program is not entitled to a refund.

c. The percentage of the program completed shall be determined by comparing the number of completed lesson assignments received by the school to the total number of lesson assignments required in the program.

d. If the school uses standard enrollment terms, such as semesters or quarters, to measure student progress, the school may use the appropriate refund policy as provided in [ ~~subdivisions~~ subdivision ] 8 or 9 of this subsection.

~~9.~~ 11. Fractions of credit for courses completed shall be determined by dividing the total amount of time required to complete the period or the program by the amount of time the student actually spent in the program or the period, or by the number of correspondence course lessons completed, as described in the contract.

~~10.~~ 12. Expenses incurred by students for instructional supplies, tools, activities, library, rentals, service charges, deposits, and all other charges are not required to be considered in tuition refund computations when these expenses have been represented separately to the student in the enrollment contract and catalogue, or other documents, prior to enrollment in the course or program. The school shall adopt and adhere to reasonable policies regarding the handling of these expenses when calculating the refund ~~and shall submit the policies to council staff for approval~~.

~~11.~~ 13. For programs longer than one year, the policy outlined in subdivisions ~~7 and 8~~ 9, 10, and 11 of this subsection shall apply separately for each academic year or portion thereof.

~~12.~~ 14. Schools shall comply with the cancellation and settlement policy outlined in this section, including promissory notes or contracts for tuition or fees sold to third parties.

~~13.~~ 15. When notes, contracts or enrollment agreements are sold to third parties, the school shall continue to have the responsibility to provide the training specified regardless of the source of any tuition, fees, or other charges that have been remitted to the school by the student or on behalf of the student.

O. The school shall keep ~~official~~ relevant academic transcripts for all teaching faculty to document that each has

the appropriate educational credentials ~~or other relevant documentation to support reported experience~~ in the area of teaching responsibility ~~or documentation of~~. In the event teaching qualification is based on professional competencies and/or scholarly achievements, relevant documentation to support reported experience must be retained by the school.

P. If an internship, externship, or production work is necessary as a part of the school's education program, the school must adhere to the following:

1. When programs contain internships or externships, in any form, the professional training must:

a. Be identified as part of the approved curriculum of the school and be specified in terms of expected learning outcomes in a written training plan.

b. Be monitored by an instructor of record during the entire period of the internship.

c. Not be used to [ ~~provided~~ provide ] labor or [ as ] replacement for a permanent employee.

d. Be performed according to a specified schedule of time required for training including an expected completion date.

e. If the internship, externship, or production work is part of the course requirement, [ the ] student may not be considered as a graduate or issued a graduation credential until the internship, externship, or production work has been satisfactorily completed.

2. When receiving compensation for services provided by students as part of their education program, the school must clearly inform customers that services are performed by students by (i) posting a notice in plain view of the public or (ii) requiring students to wear nametags that identify them as students while performing services related to their training.

Q. An institution shall notify council staff of the following occurrences no later than 30 days following said occurrence:

1. Addition of new programs or modifications to existing program. Program names must adhere to the CIP taxonomy maintained by the National Center for Education Statistics.

2. Addition [ of ] a new branch location or instructional site.

3. Address change of a branch or instructional site in Virginia.

Notification of the above-referenced occurrences shall be submitted in writing on forms provided by and in a manner prescribed by the council.

R. An institution shall notify the council of the following occurrences no later than 30 days following said occurrence.

1. Naming of new school president.

2. Naming of new campus or branch director.

3. Naming of person responsible for the regulatory oversight of the institution.

**8VAC40-31-165. Equipment and facilities.**

A. All buildings where courses of instruction are being conducted must comply with all municipal, county, state, and federal regulations as to fire, safety, health, and sanitation codes or regulations.

B. Lighting, heating, and ventilation must meet institutional needs. The equipment and facilities must be suitable to meet the training specified in the course content for the maximum student enrollment. Where applicable, all equipment, premises, and facilities must be maintained in conformity with state and federal rules and regulations.

C. Equipment shall be maintained in good working order.

Part VI
Certification Requirements

**8VAC40-31-170. Initial certification, recertification, and change of ownership.**

A. An institution shall not use the term "college" or "university" or words of similar meaning until it has received acknowledgment from council staff that the name is not in violation of 8VAC40-31-20.

1. A school may not use the term "college" in its name unless the school has been approved or seeks to offer programs at the associate degree or above.

2. A school may not use the term "university" in its name unless the school has been approved or seeks to offer programs at the master's degree or above.

3. The council may refuse to approve a name change when, in the council's judgment, the proposed name is likely to mislead the public about the school's identity or the nature of its programs.

~~1.~~ 4. A school seeking certification must notify council staff of its proposed name prior to filing such name with the State Corporation Commission.

~~2.~~ 5. Prior to receiving certification to operate, a copy of the school's certificate from the Virginia State Corporation Commission authorizing it to transact business in the Commonwealth under the acknowledged name must be submitted to council staff.

B. A school shall not operate in the Commonwealth of Virginia without first receiving certification to operate from the council. Certified schools shall not enter into any agreement to deliver or develop courses or programs of study in Virginia with noncertified postsecondary schools.

C. An out-of-state postsecondary school seeking certification to operate in the Commonwealth of Virginia must secure written documentation from the higher education coordinating and/or approving agency in the state or country in which the school is formed, chartered, established, or incorporated indicating that the school is operating in good standing. If the school formerly operated in another state or country but is not operating there at the time of its application to operate in Virginia, the school must secure from the higher

education coordinating and/or approving agency documentation that it closed in good standing and would be allowed to re-establish a postsecondary school in that state or country. These written documentations must be provided to council staff.

D. A school submitting its initial application for certification will have 180 days to complete the application process, after which time its application will be withdrawn by the council and it will receive a refund of the application fee minus the nonrefundable handling charge of $300.

E. All certifications shall expire on the certificate expiration date. Applications for recertification must be submitted to council staff at least 60 days prior to the expiration date of the current certification. If a school allows its certification to operate to expire, the school shall not be eligible for recertification and must submit an application for initial certification including the appropriate application fee.

F. Certification is not transferable. In the event of a change of ownership of a certified school, the new owner or governing body must secure certification. The school must apply for certification within 45 business days following a change of ownership. During the 45-day period and the time required for the council staff to process the new application, up to and not exceeding 90 days, the old certification shall remain in effect provided that no changes have been made in the academic programs, policies, or financial considerations such that the change would constitute or create a violation of council's policies.

1. The following constitutes a change of ownership:

a. Purchase of the entire school or assets of school.

b. Transfer, sale, or purchase of stock, membership, or other direct or beneficial ownership interest by a single entity or by multiple entities in a single transaction or a series of transactions that results in at least 51% change in control.

2. The acquisition of an interest in a certified school by bequest, descent, survivorship, or operation of law does not constitute a change of ownership. However, the person acquiring the ownership interest shall send written notice to the council of such acquisition within 30 days of its closing or validation. The council may determine on a case-by-case basis that other similar transfers may not constitute a change of ownership.

3. New school owners are responsible for maintaining and servicing all student records that were the responsibility of the prior owners of the school.

4. New school owners are responsible for resolving all student complaints that were the responsibility of the prior owners of the school or that were filed with the council prior to the final approval of the change of ownership.

5. New school owners are responsible for honoring the terms of current student enrollment agreements, institutional scholarships, or institutional grants for all students who were enrolled or taking classes at the time the change of ownership took place.

G. Council staff will process all applications, conduct the site visit, and provide notice to applicants within 45 business days of receipt of a completed application package. Approval of the certificate to operate by the council is subject to scheduling of council meetings and other factors affecting the agendas of council meetings.

H. Valid-through dates of Certificates to Operate and due dates of recertification applications are as follows:

1. Out-of-state private degree-granting and career-technical school certificates are valid for one year beginning on September 1 of the calendar year and ending on August 31 of the following calendar year. Applications are due not later than July 2.

2. Out-of-state public institution certificates are valid for one year beginning on September 15 of the calendar year and ending on September 14 of the following calendar year. Applications are due not later than July 16.

3. In-state private nonprofit institution certificates are valid for one year beginning on October 1 of the calendar year and ending on September 30 of the following calendar year. Applications are due not later than August 2.

4. In-state proprietary degree-granting and career-technical school certificates are valid for one year beginning on October 15 of the calendar year and ending on October 14 of the following calendar year. Applications are due not later than August 16.

5. In-state proprietary career-technical school certificates (letters A-D) are valid for one year beginning on November 1 of the calendar year and ending on October 31 of the following calendar year. Applications are due not later than September 2.

6. In-state proprietary career-technical school certificates (letters E-P) are valid for one year beginning on November 15 of the calendar year and ending on November 14 of the following calendar year. Applications are due not later than September 16.

7. In-state proprietary career-technical school certificates (letters Q-Z and others) are valid for one year beginning on December 1 of the calendar year and ending on November 30 of the following calendar year. Applications are due not later than October 2.

**8VAC40-31-180. Application requirements.**

A. Each certification to operate attests that the school is in compliance with Chapter 21.1 (§ 23-276.1 et seq.) of Title 23 of the Code of Virginia and with this chapter.

B. To apply for certification, the following information must be submitted:

1. A completed certification application ~~form~~ package provided by council staff.

2. A statement regarding the school's accreditation status, if applicable.

a. Career-technical schools must provide a statement that the courses of study offered conform to state, federal, trade, or manufacturing standards of training for the occupational fields in which such standards have been established or that courses conform to recognized training practices in those fields.

b. Out-of-state institutions and career-technical schools requesting initial certification must be accredited by an accrediting organization recognized by the ~~USDOE~~ U.S. Department of Education (USDOE) and must provide evidence that there has been no determination of limitation, suspension, revocation, or termination by the USDOE, an accrediting body, or a state regulatory body against the school within the past five years.

c. Unaccredited in-state institutions that offer courses for degree credit and existing unaccredited out-of-state career-technical schools must submit a plan of action for securing accreditation from an organization recognized by the USDOE, including the name of the accrediting organization and timeframe. In order to remain eligible for certification, the postsecondary school must secure, at a minimum, candidacy status or equivalent within three years of its initial date of certification, and initial accreditation no later than six years after initial certification. Changes to the plan of action timeframe for accreditation will be granted only at the discretion of the council.

d. Unaccredited in-state institutions that undergo a change of ownership during the time period covered by the plan of action for securing accreditation, and that wish to remain eligible for certification under new ownership, will remain on the plan of action timeframe established by the former ownership. This plan of action timeframe begins from the initial date of certification under the former ownership and encompasses the accreditation dates established in the plan of action put into place by the former ownership. No additional time will be granted for obtaining the minimum level of accreditation required of the plan of action due to the change in ownership. Changes to the plan of action timeframe for accreditation will not be granted except at the discretion of the council.

3. A transacted surety instrument form, with the State Council of Higher Education for Virginia named as the obligee.

4. A three-year projected budget that indicates that the school is capable of maintaining operational continuity for up to three years. The budget should demonstrate:

a. That the individual, partnership, or corporation that owns the school is solvent and has the financial capacity to support the operation; and

b. A positive net worth, accompanied by a reasonable debt to equity ratio.

~~4.~~ 5. A completed checklist, signed and dated, acknowledging full compliance with certification criteria, along with a notarized attestation statement signed by the chief executive officer or equivalent.

~~5.~~ 6. A company check in the correct, nonrefundable amount made payable to the Treasurer of Virginia.

~~6.~~ 7. A copy of the school's certificate, if incorporated, from the State Corporation Commission providing authorization to transact business within the Commonwealth.

~~7.~~ 8. For schools whose main campus is not in Virginia, a copy of the school's authorization to operate from the state agency in which its main campus is domiciled. No institution found to be operating illegally in another state shall be certified to operate in Virginia. An institution that has lost its legal authority to operate in another state shall be required to submit written documentation that describes the circumstances under which its authority was lost and to submit written documentation of the steps taken to remedy these circumstances before making application for certification in Virginia.

~~8.~~ 9. A complete listing of all sites, along with their addresses, phone numbers (if applicable), and programs offered at the site.

~~9.~~ 10. For new postsecondary school applicants, a signed and notarized statement provided by the president or CEO, that attests to any previous involvement in the operation of a postsecondary school or any previous involvement by any administrator, owner, controlling shareholder, or member of the school's governing board in the operation of a postsecondary school. At a minimum, this statement shall include the name(s) of previous schools, the dates of the involvement, the positions held within the school, the location, the status (open/closed, and accredited/nonaccredited) of the school, any known violation of federal or state financial aid rules by the school, any known violations of the policies of an accreditor of the school, any bankruptcy filings by the school, and conviction or civil penalty levied by any legal entity in connection with this or any other educational entity in which he was employed or invested.

~~10.~~ 11. A complete list of all diploma, certificate, or degree program offerings during the valid period of the certification. This list shall consist of the number of hours required for completion of each program, the Classification of Instructional Programs (CIP) Code where applicable, and the type of program and degree.

a. New and unaccredited schools must also include their estimated annual enrollment projections and number of students per program; and

b. Schools that are renewing certificates to operate shall include from the previous year the following information:

(1) The number of degrees, certificates, or diplomas conferred for each program offered by ~~a~~ the school at its Virginia facility.

(2) The number of students graduating and the number enrolled at its Virginia facility.

c. Unaccredited institutions of higher education and career-technical schools shall include, from follow-up surveys of graduates, the number of students reporting placement in jobs relating to their field of study within six months; and one year of graduation.

C. An existing postsecondary school licensed by any other state agency empowered by the Code of Virginia to license the school, its teachers or curriculum, or both, must become certified prior to enrolling any student into a course for degree credit or program of study. The school must submit an application for certification to operate that shall contain all of the requirements outlined in 8VAC40-31-160 B and C.

D. When a branch campus ~~or site~~ of a school is under different ownership or different school name than the main campus of the school, the branch campus ~~or site~~ must submit an application for certification to operate and must pay a separate certification fee than the main campus of the school.

E. All proprietary postsecondary schools must provide evidence of a valid business license from the locality within which it seeks to operate. If and when council receives confirmation that a school is operating without the required business license, council shall take action as required by § 23-276.15 of the Code of Virginia.

F. All postsecondary schools seeking certification to operate in Virginia must undergo and successfully complete a site visit prior to the issuance of the certificate to operate.

**8VAC40-31-190. Withdrawal of application by a postsecondary school.**

A. A school that has submitted an application to the council may withdraw that application without prejudice at any time.

B. Withdrawal of an application by a school shall result in revocation by the council of all authorizations associated with that application that previously had been granted to the school.

C. A school that has withdrawn an application may submit, at any time and without prejudice, a new application to the council in accordance with Part V (8VAC40-31-130 et seq.) of this chapter.

D. A school that withdraws an application prior to receiving notification of certification will receive a refund of the filing fee minus ~~a handling charge~~ an administrative processing fee.

**8VAC40-31-193. Loss of accreditation.**

A. In the event of the loss of accreditation of a certified school, the council will move to revoke the school's [ ~~Certificate~~ certificate ] to [ ~~Operate~~ operate ].

B. The council may waive the revocation provided the school does the following within 30 days of the loss of accreditation:

1. Provide council staff with a copy of the accreditor's letter and full report explaining the reason for the revocation;

2. Provide council staff with a written explanation why the loss of accreditation should not impact the school's certification to operate in Virginia [ ~~,~~ ] and any supporting documentation; and

3. Submit to an audit to determine compliance with the council's regulations.

C. Council staff shall consider [ the ] accreditor's report, the school explanation for the loss of accreditation, and the findings of the audit to prepare a report for the council [ ~~which~~ that ] recommends:

1. Initiate revocation of the school's [ ~~Certificate~~ certificate ] to [ ~~Operate~~ operate ]; or

2. Grant conditional certification, during which time the school may not enroll new students. The terms of the conditional certification will be fixed at staff discretion based upon their findings.

D. The school must maintain a surety instrument during the totality of the conditional certification period.

E. The school shall provide written notification to all enrolled students of its loss of accreditation from its accrediting body and of its provisional certification status with the council.

F. The school shall be eligible to apply for full certification upon meeting the following conditions:

1. Provide documentation that the issues causing the loss of accreditation have been resolved.

2. Demonstrate full compliance to the provisions of this chapter by virtue of an audit during the conditional certification period.

**8VAC40-31-195. Suspension or revocation of certificate to operate.**

A. The council may (i) suspend, revoke, or refuse to issue or renew a certificate to operate; (ii) modify the certificate to operate to conditional; or (iii) impose a penalty pursuant to § 23-276.12 of the Code of Virginia for any one or combination of the following:

1. Violation of any provision of this chapter pursuant to § 23-276 of the Code of Virginia, the council's minimum standards, or any rule made by the council.

2. Furnishing of false, misleading, deceptive, altered, or incomplete information or documents to the council.

3. Violation of any attestations made in an application for a certificate to operate.

4. Presenting to prospective students, either at the time of solicitation or enrollment, or through advertising, mail circulars, or telephone solicitation, misleading, deceptive, false, or fraudulent information relating to any program, employment opportunity, or opportunities for enrollment after entering or completing programs offered by the school.

5. Presenting to prospective students, either at the time of solicitation or enrollment, or through advertising, mail circulars, or telephone solicitation, misleading, deceptive, false, or fraudulent information relating financial aid offered by the school.

6. Failure to provide or maintain premises or equipment for offering programs in a safe and sanitary condition as required by law or by state regulations or local ordinances.

7. Refusal by an agent while performing duties common to agents to display his agent's permit upon demand of a prospective student or council staff member or other interested persons.

8. Failure to maintain financial resources adequate to conduct satisfactorily the courses of instruction offered or to retain an adequate, qualified instructional staff.

9. Offering training or programs other than those acknowledged by the council.

10. Illegal discrimination in the acceptance of students.

11. Failure to provide the council or council staff within a reasonable timeframe any information, records, or files pertaining to the operation of the school or recruitment and enrollment of students or in response to an audit.

12. Employment of enrolled students in any commercial activity from which the school derives revenue without reasonable remuneration to the students unless the students are engaging in activities that are an integral component of their educational program.

13. Engaging in or authorizing other conduct that constitutes fraudulent or criminal activity.

B. A school is entitled to exercise its rights under the Administrative Process Act (§ 2.2-4000 et seq. of the Code of Virginia) prior to the denial, suspension, or revocation of its certificate to operate, pursuant to 8VAC40-31-220.

**8VAC40-31-200. Audit requirements.**

A. All certified postsecondary schools shall be subject to random periodic audits. The purpose of such audit shall be to verify compliance with ~~certification criteria~~ § [ ~~23.276~~ 23-276 ] of the Code of Virginia and the provisions outlined in this chapter.

B. At the discretion of council staff, an audit review committee shall consist of the executive director or designee and may:

1. Include individuals with the experience in the disciplines in which the school provides instruction; and/or

2. Consist of council staff.

C. Audits shall be random or triggered by, but not limited to, the following events:

1. Council staff concerns based on questionable information in the initial or recertification application.

2. Greater than average volume and frequency of negative student complaints or adverse publicity.

3. Difficulty securing accreditation within the specified time period.

4. Adverse action by the USDOE or the school's accrediting agency.

5. A USDOE composite financial responsibility score of less than 1.0.

D. Following an audit of the school, council staff shall prepare a report with recommendations for review by the council. If a school is found noncompliant, the council may:

1. Determine no action is necessary and have the report filed;

2. Change the status to ~~probationary~~ conditional certification and require remedial action(s) within a specified timeframe;

3. ~~Revoke or suspend certification~~ Initiate suspension or revocation of the school's certificate to operate.

Part VII
Procedures for Conducting Fact-Finding Conferences and Hearings

**8VAC40-31-220. Procedural rules for the conduct of fact-finding conferences and hearings (§§ 2.2-4019 through 2.2-4030 of the Code of Virginia).**

A. Fact-finding conference; notification, appearance, conduct.

1. Unless emergency circumstances exist that require immediate action, ~~no certification application shall be denied, suspended or revoked~~ no order shall be issued to refuse to grant a certification, to revoke or suspend a prior certification, or to add conditions to any certification except upon written notice stating the ~~proposed~~ basis for such action and the ~~time and place for a~~ right of the affected parties to appear at an informal fact-finding conference.

2. ~~If a basis exists for a refusal to certify or a suspension or a revocation of a certificate to operate~~ If the council determines that grounds exist to refuse to grant a certification, to revoke or suspend a prior certification, or to add conditions to any certification, the council shall ~~notify, by certified mail or by hand delivery~~ provide written notice of its intention to take the proposed action to the interested parties at the address of record ~~maintained by the council~~. The notice shall be sent by certified mail,

return receipt requested, and shall state the reasons for the proposed action.

3. Notification shall ~~include the basis for the proposed action and afford~~ provide information about informal fact-finding conference procedures, including the rights of interested parties ~~the opportunity to present written and oral information to the council that may have a bearing on the proposed action at a fact-finding conference~~ to (i) reasonable notice thereof; (ii) appear in person or by counsel or other qualified representative before the agency or its subordinates, or before a hearing [ ~~office~~ officer ] for the informal presentation of factual data, argument, or proof; (iii) have notification of any contrary fact bases or information in the possession of the agency that can be relied upon in making an adverse decision; (iv) receive a prompt decision; and (v) be informed briefly and generally [ , ] in writing, of the factual or procedural basis for an adverse decision. If no withdrawal occurs, ~~a~~ an informal fact-finding conference shall be scheduled at the earliest mutually agreeable date, but no later than 60 days from the date of the notification. A ~~school~~ party wishing to waive its right to a conference and proceed directly to formal hearing shall notify the council at least 14 days before the scheduled conference.

4. If after consideration of information presented during an informal fact-finding conference, the council determines that a basis for action still exists, the interested parties shall be notified in writing within 60 days of the informal fact-finding conference, via certified ~~or hand-delivered~~ mail, of the decision, the factual or procedural basis for the decision, and the right to appeal the decision by requesting a formal hearing. Parties to the conference may agree to extend the report deadline if more time is needed to consider relevant information.

5. Parties may enter into a consent agreement to settle the issues at any time prior to a formal hearing. If one party desires to enter into a consent agreement prior to the informal fact-finding conference or the formal hearing, as the case may be, then it shall give reasonable notice to the other party prior to the conference or hearing. A party's delay may result in denial of the proposed consent agreement.

6. Following execution of the consent agreement, council staff may make frequent attempts to determine whether the terms of the consent agreement are being implemented and whether its intended results are being achieved.

B. Hearing; notification, appearance, conduct.

1. If, after ~~a~~ the council renders a decision following an informal fact-finding conference, ~~a sufficient basis still exists to deny, suspend or revoke a certification, interested parties shall be notified by certified mail or hand delivery of the proposed action and of the opportunity for a hearing on the proposed action. If~~ an ~~organization~~ interested party desires to ~~request~~ appeal the decision by requesting a formal hearing, it shall notify the council within 14 days of ~~receipt of a report on the conference~~ the date of receipt of the certified letter. ~~Parties may enter into a consent agreement to settle the issues at any time prior to, or subsequent to, an informal fact-finding conference.~~

2. Parties to a formal hearing shall be given reasonable notice of the (i) time, place, and nature thereof; (ii) basic law under which the council contemplates its possible exercise of authority; and (iii) matters of fact and law asserted or questioned by the council.

~~2.~~ 3. If an interested party or representative fails to appear at a hearing, the hearing officer may proceed in the party's/representative's absence and make a recommendation.

~~3. Oral and written arguments may be submitted to and limited by the hearing officer. Oral arguments shall be recorded in an appropriate manner.~~

4. The formal hearing shall be presided over by a hearing officer selected from a list prepared by the Executive Secretary of the Supreme Court [ of Virginia ] and maintained in the office of the Executive Secretary of the Supreme Court.

5. In the formal hearing, the parties shall be entitled to be accompanied and represented by counsel, to submit oral and documentary evidence and rebuttal proofs, and to conduct cross-examination. The presiding officer at the formal hearing may (i) administer oaths and affirmations; (ii) receive probative evidence, exclude irrelevant, immaterial, insubstantial, privileged or repetitive proofs, rebuttal, or cross-examination, rule upon offers of proof, and oversee a verbatim recording of the evidence; (iii) hold conferences for the settlement or simplification of issued by consent; (iv) dispose of procedural requests; and (v) regulate and expedite the course of the hearing.

C. Hearing location. Hearings before a hearing officer shall be held, insofar as practical, in the county or city in which the school is located. Hearing officers may conduct hearings at locations convenient to the greatest number of persons or by telephone conference, videoconference or similar technology in order to expedite the hearing process.

D. Hearing decisions.

1. Recommendations of the hearing officer shall be a part of the record and shall include a written statement of the hearing officer's findings of fact and recommendations as well as the reasons or basis for the recommendations. Recommendations shall be based upon all the material issues of fact, law or discretion presented on the record.

2. Prior to the recommendation of the hearing officer, the parties concerned shall be given opportunity, on request, to submit in writing for the record (i) proposed findings and conclusions and (ii) a statement of reasons [ ~~therefore~~ therefor ]. On request, opportunity shall be afforded for oral arguments to the hearing officer or to the council as it

may permit in its discretion. The council shall receive and act on exceptions to the recommendation of the hearing officer prior to rendering a decision.

~~2.~~ 3. The council shall review the recommendation of the hearing officer and render a decision on the recommendation within 30 days of receipt. The decision shall ~~cite the appropriate rule, relief or denial thereof as to each issue~~ be served on the parties concerned; become a part of the record; and briefly state the findings, conclusions, reasons, or basis [ ~~therefore~~ therefor ] upon the evidence presented by the record and relevant to the basic law under which the council is operating, together with the appropriate order, certificate to operate, or denial thereof.

E. Agency representation. The executive director's designee may represent the council in an informal conference or at a hearing.

**8VAC40-31-260. Fees.**

A. All fees collected by council staff will be deposited in the State Treasury.

B. All fees are nonrefundable with the exception of withdrawal of an application in which case all fees will be refunded minus a reasonable handling charge of $300.

C. Fees must be paid with a company check and made payable to the Treasurer of Virginia.

D. The annual fee is based on the annual gross tuition received by each administrative branch of institutions certified to operate in Virginia. For out-of-state institutions certified to operate in Virginia, annual gross tuition means income generated from students enrolled at Virginia locations. The flat fee schedule is as follows:

| | |
|---|---|
| New school orientation session, per person | $150 |
| Initial fee for all new institutions of higher education = | $6,000 |
| Initial fee for all new career-technical schools = | $2,500 |
| Annual fee for all unaccredited institutions of higher education = | $6,000 |
| Annual fee for all unaccredited out-of-state career-technical schools | $2,500 |
| Renewal fee for all postsecondary schools with an annual gross tuition collected ~~greater than $150,000~~ less than $50,000, as recorded on most recent financial statement = | ~~$2,500~~ $250 |
| Renewal fee for all postsecondary schools with an annual gross tuition collected greater than ~~$100,000~~ or equal to $50,000 but less than ~~or equal to $150,000~~ $100,000, as recorded on most recent financial statement = | ~~$1,500~~ $1,000 |
| Renewal fee for all postsecondary schools with an annual gross tuition collected greater than ~~$50,000~~ or equal to $100,000 but less than ~~or equal to $100,000~~ $500,000, as recorded on most recent financial statement = | ~~$1,000~~ $2,500 |
| Renewal fee for all postsecondary schools with an annual gross tuition collected ~~less~~ greater than or equal to ~~$50,000~~ $500,000 but less than $1,000,000, as recorded on most recent financial statement = | ~~$500~~ $4,000 |
| Renewal fee for all postsecondary schools with an annual gross tuition collected greater than or equal to $1,000,000, as recorded on most recent financial statement | $5,000 |
| ~~Late fee =~~ | ~~$100/day for first 10 business days after expiration of annual certification (Maximum fee = $1,000) (11th day institution notified to cease and desist and matter referred for prosecution)~~ |
| Returned check fee = | $35 |
| ~~Noncompliance administrative fees =~~ | ~~$1,000 for each occurrence of noncompliance found as a result of audit~~ |
| Initial or renewed exemption application/request for name acknowledgement/agent registration = | $300 |

| | |
|---|---|
| Nonrefundable ~~handling charge~~ administrative fee (withdrawal of application) = | ~~$300~~ $500 career-technical, $1000 institutions of higher education |
| Request duplicate certificate to operate due to school name or address change | $100 |
| Request duplicate agent permit, to replace lost/stolen/misplaced permit | $100 |
| Application fee for each additional branch | $300 |
| Application fee for each additional site | $100 |
| Application fee for each additional program or modification to an existing program | $100 |

~~E. If a late fee is assessed, the school must submit the assessed fee, required certification fee and all required certification documents prior to the issuance of the Certificate to Operate.~~

~~F.~~ E. A school that submits a payment that is returned for any reason must resubmit the required payment, any applicable late fee, and the assessed returned check fee of $35 via a money order or certified bank check only.

**8VAC40-31-280. Closure of a postsecondary school.**

A. The council, on its own motion, may authorize a postsecondary school whose application for certification to operate is denied in accordance with 8VAC40-31-200 to continue to offer instruction ~~for degree credit~~ to all currently enrolled students until the end of the semester, quarter, or other academic term during which certification is denied.

B. The council, on its own motion, may authorize a school whose certification is revoked in accordance with 8VAC40-31-200 to offer the coursework necessary for all currently enrolled students to complete their programs and to award degrees, certificates or diplomas to those students, provided that the school:

1. Offers ~~degree~~ coursework only to those students who were enrolled at the time the school's certification was revoked; and

2. Offers all necessary coursework on a schedule that permits all currently enrolled students to complete their programs in a reasonable period of time.

C. When a school decides to voluntarily cease operations, it must immediately inform the council of the following:

1.The planned date for the termination of operations.

2. The planned date and location for the transfer of student records.

3. The name and address of the organization to receive and manage the student records and the name of the official who is designated to manage transcript requests. The organization designated for the preservation of the student records may not be corporately connected to the closing school. The council may receive student records, subject to subsection D of this section, if an appropriate depository has not been established.

4. Arrangements for the continued education of currently enrolled students via teach-out agreement or other practical solution. The teach-out plan shall consist of, but not be limited to, the following:

a. Identification of the school's official date of closure;

b. A listing by program of students enrolled at the time of the school's closure including addresses, telephone numbers, and estimated graduation dates for each student;

c. The status of all current refunds due and balances owed;

d. A listing of those students who had prepaid for any portion of their training and a calculation of the total amount that was prepaid by each student;

e. Signed agreement with one or more local educational institutions able to provide adequate education to all students in all programs; and

f. Procedures for awarding graduates their certificates, diplomas, or degrees.

5. ~~A roster showing the name, address, and current academic status of all enrolled students~~ A listing of all former students, including full name, last known mailing address, [ ~~e-mail~~ email ] address, program of study, dates of enrollment, date of completion, and credential awarded, if applicable.

D. In the event of school closure or revocation of certification, ~~the council may facilitate the transfer of student records to the designated repository~~ the school shall make provisions for transferring all official records of students to the council office, or secure a location that will maintain the records permanently, notify all students of this location and how they may obtain official copies. The records transferred to the council office, or other depository, shall include the academic records of each student, which should include:

1. Academic transcripts showing the basis of admissions, transfer credits, courses, credits, grades, graduation authorization, and student name changes for each student;

2. Transcripts of financial aid for each student, if maintained;

3. Foreign student forms for foreign students;

4. Veterans Administration records for veterans;

5. Copies of degrees, diplomas, and certificates awarded, if maintained;

6. One set of course descriptions for all courses offered by the school; and

7. Evidence of accreditation, if any, during the years covered by transcripts.

E. ~~The council shall be responsible for securing and preserving student records until the designated repository accepts the records.~~ The school shall notify all enrolled students of the pending closure immediately, describing their financial obligations as well as their rights to a refund or adjustment, and provisions made for assistance toward completion of their academic programs, whether in the institution that is closing, or by contract with another institution or organization to teach out the educational programs. Such agreements must be approved by the council.

F. The council shall seek the advice of the Career College Advisory Board on matters relating to closures of its member schools.

**8VAC40-31-300. ~~Freedom of Information Act to apply.~~ (Repealed.)**

~~All materials submitted by a school in its application for approval or in response to a request by the council for pertinent information shall be subject to the Virginia Freedom of Information Act (§ 2.2-3700 et seq. of the Code of Virginia) and shall be available for public inspection in accordance with the provisions of § 2.2-3704 of the Code of Virginia.~~

**8VAC40-31-310. Student Tuition Guaranty Fund.**

A. The executive director shall appoint in writing a Director of the Student Tuition Guaranty Fund.

B. The purpose of the fund is to reimburse tuition ~~and fees~~ due students at schools ~~previously approved under § 22.1-321 of the Code of Virginia~~ certified to operate when the school ceases to operate.

C. Schools seeking initial certification after July 1, 2004, shall not be required to pay into the fund. All other schools that were certified to operate prior to July 1, 2004, under the provisions of § 22.1-321 of the Code of Virginia, shall be subject to the provisions valid at the time of its recertification.

D. A claim shall be made against the fund only if it arises out of the cessation of operation by a school at which the student was enrolled or was on an approved leave of absence at the time of the closure and the closure prevented the student from completing the program of study for which he enrolled on or after July 1, 2004. ~~If the school holds a surety bond or other guaranty instrument, filing a claim against the guaranty instrument shall be the initial response.~~ Claims shall be filed with the director of the fund on forms prescribed by the council within three years after cessation of operation by the school. Claims filed after that period shall not be considered. ~~Within a reasonable time after receipt of a claim, the director shall give the school or its owners, or both, notice of the claim and an opportunity to show cause, within 30 days, why the claim should not be reimbursed in whole or part. The director may cause to be made other investigation of the claim as he deems appropriate or may base his determination, without further investigation, upon information contained in the records of the council~~ [ ~~,~~ ] Claims shall be limited to the unearned tuition paid to the closing institution for which the student received no educational instruction.

E. ~~The director's determination shall be in writing and shall be mailed to the claimant and the school or its owners, or both, and shall become final 30 days after the receipt of the determination unless either the claimant or the school, or its owners, within the 30-day period, files with the director a written request for a hearing. Upon request, a hearing shall be held and, subject to the authority of the director to exclude irrelevant or other inappropriate evidence, the claimant and the school or its owners may present such information as these parties deem pertinent.~~ The director will attempt to secure a teach-out agreement as outlined in 8VAC40-31-280 C 4 prior to issuing a refund of the unearned tuition to a student unable to complete a program of study due to a school closure. If a teach-out agreement cannot be secured, the director shall proceed with a claim against the closed school's surety instrument.

F. The executive director shall administer the fund upon the following basis:

1. The assets of the fund may not be expended for any purpose other than to pay bona fide claims made against the fund;

2. All payments into the fund shall be maintained by the state comptroller who shall deposit and invest the assets of the fund in any savings accounts or funds that are federally or state insured, and all interests or other return on the fund shall be credited to the fund;

3. Payment into the fund shall be made in the form of a company or cashier's check or money order made payable to the "Student Tuition Guaranty Fund."

G. When a claim is allowed by the director, the executive director, as agent for the fund, shall be subrogated in writing to the amount of the claim and the executive director shall thereby be authorized to take all steps necessary to perfect the subrogation rights before payment of the claim. Refunds will be made, first, to the lender issuing student financial aid or the guarantor of the loan, and second, to the student. In the event no financial aid was involved, then refunds will be made to the student.

**8VAC40-31-320. Agent registration.**

A. Agents representing one or more noncertified accredited postsecondary schools must:

1. Register with the council prior to soliciting in Virginia; and

2. Pay an annual fee of $300 per school represented.

B. Agents representing noncertified unaccredited postsecondary schools shall not conduct business in Virginia.

C. Agents operating instructional sites in Virginia must seek council certification.

D. Agent permits expire on December 31 of each calendar year. An application for an agent permit renewal must be submitted to council staff at least 60 days prior to the expiration date.

E. Refusal by an agent to display his agent's permit upon request of a prospective student, council staff member, or other interested person may result in the revocation of the agent permit.

NOTICE: The following forms used in administering the regulation were filed by the agency. The forms are not being published; however, online users of this issue of the Virginia Register of Regulations may click on the name to access a form. The forms are also available from the agency contact or may be viewed at the Office of the Registrar of Regulations, General Assembly Building, 2nd Floor, Richmond, Virginia 23219.

FORMS (8VAC40-31)

~~Institutional Certification Application Form: Religious Exemption (rev. 10/04).~~

~~Institutional Certification Application Form (rev. 4/06).~~

~~Institutional Certification Checklist for Institutions of Higher Education (rev. 10/04).~~

~~Institutional Certification Checklist for Postsecondary Schools (rev. 4/06).~~

~~Enrollment Data Worksheet (eff. 8/06).~~

~~Institutional Sites Listing (rev. 4/06).~~

~~Acknowledgement of Prior Postsecondary Involvement (rev. 11/04).~~

~~Surety Instrument Calculation Worksheet (rev. 4/06).~~

~~Surety Bond (rev. 4/06).~~

~~Sample Clean Irrevocable Letter of Credit; Surety Information and Bond Checklist (rev. 4/06).~~

~~Certificate, Diploma, or Degree Program Information (rev. 4/06).~~

~~Chart of Accounts; Income Statement; Balance Sheet.~~

~~Change of Location Application.~~

~~Change of Ownership Application.~~

~~Buyer/Seller Affidavit and Certification.~~

~~Statement of Responsibility of Refund Liability.~~

~~Report on the Closing of a Campus.~~

~~Institutional Change of Name Application.~~

~~Private Nonprofit School Financial Composite Score Calculation Worksheet.~~

~~Proprietary School Financial Composite Score Calculation Worksheet.~~

Acknowledgement of Prior Postsecondary Involvement (rev. 3/07)

Administrator Qualification (7/08)

Application for Agent Permit (9/09)

Certificate, Diploma, or Degree Program Information (rev. 2/12)

Change of Location Application (rev. 3/07)

Change of Ownership Application (rev. 3/07)

Chart of Accounts (rev. 3/07)

Directions for Preparing School Plan Report (undated)

Institutional Certification Application Form (rev. 8/08)

Institutional Certification Application Form: Religious Exemption (rev. 7/11)

Institutional Certification Checklist for Postsecondary Schools (rev. 7/07)

Institutional Change of Name Application (3/07)

Institutional Sites Listing (rev. 1/12)

Instructions for Completing Institutional Certification Applications (rev. 8/08)

Instructor Qualification (7/08)

Notification of Program Modification (rev. 2/12)

Program Notification (rev. 2/12)

Projected Accounting Budget (rev. 7/07)

Proprietary School Financial Composite Score Calculation Worksheet (undated)

Report on the Closing of a Campus (rev. 3/07)

Request for Name Acknowledgement (rev. 3/07)

School Catalog Checklist (rev. 8/08)

Sample Irrevocable Letter of Credit (rev. 3/07)

Surety Bond (rev. 4/09)

Surety Instrument Calculation Worksheet (rev. 2/11)

VA.R. Doc. No. R09-1980; Filed November 25, 2013, 2:14 p.m.

# TITLE 11. GAMING

## VIRGINIA RACING COMMISSION

### Final Regulation

REGISTRAR'S NOTICE: The Virginia Racing Commission is claiming an exemption from the Administrative Process Act pursuant to subdivision A 17 of § 2.2-4002 of the Code of Virginia (i) when acting by and through its duly appointed stewards or in matters related to any specific race meeting or (ii) in promulgating technical rules regulating actual live horse racing at race meetings licensed by the commission.

Title of Regulation: **11VAC10-120. Claiming Races (amending 11VAC10-120-50).**

Statutory Authority: § 59.1-369 of the Code of Virginia.

Effective Date: January 1, 2014.

Agency Contact: David S. Lermond, Jr., Regulatory Coordinator, Virginia Racing Commission, 10700 Horseman's Road, New Kent, VA 23124, telephone (804) 966-7404, FAX (804) 966-7418, or email david.lermond@vrc.virginia.gov.

Summary:

*The amendments allow the original owner of a claimed horse to receive the claiming price as soon as the stewards issue a transfer authorization of the horse from the original owner to the claimant. This rule change makes the claiming rule in Virginia consistent with most other jurisdictions.*

**11VAC10-120-50. Claiming procedure.**

A claim may be filed on a horse programmed to race by properly completing a claim slip, including but not limited to the correct spelling of the horse's name, the date and the race number, sealing the claim slip in an envelope and depositing the envelope in a locked claims box. The following provisions shall apply to the claiming of a horse:

1. The licensee shall provide claim slips, claim envelopes and a locked claim box to secure filed claims;

2. The claim slip, enclosed in a sealed envelope, must be deposited in a locked claim box at least 15 minutes before post time of the race for which the claim is filed;

3. The licensee shall provide a clock, and before the sealed envelope is deposited in the locked claim box, the time of day shall be stamped upon the envelope;

4. No money or its equivalent shall be put in the claim box;

5. The person filing the claim must have sufficient funds on deposit with the horsemen's bookkeeper or licensee in not less than the amount of the designated price and applicable sales taxes;

6. The claims clerk shall inform the stewards of a claim filed for a horse and of multiple claims on a horse;

7. The claims clerk shall ascertain that the claim slip and envelope are properly complete;

8. The claims clerk shall ascertain that the person is eligible to claim a horse and inform the stewards immediately of any doubts of the person's eligibility;

9. The claims clerk shall ascertain that there are sufficient funds on deposit with the horsemen's bookkeeper or licensee of not less than the amount of the claim and applicable sales taxes;

10. If more than one valid claim is filed for a horse, then title to the horse shall be determined by lot under the supervision of the stewards or their representative;

11. A claimed horse shall race in the interest of and for the account of the owner from whom the horse was claimed;

~~12. The original trainer shall remain the absolute insurer of the condition of the horse until any post-race testing is completed;~~

~~13.~~ 12. Title to a claimed horse shall ~~be transferred to the new owner~~ vest in the successful claimant at the time the horse is deemed a starter whether the horse is dead or alive, sound or unsound, or injured in the race or after the race;

13. Upon a successful claim the stewards shall issue a transfer authorization of the horse from the original owner to the claimant. Copies of the transfer authorization shall be maintained by the stewards and the racing secretary. Upon notification by the stewards the horsemen's bookkeeper shall immediately debit the claimant's account for the claiming price, along with applicable taxes and transfer fees, and shall immediately credit the original owner's account with the claiming price;

14. In harness racing, the successful claimant of a horse programmed to start may, at his option, acquire ownership of a claimed horse even though such claimed horse was scratched and did not start in the claiming race from which it was scratched. The successful claimant must exercise his option by 9 a.m. of the day following the claiming race to which the horse programmed and scratched. No horse may be claimed from a claiming race unless the race is contested;

15. A horse that has been claimed shall be delivered to the new owner at the conclusion of the race either at the paddock or at the detention barn, after the completion of any post-race testing;

16. The claimant shall present the former owner with written authorization of the claim from the racing secretary;

17. A positive test result for any prohibited drug is grounds for voiding the claim;

18. The new owner may request that the horse be tested for equine infectious anemia, by taking the horse immediately following the race to the detention barn where a blood sample will be drawn;

19. A positive test result for equine infectious anemia is grounds for voiding a claim;

~~20. The certificate of registration, eligibility certificate or registration document shall be retained by the racing secretary until the results of the post-race testing are known;~~

~~21. The funds for the claim shall be retained by the horsemen's bookkeeper or licensee until the results of the post-race testing are known;~~

~~22. When it is determined that the claim is valid and that there are no grounds for voiding the claim, the certificate of registration shall be delivered by the racing secretary to the claimant and the funds for the claim shall be paid to the former owner;~~

~~23.~~ 20. The new owner shall be responsible for filing the change of ownership with the appropriate breed registry;

~~24.~~ 21. Despite any designation of sex or age of a horse appearing in the daily program or other publication, the person making the claim shall be solely responsible for determining the sex or age of the horse before filing a claim for the horse; and

~~25.~~ 22. Officials and employees of the licensee shall not provide any information as to the filing of the claim until after the race has been run, except as necessary for processing of the claim.

VA.R. Doc. No. R14-3923; Filed November 25, 2013, 10:49 a.m.

## Final Regulation

REGISTRAR'S NOTICE: The Virginia Racing Commission is claiming an exemption from the Administrative Process Act pursuant to § 2.2-4002 B 23 of the Code of Virginia when promulgating regulations pertaining to the administration of medication or other substances foreign to the natural horse.

Title of Regulation: **11VAC10-180. Medication (amending 11VAC10-180-25 through 11VAC10-180-80).**

Statutory Authority: § 59.1-369 of the Code of Virginia.

Effective Date: January 1, 2014.

Agency Contact: David S. Lermond, Jr., Regulatory Coordinator, Virginia Racing Commission, 10700 Horseman's Road, New Kent, VA 23124, telephone (804) 966-7404, FAX (804) 966-7418, or email david.lermond@vrc.virginia.gov.

Summary:

*The amendments set uniform thresholds for a determined list of controlled therapeutic medications and provide for a point system to track medication violations to assist the racing commission in Virginia and other jurisdictions in determining whether additional penalties are appropriate for licensees with multiple violations of the medication rules. These amendments make Virginia's medication rules consistent with nine other states in the Mid-Atlantic region, which benefits horsemen who race their horses in more than one jurisdiction in the region.*

**11VAC10-180-25. Veterinary practices.**

A. Veterinarians under authority of commission veterinarian. Veterinarians holding valid veterinarian permits issued by the commission and practicing at any location under the jurisdiction of the commission are under the authority of the commission veterinarian and the stewards. The commission veterinarian shall recommend to the stewards the discipline that may be imposed upon a veterinarian who violates these regulations.

B. Treatment restrictions.

1. Except as otherwise provided in the regulations, no person other than a licensed veterinarian holding a valid permit issued by the commission may administer a prescription or controlled medication, drug, chemical or other substance to a horse at any location under the jurisdiction of the commission.

2. No person, except a veterinarian holding a valid veterinarian's permit or an assistant under his immediate supervision, shall have in his possession within the enclosure any hypodermic syringe or needle or any instrument capable of being used for the injection of any substance.

3. No person, except a veterinarian holding a valid veterinarian's permit or an assistant under his immediate supervision, shall have in his possession within the enclosure any injectable substance.

4. Notwithstanding these regulations, a veterinarian or other permit holder may possess within the enclosure of a horse racing facility a hypodermic syringe and needle for the purpose of administering to himself a substance, provided that the permit holder has documentary evidence that the substance can only be administered by injection and that the substance to be administered by injection has been prescribed for him.

5. Unless granted approval by the commission veterinarian, practicing veterinarians shall not have contact with an entered horse on race day ~~except for the administration of race day medications expressly permitted by the regulations~~. Any unauthorized contact may result in the horse being scratched from the race in which it was scheduled to compete and may result in further disciplinary action by the stewards.

C. Veterinarian treatment reports.

1. Practicing veterinarians must maintain complete records of all treatments, including date, time and proper identification of each horse. The record shall contain the name of the trainer, the name of the horse, all medications and dosages administered, and all diagnostic and therapeutic procedures performed on the horse.

2. At the request of the commission veterinarian or stewards, practicing veterinarians shall produce within 24 hours the billing and/or treatment records or other information for any horse treated by the veterinarian.

**11VAC10-180-35. Prohibited practices.**

A. No trainer shall allow a horse to appear in a race, qualifying race or official timed workout, when the horse contains in its system any prohibited substance, as determined by testing of blood, saliva or urine, or any other reasonable means.

B. No person shall administer any prohibited substance to a horse on race day ~~other than those substances expressly permitted by the commission. Substances permitted by the commission shall be administered solely for the benefit and welfare of the horse, nonperformance altering, of no danger to riders/drivers, and unlikely to interfere with the detection of~~

~~prohibited substances~~. Furosemide is the only substance specifically permitted for use in approved horses on race day.

C. No veterinarian or permit holder shall, without good cause, possess or administer any substance to a horse stabled within the enclosure or at any facility under the jurisdiction of the commission:

1. That has not been approved by the U.S. Food and Drug Administration (FDA) for any use (human or animal), or the U.S. Department of Agriculture's Center for Veterinary Biologics;

2. That is on the U.S. Drug Enforcement Agency's Schedule I or Schedule II of controlled substances as prepared by the Attorney General of the United States pursuant to 21 USC § 811 and 812;

3. That its use may endanger the health and welfare of the horse or endanger the safety of the rider or driver, or its use may adversely affect the integrity of racing; or

4. That does not have a recognized laboratory analytical method to detect and confirm its administration.

D. No person, except a veterinarian holding a valid veterinarian's permit or an assistant under his immediate supervision, shall have in his possession within the enclosure of a horse racing facility any prescription substance for animal use unless:

1. The person actually possesses, within the enclosure of the horse racing facility, documentary evidence that a prescription has been issued to him for the substance by a licensed veterinarian;

2. The prescription substance is labeled with a dosage for the horse or horses to be treated with the prescription substance; and

3. The horse or horses named in the prescription are then under the care and supervision of the permit holder and are then stabled within the enclosure of the horse racing facility.

E. The possession or administration of erythropoietin (Epogen), darbepoietin, oxyglobin, Hemopure, or any analogous substance that increases oxygen-carrying capacity of the blood is prohibited. Furthermore, should the analysis of a test sample detect the presence of antibodies of erythropoietin or darbepoietin or any analogous substance in the horse's blood that indicates a history of use of these substances, the horse shall be prohibited from racing and placed on the veterinarian's list until the horse tests negative for the presence of such antibodies.

F. The use of androgenic and anabolic steroids is prohibited in racing horses as stipulated in 11VAC10-180-75.

G. The use of an extracorporal shockwave therapy device or radial pulse wave therapy device is prohibited on the racetrack premises and at any site that falls under the jurisdiction of the Virginia Racing Commission unless:

1. The therapy device is registered with the commission veterinarian;

2. The therapy device is used by a veterinarian who is a permit holder; and

3. Each use of the therapy device is reported to the commission veterinarian on the treatment report.

Notwithstanding the provisions above, whether on or off the premises, a shockwave therapy device or radial pulse wave therapy device shall not be used on a racehorse fewer than 10 days before the horse is to race. For the purposes of this calculation, the day of treatment shall be considered day one.

H. Tubing of horses prohibited. The tubing or dosing of any horse for any reason on race day is prohibited, unless administered for medical emergency purposes by a licensed veterinarian in which case the horse shall be scratched. The practice of administration of any substance, via a tube or other method, into a horse's stomach on race day is considered a violation of this chapter.

1. Using or possessing the ingredients or the paraphernalia associated with forced feeding to a horse of any alkalinizing agent with or without a concentrated form of carbohydrate, or administering any substance by tubing or other method on race day shall be considered a violation of this chapter.

2. Under the provisions of this subsection, endoscopic examination shall not be considered a violation of this chapter.

I. Notwithstanding any other provision in this chapter, no substance of any kind may be administered to a horse within ~~three~~ four hours of the scheduled post time for the race in which the horse is entered. To ensure uniform supervision and conformity to this regulation, the trainer shall have each horse programmed to race stabled in its assigned stall within the enclosure of the horse race facility no fewer than ~~four~~ five hours prior to post time for the respective race.

J. Intra-articular injections prohibited. Injecting any substance or inserting a needle into a joint space is prohibited within ~~five~~ seven days prior to the horse's race.

K. Peri-neural injections prohibited. Injecting a local anesthetic or other chemical agent adjacent to a nerve is prohibited within three days prior to the horse's race.

L. Hyperbaric oxygen chamber prohibited. Subjecting a horse to therapy utilizing a hyperbaric oxygen chamber is prohibited within four days prior to the horse's race.

**11VAC10-180-60. Medications and prohibited substances.**

A. Medications and prohibited substances are divided into five classes. The classes are:

1. Class 1. Substances found in this class have no generally accepted medical use in the racehorse and have a very high pharmacological potential for altering the performance of a racehorse. These substances should never be found in the horse's system through postrace testing or in the possession

of any holder of a permit within the enclosure of a horse racing facility licensed by the commission. Such substances are potent stimulants of the nervous system including opiates, opium derivatives, synthetic opioids, psychoactive drugs, amphetamines and U.S. Drug Enforcement Agency (DEA) ~~Scheduled~~ Schedules I and II controlled substances.

2. Class 2. Substances in this class have a high potential to affect the outcome of a race. Most are not generally accepted as therapeutic agents in the racehorse. Many are products intended to alter consciousness or the psychic state of humans~~,~~ and have no approved or indicated use in the horse. Some, such as injectable local anesthetics, have legitimate uses in equine medicine~~,~~ but should not be found in a racehorse through postrace testing. The following groups of substances are in this class:

a. Opiate partial agonists or agonist-antagonists;

b. Nonopiate psychotropic drugs, which may have stimulant, depressant, analgesic or neuroleptic effects;

c. Miscellaneous substances that might have a stimulant effect on the central nervous system (CNS);

d. Drugs with prominent CNS depressant action;

e. Antidepressant and antipsychotic drugs, with or without prominent CNS stimulatory or depressant effects;

f. Muscle-blocking substances that have a direct neuromuscular blocking action;

g. Local anesthetics that have a reasonable potential for use as nerve-blocking agents (except procaine);

h. Other biological substances and snake venoms or chemicals that may be used as nerve-blocking agents; and

i. Erythropoietin (Epogen), darbepoietin, oxyglobin, hemopure, or other blood-doping agents.

3. Class 3. Substances found in this class may or may not have an accepted therapeutic use in the horse~~,~~ but have a potential to enhance performance, and their presence in the horse's system is prohibited on race day. The following groups of substances are in this class:

a. Substances affecting the autonomic nervous system that do not have prominent CNS effects, but that do have prominent cardiovascular and respiratory system effects (bronchodilators are included in this category);

b. Local anesthetics that have nerve-blocking potential but also a high potential for producing urine residue levels from a method of use not related to the anesthetic effect of the substance (procaine);

c. Miscellaneous substances with mild sedative action, such as the sleep-inducing antihistamines;

d. Primary vasodilating/hypotensive agents;

e. Potent diuretics affecting renal function and body fluid composition; and

f. Anabolic and/or androgenic steroids and/or growth hormones other than boldenone, stanozolol, nandrolone, and testosterone, which are classified elsewhere in this section.

4. Class 4. Substances in this class are primarily therapeutic medications routinely used in racehorses. These may influence performance, but generally have a more limited ability to do so. The following groups of drugs are in this class:

a. Nonopiate substances that have a mild central analgesic effect;

b. Substances affecting the autonomic nervous system that do not have prominent CNS, cardiovascular or respiratory effects:

(1) Substances used solely as topical vasoconstrictors or decongestants;

(2) Substances used as gastrointestinal antispasmodics;

(3) Substances used to void the urinary bladder; and

(4) Substances with a major effect on CNS vasculature or smooth muscle of visceral organs.

(5) Antihistamines that do not have a significant CNS depressant effect (this does not include H1 blocking agents, which are listed in Class 3).

c. Mineral corticoid substances;

d. Skeletal muscle relaxants;

e. Anti-inflammatory substances that may reduce pains as a consequence of their anti-inflammatory actions, which include:

(1) Nonsteroidal anti-inflammatory drugs (NSAIDs);

(2) Corticosteroids (glucocorticoids); and

(3) Miscellaneous anti-inflammatory agents.

f. Boldenone, stanozolol, nandrolone, and testosterone, individually but not in combination, at levels stipulated in 11VAC10-180-75.

g. Less potent diuretics;

h. Cardiac glycosides and antiarrhythmics including:

(1) Cardiac glycosides;

(2) Anti-arrhythmic agents (exclusive of lidocaine, bretylium and propranolol); and

(3) Miscellaneous cardiotonic drugs.

i. Topical anesthetics agents not available in injectable formulations;

j. Antidiarrheal agents; and

k. Miscellaneous substances including:

(1) Expectorants with little or no other pharmacologic action;

(2) Stomachics; and

(3) Mucolytic agents.

5. Class 5. Drugs in this class are therapeutic medications for which concentration limits have been established as well as certain miscellaneous agents. Included specifically are agents that have very localized action only, such as anti-ulcer drugs and certain anti-allergenic drugs. The anticoagulant drugs are also included.

B. Disciplinary actions.

1. In issuing penalties against individuals found guilty of medication and drug violations a regulatory distinction shall be made between the detection of therapeutic medications used routinely to treat racehorses and those drugs that have no reason to be found at any concentration in the test sample on race day.

2. The stewards or the commission may use the most recent revision of the Association of Racing Commissioners International (RCI) Uniform Classification Guidelines for Foreign Substances and the Multiple Violations Penalty System as the guideline in the penalty stage of the deliberations for a rule violation for any prohibited substance.

3. If a licensed veterinarian is administering or prescribing a drug not listed in the RCI Uniform Classification Guidelines for Foreign Substances, the identity of the drug shall be forwarded to the commission veterinarian to be forwarded to RCI for classification.

4. Any drug or metabolite thereof found to be present in a pre-race or postrace sample that is not classified in the most recent RCI Uniform Classification Guidelines for Foreign Substances may be assumed to be an RCI Class 1 Drug and the trainer and owner may be subject to those penalties as set forth in schedule "A" unless satisfactorily demonstrated otherwise by the Racing Medication and Testing Consortium, with a penalty category assigned.

5. Any permit holder of the commission, including practicing veterinarians, found to be responsible for the improper or intentional administration of any drug resulting in a positive test may be subject to the same penalties set forth to the trainer.

6. Any veterinarian found to be involved in the administration of any drug carrying the penalty category of "A" shall be referred to the respective state licensing board of veterinary medicine for consideration of further disciplinary action and/or license revocation. This is in addition to any penalties issued by the stewards or the commission.

7. Any person who the stewards or the commission believe may have committed acts in violation of criminal statutes shall be referred to the appropriate law-enforcement agency. Administrative action taken by the stewards or the commission in no way prohibits a prosecution for criminal acts committed, nor does a potential criminal prosecution stall administrative action by the stewards or the commission.

8. Pursuant to 11VAC10-60-70 E, all horses in the care of a trainer who is suspended for more than 10 days must be transferred to another trainer approved by the stewards. During the period of suspension the suspended trainer shall have no communication with the new trainer, the new trainers' staff, or the horse owner; shall not benefit financially from transferred horses in his stable during the time of suspension; and shall not be permitted on the grounds except with the permission of the stewards.

**11VAC10-180-70. Phenylbutazone, flunixin and other NSAIDs.**

A. Generally. By this regulation, the Virginia Racing Commission prohibits the use of multiple NSAIDs in a horse on any given day (stacking) within 96 hours prior to the horse's race. Despite this prohibition of stacking, this regulation specifically permits the use of one of either phenylbutazone ~~or,~~ flunixin ~~(but not concurrently),~~ or ketoprofen in racehorses in the quantities provided for in this chapter.

B. Quantitative testing. Any horse to which phenylbutazone ~~or,~~ flunixin, or ketoprofen has been administered shall be subject to testing at the direction of the commission veterinarian to determine the quantitative levels of phenylbutazone ~~and,~~ flunixin, and ketoprofen or the presence of other substances ~~which~~ that may be present.

C. Disciplinary actions. The stewards may take disciplinary actions for reports of quantitative testing by the primary testing laboratory for levels of phenylbutazone quantified at levels above 2.0 micrograms per milliliter of serum or plasma ~~or,~~ flunixin quantified at levels above 20 ng per milliliter of serum or plasma, or ketoprofen quantified at levels above 10 ng per milliliter of serum or plasma in horses following races, qualifying races, and official timed workouts for the stewards or commission veterinarian, and may use the most recent revision of the Association of Racing Commissioners International (RCI) Uniform Classification Guidelines for Foreign Substances and the Multiple Violations Penalty System as a guide. The stewards, in their discretion, may impose other more stringent disciplinary actions against trainers or other permit holders who violate the provisions under which phenylbutazone ~~or,~~ flunixin, or ketoprofen is permitted by the commission.

**11VAC10-180-75. Androgenic and anabolic steroids.**

A. All androgenic and anabolic steroids are prohibited in racing horses, except as provided below.

B. Residues of the major metabolite of stanozolol, nandrolone, boldenone and testosterone at concentrations less than the thresholds indicated below are permitted in test samples collected from racing horses.

C. Concentrations of these substances identified in subsection B of this section shall not exceed the following

~~total~~ threshold concentrations ~~(i.e., free drug or metabolite and drug or metabolite liberated from its conjugates)~~:

1. ~~Metabolite of stanozolol (16Beta hydroxystanozolol) – 25~~ Stanozolol – 100 pg/ml in serum or plasma ~~or 1 ng/ml in urine~~ for all horses regardless of gender.

2. Boldenone – ~~200~~ 250 pg/ml in serum or plasma ~~or 15 ng/ml in urine in male horses other than geldings. No boldenone is permitted in geldings or female horses~~ for all horses regardless of gender.

3. Nandrolone~~:~~.

a. ~~50~~ 100 pg/ml in serum or plasma ~~or 1 ng/ml in urine~~ in geldings, fillies, and mares.

~~b. 50 pg/ml in serum or plasma or 45 ng/ml in urine in male horses other than geldings.~~

~~c.~~ b. Male horses other than geldings will not be tested for nandrolone.

4. Testosterone.

a. ~~25~~ 100 pg/ml in serum or plasma ~~or 20 ng/ml in urine~~ in geldings, fillies, and mares.

~~b. 25 pg/ml in serum or plasma or 55 ng/ml in urine in fillies and mares.~~

~~c.~~ b. Male horses other than geldings will not be tested for testosterone.

D. The presence of more than one of the four substances identified in subsection B of this section at concentrations greater than the individual thresholds indicated in subsection C of this section or a combination of any two or more substances recognized as androgenic or anabolic is prohibited.

E. ~~Test samples collected from male horses other than geldings~~ The gender of each horse must be so identified for test samples submitted to the laboratory.

F. Any horse administered an androgenic or anabolic steroid to assist in the recovery from illness or injury may be placed on the veterinarian's list in order to monitor the concentration of the drug ~~or metabolite in urine~~ in serum or plasma. After the concentration has fallen below the designated threshold, the horse is eligible to be removed from the list.

G. The stewards may take disciplinary actions for reports of quantitative testing by the primary testing laboratory indicating the presence of one or more androgenic or anabolic steroid at concentrations above the individual thresholds indicated in subsection C of this section and may use the most recent revision of the Association of Racing Commissioners International (RCI) Uniform Classification Guidelines for Foreign Substances and the Multiple Violations Penalty System as a guide.

**11VAC10-180-80. Permitted race day substances.**

A. Generally. ~~The following substances that have been determined to be solely for the benefit and welfare of the horse, nonperformance altering, of no danger to riders/drivers, and unlikely to interfere with the detection of prohibited substances, may be administered to a horse on race day are: Intravenous commercially available electrolyte solutions including calcium and magnesium, but not including bicarbonate, providing such administration is a minimum of three hours prior to the post time for that horse's race and administered under veterinary supervision within the limits of this chapter~~ Furosemide shall be the only medication permitted to be administered on race day and only to those horses eligible for furosemide treatment as designated by the bleeder list and furosemide list described in subsection B of this section.

B. Bleeder medications. By this regulation, the Virginia Racing Commission specifically permits the use of bleeder medications in only those horses that:

1. Have been placed on the bleeders list by the stewards;

2. Have raced on furosemide in another jurisdiction on the last previous start in a pari-mutuel race, as indicated by the past performance chart or by verification by the commission veterinarian from that racing jurisdiction, or both; or

3. Have been placed on the furosemide list by the stewards. A horse is eligible for inclusion on the furosemide list if the licensed trainer and a licensed veterinarian determine it is in the horse's best interest to race with furosemide, and the prescribed commission form is presented to the commission veterinarian prior to the close of entries for the horse's race. A horse placed on the furosemide list without demonstrating an episode of exercise-induced pulmonary hemorrhage is not restricted from racing for the usual recovery period described in 11VAC10-180-85 D. However, any future episode of exercise-induced pulmonary hemorrhage shall be considered a reoccurrence of bleeding for the purpose of determining restrictions from racing, as provided in this chapter.

a. A trainer or owner may discontinue the administration of furosemide to his racehorse only with the permission of the stewards. The request must be submitted in writing on forms prescribed by the commission and prior to entering the horse in a race.

b. A horse removed from the furosemide list may not be placed back on the furosemide list for a period of 60 calendar days unless the horse suffers an external bleeding incident witnessed by the commission veterinarian or his designee. In such case, the horse shall be placed on the bleeders list as though that bleeding incident was a reoccurrence of bleeding and subjected to a minimum 30-day or 90-day restriction for recovery as provided in this chapter.

C. Furosemide.

1. Procedures for usage. The use of furosemide ~~shall be~~ on race day is permitted by the commission only in horses

eligible to receive bleeder medications and under the following circumstances:

a. Furosemide shall be administered by a single dose intravenously no less than four hours prior to post time within the enclosure of the horse race facility by a veterinarian who ~~is a permit holder~~ shall be specifically designated by the commission to administer furosemide.

b. The furosemide dosage administered shall not exceed 10 ml (500 mg) and shall not be less than 3 ml (150 mg).

c. The veterinarian administering the furosemide shall deliver a furosemide treatment report to the commission no later than two hours prior to post time. The furosemide treatment report shall contain the following:

(1) The trainer's name, date, horse's name, and horse's identification number;

(2) The time furosemide was administered to the horse;

(3) The dosage level administered for this race;

(4) The barn and stall number; and

(5) The signature of the practicing veterinarian, who is a permit holder.

2. Furosemide quantification. Furosemide levels must not exceed 100 nanograms per milliliter (ng/ml) of serum or plasma and urine specific gravity measuring 1.010 or lower. Furosemide must be present in the serum or plasma or urine of any horse that has been designated in the program as being treated with furosemide.

D. Disciplinary actions.

1. For the first violation of the regulation pertaining to furosemide quantification (subdivision C 2 of this section), the stewards shall issue a written reprimand to the trainer and to the practicing veterinarian, if applicable.

2. For the second violation of the regulation pertaining to furosemide quantification (subdivision C 2 of this section), the stewards shall fine the trainer, practicing veterinarian or both an amount not to exceed $500.

3. For the third violation of the regulation pertaining to furosemide quantification (subdivision C 2 of this section) within a 365-day period, the stewards shall suspend or fine the trainer, practicing veterinarian, or both, not to exceed $1,000 and 15 days.

4. The stewards, in their discretion, may impose other more stringent disciplinary actions against trainers or other permit holders who violate the provisions under which furosemide is permitted by the commission, regardless of whether or not the same horse is involved.

E. Adjunct bleeder medications. The Virginia Racing Commission ~~permits the use of no more than one adjunct bleeder medication in horses that receive furosemide as provided for in this chapter. Such medications, if administered to a horse, must be administered on race day no less than three hours before post time. Permissible adjunct bleeder medications and maximum dosages are:~~ prohibits the use of bleeder adjunct medication on race day.

~~1. Conjugated estrogens, not to exceed 25 milligrams.~~

~~2. Aminocaproic acid, not to exceed 2.5 grams.~~

~~3. Tranexamic acid, not to exceed 1 gram.~~

~~4. Carbazochrome, not to exceed 5 milliliters.~~

F. Program designation. The licensee shall be responsible for designating in the program those horses racing on furosemide. The designation shall also include those horses making their first start while racing on furosemide. In the event there is an error, the licensee shall be responsible for making an announcement to be made over the public address system and taking other means to correct the information published in the program.

G. Discontinue use of furosemide. A trainer or owner may discontinue the administration of furosemide to his horse only with the permission of the stewards and prior to entering the horse in a race.

NOTICE: The following forms used in administering the regulation were filed by the agency. The forms are not being published; however, online users of this issue of the Virginia Register of Regulations may click on the name of a form with a hyperlink to access it. The forms are also available from the agency contact or may be viewed at the Office of the Registrar of Regulations, General Assembly Building, 2nd Floor, Richmond, Virginia 23219.

FORMS (11VAC10-180)

Universal Bleeder Certificate - Examination Report for Excercise Induced Pulmonary Hemorrhage (eff. 9/09)

Chain of Custody Form (eff. 2/10)

Test Barn Daily Log (eff. 2/10)

Request to Add Horse to the Furosemide List (rev. 12/13)

Request to Remove Horse from the Furosemide Program (eff. 9/09)

Test Barn Samples Log (eff. 2/10)

Test Barn Freezer Log (eff. 2/10)

VA.R. Doc. No. R14-3924; Filed November 25, 2013, 1:49 p.m.

# TITLE 12. HEALTH

## STATE BOARD OF HEALTH

### Proposed Regulation

Title of Regulation: **12VAC5-165. Regulations for the Repacking of Crab Meat (amending 12VAC5-165-10, 12VAC5-165-80, 12VAC5-165-90, 12VAC5-165-100, 12VAC5-165-120, 12VAC5-165-150, 12VAC5-165-180, 12VAC5-165-220, 12VAC5-165-230, 12VAC5-165-240,**

**12VAC5-165-270; repealing 12VAC5-165-70, 12VAC5-165-200, 12VAC5-165-280, 12VAC5-165-290).**

Statutory Authority: §§ 28.2-801 and 28.2-806 of the Code of Virginia.

Public Hearing Information:

December 18, 2013 - 9 a.m. - James Madison Building, 109 Governor Street, Mezzanine Conference Room, Richmond, VA 23219

Public Comment Deadline: February 14, 2014.

Agency Contact: Bob Croonenberghs, PhD, Director, Division of Shellfish Sanitation, Department of Health, 109 Governor Street, Richmond, VA 23219, telephone (804) 864-7477, FAX (804) 864-7481, or email bob.croonenberghs@vdh.virginia.gov.

Basis: Section 28.2-801 of the Code of Virginia authorizes the State Board of Health to promulgate regulations necessary to carry out the provisions of Chapter 8 (§ 32.1-800 et seq.) of Title 32.1 of the Code of Virginia. Section 28.2-806 of the Code of Virginia provides that the State Health Commissioner may establish and change standards, examinations, analyses, and inspections that control the taking and marketing of crustacea, finfish, or shellfish from a health standpoint.

Purpose: Some of the provisions of 12VAC5-165 either cannot be met by certified Virginia repacking establishments because of changes in the way that crab meat is being imported from foreign countries and shipped into the United States or are unnecessary and have no relevance to public health. The amended regulations provide requirements that Virginia processors can reasonably meet and will address the existing risks of the importation of crab meat from unapproved sources and the repacking of foreign crab meat and labeling it as domestic crab meat. The proposed regulations will serve to protect the public's health by clarifying requirements for repacking crab meat.

Substance: The proposed amendments:

1. Repeal 12VAC5-165-70, which states that the Division of Shellfish Sanitation should be contacted when any condition that may compromise the safety of the product exists. This provision is unnecessary and burdensome to both industry and the division. The repacker must be able to decide the appropriate disposition of product it is processing without the approval or disapproval of the division.

2. Modify 12VAC5-165-90, which addresses the verification of shipping temperatures of imported crab meat, to include all crab meat and to clarify the verification.

3. Modify 12VAC5-165-100 A, which addresses sampling requirements for imported crab meat to be repacked. The current U.S. Food and Drug Administration import requirements in the Code of Federal Regulations located at 21 CFR 123.12 (Special requirements for imported products) have specific requirements for fish and fishery products that preclude the end product sampling requirement currently in place.

4. Modify 12VAC5-165-100 B, which addresses organoleptic sensing. There is a lack of local capacity to train persons in organoleptic sensing to the level of being certified in seafood decomposition, which has made this regulation impractical. In its place, repacking establishments may organoleptically sense, to the best of the individual's capability, each container when opened and keep records attesting to this practice. Unsatisfactory containers would be discarded and a record kept of this process.

5. Modify 12VAC5-165-220 B, which requires that the lot number indicate the original source firm that picked the crab meat. Since a reliable indication of the establishment that picked the meat may be unrealistic, some other means of identifying lot numbers may be used by the repacker.

6. Repeal 12VAC5-165-280, which requires that records must be kept separate from other production records. This requirement is unnecessary since the method and type of records being kept are dictated by the repacker's Hazard Analysis Critical Control Point plan.

Other sections of this regulation may be addressed during this process.

Issues: The proposed regulations eliminate or modify certain regulatory requirements that are unnecessary, burdensome, or no longer practical. For example, the proposed amendment to 12VAC5-165-100 will eliminate burdensome and unnecessary sampling requirements. In addition, the repeal of 12VAC5-165-280 will eliminate unnecessary recordkeeping requirements. There are no disadvantages to the public or the Commonwealth.

Department of Planning and Budget's Economic Impact Analysis:

Summary of the Proposed Amendments to Regulation. These regulations pertain to the practice of transferring crab meat from one processor's container into the container of a different processor, primarily for marketing purposes. Specifically these regulations address the sanitation, product traceability, and labeling concerns associated with the situation where one processor would purchase crab meat packed by another certified crab meat processor, whether of a domestic or foreign origin, and repack the meat into the new processor's container. The Board of Health (Board) proposes amendments to these regulations that either align these regulations with federal regulations or reduce the regulatory burden for crab meat processing firms without negatively affecting public safety.

Result of Analysis. The benefits likely exceed the costs for all proposed changes.

Estimated Economic Impact. The Board proposes several amendments which will align these regulations with federal

regulations. Most of these changes will not affect requirements in practice for crab meat processors since the current Virginia regulations are not more restrictive than the federal regulations. Other proposed changes will have some impact as described in the following paragraphs.

The Board proposes repealing 12VAC5-165-70 which states that the Department of Health, Division of Shellfish Sanitation (Division) should be contacted when any condition that may compromise the safety of the product exists. The Board has determined that this provision is unnecessary and burdensome to both industry and the Division. The proposal to repeal this requirement will save staff time for both crab meat processors and the Division.

Under the current regulations (12VAC5-165-100), when imported crab meat is used as a source for repacking, the repacker shall take a minimum of five samples from the first two shipments prior to any processing to be analyzed by a certified laboratory. The Board proposes eliminating this requirement. According to the Division, in ten years of regulation experience there have been no known significant illnesses and the risk of contamination is very low as long as other required procedures are followed. If the other required procedures are not followed, any potential subsequent contamination would not have been detected at this sampling stage anyway. The Division estimates that it typically takes about a week for samples to be analyzed. (Virginia Tech provides the analysis for free.[1]) This delays the sale of the crab meat and firms incur storage costs. Thus, the Board's proposal to repeal this requirement will produce savings for crab meat processors through reduced time and storage costs without endangering public safety.

The current regulations (12VAC5-165-200) require that prior to or after repacking, the repacker shall pasteurize all imported crab meat which has not been pasteurized in the country of origin. The Board proposes to eliminate this requirement. The Division and Board believe that the pasteurization requirement is not necessary for public safety. According to the Division, in ten years of regulation experience there have been no typhoid or hepatitis outbreaks and only one minor health problem perhaps linked to lack of pasteurization. One contacted crab meat firm stated that the cost of pasteurizing crab meat for a processor ranges from $1.50 - $2.00/lb. A second contacted firm stated that the cost of pasteurizing crab meat for a processor depends on the container it is pasteurized in (bags and cans are used) and ranges from $1.00 - $3.00/lb. The Division believes that most firms will continue to pasteurize all or most of the imported crab meat they process due to the greatly enhanced shelf life of pasteurized meat. For those firms that choose to stop pasteurizing some of their crab meat there will be savings of from $1.00 - $3.00/lb.

The current regulations (12VAC5-165-290) state that "Any certified crab meat processor found to be packing or repacking foreign crab meat into a container without the country of origin on the principal display panel will be decertified for 30 days, effective immediately upon the finding by the Director of the Division of Shellfish Sanitation." Packing or repacking foreign crab meat into a container without the country of origin on the principal display panel is also a Class 1 misdemeanor. The Board proposes to repeal this language since decertification for noncompliance of this regulation could potentially put the processor out of business and the Board and Division believe that a Class 1 misdemeanor is adequately punitive to discourage noncompliance. This should produce a net benefit.

Businesses and Entities Affected. The Department of Health Division of Shellfish Sanitation currently certifies 19 crab meat processors.

Localities Particularly Affected. Certified crab meat processors are located primarily in coastal localities, which include, but are not limited to: Accomack County, Southampton County, Gloucester County, Hampton, Newport News, Urbanna, Montross and Deltaville.

Projected Impact on Employment. The proposed amendments will not likely significantly affect total employment. The proposal to repeal the requirement to contact the Division when any condition that may compromise the safety of the product exists will enable crab meat processor employees to use their time more productively.

Effects on the Use and Value of Private Property. The proposal to repeal the requirement to contact the Division when any condition that may compromise the safety of the product exists will enable crab meat processor employees to use their time more productively. The proposal to repeal the requirement for lab analysis of samples will provide savings for crab meat processors through reduced time and storage costs. Those processors who choose to take advantage of the proposed repeal of the pasteurization requirement will save from $1.00 - $3.00/lb of imported crab meat which has not been pasteurized in the country of origin.

Small Businesses: Costs and Other Effects. None of the proposed amendments will increase costs for small businesses. The proposal to repeal the requirement to contact the Division when any condition that may compromise the safety of the product exists will enable small crab meat processor employees to use their time more productively. The proposal to repeal the requirements for lab analysis of samples will provide savings for small crab meat processors through reduced time and storage costs. Those small processors who choose to take advantage of the proposed repeal of the pasteurization requirement will save from $1.00 - $3.00/lb of imported crab meat which has not been pasteurized in the country of origin.

Small Businesses: Alternative Method that Minimizes Adverse Impact. The proposed regulations do not adversely affect small businesses.

Real Estate Development Costs. The proposed amendments are unlikely to significantly affect real estate development costs.

Legal Mandate. The Department of Planning and Budget (DPB) has analyzed the economic impact of this proposed regulation in accordance with § 2.2-4007.04 of the Administrative Process Act and Executive Order Number 14 (10). Section 2.2-4007.04 requires that such economic impact analyses include, but need not be limited to, the projected number of businesses or other entities to whom the regulation would apply, the identity of any localities and types of businesses or other entities particularly affected, the projected number of persons and employment positions to be affected, the projected costs to affected businesses or entities to implement or comply with the regulation, and the impact on the use and value of private property. Further, if the proposed regulation has adverse effect on small businesses, § 2.2-4007.04 requires that such economic impact analyses include (i) an identification and estimate of the number of small businesses subject to the regulation; (ii) the projected reporting, recordkeeping, and other administrative costs required for small businesses to comply with the regulation, including the type of professional skills necessary for preparing required reports and other documents; (iii) a statement of the probable effect of the regulation on affected small businesses; and (iv) a description of any less intrusive or less costly alternative methods of achieving the purpose of the regulation. The analysis presented above represents DPB's best estimate of these economic impacts.

[1] Source: Virginia Department of Health, Division of Shellfish Sanitation

Agency's Response to Economic Impact Analysis: The Department of Health concurs with the economic impact analysis of the Department of Planning and Budget.

Summary:

*The proposed amendments (i) align the regulations with the Code of Federal Regulations, (ii) eliminate the requirement that the repacker contact the Division of Shellfish Sanitation when any condition that may compromise the safety of final product exists, and (iii) loosen the sampling requirements for imported crab meat.*

Part I
General Provisions

**12VAC5-165-10. Definitions.**

The following words and terms when used in this chapter shall have the following meanings, unless the context clearly indicates otherwise:

"Action level" means the limit established for a deleterious substance present in a product or the environment, above which level prescribed actions by the division may be required to protect public health.

~~"Agency" means the Virginia Department of Health.~~

"Certificate of Inspection" means a numbered certificate issued by the division to a shipper after an inspection confirms compliance with applicable regulations and standards.

"Certification number" means a unique number assigned to each shipper upon issuance of a Certificate of Inspection.

"Certified laboratory" means a laboratory certified by the U.S. Food and Drug Administration for analysis of food products.

"Critical Control Point ~~(CCP)~~" or "CCP" means a point, step or procedure in a food process at which control can be applied, and a food safety hazard can, as a result, be prevented, eliminated or reduced to acceptable numbers.

"Critical limit" means the maximum or minimum value to which a physical, biological, or chemical parameter must be controlled at a critical control point to prevent, eliminate, or reduce to an acceptable level the occurrence of the identified food safety hazard.

~~"Decertification" means the revocation of a Certificate of Inspection.~~

~~"Department" means the Virginia Department of Health.~~

"Division" means the Division of Shellfish Sanitation of the Virginia Department of Health.

"Establishment" means any vehicle, vessel, property, or premises where crustacea, finfish or shellfish are transported, held, stored, processed, packed, repacked or pasteurized in preparation for marketing.

"HACCP plan" means a written document that delineates the formal procedures that a dealer follows to implement a Hazard Analysis Critical Control Point methodology to assure food safety.

"Hazard analysis" means a process used to determine whether there are food safety hazards that are reasonably likely to occur while repacking crab meat and to identify the preventive measures that the repacker can apply to control those hazards.

"Importer" means either the owner or consignee at the time of entry of the crab meat into the United States, or the agent or representative of the foreign owner or consignee at the time of entry into the United States, who is responsible for ensuring that goods being offered for entry into the United States are in compliance with all laws affecting the importation.

"Lot" means repacked crab meat that bears the same repack date and source code.

"Preventive measure" means actions taken to prevent or control a food safety hazard.

"Principal display panel" means the part of a label that is most likely to be displayed, presented, shown, or examined under customary conditions of display for retail sale.

"Processing" means cooking, picking, packing, repacking or pasteurizing crab meat.

"Processor" means ~~a person who operates an establishment that cooks, picks, packs, repacks or pasteurizes crab meat~~ any person engaged in commercial, custom, or institutional processing of crab meat, either in the United States or in a foreign country.

"Repacker" means a person who operates an establishment that transfers crab meat from a container originally packed by another establishment to another container.

"Repacking operation" means a process of transferring crab meat from the original shipper's packing container to a different packing container, including all steps beginning with the removal of the original containers of meat from the repacker's refrigeration and ending with the repacked crab meat in properly identified containers placed into refrigeration.

"Shipper" means a person who operates an establishment for the cooking, picking, repacking or pasteurizing of crab meat.

"Source code" means a code designated by the repacker which represents the crab processing facility where crab meat was obtained.

**12VAC5-165-70. ~~Oversight for safety of product.~~ (Repealed.)**

~~Any condition that may compromise the safety of the final product shall be identified by the repacker and the division shall be contacted for appropriate disposition of the product.~~

Part II
Sources of Crab Meat for Repacking

**12VAC5-165-80. Source facility requirements.**

Crab meat for repacking shall be picked and packed by a crab processing establishment which is currently licensed, permitted or certified and inspected by either a state public health authority or by a foreign government public health authority, and shall operate under a HACCP plan approved by the state or a foreign government public health authority, or the U.S. Food and Drug Administration. Imported crab meat shall meet the requirements for imported products set forth in 21 CFR 123.12 (60 FR 65197, December 18, 1995).

**12VAC5-165-90. Verification of shipping temperatures for ~~imported~~ crab meat.**

~~When imported crab meat is used as a source for repacking,~~ ~~the~~ The repacker shall provide a record of ~~international~~ transport temperature receiving conditions for each shipment~~, or other information sufficient to verify that the product was not temperature abused~~ of crab meat. Temperature recording may be by maximum temperature recording, continuous temperature recording, or by other device ~~approved by the Division of Shellfish Sanitation~~ such as adequate amount of ice or adequate quantity of chemical cooling media. The ~~processor~~ repacker shall include the transport receiving temperature conditions as a part of the receiving CCP in ~~its~~ the HACCP plan.

**12VAC5-165-100. Sampling and analysis requirements for imported crab meat.**

A. When imported crab meat is used as a source for repacking, the ~~repacker shall take a minimum of five samples from the first two shipments prior to any processing to be analyzed by a certified laboratory. If all samples from both initial shipments meet the specified action levels, then the sampling interval may be reduced to once every three months (quarterly) for each shipper. If any quarterly samples exceed the action levels, then sampling will be required on all successive shipments until all samples from two successive shipments meet the action levels as follows:~~ importer or repacker may take samples from each lot prior to processing to be analyzed by a certified laboratory and maintain on file a copy of the sampling results for a minimum of one year. The action levels for the crab meat sampled are as follows:

1. Pasteurized crab meat.
   a. Aerobic plate count; action level of >3,000/g.
   b. Fecal coliforms; action level of >20/100g.
2. All other crab meat.
   a. Aerobic plate count; action level of >100,000/g.
   b. Fecal coliforms; action level of >93/100g.

B. When imported crab meat is used as a source for repacking, the importer or repacker ~~shall~~ may take a minimum of five samples from every shipment to be tested for decomposition by organoleptic sensing technique and maintain a copy of the results on file for a minimum of one year. ~~These analyses shall be conducted only by a designated person trained in organoleptic sensing technique either by Virginia Polytechnic Institute and State University (Virginia Tech), the United States Food and Drug Administration (FDA), or by another source approved by the division. The repacker shall submit to the division a copy of the certificate of training or other documentation denoting successful completion of the training from the trainer for each individual conducting the analysis, and shall maintain a copy in his records.~~

C. If any sample is found to exceed an action level or guideline, or is found to show evidence of decomposition, the repacker shall stop processing the lot sampled and ~~contact the division before proceeding with processing to~~ determine the disposition of that lot.

D. All records of sample analyses ~~shall be~~ kept on file at the ~~repacker and~~ repacker's establishment shall be made available for review by the division. These records shall be maintained for a period of one year from the date of processing for products packaged for fresh distribution, and two years for products packaged for frozen or pasteurized distribution.

**12VAC5-165-120. Verification of container integrity for imported, pasteurized crab meat.**

The repacker shall evaluate the container integrity of all imported, pasteurized crab meat products. These evaluations

shall also be conducted after any pasteurization by the repacker. This evaluation shall at a minimum include visual inspection of all containers for evidence of leaks. A record of inspection shall be maintained on file by the repacker for a minimum of one year.

**12VAC5-165-150. Pasteurized crab meat storage temperature.**

Containers of pasteurized crab meat ~~destined for repacking~~ shall be stored ~~and transported~~ in a refrigerated room ~~or vehicle~~ at a temperature of 36°F or less.

**12VAC5-165-180. Cooling of crab meat after repacking.**

Immediately after repacking, the repacker shall place containers of repacked crab meat ~~shall be either placed~~ into ~~crushed or flaked~~ ice or ~~placed~~ into refrigeration not to exceed 36°F~~, or both~~.

**12VAC5-165-200. ~~Imported crab meat to be pasteurized.~~ (Repealed.)**

~~Prior to or after repacking, the repacker shall pasteurize all imported crab meat which has not been pasteurized in the country of origin. Pasteurization shall meet the National Blue Crab Industry Pasteurization and Alternative Thermal Processing Standards, revised November 8, 1993, with records of pasteurization to be kept as required in Article 3 (12VAC5-165-240 et seq.) of this part. The heat penetration in the crab meat during the pasteurization process for all container sizes and types shall be confirmed in writing by Virginia Tech or other authority approved by the division as meeting the aforementioned minimum requirements.~~

**12VAC5-165-220. Lot numbers.**

A. Containers of repacked crab meat shall be stamped or embossed with the lot number.

B. Lot numbers shall consist of a repack date and a code indicating the original ~~source firm that picked the crab meat. All codes for lot numbers shall be logged in the~~ processor ~~records~~. Records shall be maintained by the repacker for a minimum of one year with an explanation of the code.

**12VAC5-165-230. Country of origin for imported crab meat.**

Imported crab meat shall be packed by the repacker into containers ~~which~~ that bear a declaration of the country of origin of the repacked crab meat ~~on the~~ using a preprinted principal display panel ~~of the container~~.

Article 3
Records and Recordkeeping

**12VAC5-165-240. Accessibility of records.**

All required records shall be ~~(i) kept in logical order, (ii)~~ maintained by the repacker~~,~~ and ~~(iii) readily accessible by~~ shall be made available to the ~~Division of Shellfish Sanitation staff~~ division for inspection.

**12VAC5-165-270. Minimum records to be kept.**

The repacker shall~~, at a minimum,~~ maintain the following information on each lot of repacked crab meat ~~the source plant, quantity received from source, type of meat, date of repacking, buyers, and quantities of repacked lots sold. Additional clarifying records may be required if individual lots of product cannot easily be traced~~ for a minimum of one year: (i) the original processor information, (ii) verification records of shipping temperature conditions, (iii) records required by the repacker's HACCP plan, and (iv) repacked crab meat sales records. Additional clarifying records may be required by the division to identify lot codes on containers.

**12VAC5-165-280. ~~Records to be kept separate.~~ (Repealed.)**

~~Records for repacked imported crab meat shall be kept separate from other production records.~~

Article 4
Penalties

**12VAC5-165-290. ~~Decertification of certified facilities.~~ (Repealed.)**

~~Any certified crab meat processor found to be packing or repacking foreign crab meat into a container without the country of origin on the principal display panel will be decertified for 30 days, effective immediately upon the finding by the Director of the Division of Shellfish Sanitation.~~

DOCUMENTS INCORPORATED BY REFERENCE (12VAC5-165)

~~National Blue Crab Industry Pasteurization and Alternative Thermal Processing Standards, National Blue Crab Industry Association Grades and Cooking Standards Committee, revised November 8, 1993.~~

VA.R. Doc. No. R11-2705; Filed November 22, 2013, 12:10 p.m.

## Fast-Track Regulation

Title of Regulation: **12VAC5-220. Virginia Medical Care Facilities Certificate of Public Need Rules and Regulations (amending 12VAC5-220-110, 12VAC5-220-200).**

Statutory Authority: § 32.1-102.2 of the Code of Virginia.

Public Hearing Information: No public hearings are scheduled.

Public Comment Deadline: January 15, 2014.

Effective Date: February 3, 2014.

Agency Contact: Carrie Eddy, Senior Policy Analyst, Department of Health, 9960 Mayland Drive, Suite 401, Richmond, VA 23233, telephone (804) 367-2157, or email carrie.eddy@vdh.virginia.gov.

Basis: Section 32.1-102.2 of the Code of Virginia grants the Board of Health the legal authority to promulgate regulations that are consistent with Article 1 (§ 32.1-102.1 et seq.) of Chapter 4 of Title 32.1 of the Code of Virginia. Section 32.1-

102.1 of the Code of Virginia requires that 12VAC5-220-110 and 12VAC5-220-200 be updated annually.

Purpose: The certificate of public need (COPN) program is the mechanism used in Virginia to restrain specified health care facilities and services from unnecessary duplication as a cost control measure. Section 32.1-102.1 of the Code of Virginia requires an annual adjustment to the project cost threshold by which health care entities subject to COPN can make necessary capital improvements, such as parking decks and computer systems, without having to register or obtain a certificate. Raising the cost threshold for capital expenditure projects benefits health care entities by reducing the costs of those projects.

The proposed regulatory action assists is protecting the health, safety, and welfare of Virginians by allowing medical care facilities and services providers subject to the COPN program to make necessary capital improvements quicker and for less cost thus improving service delivery of certain regulated medical services to those patients in need of those services. Adjusting the cost of miscellaneous expenditures also provides greater opportunity for smaller medical providers subject to certificate of need to expand their services, thus providing more patient choice in medical services available.

Rationale for Using Fast-Track Process: Because § 32.1-102.1 of the Code of Virginia does not specify which nationally recognized consumer price index to use in adjusting the capital expenditure threshold, the department chose to use the Consumer Price Index published by the U.S. Department of Labor (USDL). The discretionary decision prohibits use of the exempt regulatory action process for updating the project threshold each year. The department, however, has not received negative response from affected constituents in using the USDL. Therefore, the department believes this action will remain noncontroversial and is appropriate for the fast-track rulemaking process.

Substance: This action affects the cost threshold amounts for miscellaneous capital expenditure projects requiring a COPN by raising the threshold for registration for projects costing more than $5,859,565 and raising the threshold for projects requiring a COPN application to more than $17,608,697.

Issues: The proposed regulatory action has the advantage of ensuring that the provisions of § 32.1-102.1 of the Code of Virginia can be complied with in a more efficient manner. The proposed regulatory action does not pose any disadvantages to the public or the Commonwealth.

Department of Planning and Budget's Economic Impact Analysis:

Summary of the Proposed Amendments to Regulation. The proposed changes will adopt a formula to update the threshold for capital expenditure projects for which a registration or the filing of an application for a Certificate of Public Need (COPN) is required.

Result of Analysis. The benefits likely exceed the costs for all proposed changes.

Estimated Economic Impact. The proposed changes will adopt a formula to update the threshold for capital expenditure projects for which a registration or the filing of an application for a COPN is required. Section 32.1-102.1 of the Code of Virginia mandates that COPN registration and application thresholds are revised annually to reflect inflation. Currently, the registration threshold is $5,698,607 and application threshold is $17,095,823. The Board of Health proposes to adopt a formula which will increase these thresholds by 3%, or by $170,958 to $5,869,565 and by $512,874 to $17,608,697 according to Consumer Price Index published by the U.S. Department of Labor.

The main impact of these proposed changes will be on projects that would no longer register or apply for COPN due to the higher thresholds. Since the magnitude of the increase is relatively small, 3%, this change is not expected to have an impact on a significant number of projects in the short term. For example, last year the Virginia Department of Health (VDH) received one registration and four applications. Since the amounts of these projects were not within the incremental increase proposed by these regulations, all of these projects would still be required to register or apply under the revised thresholds. However, the proposed change is likely to have an impact on projects in the long term by increasing the threshold base automatically that will be employed for future revisions.

The COPN application fee is $20,000. In addition to the application fee, compliance costs for an applicant may include expenses associated with the preparation for and processing of an application in the review process. Some applicants may hire a consultant to manage the application. If no application is required for a project due to increased thresholds, these costs associated with a COPN review would represent savings in compliance costs to the applicant. Compliance costs for registration appear to be low. There is no fee charged for registration and the registration is reported to be a simple process.

The likely impact on VDH in the long term would include a reduction in the amount of fees collected and a reduction in the administrative resources usually needed for the application review.

Businesses and Entities Affected. The proposed regulations apply to entities that are required to register or apply for a COPN. There were four applications and one registration for capital projects last year.

Localities Particularly Affected. The proposed changes apply throughout the Commonwealth.

Projected Impact on Employment. Since the change in the revised threshold is relatively small, no projects are likely to be affected immediately. Thus, no significant impact on employment is expected in the short term. In the long term, automatically increased thresholds should eliminate the need

for reviews in a number of projects reducing the labor demand due to reduced need for review staff and staff needed to prepare an application.

Effects on the Use and Value of Private Property. No significant economic impact is expected on the use and value of private property in the short run as the incremental increase in the thresholds are relatively small. However, reduced compliance costs in the long term due to automatically adjusted higher thresholds are expected to improve profits and have a positive impact on asset value of affected applicants.

Small Businesses: Costs and Other Effects. The proposed changes are not anticipated to have an impact on small businesses as the sizes of businesses requiring registration or application tend to be relatively large.

Small Businesses: Alternative Method that Minimizes Adverse Impact. No adverse impact on small businesses is expected.

Real Estate Development Costs. The proposed changes will likely reduce costs of capital projects in the long term some of which may be real estate development projects at least partially.

Legal Mandate. The Department of Planning and Budget (DPB) has analyzed the economic impact of this proposed regulation in accordance with § 2.2-4007.04 of the Administrative Process Act and Executive Order Number 14 (10). Section 2.2-4007.04 requires that such economic impact analyses include, but need not be limited to, a determination of the public benefit, the projected number of businesses or other entities to whom the regulation would apply, the identity of any localities and types of businesses or other entities particularly affected, the projected number of persons and employment positions to be affected, the projected costs to affected businesses or entities to implement or comply with the regulation, and the impact on the use and value of private property. Further, if the proposed regulation has an adverse effect on small businesses, § 2.2-4007.04 requires that such economic impact analyses include (i) an identification and estimate of the number of small businesses subject to the regulation; (ii) the projected reporting, recordkeeping, and other administrative costs required for small businesses to comply with the regulation, including the type of professional skills necessary for preparing required reports and other documents; (iii) a statement of the probable effect of the regulation on affected small businesses; and (iv) a description of any less intrusive or less costly alternative methods of achieving the purpose of the regulation. The analysis presented above represents DPB's best estimate of these economic impacts.

Agency Response to Economic Impact Analysis: The Department of Health thanks the regulatory review staff of the Department of Planning and Budget with its suggestion and assistance in adopting a formula to annually update the threshold for capital expenditure projects under the certificate of public need program. Using a formula that will be updated will ensure a more timely process of the required annual increases.

VDH suggests there is a technical misstatement of the percentage amount used in the analysis writeup - the dollar amounts are correct, equating to an increase of 3.0%, taken from the Consumer Price Index for Urban Medical. The percentage recorded in the economic impact analysis is misstated at 3.2%. However, the misstatement is minor and does not affect the analysis or the agreed upon formula being promulgated in the regulation.

EDITOR'S NOTE: The Department of Planning and Budget economic impact analysis was updated to reflect the 3.0% increase noted in the Department of Health's response.

Summary:

*The proposed amendments establish a formula to update the threshold for capital expenditure projects for which a registration or filing of an application for a certificate of public need is required.*

**12VAC5-220-110. Requirements for registration of certain capital expenditures.**

A. At least 30 days before any person contracts to make or is otherwise legally obligated to make a capital expenditure by or on behalf of a medical care facility ~~that is $5,698,607 or more but is less than $17,095,823 and~~ as defined in this chapter that has not been previously authorized by the commissioner, ~~the owner of any medical care facility as defined in this chapter~~ such expenditure shall ~~register~~ be registered in writing ~~such expenditure~~ with the commissioner. The threshold amount for capital expenditure project registration shall be determined using the formula contained in subsection B of this section.

B. The threshold contained in subsection A of this section shall be adjusted annually using the percentage increase listed in the Consumer Price Index for All Urban Consumers (CPI-U) for the most recent year as follows:

A x (1+B)

where:

A = the capital expenditure threshold amount for the previous year

and

B = the percent increase for the expense category "Medical Care" listed in the most recent year available of the CPI-U of the U.S. Bureau of Labor Statistics.

C. The format for registration shall include information concerning the purpose of such expenditure and projected impact that the expenditure will have upon the charges for services. For purposes of registration, the owner shall include any person making the affected capital expenditure. See definition of "project."

D. Annually, the department shall (i) publish the threshold amount in the General Notices section of the Virginia

Register of Regulations and (ii) post the threshold amount on its website.

**12VAC5-220-200. One hundred ninety-day review cycle.**

A. The department shall review the following groups of completed applications in accordance with the following 190-day scheduled review cycles and the following descriptions of projects within each group, except as provided for in 12VAC5-220-220.

| BATCH GROUP | GENERAL DESCRIPTION | REVIEW CYCLE | |
|---|---|---|---|
| | | Begins | Ends |
| A | General Hospitals/Obstetrical Services/Neonatal Special Care Services | Feb. 10<br>Aug. 10 | Aug. 18<br>Feb. 16 |
| B | Open Heart Surgery/Cardiac Catheterization/Ambulatory Surgery Centers/Operating Room Additions/Transplant Services | Mar. 10<br>Sep. 10 | Sep. 16<br>Mar. 19 |
| C | Psychiatric Facilities/Substance Abuse Treatment/Mental Retardation Facilities | Apr. 10<br>Oct. 10 | Oct. 17<br>Apr. 18 |
| D/F | Diagnostic Imaging Facilities/Services Selected Therapeutic Facilities/Services | May 10<br>Nov. 10 | Nov. 16<br>May 19 |
| E | Medical Rehabilitation Beds/Services | June 10<br>Dec. 10 | Dec. 17<br>Jun. 18 |
| D/F | Selected Therapeutic Facilities/Services Diagnostic Imaging Facilities/Services | July 10<br>Jan. 10 | Jan. 16<br>Jul. 18 |
| G | Nursing Home Beds at Retirement Communities/Bed Relocations/Miscellaneous Expenditures by Nursing Homes | Jan. 10<br>Mar. 10<br>May 10<br>July 10<br>Sep. 10<br>Nov. 10 | Jul. 18<br>Sep. 16<br>Nov. 16<br>Jan. 16<br>Mar. 19<br>May 19 |

Batch Group A includes:

1. The establishment of a general hospital.

2. An increase in the total number of general acute care beds in an existing or authorized general hospital.

3. The relocation at the same site of 10 general hospital beds or 10% of the general hospital beds of a medical care facility, whichever is less, from one existing physical facility to another in any two-year period if such relocation involves a capital expenditure ~~of $17,095,823 or more~~ with an expenditure exceeding the threshold amount as determined using the formula contained in subsection B of this section (see 12VAC5-220-280).

4. The introduction into an existing medical care facility of any new neonatal special care or obstetrical services that the facility has not provided in the previous 12 months.

5. Any capital expenditure ~~of $17,095,823 or more,~~ with an expenditure exceeding the threshold amount as determined using the formula contained in subsection B of this section and not defined as a project category included in Batch Groups B through G, by or in behalf of a general hospital.

Batch Group B includes:

1. The establishment of a specialized center, clinic, or portion of a physician's office developed for the provision of outpatient or ambulatory surgery or cardiac catheterization services.

2. An increase in the total number of operating rooms in an existing medical care facility or establishment of operating rooms in a new facility.

3. The introduction into an existing medical care facility of any new cardiac catheterization, open heart surgery, or organ or tissue transplant services that the facility has not provided in the previous 12 months.

4. The addition by an existing medical care facility of any medical equipment for the provision of cardiac catheterization.

5. Any capital expenditure ~~of $17,095,823 or more,~~ with an expenditure exceeding the threshold amount as determined using the formula contained in subsection B of this section and not defined as a project category in Batch Group A or Batch Groups C through G, by or in behalf of a specialized center, clinic, or portion of a physician's office developed for the provision of outpatient or ambulatory surgery or cardiac catheterization services.

6. Any capital expenditure ~~of $17,095,823 or more,~~ with an expenditure exceeding the threshold amount as determined using the formula contained in subsection B of this section and not defined as a project category in Batch Group A or Batch Groups C through G, by or in behalf of a medical care facility, that is primarily related to the provision of surgery, cardiac catheterization, open heart surgery, or organ or tissue transplant services.

Batch Group C includes:

1. The establishment of a mental hospital, psychiatric hospital, intermediate care facility established primarily for the medical, psychiatric or psychological treatment and rehabilitation of alcoholics or drug addicts, or mental retardation facility.

2. An increase in the total number of beds in an existing or authorized mental hospital, psychiatric hospital, intermediate care facility established primarily for the medical, psychiatric or psychological treatment and

rehabilitation of alcoholics or drug addicts, or mental retardation facility.

3. An increase in the total number of mental hospital, psychiatric hospital, substance abuse treatment and rehabilitation, or mental retardation beds in an existing or authorized medical care facility ~~which~~ that is not a dedicated mental hospital, psychiatric hospital, intermediate care facility established primarily for the medical, psychiatric or psychological treatment and rehabilitation of alcoholics or drug addicts, or mental retardation facility.

4. The relocation at the same site of 10 mental hospital, psychiatric hospital, substance abuse treatment and rehabilitation, or mental retardation beds or 10% of the mental hospital, psychiatric hospital, substance abuse treatment and rehabilitation, or mental retardation beds of a medical care facility, whichever is less, from one existing physical facility to another in any two-year period if such relocation involves a capital expenditure ~~of $17,095,823 or more~~ with an expenditure exceeding the threshold amount as determined using the formula contained in subsection B of this section (see 12VAC5-220-280).

5. The introduction into an existing medical care facility of any new psychiatric or substance abuse treatment service that the facility has not provided in the previous 12 months.

6. Any capital expenditure ~~of $17,095,823 or more,~~ with an expenditure exceeding the threshold amount as determined using the formula contained in subsection B of this section and not defined as a project category in Batch Groups A and B or Batch Groups D/F through G, by or in behalf of a mental hospital, psychiatric hospital, intermediate care facility established primarily for the medical, psychiatric or psychological treatment and rehabilitation of alcoholics or drug addicts, or mental retardation facilities.

7. Any capital expenditure ~~of $17,095,823 or more,~~ with an expenditure exceeding the threshold amount as determined using the formula contained in subsection B of this section and not defined as a project category in Batch Groups A ~~through~~ and B or Batch Groups D/F through G, by or in behalf of a medical care facility, which is primarily related to the provision of mental health, psychiatric, substance abuse treatment or rehabilitation, or mental retardation services.

Batch Group D/F includes:

1. The establishment of a specialized center, clinic, or that portion of a physician's office developed for the provision of computed tomographic (CT) scanning, magnetic resonance imaging (MRI), magnetic source imaging (MSI), positron emission tomographic (PET) scanning, or nuclear medicine imaging, except for the purpose of nuclear cardiac imaging.

2. The introduction into an existing medical care facility of any new computed tomography (CT), magnetic resonance imaging (MRI), magnetic source imaging (MSI), positron emission tomographic (PET) scanning, or nuclear medicine imaging services, except for the purpose of nuclear cardiac imaging that the facility has not provided in the previous 12 months.

3. The addition by an existing medical care facility of any equipment for the provision of computed tomography (CT), magnetic resonance imaging (MRI), magnetic source imaging (MSI), positron emission tomographic (PET) scanning.

4. Any capital expenditure ~~of $17,095,823 or more,~~ with an expenditure exceeding the threshold amount as determined using the formula contained in subsection B of this section and not defined as a project category in Batch Groups A, B, C, E, and G, by or in behalf of a specialized center, clinic, or that portion of a physician's office developed for the provision of computed tomographic (CT) scanning, magnetic resonance imaging (MRI), magnetic source imaging (MSI), positron emission tomographic (PET) scanning, or nuclear medicine imaging, except that portion of a physician's office dedicated to providing nuclear cardiac imaging.

5. Any capital expenditure ~~of $17,095,823 or more,~~ with an expenditure exceeding the threshold amount as determined using the formula contained in subsection B of this section and not defined as a project category in Batch Groups A, B, C, E, and G, by or in behalf of a medical care facility, which is primarily related to the provision of computed tomographic (CT) scanning, magnetic resonance imaging (MRI), magnetic source imaging (MSI), positron emission tomographic (PET) scanning, or nuclear medicine imaging, except for the purpose of nuclear cardiac imaging.

Batch Group E includes:

1. The establishment of a medical rehabilitation hospital.

2. An increase in the total number of beds in an existing or authorized medical rehabilitation hospital.

3. An increase in the total number of medical rehabilitation beds in an existing or authorized medical care facility that is not a dedicated medical rehabilitation hospital.

4. The relocation at the same site of 10 medical rehabilitation beds or 10% of the medical rehabilitation beds of a medical care facility, whichever is less, from one existing physical facility to another in any two-year period, if such relocation involves a capital expenditure ~~of~~ ~~$17,095,823 or more~~ with an expenditure exceeding the threshold amount as determined using the formula contained in subsection B of this section (see 12VAC5-220-280).

5. The introduction into an existing medical care facility of any new medical rehabilitation service that the facility has not provided in the previous 12 months.

6. Any capital expenditure ~~of $17,095,823 or more,~~ with an expenditure exceeding the threshold amount as determined using the formula contained in subsection B of this section and not defined as a project category in Batch Groups A, B, C, D/F, and G, by or in behalf of a medical rehabilitation hospital.

7. Any capital expenditure ~~of $17,095,823 or more,~~ with an expenditure exceeding the threshold amount as determined using the formula contained in subsection B of this section and not defined as a project category in Batch Groups A, B, C, D/F, and G, by or in behalf of a medical care facility, that is primarily related to the provision of medical rehabilitation services.

Batch Group D/F includes:

1. The establishment of a specialized center, clinic, or that portion of a physician's office developed for the provision of gamma knife surgery, lithotripsy, or radiation therapy.

2. Introduction into an existing medical care facility of any new gamma knife surgery, lithotripsy, or radiation therapy services that the facility has not provided in the previous 12 months.

3. The addition by an existing medical care facility of any medical equipment for the provision of gamma knife surgery, lithotripsy, or radiation therapy.

4. Any capital expenditure ~~of $17,095,823 or more,~~ with an expenditure exceeding the threshold amount as determined using the formula contained in subsection B of this section and not defined as a project in Batch Groups A, B, C, E, and G, by or in behalf of a specialized center, clinic, or that portion of a physician's office developed for the provision of gamma knife surgery, lithotripsy, or radiation therapy.

5. Any capital expenditure ~~of $17,095,823 or more,~~ with an expenditure exceeding the threshold amount as determined using the formula contained in subsection B of this section and not defined as a project in Batch Groups A, B, C, E, and G, by or in behalf of a medical care facility, which is primarily related to the provision of gamma knife surgery, lithotripsy, or radiation therapy.

Batch Group G includes:

1. The establishment of a nursing home, intermediate care facility, or extended care facility of a continuing care retirement community by a continuing care provider registered with the State Corporation Commission pursuant to Chapter 49 (§ 38.2-4900 et seq.) of Title 38.2 of the Code of Virginia.

2. The establishment of a nursing home, intermediate care facility, or extended care facility that does not involve an increase in the number of nursing home facility beds within a planning district.

3. An increase in the total number of beds in an existing or authorized nursing home, intermediate care facility, or extended care facility of a continuing care retirement community by a continuing care provider registered with the State Corporation Commission pursuant to Chapter 49 (§ 38.2-4900 et seq.) of Title 38.2 of the Code of Virginia.

4. An increase in the total number of beds in an existing or authorized nursing home, intermediate care facility, or extended care facility that does not involve an increase in the number of nursing home facility beds within a planning district.

5. The relocation at the same site of 10 nursing home, intermediate care facility, or extended care facility beds or 10% of the nursing home, intermediate care facility, or extended care facility beds of a medical care facility, whichever is less, from one physical facility to another in any two-year period, if such relocation involves a capital expenditure ~~of $17,095,823 or more~~ with an expenditure exceeding the threshold amount as determined using the formula contained in subsection B of this section (see 12VAC5-220-280).

6. Any capital expenditure ~~of $17,095,823 or more,~~ with an expenditure exceeding the threshold amount as determined using the formula contained in subsection B of this section and not defined as a project category in Batch Groups A through D/F, by or in behalf of a nursing home, intermediate care facility, or extended care facility, which does not increase the total number of beds of the facility.

7. Any capital expenditure ~~of $17,095,823 or more,~~ with an expenditure exceeding the threshold amount as determined using the formula contained in subsection B of this section and not defined as a project category in Batch Groups A through D/F, by or in behalf of a medical care facility, that is primarily related to the provision of nursing home, intermediate care, or extended care services, and does not increase the number of beds of the facility.

B. The capital expenditure threshold referenced in subsection A of this section shall be adjusted annually using the percentage increase listed in the Consumer Price Index for All Urban Consumers (CPI-U) for the most recent year as follows:

A x (1+B)

where:

A = the capital expenditure threshold amount for the previous year

and

B = the percent increase for the expense category "Medical Care" listed in the most recent year available of the CPI-U of the U.S. Bureau of Labor Statistics.

C. Annually, the department shall (i) publish the threshold amount in the General Notices section of the Virginia Register of Regulations and (ii) post the threshold amount on its website.

VA.R. Doc. No. R14-3191; Filed November 26, 2013, 12:29 p.m.

## Fast-Track Regulation

Title of Regulation: **12VAC5-230. State Medical Facilities Plan (amending 12VAC5-230-530, 12VAC5-230-760).**

Statutory Authority: § 32.1-102.2 of the Code of Virginia.

Public Hearing Information: No public hearings are scheduled.

Public Comment Deadline: January 15, 2014.

Effective Date: February 4, 2014.

Agency Contact: Carrie Eddy, Policy Analyst, Department of Health, 3600 West Broad Street, Richmond, VA 23230, telephone (804) 367-2157, or email carrie.eddy@vdh.virginia.gov.

Basis: Section 32.1-102.2 of the Code of Virginia grants the Board of Health the legal authority to promulgate regulations that are consistent with Article 1 (§ 32.1-102.1 et seq.) of Chapter 4 of Title 32.1 of the Code of Virginia. Section 32.1-102.1 of the Code of Virginia requires that 12VAC5-230-760 be updated annually.

Purpose: The state medical facilities plan (SMFP) is the tool used by the certificate of public need (COPN) program to restrain specified health care facilities and services from unnecessary duplication as a cost control measure. Section 32.1-102.1 of the Code of Virginia requires an annual adjustment to the project cost threshold by which health care entities subject to COPN can make necessary capital improvements such as parking decks and computer systems without having to obtain a certificate. Raising the cost threshold for capital expenditure projects benefits health care entities by reducing the costs of those projects.

The proposed regulatory action assists is protecting the health, safety, and welfare of Virginians by allowing medical care facilities and services providers subject to the COPN program to make necessary capital improvements quicker and for less cost thus improving service delivery of certain regulated medical services to those patients in need of those services. Adjusting the cost of miscellaneous expenditures also provides greater opportunity for smaller medical providers subject to certificate of need to expand their services, thus providing more patient choice in medical services available.

Rationale for Using Fast-Track Process: Because § 32.1-102.1 of the Code of Virginia does not specify which nationally recognized consumer price index to use in adjusting the capital expenditure threshold, the department chose to use the Consumer Price Index published by the U.S. Department of Labor (USDL). The discretionary decision prohibits use of the exempt regulatory action process for updating the miscellaneous capital expenditure project thresholds listed in 12VAC5-220 and 12VAC5-230 each year. The department, however, has not received negative response from affected constituents in using the USDL index in prior years. Therefore, the department believes this action will remain noncontroversial and is appropriate for the fast-track rulemaking process.

Substance: This action affects the cost threshold amounts for miscellaneous capital expenditure projects requiring a COPN by raising the threshold for projects requiring a COPN application to more than $17,694,176.

Issues: The proposed regulatory action has the advantage of ensuring that the provisions of § 32.1-102.1 of the Code of Virginia can be complied with in a more efficient manner. The proposed regulatory action does not pose any disadvantages to the public or the Commonwealth.

Department of Planning and Budget's Economic Impact Analysis:

Summary of the Proposed Amendments to Regulation. In order to be consistent with a separate regulatory action (12VAC5-220), the proposed regulations update the threshold methodology in these regulations for capital expenditure projects for which the filing of an application for a Certificate of Public Need (COPN) is required.

Result of Analysis. The benefits likely exceed the costs for all proposed changes.

Estimated Economic Impact. The proposed changes will update the threshold methodology for capital expenditure projects for which the filing of an application for a COPN is required. The application threshold in these regulations has not been updated since 2008 and is $15 million currently.

Section 32.1-102.1 of the Code of Virginia mandates that the COPN application threshold is revised annually to reflect inflation. Pursuant to this requirement and through a separate regulatory action (12VAC5-220), the Board of Health proposes to adopt a methodology that will adjust the threshold automatically every year according to the Consumer Price Index published by the U.S. Department of Labor. The threshold calculated by the proposed methodology currently corresponds to $17,608,697.

This proposed change merely updates the threshold methodology in these regulations to be consistent with the proposed methodology in COPN regulations. Thus, no significant economic impact is expected from this change other than preventing potential confusion among the regulated entities.

Businesses and Entities Affected. The proposed regulations apply to entities that are required to apply for a COPN. There were four applications for capital projects last year.

Localities Particularly Affected. The proposed changes apply throughout the Commonwealth.

Projected Impact on Employment. No significant impact on employment is expected.

Effects on the Use and Value of Private Property. No significant impact on the use and value of private property is expected.

Small Businesses: Costs and Other Effects. No significant costs or other effects on small businesses are expected.

Small Businesses: Alternative Method that Minimizes Adverse Impact. No adverse impact on small businesses is expected.

Real Estate Development Costs. No adverse impact on real estate development costs is expected.

Legal Mandate. The Department of Planning and Budget (DPB) has analyzed the economic impact of this proposed regulation in accordance with § 2.2-4007.04 of the Administrative Process Act and Executive Order Number 14 (10). Section 2.2-4007.04 requires that such economic impact analyses include, but need not be limited to, a determination of the public benefit, the projected number of businesses or other entities to whom the regulation would apply, the identity of any localities and types of businesses or other entities particularly affected, the projected number of persons and employment positions to be affected, the projected costs to affected businesses or entities to implement or comply with the regulation, and the impact on the use and value of private property. Further, if the proposed regulation has an adverse effect on small businesses, § 2.2-4007.04 requires that such economic impact analyses include (i) an identification and estimate of the number of small businesses subject to the regulation; (ii) the projected reporting, recordkeeping, and other administrative costs required for small businesses to comply with the regulation, including the type of professional skills necessary for preparing required reports and other documents; (iii) a statement of the probable effect of the regulation on affected small businesses; and (iv) a description of any less intrusive or less costly alternative methods of achieving the purpose of the regulation. The analysis presented above represents DPB's best estimate of these economic impacts.

Agency's Response to Economic Impact Analysis: The Department of Health agrees with the economic impact analysis for 12VAC5-230 produced by the Department of Planning and Budget and has no further comments.

Summary:

*The amendments change the threshold for capital improvement projects for projects that are required to obtain a certificate of public need before construction begins by (i) establishing a formula for figuring the expenditure threshold and (ii) tying its annual increase to the Consumer Price Index for All Urban Consumers published by the U.S. Department of Labor.*

**12VAC5-230-530. Need for new service.**

A. No new inpatient beds should be approved in any health planning district unless:

1. The resulting number of beds for each bed category contained in this article does not exceed the number of beds projected to be needed for that health planning district for the fifth planning horizon year; and

2. The average annual occupancy based on the number of beds in the health planning district for the relevant reporting period is:

a. 80% at midnight census for medical/surgical or pediatric beds;

b. 65% at midnight census for intensive care beds.

B. For proposals to convert under-utilized beds that require a capital expenditure ~~of $15 million or more~~ with an expenditure exceeding the threshold amount as determined using the formula contained in subsection C of this section, consideration may be given to such proposal if:

1. There is a projected need in the applicable category of inpatient beds; and

2. The applicant can demonstrate that the average annual occupancy of the converted beds would meet the utilization standard for the applicable bed category by the first year of operation.

For the purposes of this part, "underutilized" means less than 80% average annual occupancy for medical/surgical or pediatric beds, when the relocation involves such beds and less than 65% average annual occupancy for intensive care beds when relocation involves such beds.

C. The capital expenditure threshold referenced in subsection B of this section shall be adjusted annually using the percentage increase listed in the Consumer Price Index for All Urban Consumers (CPI-U) for the most recent year as follows:

A x (1+B)

where:

A = the capital expenditure threshold amount for the previous year

and

B = the percent increase for the expense category "Medical Care" listed in the most recent year available of the CPI-U of the U.S. Bureau of Labor Statistics.

**12VAC5-230-760. Project need.**

A. All applications involving ~~the~~ a capital expenditure ~~of $15 million or more~~ with an expenditure exceeding the threshold amount as determined using the formula contained in subsection B of this section by a medical care facility should include documentation that the expenditure is necessary in order for the facility to meet the identified medical care needs of the public it serves. Such documentation should clearly identify that the expenditure:

1. Represents the most cost-effective approach to meeting the identified need; and

2. The ongoing operational costs will not result in unreasonable increases in the cost of delivering the services provided.

B. The capital expenditure threshold referenced in subsection A of this section shall be adjusted annually using

the percentage increase listed in the Consumer Price Index for All Urban Consumers (CPI-U) for the most recent year as follows:

A x (1+B)

where:

A = the capital expenditure threshold amount for the previous year

and

B = the percent increase for the expense category "Medical Care" listed in the most recent year available of the CPI-U of the U.S. Bureau of Labor Statistics.

VA.R. Doc. No. R14-3247; Filed November 26, 2013, 12:31 p.m.

## Proposed Regulation

Title of Regulation: **12VAC5-475. Regulations Implementing the Virginia Organ and Tissue Donor Registry (amending 12VAC5-475-10, 12VAC5-475-30, 12VAC5-475-50 through 12VAC5-475-90; adding 12VAC5-475-75; repealing 12VAC5-475-20, 12VAC5-475-40).**

Statutory Authority: § 32.1-292.2 of the Code of Virginia.

Public Hearing Information: No public hearings are scheduled.

Public Comment Deadline: February 14, 2014.

Agency Contact: Janice Hicks, Department of Health, 109 Governor Street, Richmond, VA 23219, telephone (804) 864-7662, FAX (804) 864-7670, or email janice.hicks@vdh.virginia.gov.

Basis: Section 32.1-292.2 of the Code of Virginia requires the State Board of Health, in consultation with the Virginia Transplant Council, to promulgate regulations necessary to create, compile, maintain, modify as necessary, and administer the Virginia Donor Registry.

Purpose: Several aspects of the regulations regarding the Virginia Donor Registry need updating and clarifying. The current regulations were the first promulgated under statutory authority granted by the 2000 Session of the Virginia General Assembly and have been in effect since March 27, 2002, without amendment. The board has concluded that amendments to the regulations are necessary to provide clarity, improve efficiency and effectiveness, and bring the regulations in line with current practice. The proposed amendments will assist in ensuring the public health, safety, and welfare of the citizens of the Commonwealth by (i) making it simpler for individuals to become organ donors, thereby increasing the number of donors and (ii) allowing the Virginia Transplant Council to collect and report accurate statistics on organ donation to the Department of Health.

Substance: The proposed amendments include:

1. Changing the references from the Virginia Organ and Tissue Donor Registry to the Virginia Donor Registry.

2. Replacing references to §§ 32.1-289 and 32.1-290 of the Code of Virginia, which were repealed by the 2007 General Assembly, with references to the Revised Uniform Anatomical Gift Act (§ 32.1-291.1 et seq. of the Code of Virginia).

3. Updating definitions for consistency with the Revised Uniform Anatomical Gift Act.

4. Amending the definition of "document of gift" to reference the donor registration form available on the DonateLifeVirginia.org website, and amending the definition of "registry" to clarify that the Virginia Transplant Council is responsible for creating, compiling, maintaining, and modifying the Virginia Donor Registry.

5. Adding a definition for "designee," which is used throughout the regulation to refer to a person who is designated to use the Virginia Donor Registry for certain limited purposes.

6. Adding DonateLifeVirginia.org to the definition section to identify the official website that provides information on organ and tissue donation and provides a registration form to indicate a willingness to donate.

7. Clarifying data requirements that the Virginia Transplant Council shall maintain and annually report to the State Board of Health.

8. Providing that persons may indicate their willingness to donate by completing the Donor Registration Form available on the DonateLifeVirginia.org website and eliminating the necessity for the Virginia Transplant Council to contact persons who identify their willingness to be a donor through the Department of Motor Vehicles to complete a registration form.

Issues: There are no disadvantages to the public. The identification of the DonateLifeVirginia.org website as an available resource on organ and tissue donation and the ability to complete an online registration to indicate a willingness to donate are advantages for the public.

There are no disadvantages to the agency or the Commonwealth. An advantage to both the State Board of Health and the Virginia Transplant Council is that the amended regulations will provide greater clarification of the information that the council must annually report to the board.

Department of Planning and Budget's Economic Impact Analysis:

Summary of the Proposed Amendments to Regulation. The Board of Health (Board) proposes to update and clarify the current Regulations Implementing the Virginia Organ and Tissue Donor Registry. The proposed amendments include changing the references to the Virginia Organ and Tissue Donor Registry to the "Virginia Donor Registry" as determined by the 2006 amendments to §§ 32.1-292.2 and 32.1-297.1 of the Code of Virginia and to replace references to §§ 32.1-289 et seq. and 32.1-290, which were repealed by

the 2007 General Assembly, with references to the Revised Uniform Anatomical Gift Act (§ 32.1-291.1 et seq.). Also the Board proposes to make definitions consistent with the Revised Uniform Anatomical Gift Act (§ 32.1-291.1 et seq.), to delete definitions no longer required or used in the text, and to amend or add definitions to include donor registration processes available on the DonateLifeVirginia.org website and clarify other functions and entities. Further the Board proposes to specify the data that are maintained and annually reported to the Board, to specify that designees may assist individuals to complete a signed application and that people may indicate their willingness to donate through a donor registration process or mail-in form available on the DonateLifeVirginia.org website.

Result of Analysis. The benefits likely exceed the costs for all proposed changes.

Estimated Economic Impact. None of the proposed amendments change requirements in practice. Thus, the proposed amendments have no impact beyond improving clarity.

Businesses and Entities Affected. These regulations affect the four organ procurement organizations, two eye banks, four tissue recovery agencies and hospitals in the commonwealth, as well as associated medical staff, potential donors and transplant recipients.

Localities Particularly Affected. There are no localities that bear any identified disproportionate material impact from these amended regulations.

Projected Impact on Employment. The proposed amendments do not affect employment.

Effects on the Use and Value of Private Property. The proposed amendments do not significantly affect the value and use of private property.

Small Businesses: Costs and Other Effects. The proposed amendments do not produce costs for small businesses.

Small Businesses: Alternative Method that Minimizes Adverse Impact. The proposed amendments do not adversely affect small businesses.

Real Estate Development Costs. The proposed amendments do not affect real estate development costs.

Legal Mandate. The Department of Planning and Budget (DPB) has analyzed the economic impact of this proposed regulation in accordance with § 2.2-4007.04 of the Administrative Process Act and Executive Order Number 14 (10). Section 2.2-4007.04 requires that such economic impact analyses include, but need not be limited to, the projected number of businesses or other entities to whom the regulation would apply, the identity of any localities and types of businesses or other entities particularly affected, the projected number of persons and employment positions to be affected, the projected costs to affected businesses or entities to implement or comply with the regulation, and the impact on the use and value of private property. Further, if the proposed regulation has adverse effect on small businesses, § 2.2-4007.04 requires that such economic impact analyses include (i) an identification and estimate of the number of small businesses subject to the regulation; (ii) the projected reporting, recordkeeping, and other administrative costs required for small businesses to comply with the regulation, including the type of professional skills necessary for preparing required reports and other documents; (iii) a statement of the probable effect of the regulation on affected small businesses; and (iv) a description of any less intrusive or less costly alternative methods of achieving the purpose of the regulation. The analysis presented above represents DPB's best estimate of these economic impacts.

Agency's Response to Economic Impact Analysis: The Virginia Department of Health concurs with the findings of the economic impact analysis.

Summary:

*The proposed amendments (i) change references to the Virginia Organ and Tissue Donor Registry to the Virginia Donor Registry to conform to 2006 amendments to §§ 32.1-292.2 and 32.1-297.1 of the Code of Virginia and replace references repealed by the 2007 Session of the General Assembly with references to the Revised Uniform Anatomical Gift Act (§ 32.1-291.1 et seq. of the Code of Virginia); (ii) remove unnecessary definitions and modify definitions for consistency with the Revised Uniform Anatomical Gift Act and to include donor registration processes available on the DonateLifeVirginia.org website; (iii) specify the data that are maintained and annually reported to the State Board of Health; (iv) specify that designees may assist individuals in completing a signed application; and (v) specify that a willingness to donate may be indicated through a donor registration process or mail-in form available on the DonateLifeVirginia.org website.*

## CHAPTER 475
## REGULATIONS IMPLEMENTING THE VIRGINIA ~~ORGAN AND TISSUE~~ DONOR REGISTRY

### Part I
### Definitions and General Information

**12VAC5-475-10. Definitions.**

The following words and terms when used in this chapter shall have the following meanings, unless the context clearly indicates otherwise:

~~"Agent" means an adult appointed by the declarant under an advance directive, executed or made in accordance with the provisions of § 54.1 2983 of the Code of Virginia, to make health care decisions for him, including decisions relating to visitation, provided the advance directive makes express provisions for visitation and subject to physician orders and policies of the institution to which the declarant is admitted. The declarant may also appoint an adult to make, after the declarant's death, an anatomical gift of all or any part of his~~

~~body pursuant to Article 2 (§ 32.1-289 et seq.) of Chapter 8 of Title 32.1 of the Code of Virginia~~.

"Anatomical gift" or "organ donation" means a donation of ~~organs, tissues, or eyes or all or any part of a human body to take effect upon or after death~~ all or part of a human body to take effect after the donor's death for the purpose of transplantation, therapy, research, or education.

"Board" means the State Board of Health.

~~"Commissioner" means the State Health Commissioner or his duly designated officer or agent.~~

"Decedent" means a deceased individual ~~and includes a stillborn infant or fetus~~ whose body or part is or may be the source of an anatomical gift. The term includes a stillborn infant and, subject to restrictions imposed by law other than the restrictions imposed by the Revised Uniform Anatomical Gift Act (§ 32.1-291.1 et seq. of the Code of Virginia), a fetus.

"Department" means the ~~State~~ Virginia Department of Health.

"Designee" means a person designated by an organ procurement organization, eye bank, or tissue bank to identify and determine the suitability of a potential donor.

"Document of gift" means a donor card~~, a statement attached to or imprinted on a motor vehicle driver's or chauffeur's license or the record of the individual's motor vehicle driver's or chauffeur's license, a will, an advance directive, or other writing used to make an organ donation or an anatomical gift~~ or other record used to make an anatomical gift. The term includes a statement or symbol made pursuant to § 46.2-342 G of the Code of Virginia on a driver's license, an identification card, or a donor registry. ~~"Document of gift" also includes a record of the donor's gift stored in a registry.~~

"DonateLifeVirginia.org" means the official Virginia website that provides information on organ and tissue donation and provides a registration form for registrants to make an anatomical gift in accordance with the Revised Uniform Anatomical Gift Act (§ 32.1-291.1 et seq. of the Code of Virginia).

"Donor" means an individual ~~who makes a donation of organs, tissues, or eyes or an anatomical gift of all of his body~~ whose body or part is the subject of an anatomical gift.

~~"Disseminate" means to release, transfer, or otherwise communicate information orally, in writing, or by electronic means.~~

"Eye bank" means ~~an agency~~ a person that is licensed, accredited, or regulated under federal or state law to engage in the recovery, screening, testing, processing, storage, or distribution of human eyes or portions of human eyes and that is a member of the Virginia Transplant Council, accredited by the Eye Bank Association of America or the American Association of Tissue Banks and operating in the Commonwealth of Virginia.

"Guardian" means a person appointed by ~~the~~ a court ~~who is responsible for the personal affairs of an incapacitated person, including responsibility for making decisions regarding the person's support, care, health, safety, habilitation, education, and therapeutic treatment, and, if not inconsistent with an order of commitment, residence. Where the context plainly indicates, the term includes a "limited guardian" or a "temporary guardian." The term includes a local or regional program designated by the Department for the Aging as a public guardian pursuant to Article 2 (§ 2.2-711 et seq.) of Chapter 7 of Title 2.2 of the Code of Virginia~~ to make decisions regarding the support, care, education, health, or welfare of an individual. The term does not include a guardian ad litem, except when the guardian ad litem is authorized by a court to consent to donation.

~~"Informed consent" means the knowing and voluntary agreement, obtained without undue influence or any use of force, fraud, deceit, duress, or other form of constraint or coercion, of a person who is capable of exercising free power of choice.~~

"Organ procurement organization" means ~~an agency certified by the United States Health Care Financing Administration~~ a person designated by the Secretary of the U.S. Department of Health and Human Services as an organ procurement organization that is also a member of the Virginia Transplant Council.

"Part" means an organ, ~~tissue, eye, bone, artery, blood, fluid or other portion of a human body~~ an eye, or tissue of a human being. The term does not include the whole body.

~~"Personal information" means all information that describes, locates or indexes anything about an individual, as defined in § 2.2-3801 of the Code of Virginia.~~

"Procurement" means the recovery of any donated part by a licensed physician ~~licensed, accredited, or approved under the laws of any state~~ or a technician who is qualified in accordance with § 32.1-291.14 of the Code of Virginia.

"Registry" means the ~~Organ and Tissue~~ Virginia Donor Registry ~~for the Commonwealth~~, which shall be ~~administered by the Department of Health~~ created, compiled, operated, maintained, and modified as necessary by the Virginia Transplant Council in accordance with § 32.1-292.2 of the Code of Virginia. ~~The registry shall maintain and update, as needed, the pertinent information on all Virginians who have indicated a willingness to donate.~~

"Tissue bank" means ~~an agency~~ a person that is licensed, accredited, or regulated under federal or state law to engage in the recovery, screening, testing, processing, storage, or distribution of tissue, and that is a member of the Virginia Transplant Council, accredited by the American Association of Tissue Banks, and operating in the Commonwealth of Virginia.

~~"UNOS" means the United Network for Organ Sharing.~~

"VTC" means the Virginia Transplant Council~~, a program within the Virginia Department of Health that exists to promote and coordinate educational and information activities as related to the organ, tissue, and eye donation process and transplantation in the Commonwealth of Virginia~~.

**12VAC5-475-20. ~~Purpose.~~ (Repealed.)**

~~These regulations are designed to accomplish the tasks listed in § 32.1 292.2 C 1 and 2 of the Code of Virginia by establishing procedures for the administration of the registry.~~

**12VAC5-475-30. Administration.**

~~A. The board has the responsibility for promulgating regulations, in consultation with the VTC, pertaining to the administration of the organ and tissue donor registry~~.

~~B. The commissioner is the executive officer for the State Board of Health with the authority of the board when it is not in session, subject to the rules and regulations of and review by the board.~~

~~C.~~ A. The VTC, as ~~delegated~~ authorized by the board pursuant to § 32.1-292.2 D 2 of the Code of Virginia, ~~is responsible for analyzing~~ shall analyze registry data under research protocols directed toward determination and identification of means to promote and increase organ, eye, and tissue donation within the Commonwealth.

~~D. Confidentiality.~~ B. All persons responsible for the administration of the ~~organ and tissue donor registry~~ Virginia Donor Registry shall ensure that the registry and all information therein shall be confidential in accordance with §§ 32.1-127.1:03 and 32.1-292.2 B of the Code of Virginia and other applicable state and federal law.

C. The VTC shall maintain and report annually the following information to the board: (i) the number of unique individuals registered in the registry; (ii) the number of recovered organ donors; (iii) the number or recovered organ donors who were identified through the registry; (iv) the number of recovered tissue donors; (v) the number of recovered tissue donors who were identified through the registry; (vi) the number of recovered eye/cornea donors; and (vii) the number of recovered eye/cornea donors identified through the registry. This report shall be made on or before September 30 of each year and contain information pertaining to the previous fiscal year.

**12VAC5-475-40. ~~Access.~~ (Repealed.)**

~~The registry and all information therein shall be accessible 24 hours a day and only to the department and the specific designees of accredited organ procurement organizations, eye banks and tissue banks operating in or serving Virginia and which are members of the VTC, for the purpose of identifying a potential donor according to the provisions of §§ 32.1 127.1 and 32.1-292.2, and subsection F of § 46.2-342.~~

~~The name of such designees shall be provided to the VTC. All other persons or entities shall be prohibited from having access to the registry. If at any time the designee is unable to carry out his responsibilities with respect to the registry, a replacement shall be selected and the VTC shall be notified of such replacement.~~

~~All accredited organ procurement organizations, eye banks, and tissue banks with authorized access to the registry shall be required to report annually to the VTC the following outcome data: (i) the number of times the registry is accessed; (ii) the number of times access to the registry results in an unsuccessful search (i.e., the individual is not a member of the registry); (iii) the number of times an organ, tissue or eye procurement proceeds solely from accessing the registry; (iv) the number of times the next of kin's consent is obtained in addition to a successful search of the registry; (v) the number of times donation of organs, tissue, or eyes occurred as a result of alternative donation designation documentation; and (vi) the number of times the next of kin's consent is obtained without accessing the registry.~~

Part II
Registry Information

**12VAC5-475-50. Registry membership.**

~~Those persons 18 years and older who have indicated a willingness to donate in accordance with § 32.1 290 of the Code of Virginia and have completed the required registration form (VTC 1) shall be recorded in the registry. Persons under the age of 18 may enter the registry upon completion of the registration form and only with the written consent of his parent or legal guardian. No person may enter another person in the registry.~~ The registry shall record anatomical gifts made in accordance with the Revised Uniform Anatomical Gift Act (§ 32.1-291.1 et seq. of the Code of Virginia). Designees may assist individuals to complete a signed donor registration form.

Those persons who have ~~indicated a willingness to donate~~ designated an anatomical gift on their driver's license or personal identification card as authorized by the Department of Motor Vehicles will be automatically entered into the registry. Through ~~inter-agency~~ interagency agreement, the Department of Motor Vehicles will assist the department by electronically providing this information to the registry on a ~~daily~~ regular basis as agreed upon by the Department of Motor Vehicles and the VTC. ~~The VTC shall contact any such self-identified persons by United States mail regarding notification of membership to the registry and request the completion of the registration form (VTC-1).~~ Persons who make an anatomical gift by completing the donor registration form available on the DonateLifeVirginia.org website will also be automatically entered into the registry.

**12VAC5-475-60. Data to be recorded.**

The following information shall be recorded in the registry: the donor's full name, address (including county or independent city of residence with zip code), ~~telephone number,~~ date of birth, age, sex, race, and driver's license number or unique identification number. If the donor is under the age of 18, the name, ~~telephone number,~~ address, and

unique identification number of the donor's parent or legal guardian shall be recorded.

~~Information shall be recorded by completing the Virginia Organ and Tissue Donor Registry Form (VTC 1).~~

**12VAC5-475-70. Removal from the registry.**

A. A person who has joined the registry may ~~have his name removed~~ amend his anatomical gift or revoke the anatomical gift by filing an appropriate form ~~(VTC 0)~~ with the VTC ~~or~~ in accordance with ~~subsections E and F of § 32.1-290~~ the Revised Uniform Anatomical Gift Act (§ 32.1-291.1 et seq. of the Code of Virginia) or subsection ~~G~~ I of § 46.2-342 of the Code of Virginia.

B. Persons who revoke an anatomical gift shall be automatically removed from the registry by the VTC.

C. Persons can revoke an anatomical gift by completing any of the following actions:

1. Notifying the VTC in writing using an appropriate form provided by the VTC, which shall result in being removed from the registry upon receipt of notification by the VTC;

2. Completing the form available on the DonateLifeVirginia.org website, which shall result in immediate removal from the registry by the VTC; or

3. Not renewing an anatomical gift when renewing or replacing a driver's license or personal identification card at the Department of Motor Vehicles, which will result in being removed from the registry within 24 hours of receipt of notification to the VTC from the Department of Motor Vehicles.

D. The name of a person entered in the registry who has died shall be removed from the registry within 90 days of notification of death by the Virginia ~~Office~~ Division of Vital Records and Health Statistics.

Part III

Access, Use, and Dissemination of Registry Information

**12VAC5-475-75. Access.**

A. Except as otherwise provided by law, no person shall have access to the registry except as provided in this section.

B. Designees shall have access to the registry for the purpose of creating, amending, or revoking the registrant's anatomical gift.

C. The registry and all information therein shall be accessible 24 hours a day and only to specific designees of organ procurement organizations, eye banks, and tissue banks for the purpose of identifying a potential donor according to the provisions of §§ 32.1-127 and 32.1-292.2 of the Code of Virginia. The name of such designees shall be provided to the VTC. If at any time the designee is unable to carry out his responsibilities with respect to the registry, a replacement shall be selected and the VTC shall be notified of such replacement.

D. Persons who require access to the registry for operational and maintenance purposes shall have access to the registry upon receipt from VTC of appropriate access privileges.

E. The department shall be provided access to the registry for the purpose of exercising responsibility for oversight of VTC activities. The department shall not have access to personal information of registrants unless such access is required for the department's oversight responsibilities.

~~Part III~~

~~Use and Dissemination of Registry Information~~

**12VAC5-475-80. Use.**

The designees of ~~accredited~~ organ procurement organizations, eye banks, and tissue banks and all other persons with authorized access to the registry shall have an organizational or individual pass code, or both, assigned by the VTC to gain entry to the registry via the ~~VTC~~ website.

Once entry to the registry has been established, the designees shall enter the decedent's full name, ~~the decedent's~~ date of birth, ~~the decedent's~~ driver's license number, ~~the decedent's~~ unique identification number, or any combination thereof, to verify whether the decedent made a donor designation in the registry. Once the decedent's donor designation has been verified, the designees shall include the ~~intent to donate~~ document of gift as part of the donor record maintained by the ~~accredited~~ organ procurement organization, eye bank, and tissue bank.

If the decedent is not in the registry, the designees shall exit the registry. ~~Designees shall not perform a search of the registry on any other person other than the decedent.~~

**12VAC5-475-90. Dissemination.**

The ~~accredited~~ organ procurement organizations, eye banks, and tissue banks with authorized access to the registry may disclose the contents of the decedent's ~~documented donation designation~~ document of gift to the decedent's next of kin, the nearest available relative, a member of the decedent's household, an individual with an affinity relationship, ~~and~~ the ~~primary treating physician~~ decedent's physicians, and any other person or entity specified in §§ 32.1-291.9 and 32.1-291.11 of the Code of Virginia, in order to demonstrate that the ~~decedent's wish to donate~~ decedent made an anatomical gift in accordance with ~~§§ 32.1-290~~ the Revised Uniform Anatomical Gift Act (§ 32.1-291.1 et seq. of the Code of Virginia), § 46.2-342 of the Code of Virginia, ~~54.1-2984, and 54.1-2986~~ or an advance directive executed pursuant to the Health Care Decisions Act (§ 54.1-2981 et seq. of the Code of Virginia).

~~The VTC may disclose to the DMV the donor designation on those persons who are recorded in the registry in order that the driver's record accurately reflect those persons' wishes to donate pursuant to subsections E and F of § 46.2-342 of the Code of Virginia~~.

NOTICE: The following forms used in administering the regulation were filed by the agency. The forms are not being published; however, online users of this issue of the Virginia Register of Regulations may click on the name of a form with a hyperlink to access it. The forms are also available from the agency contact or may be viewed at the Office of the Registrar of Regulations, General Assembly Building, 2nd Floor, Richmond, Virginia 23219.

FORMS (12VAC5-475)

~~Virginia Organ and Tissue Donor Registry Removal Form, VTC 0 (eff. 7/00).~~

~~Virginia Organ and Tissue Donor Registry Form, VTC 1 (eff. 7/00).~~

Registry Removal Form, Donate Life Virginia (undated)

VA.R. Doc. No. R08-1335; Filed November 26, 2013, 10:09 a.m.

## Proposed Regulation

Title of Regulation: **12VAC5-620. Regulations Governing Application Fees for Construction Permits for Onsite Sewage Disposal Systems and Private Wells (amending 12VAC5-620-10, 12VAC5-620-30, 12VAC5-620-40, 12VAC5-620-50, 12VAC5-620-70 through 12VAC5-620-100; adding 12VAC5-620-75; repealing 12VAC5-620-20).**

Statutory Authority: §§ 32.1-12, 32.1-164, and 32.1-176.4 of the Code of Virginia.

Public Hearing Information:

January 13, 2014 - 1 p.m. - Department of Health, 9960 Mayland Drive, Perimeter Center, Training Room #2, Richmond, VA 23233

Public Comment Deadline: February 14, 2014.

Agency Contact: Jim Bowles, Department of Health, 109 Governor Street, Richmond, VA 23219, telephone (804) 864-7475, or email jim.bowles@vdh.virginia.gov.

Basis: The authority for these regulations is found in the following sections of the Code of Virginia:

1. § 32.1-12 provides the authority to make, adopt, and promulgate regulations necessary to carry out the provisions of Title 32.1 of the Code of Virginia.

2. § 32.1-164 C provides the authority to charge a fee for filing an application for an onsite sewage system or an alternative discharging sewage system permit with the department, to waive application fees for persons whose income is below the federal poverty guidelines or whose application is for the construction of a pit privy, and to refund the application fee when the department denies a permit for land upon which the applicant proposed to construct his principle place of residence.

3. § 32.164 E provides the authority to charge fees for installation and monitoring inspections of alternative discharging systems.

4. § 32.164 G provides the authority to charge fees for letters recognizing the appropriateness of onsite sewage site conditions in lieu of issuing onsite sewage system permits (i.e., certification letters).

5. § 32.1-164.1:2 C provides the authority to charge fees for betterment loan eligibility letter requests.

6. § 32.1-166.10 provides the authority to establish a reasonable fee to be charged to the appealing party commensurate with the time and expenses related to the handling of each appeal to the Review Board.

7. § 32.1-176.4 B authorizes fees for private well construction permits, the waiver of fees for persons whose incomes are below the federal poverty guidelines or when the application is for a replacement well, and the refund of the application fee when a permit is denied for land on which the applicant seeks to construct his principle place of residence.

8. § 32.1-176.4 C authorizes a fee for geothermal well system applications that will be equal to the fee for a private well construction permit and mandates a single fee for any geothermal system.

Purpose: This action protects the public health, safety, and welfare by establishing fees that support the agency's ability to provide services that ensure that sewage is adequately treated and disposed of, reducing the risk of sewage-borne and water-borne disease.

The current regulation is out of date because applicable sections of the Code of Virginia have been amended since the regulation was written. The regulation explains to citizens the requirements for application fees, the potential right to a waiver of the fees, their potential right to obtain a refund of the fee in the event that an application is denied, and the board's procedures for refunds.

Substance: The proposed changes remove references to specific fee amounts and require that the Commissioner of Health establish a schedule of fees based on current provisions of the Code of Virginia, the appropriation act, and the cost to the agency to provide services. Additionally, the proposed regulations incorporate Code of Virginia requirements related to fees for alternative discharging sewage systems for single family homes.

The proposed changes allow district health directors to reduce fee amounts for exceptional individual circumstances on a case-by-case basis; waive the fee for an application to abandon a well at the owner's primary residence; provide for a refund of the application fee for a replacement well after the existing well is properly abandoned rather than waive the fee at the time of application; and clarify that a request for refund must be made in writing and within 12 months of final agency action on the application.

Issues: The advantage to the public and the Commonwealth is that the proposed regulation codifies current requirements of the Code of Virginia and agency policy. This action will

reduce uncertainty and potential inconsistency in application of the board's and regulations. The regulatory action poses no disadvantages to the public or the Commonwealth.

Department of Planning and Budget's Economic Impact Analysis:

Summary of the Proposed Amendments to Regulation. The State Board of Health proposes to 1) establish that the fees charged for construction, maintenance and repair or replacement of onsite sewage disposal systems, alternative discharge systems, and private wells will be the maximum allowed by the Code of Virginia or the 2010 Appropriation Act and that the permit fee for a minor modification of an existing system will be half of the fee for onsite sewage disposal system construction permit, 2) allow the Virginia Department of Health to charge a fee for applying to replace a private well, to refund the fee upon permanently abandoning or decommissioning the old well, and to clarify that no fee will be charged for decommissioning of a private well in cases where no replacement is planned, and 3) clarify that refunds must be requested in writing within 12 months of the denial of the permit, withdrawal of the application, or the conclusion of the appeal process.

Result of Analysis. The benefits likely exceed the costs for all proposed changes.

Estimated Economic Impact. One of the proposed changes establishes that the fees charged for construction, maintenance, and repair or replacement of onsite sewage disposal systems, alternative discharge systems, and private wells will be the maximum allowed by the Code of Virginia or the 2010 Appropriation Act. In addition, the permit fee for a minor modification of an existing system will be half of the fee for the onsite sewage disposal system construction permit.

The current fee amounts in the regulations were established in 1988[1]. Since then the fees were revised by legislation in 1994[2], 2003[3], 2008[4], and 2010[5], but the specific amounts in the regulations have not been updated. Historically, the actual amounts of fees charged by the Virginia Department of Health (VDH) have been the maximum allowed by the legislation. According to VDH, updating the regulations to reflect the specific amount of fees has been impractical due to the high frequency of legislative actions affecting fees.

The proposed changes will establish that the fees are the maximum allowed by legislation except for minor modifications to existing permits where the fee would be 50% of the regular amount. However, the regulations will not contain a specific amount for the fees. This approach will allow VDH to update their fee schedule very quickly through an exempt regulatory action. Since the actual fees currently charged are the same as the maximum allowed by the legislation, no significant economic effect is expected. The main benefit of this proposed change is the elimination of potentially confusing differing amounts in the regulations and what is being charged in practice. In addition, VDH will charge lower fees for minor modification permits since they require less administrative work to process. Based on fiscal year 2011 data, VDH estimates that approximately 247 to 495 applications may be submitted for a minor modification permit which is expected to lower fee revenues between $48,893 and $97,587 per year. The main benefit of this change is to adjust the fee scale to be commensurate with the relative time it takes to process minor modification permits.

Another proposed change will allow VDH to charge a fee for applying to replace a private well and to refund the fee upon permanently abandoning or decommissioning the old well. Currently, VDH does not charge any fees at the time of the initial application for replacement wells. In addition, the proposed changes will clarify that no fee will be charged for decommissioning of a private well in cases where no replacement is planned. In 2011, VDH received 1,175 applications for private well replacements and 379 applications to abandon wells.

The main cost of this change falls on the applicants who will have to pay a fee amount to be reimbursed at a later time when the well is decommissioned. These applicants will have a reduced liquidity until they get their refund back and will have to absorb the time value associated with the fee amount being held by VDH for a period of time.

On the other hand, this change will provide additional incentives to properly close a well and to provide information to VDH about the wells that are closed. According to VDH, improperly abandoned or decommissioned wells pose fall risks, groundwater contamination risks, and improper use risks such as being used as an illegal sewage dumping place.

The proposed changes will also clarify that refunds must be requested in writing within 12 months of the denial of permit, withdrawal of the application, or the conclusion of the appeal process. According to VDH, currently there is some confusion surrounding the procedures for refunds. This proposed change is expected to clarify the conditions and time period in which a refund can be requested.

The remaining proposed changes are clarifications of other current requirements or incorporation of changes in the Code of Virginia and current policies followed in practice. Thus, no significant economic effects are expected from remaining changes other than improving the clarity of the regulations.

Businesses and Entities Affected. In 2011, VDH received approximately 20,000 sewage disposal or private well construction applications from an estimated 15,000 individuals and businesses. In addition, there are approximately 350 licensed individuals providing site evaluation or design services for onsite sewage disposal systems, single family discharge sewage systems, and installation of private wells.

Localities Particularly Affected. The proposed regulations apply throughout the Commonwealth.

Projected Impact on Employment. The proposed changes are expected to reduce the need for administrative staff time that

would have been necessary to update the regulations through the standard regulatory process on a frequent basis.

Effects on the Use and Value of Private Property. The proposed changes are not expected to have a significant direct effect on the use and value of private property. However, the proposed reduction in fees for minor modifications may contribute to the value of homes as it could be considered as a reduction in potential maintenance costs. Also, increased incentives to properly close wells may lead to a reduction in the number of inappropriate closures and add to the value of private property at the aggregate.

Small Businesses: Costs and Other Effects. Of the 350 licensed individuals providing site evaluation or design services for onsite sewage disposal systems, single family discharge systems, and installation of private wells who may be affected by the proposed regulations, the majority are estimated to be small businesses. While the proposed changes do not impose any direct costs on these small businesses, other effects on them are the same as discussed above.

Small Businesses: Alternative Method that Minimizes Adverse Impact. The proposed changes do not impose any significant adverse impact on the small businesses.

Real Estate Development Costs. No significant direct impact on real estate development costs is expected.

Legal Mandate. The Department of Planning and Budget (DPB) has analyzed the economic impact of this proposed regulation in accordance with § 2.2-4007.04 of the Administrative Process Act and Executive Order Number 14 (10). Section 2.2-4007.04 requires that such economic impact analyses include, but need not be limited to, the projected number of businesses or other entities to whom the regulation would apply, the identity of any localities and types of businesses or other entities particularly affected, the projected number of persons and employment positions to be affected, the projected costs to affected businesses or entities to implement or comply with the regulation, and the impact on the use and value of private property. Further, if the proposed regulation has adverse effect on small businesses, § 2.2-4007.04 requires that such economic impact analyses include (i) an identification and estimate of the number of small businesses subject to the regulation; (ii) the projected reporting, recordkeeping, and other administrative costs required for small businesses to comply with the regulation, including the type of professional skills necessary for preparing required reports and other documents; (iii) a statement of the probable effect of the regulation on affected small businesses; and (iv) a description of any less intrusive or less costly alternative methods of achieving the purpose of the regulation. The analysis presented above represents DPB's best estimate of these economic impacts.

[1] Chapter 203, 1988 Acts of Assembly.

[2] Chapter 747, 1994 Acts of Assembly.

[3] Item 314, 2003 Appropriation Act.

[4] Item 296, 2008 Appropriation Act.

[5] Item 287, 2010 Appropriation Act.

Agency's Response to Economic Impact Analysis: The Virginia Department of Health concurs with the economic impact analysis that was posted to the Virginia Town Hall website on January 26, 2012.

Summary:

*The proposed amendments (i) clarify that an application fee is required for an alternative discharging sewage system; (ii) clarify that an application fee is required for a letter certifying that a site is suitable for installation of an onsite sewage disposal system; (iii) clarify the application fee for closed-loop geothermal well systems; (iv) provide for fees of varying amounts based on the cost to the agency for processing the application; (v) provide authority to waive the application fee where beneficial to public health and safety; and (vi) clarify that an applicant may not receive a refund for denial of an application if the applicant is actively pursuing an administrative appeal of the denial.*

## CHAPTER 620
## REGULATIONS GOVERNING ~~APPLICATION~~ FEES ~~FOR CONSTRUCTION PERMITS~~ FOR ONSITE SEWAGE DISPOSAL SYSTEMS, ALTERNATIVE DISCHARGE SYSTEMS, AND PRIVATE WELLS

### Part I
### Definitions

**12VAC5-620-10. Definitions.**

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise:

"Agent" means a legally authorized representative of the owner.

"Alternative discharging system" means any device or system that results in a point source discharge of treated sewage for which the board may issue a permit authorizing construction and operation when the system is regulated by the State Water Control Board pursuant to a general Virginia Pollutant Discharge Elimination System permit for an individual single family dwelling with flows less than or equal to 1,000 gallons per day.

"Board" means the State Board of Health.

"Certification letter" means a letter issued by the commissioner in lieu of a construction permit, which identifies a specific site and recognizes the appropriateness of the site for an onsite wastewater disposal system.

"Commissioner" means the State Health Commissioner.

"Construction of private wells" means acts necessary to construct private wells, including the location of private wells, the boring, digging, drilling, or otherwise excavating a well hole and installing casing with or without well screens, or well curbing.

"Department" means the Virginia Department of Health.

"Dewatering well" means a driven well constructed for the sole purpose of lowering the water table and kept in operation for a period of 60 days or less. Dewatering wells are used to allow construction in areas where a high water table hinders or prohibits construction and are always temporary in nature.

"Family" means the economic unit which shall include the owner, the spouse of the owner, and any other person actually and properly dependent upon or contributing to the family's income for subsistence. A husband and wife who have been separated and are not living together, and who are not dependent on each other for support, shall be considered separate family units. The family unit, which is based on cohabitation, is considered to be a separate family unit for determining if an application fee ~~is waivable~~ may be waived. The ~~cohabitating~~ cohabiting partners and any children shall be considered a family unit.

"Fee schedule" means a listing by item of the fees to be charged by the department for processing applications and for other services rendered by the department.

"Income" means total cash receipts of the family before taxes from all sources. These include money wages and salaries before any deductions, but do not include food or rent in lieu of wages. These receipts include net receipts from nonfarm or farm self-employment (e.g., receipts from the family's own business or farm after deductions for business or farm expenses.) They include regular payments from public assistance (including Supplemental Security Income), social security or railroad retirement, unemployment and worker's compensation, strike benefits from union funds, veterans' benefits, training stipends, alimony, child support, and military family allotments or other regular support from an absent family member or someone not living in the household; private pensions, government employee pensions, and regular insurance or annuity payment; and income from dividends, interest, rents, royalties, or periodic receipts from estates or trusts. These receipts further include funds obtained through college work study programs, scholarships, and grants to the extent said funds are used for current living costs. Income does not include the value of food stamps, WIC checks, fuel assistance, money borrowed, tax refunds, gifts, lump sum settlements, inheritances or insurance payments, withdrawal of bank deposits, earnings of minor children, money received from the sale of property. Income also does not include funds derived from college work study programs, scholarships, loans, or grants to the extent such funds are not used for current living costs.

"Minor modification of an existing sewage disposal system" means an alteration that is not a repair or routine maintenance, does not result in an increase in treatment level or volume of the system, and does not require evaluation of the soil conditions prior to issuance of a permit. Minor modifications include but are not limited to relocation of a system component or an additional plumbing connection to the system that does not increase the actual or estimated flow of the system.

"Onsite sewage disposal system" means a sewerage system or treatment works designed not to result in a point source discharge.

"Owner" means any person who owns, leases, or proposes to own or lease a private well ~~or~~, an onsite sewage disposal system, or ~~both~~ an alternative discharging system.

"Person" means the Commonwealth or any of its political subdivisions, including sanitary districts, sanitation district commissions and authorities, any individual, any group of individuals acting individually or as a group, or any public or private institution, corporation, company, partnership, firm or association which owns or proposes to own a sewerage system, treatment works or private well.

"Principal place of residence" means the dwelling unit, single family dwelling, or mobile home where the owner lives.

"Private well" means any water well constructed for a person on land which is owned or leased by that person and is usually intended for household, groundwater source heat pump, agricultural use, industrial use, use as an observation or monitoring well, or other nonpublic water well. A dewatering well, for the purposes of this chapter, is not a private well.

~~"Repair of a failing onsite sewage disposal system" means the construction of an onsite sewage disposal system or parts thereof to correct an existing and failing sewage disposal system for an occupied structure with indoor plumbing.~~

"Repair" means the construction or replacement of all or parts of a sewage disposal system or private well to correct a failing, damaged, or improperly functioning system or well when such construction or replacement is required by the board's regulations.

"Replacement of a private well" means the construction of a private well to be used in lieu of an existing private well.

"Review Board" means the State Sewage Handling and Disposal Appeals Review Board.

"Sewage" means water-carried and nonwater-carried human excrement, kitchen, laundry, shower, bath or lavatory wastes separately or together with such underground, surface, storm and other water and liquid industrial wastes as may be present from residences, buildings, vehicles, industrial establishments or other places.

"Sewerage system" means pipelines or conduits, pumping stations and force mains and all other construction, devices and appliances appurtenant thereto, used for the collection and conveyance of sewage to a treatment works or point of ultimate disposal.

"Treatment works" means any device or system used in the storage, treatment, disposal or reclamation of sewage or combinations of sewage and industrial wastes, including but

not limited to pumping, power and other equipment and appurtenances, septic tanks and any works, including land, that are or will be (i) an integral part of the treatment process or (ii) used for ultimate disposal of residues or effluents resulting from such treatment.

"Voluntary upgrade" means a change to or replacement of an existing nonfailing onsite or alternative discharging sewage disposal system, without an increase in the permitted volume or strength of the sewage, in accordance with the regulations for repairing failing systems.

"Well" means any artificial opening or artificially altered natural opening, however made, by which groundwater is sought or through which groundwater flows under natural pressure or is intended to be artificially drawn; provided this definition shall not include wells drilled for the purpose of exploration or production of oil or gas, for building foundation investigation and construction, elevator shafts, grounding of electrical apparatus, or the modification or development of springs.

~~Part II~~

~~General Information~~

**12VAC5-620-20. ~~Authority for regulations.~~ (Repealed.)**

~~Sections 32.1-164#C and 32.1-176.4#B of the Code of Virginia provide that the State Board of Health has the power to prescribe a reasonable fee to be charged for filing an application for an onsite sewage disposal system permit and a reasonable fee to be charged for filing an application for a private well construction permit.~~

Part II

General Information

**12VAC5-620-30. Purpose of regulations.**

The board has promulgated these regulations to:

1. ~~Establish a fee for filing an application for a permit to construct an onsite sewage disposal system or for the construction of a private well; and~~ Establish a procedure for determining the fees for services provided by the department for onsite sewage systems, alternative discharge systems, and private wells;

~~2. Establish a procedure for the waiver of fees for an owner whose income of his family is at or below the federal poverty guidelines established by the United States Department of Health and Human Services, or when the application is for a pit privy, the replacement of a private well, or the repair of a failing onsite sewage disposal system.~~

2. Establish procedures for the refund of fees; and

3. Establish procedures for the waiver of fees.

**12VAC5-620-40. Compliance with the Administrative Process Act.**

The provisions of the Virginia Administrative Process Act (§ ~~9-6.14:1~~ 2.2-4000 et. seq. of the Code of Virginia) shall govern the promulgation and administration of these regulations and shall ~~be applicable to the appeal of any case decision based upon~~ govern the decisions of cases under this chapter.

**12VAC5-620-50. Powers and procedures of regulations not exclusive.**

The ~~Commissioner~~ commissioner may enforce these regulations through any means lawfully available.

Part III

Fees

**12VAC5-620-70. ~~Application~~ Establishing fees.**

~~A. A fee of $50 shall be charged to the owner for filing an application for an onsite sewage disposal system permit with the department. The fee shall be paid to the Virginia Department of Health by the owner or his agent at the time of filing the application and the application shall not be processed until the fee has been collected. Applications shall be limited to one site specific proposal. When site conditions change, or the needs of an applicant change, or the applicant proposes and requests another site be evaluated, and a new site evaluation is conducted, a new application and fee is required.~~

~~B. A fee of $25 shall be charged to the owner for filing an application for the construction of a private well with the department. The fee shall be paid to the Virginia Department of Health by the owner or his agent at the time of filing the application and the application shall not be processed until the fee has been collected. Applications shall be limited to one site specific proposal. When site conditions change, or the needs of an applicant change or the applicant proposes and requests another site be evaluated, and a new site evaluation is conducted, a new application and fee is required.~~

~~C. A person seeking revalidation of a construction permit for an onsite sewage disposal system shall file a completed application and shall pay a fee of $50.~~

~~D. A person seeking revalidation of a permit for the construction of a private well shall file a completed application and shall pay a fee of $25.~~

A. The commissioner shall establish a schedule of fees to be charged by the department for services related to construction, maintenance, and repair or replacement of onsite sewage disposal systems, alternative discharge systems, and private wells and for appeals before the Review Board.

B. In establishing fees, the commissioner shall consider the actual or estimated average cost to the agency of delivering each service included in the schedule of fees.

C. The fees shall be the maximum allowable fees as established by the Code of Virginia or the appropriation act except that the fee for an application for a permit to make minor modifications of existing systems shall be 50% of the application fee for an onsite sewage disposal system construction permit.

D. The fee for filing an application for an administrative hearing before the Review Board shall be $135.

**12VAC5-620-75. Fee remittance; application completeness.**

A. Each applicant shall remit any required application fee to the department at the time of making application. In any case where an application fee is required, including requests for hearings before the Review Board, the application will be deemed to be incomplete and will not be accepted or processed until the fee is paid.

B. The owner of a newly installed alternative discharge system shall pay the installation inspection fee prior to the required department inspection.

C. The owner of an alternative discharge system shall pay the monitoring fee to the department for monitoring inspections conducted by the department that are mandated by 12VAC5-640. The department shall waive the monitoring fee when it conducts a monitoring inspection that is not mandated by 12VAC5-640.

**12VAC5-620-80. Waiver of fees.**

A. An owner whose ~~income of his~~ family income is at or below the ~~1988~~ 2013 Poverty Income Guidelines ~~For All~~ for the 48 Contiguous States ~~(Except Alaska and Hawaii)~~ and ~~The~~ the District of Columbia established by the Department of Health and Human Services, ~~53 FR 4213 (1988)~~ 78 FR 5182 (January 24, 2013), or any successor guidelines, shall not be charged a fee ~~for filing an application for an onsite sewage disposal system permit or a private well construction permit~~ pursuant to this chapter.

B. Any person applying for a permit to construct a pit privy shall not be charged a fee for filing the application.

C. Any person applying for a permit ~~to construct an onsite sewage disposal system~~ to repair ~~a failing~~ an onsite sewage disposal system or alternative discharging system shall not be charged a fee for filing the application.

D. Any person applying for a construction permit for the replacement of a private well ~~shall not~~ may be charged a fee for filing the application. Any application fee paid for a construction permit for a replacement well shall be refunded in full upon receipt by the department of a Uniform Water Well Completion Report, pursuant to 12VAC5-630-310, indicating that the well that was replaced has been permanently and properly abandoned or decommissioned.

E. Any person applying for a permit to properly and permanently abandon or decommission an existing well on property that is his principle place of residence shall not be charged a fee for filing the application.

F. Any person who applies to renew a construction permit for an onsite sewage disposal system, alternative discharge system, or private well shall not be charged a fee for filing the application, provided that:

1. The site and soil conditions upon which the permit was issued have not changed;

2. The legal ownership of the property has not changed;

3. A building permit for the facility to be served by the sewage system or well has been obtained or construction of the facility has commenced;

4. No previous renewal of the permit has been granted; and

5. The expiration date of the renewed permit shall be the date 18 months following the expiration date of the original permit.

G. Any person whose application for a permit to construct an onsite sewage disposal system, alternative discharging system, or private well is denied may file one subsequent application for the same site-specific construction permit for which the application fee shall be waived, provided that:

1. The subsequent application is filed within 90 days of receiving the notice of denial for the first application;

2. The denial is not currently under appeal; and

3. The application fee for the first application has not been refunded.

**12VAC5-620-90. Refunds of application fee.**

~~An application fee shall be refunded to the owner (or agent, if applicable) if the department denies a permit on his land on which the owner seeks to construct his principal place of residence. Such fee shall not be refunded by the department until final resolution of any appeals made by the owner from the denial.~~

A. An applicant for a construction permit or certification letter whose application is denied may apply for a refund of the application fee. The application fee shall be refunded to the owner or agent, if applicable, if the department denies an application for the land upon which the owner intends to build his principal place of residence. When the application was made for both a sewage disposal system and a private well, both fees may be refunded at the owner's request.

B. An applicant for a construction permit or a certification letter may request a refund of the application fee if the applicant voluntarily withdraws his application before the department issues the requested permit. The application fee will be refunded if the application is withdrawn before the department makes a site visit for the purpose of evaluating the application.

C. An applicant who has paid an application fee for a replacement well shall be refunded the application fee in full upon receipt by the department of a Uniform Water Well Completion Report, pursuant to 12VAC5-630-310, showing that the well that was replaced has been properly and permanently abandoned or decommissioned.

D. All applications for refunds must be made to the department no later than 12 months following the date upon which the applicant receives notification that his application for a construction permit or certification letter has been

denied, within 12 months following the date upon which his application was withdrawn, or within 12 months following the date upon which any appeals of the denial of the application have been concluded.

E. All applications for refunds shall be made in writing in a form approved by the department.

F. Denials of applications may be appealed only when the applicant has a currently active application before the department, including payment of any required application fee.

**12VAC5-620-100. Determining eligibility for waiver based on family income.**

A. An owner seeking a waiver of an application fee shall request the waiver on the application form. The department will require information as to income, family size, financial status and other related data. The department shall not process the application until final resolution of the eligibility determination for waiver.

B. It is the owner's responsibility to furnish the department with the correct financial data in order to be appropriately classified according to income level and to determine eligibility for a waiver of an application fee. The owner shall be required to provide written verification of income such as check stubs, written letter from an employer, W-2 forms, etc., in order to provide documentation for the application.

C. The proof of income must reflect current income ~~which~~ that is expected to be available during the next 12-month period. Proof of income must include~~: Name~~ name of employer, amount of gross earnings, and pay period for stated earnings. If no pay stub is submitted, a written statement must include the name, address, telephone number, and title of person certifying the income.

VA.R. Doc. No. R11-2718; Filed November 18, 2013, 4:42 p.m.

## Proposed Regulation

Title of Regulation: **12VAC5-640. Alternative Discharging Sewage Treatment Regulations for Individual Single Family Dwellings (amending 12VAC5-640-20, 12VAC5-640-30, 12VAC5-640-40, 12VAC5-640-60, 12VAC5-640-70, 12VAC5-640-80, 12VAC5-640-110, 12VAC5-640-140, 12VAC5-640-150, 12VAC5-640-170, 12VAC5-640-180, 12VAC5-640-210 through 12VAC5-640-290, 12VAC5-640-400, 12VAC5-640-420 through 12VAC5-640-470, 12VAC5-640-490 through 12VAC5-640-520; adding 12VAC5-640-5, 12VAC5-640-262, 12VAC5-640-264, 12VAC5-640-266, 12VAC5-640-432, 12VAC5-640-434; repealing 12VAC5-640-10, 12VAC5-640-50, 12VAC5-640-100, 12VAC5-640-130, 12VAC5-640-190, 12VAC5-640-200, 12VAC5-640-300 through 12VAC5-640-380, 12VAC5-640-480).**

Statutory Authority: §§ 32.1-12 and 32.1-164 of the Code of Virginia.

Public Hearing Information:

January 13, 2014 - 9 a.m. - Department of Health, Perimeter Center, 9960 Mayland Drive, Training Room, Richmond, VA 23233

Public Comment Deadline: February 14, 2014.

Agency Contact: Marcia Degen, Department of Health, 109 Governor Street, Richmond, VA 23219, telephone (804) 387-1883, FAX (804) 864-7475, or email marcia.degen@vdh.virginia.gov.

Basis: Sections 32.1-12, 32.1-163, and 32.1-164 of the Code of Virginia provide the statutory authority and mandate that the board protect public health and the environment. Section 32.1-12 authorizes the board to make, adopt, promulgate, and enforce regulations that may be necessary to carry out the provisions of Title 32.1 of the Code of Virginia and other laws of the Commonwealth administered by it or the State Health Commissioner. Further, § 32.1-164 A of the Code of Virginia states that the board shall have supervision and control over the safe and sanitary collection, conveyance, transportation, treatment, and disposal of sewage by onsite sewage systems and alternative discharging sewage systems, and treatment works as they affect the public health and welfare. Moreover, § 32.1-164 B mandates that the board promulgate regulations that govern the collection, conveyance, transportation, treatment, and disposal of sewage by onsite sewage systems and alternative discharging sewage systems. Section 32.1.-164 A mandates that the board require and that the department conduct regular inspections of alternative discharging sewage systems and that the board establish requirements for maintenance contracts for alternative discharging sewage systems.

Purpose: The board has not updated the regulations since the initial adoption in 1992. Since the regulations became effective, additional technological options have emerged that offer more cost effective discharging options to homeowners. In addition, these new technologies offer a higher degree of protection of public health and the environment. The proposed amendments are intended to benefit stakeholders by simplifying application processes, improving the process for conferring general approval on treatment units, and providing greater flexibility for the design and use of discharging systems. Further, the proposed amendments are intended to protect the health, safety, and welfare of citizens by ensuring that these systems are properly designed, operated, and maintained so as to prevent system failure and to protect Commonwealth's citizens from the deleterious effects of raw sewage.

Substance: The proposed amendments add (i) definitions for a number of terms, including but not limited to the following: alternative onsite sewage system, BOD5, biological treatment unit, combined application, conventional onsite sewage system, dechlorination, maintenance, modify, operate, operation, general approval, definitions for reliability and treatment levels, wetlands, surface waters, emergency pump

and haul, post aeration unit, point source discharge, NPDES, and VPDES and (ii) requirements that owners of discharging systems permitted after the effective date of the proposed amendments must have an operation and maintenance manual.

The proposed amendments also:

1. Expand the onsite options that must be evaluated and found unsatisfactory before a discharge option is to be considered so as to extend the evaluation to reduced footprint options available under 12VAC5-613;

2. Eliminate redundancies and inconsistencies with the Administrative Process Act and Title 32.1 of the Code of Virginia with regard to hearings, orders and enforcement;

3. Increase the length of time that a construction permit is valid;

4. Provide for the transfer of construction and operation permits under limited circumstances;

5. Modifiy the application process in an effort to simplify it;

6. Eliminate any reference to permit suspension;

7. Require wetland delineation by the U.S. Army Corps of Engineers when the proposed discharge is to a wetland;

8. Simplify the general approval process for treatment units to make it more reliable;

9. Reduce the sampling and monitoring requirements to the homeowner for most systems;

10. Require reliability assurances for discharging systems to protect against public health and environmental problems associated with component or system failure. The Virginia Department of Health added three levels of reliability that are based on the available discharge area and the discharge point;

11. Repeal the prohibition on the use of discharging systems for dwellings subject to intermittent use and allow it under certain circumstances;

12. Require systems to be designed to accommodate peak flow rates and to protect against adverse weather conditions;

13. Restrict access between humans, animals, and effluent in order to account for wetland discharges and in order to provide more design flexibility;

14. Add design requirements for system components in order to parallel the requirements contained in the Sewage Collection and Treatment Regulations (9VAC25-790);

15. Modify the informal process control testing such that the testing conducted more accurately assesses system performance;

16. Expand the list of individuals allowed to perform maintenance to include alternative onsite sewage system operators in addition to the existing Class IV or higher wastewater works operator license; and

17. Require electronic reporting of inspection results.

Issues:

The proposed amendments provide benefits to the public by accommodating access to more cost-efficient technologies, simplifying the application process, and allowing for the transfer of construction and operation permits under certain circumstances.

The proposed amendments provide advantages to the agency by simplifying the application process and allowing private sector individuals to perform site evaluations.

The proposed amendments also provide greater protection to public health and the environment by requiring reliability assurances for discharging systems to protect against public health and environmental problems associated with component or system failure. The proposed amendments also provide system designers and users with greater flexibility by enabling designers to reduce the separation distance between discharge points if certain design criteria are met and by allowing these systems for dwellings subject to intermittent use. There are no disadvantages to the public or the Commonwealth.

Department of Planning and Budget's Economic Impact Analysis:

Summary of the Proposed Amendments to Regulation. The State Board of Health proposes to 1) require new owners of alternative discharging systems to have an operation and maintenance manual, 2) add wetlands as a potential discharge point, 3) expand the areas where systems may discharge under certain conditions, 4) reduce the number of required analytical tests and the maintenance visits for some homeowners, 5) no longer allow homeowners to conduct sampling of their own systems, 6) expand the types of systems that must be considered, evaluated, and found unsatisfactory before a discharging system permit may be issued, and 7) increase the time frame of a construction permit from 54 months to 60 months.

Result of Analysis. The benefits likely exceed the costs for one or more proposed changes. There is insufficient data to accurately compare the magnitude of the benefits versus the costs for other changes. Detailed analysis of the benefits and costs can be found in the next section.

Estimated Economic Impact. One of the proposed changes will require new owners of alternative discharging systems to have an operation and maintenance manual for their system. The manual will provide information on what is in the ground, how to operate it, maintenance requirements, where sample ports are, what samples are required, etc. The manual will be a quick reference for the operator and is expected to improve the quality of maintenance and repair service and shorten the amount of time it would otherwise take to service the system. It will also help pass this information to new owners. Virginia Department of Health (VDH) estimates that the cost of the manual ranges from $300 to $500 per system.

This change will affect approximately 100 discharging systems expected to come online every year. The main benefit of this requirement is a reduction in likelihood and amount of having an untreated discharge into the environment due to reduced chances for a system failure or reduced time to repair a failing system.

Another proposed change will add wetlands as a potential discharge point, but will require that wetland delineation is conducted. These delineations can be conducted for free by Army Corps of Engineers or for an estimated cost of $1,000 to $2,500 by private consultants. VDH expects no more than 5 to 10 systems per year to be allowed to discharge into wetlands. While this change may expose wetlands to some environmental risks, the amount of land available for development in coastal areas of the state is expected to increase. Landowners in wetlands where no development was possible before may see an increase in the value of their real property. However, if discharges from these systems are perceived to be detrimental to human health and the environment, the value of properties in the area may be negatively affected.

The proposed changes will also allow VDH to issue permits for systems discharging to areas that were previously prohibited, such as downstream waters used for swimming, water skiing, or tubing, provided an appropriate level of treatment is achieved. Similar to the previous change, while public may be exposed to additional health risks, the amount of land available for development will increase. Landowners in these areas where discharging systems are currently prohibited on their land may see an increase in the value of their real property. Similarly, if discharges from these systems are perceived to be detrimental to human health and environment, the value of properties in the area may be negatively affected.

The proposed changes will also reduce the number of required analytical tests and maintenance visits for some homeowners. Currently, maintenance and monitoring costs for non-generally approved systems range from $1,000 per year for monthly maintenance visits and quarterly formal monitoring to about $800 for quarterly visits and semiannual monitoring. The proposed changes will allow non-generally approved systems to be monitored initially quarterly, but once the system demonstrates compliance, the system will revert to the generally approved sampling schedule which will save the owner approximately $400 per year in operation and maintenance costs. According to VDH, the majority (approximately 90% to 95%) of the systems are generally approved systems. Thus, of the 100 systems expected to come online every year, about 5 to 10 are likely to experience cost savings due to this change. Of the existing systems, VDH estimates that approximately 200 to 300 systems may benefit from this change.

Another proposed change will no longer allow homeowners to conduct sampling of their own systems. VDH estimates that approximately 120 owners are currently performing their own sampling. However, current sampling waiver holders may be grandfathered under the proposed regulations. Thus, this change is expected to mainly affect new homeowners. This proposed change may add to compliance costs in terms of increased monitoring costs, but is also expected to reduce potentially risky discharges to the environment by making sure that sampling is performed by independent professionals.

One of the proposed changes will expand the types of systems that must be considered, evaluated, and found unsatisfactory before a discharging system permit may be issued to include alternative systems in addition to conventional systems. This change has the potential to reduce the number of discharging system permits as some alternative systems may now be found satisfactory, but also add to compliance costs associated with evaluating more types of systems.

Finally, the proposed changes will increase the time frame of a construction permit from 54 months to 60 months. The proposed new time frame will coincide with life span of the general permit and may provide administrative cost savings.

Businesses and Entities Affected. These regulations apply to individual residential discharging sewage treatment systems. There are approximately 1,500 to 1,800 such systems permitted to operate in Virginia.

Localities Particularly Affected. The proposed regulations apply throughout the Commonwealth. However, discharging sewage treatment systems are known to cluster around Interstate 81 corridor and Southwest Virginia. Thus, localities in these regions of the state may proportionally be more affected.

Projected Impact on Employment. While reducing the number of required analytical tests and the maintenance visits for some homeowners is expected to reduce demand for labor, the majority of the changes (i.e., requiring new owners of alternative discharging systems to have an operation and maintenance manual, adding wetlands as a potential discharge point, expanding the areas where systems may discharge under certain conditions, no longer allowing homeowners to conduct sampling of their own systems, expanding the types of systems that must be considered, evaluated, and found unsatisfactory before a discharging system permit may be issued) are expected to increase demand for labor.

Effects on the Use and Value of Private Property. The proposed changes are expected to have a significant positive effect on the value of land which could not be developed under the current regulations, but may be developed under the proposed regulations due to adding wetlands as a potential discharge point and expanding the areas where systems may discharge under certain conditions. Whether land can now be developed under the proposed regulations will be site specific.

On the other hand, if the market perceives that building systems that discharge into wetlands and waters where human contact is present pose a significant health and environmental

risks, the value of surrounding properties may be negatively affected.

Finally, reduced compliance costs (due to reducing the number of required analytical tests and the maintenance visits for some homeowners and increasing the time frame of a construction permit from 54 months to 60 months) are expected to increase asset value of the properties while added compliance costs (due to requiring new owners of alternative discharging systems to have an operation and maintenance manual, no longer allowing homeowners to conduct sampling of their own systems, and expanding the types of systems that must be considered, evaluated, and found unsatisfactory before a discharging system permit may be issued) are expected to have a negative effect on the asset value of affected properties.

Small Businesses: Costs and Other Effects. The proposed regulations do not have any direct impact on small businesses. However, the proposed changes may have some indirect effects on the revenue of small businesses involved in construction and maintenance of discharging systems and houses. For example, requiring new owners of discharging systems to have an operation and maintenance manual, adding wetlands as a potential discharge point, expanding the areas where systems may discharge under certain conditions, no longer allowing homeowners to conduct sampling of their own systems, expanding the types of systems that must be considered, evaluated, and found unsatisfactory before a discharging system permit may be issued are expected to increase the demand for services of small businesses and have a positive impact on their revenues.

On the other hand, reducing the number of required analytical tests and the maintenance visits for some homeowners is expected to reduce demand for services of small businesses and have a negative impact on their revenues.

Small Businesses: Alternative Method that Minimizes Adverse Impact. The proposed changes are not expected to have a direct and significant adverse impact on small businesses.

Real Estate Development Costs. Some of the proposed regulations (i.e., adding wetlands as a potential discharge point and expanding the areas where systems may discharge under certain conditions) are expected to reduce real estate development costs while some others (i.e., requiring new owners of alternative discharging systems to have an operation and maintenance manual, expanding the types of systems that must be considered, evaluated, and found unsatisfactory before a discharging system permit may be issued) are expected to increase real estate development costs.

Legal Mandate. The Department of Planning and Budget (DPB) has analyzed the economic impact of this proposed regulation in accordance with § 2.2-4007.04 of the Administrative Process Act and Executive Order Number 14 (10). Section 2.2-4007.04 requires that such economic impact analyses include, but need not be limited to, the projected number of businesses or other entities to whom the regulation would apply, the identity of any localities and types of businesses or other entities particularly affected, the projected number of persons and employment positions to be affected, the projected costs to affected businesses or entities to implement or comply with the regulation, and the impact on the use and value of private property. Further, if the proposed regulation has adverse effect on small businesses, § 2.2-4007.04 requires that such economic impact analyses include (i) an identification and estimate of the number of small businesses subject to the regulation; (ii) the projected reporting, recordkeeping, and other administrative costs required for small businesses to comply with the regulation, including the type of professional skills necessary for preparing required reports and other documents; (iii) a statement of the probable effect of the regulation on affected small businesses; and (iv) a description of any less intrusive or less costly alternative methods of achieving the purpose of the regulation. The analysis presented above represents DPB's best estimate of these economic impacts.

Agency's Response to Economic Impact Analysis: The agency concurs with the Department of Planning and Budget's (DPB) analysis that the benefits of the proposed regulations are likely to exceed the economic costs. In developing these amendments, the Virginia Department of Health (VDH) worked with both internal and external advisory committees to assess which administrative and technical components of the regulations should be changed to make the regulation more efficient and reflect the advances made in technology since the regulations were first adopted in 1992.

The addition of an operation and maintenance manual requirement for new owners is estimated to cost $300 - $500 per system installed. Originally, VDH had estimated the cost of the manual at $1,000 - $2,500. However, after further investigation and with new information regarding manuals that are now required for other regulated systems, that estimate has dropped to $300 - $500. While this is a new cost, there is a benefit to the homeowner in having this document. This document details the physical components of the installed system, how it works, what routine maintenance should be provided, and what sampling is required. When the owner hires an operator for his system, the owner will know what is required and what he is paying for. The manual also provides the operator valuable information as to what is supposed to be installed and how it is supposed to operate. Most of these systems are buried so having that background information allows a new operator to understand the system faster.

The addition of wetlands as a potential discharge point recognizes that wetlands are a surface water of Virginia and, as such, may receive appropriately treated wastewater. Previously, wetlands had not been included as a potential discharge point because the technology was not available to reliably produce wastewater of sufficient quality. This

regulation utilizes advances in technology and appropriate setback distances to set standards that are protective of public health. These potential discharge points are still subject to evaluation for effects on public health concerns such as shellfish waters and public drinking water supplies, so while the potential to create a discharge to a wetland exists, it should not be interpreted to mean that all discharges to wetlands will be approved. The option, however, to consider discharges to wetlands may provide an economic benefit to homeowners who previously had no recourse for sewage disposal.

Changes in the sampling requirements are perhaps the largest potential benefit. The current regulations have three levels of frequency for maintenance visits, informal testing, and formal testing depending on the approval status of the treatment system installed. The new regulations reduce the levels to two and allow the more frequent level to convert to the less frequent level upon satisfactory completion of an initial sampling regime. This will simplify the program from an implementation standpoint and will save owners in the cost of maintaining their systems.

Another large benefit not noted in the DPB analysis is the addition of another licensed operator group as being acceptable to operate these systems. Previously, only licensed wastewater operators were allowed. The amendments add alternative onsite sewage system operators as acceptable operators. This class of licensed operators is new and was not previously available. This will expand the number of available operators for owners to contract with and should help reduce costs as well. Because of the expansion of the operator base, VDH believed it was prudent to remove the waiver to allow new owners to collect their own samples. Proper sample collection is critical to producing an accurate analytical result, and most owners are not trained in proper sample collection, sample preservation, and sample holding times.

The DPB analysis discusses the types of systems that must be considered and determined unsatisfactory prior to allowing a discharge permit. The current regulation recognizes that all onsite options must be evaluated and found unsuitable prior to considering a discharge permit. This statement recognizes that the discharge of treated sewage to soil is preferable than a direct discharge whenever possible. The 1992 regulation defines the limits of the types of systems to be considered based on the current onsite regulatory environment at the time. In 2011, VDH adopted new regulations for alternative onsite sewage systems that allow the use of sites with greater restrictions than previously allowed when appropriate treatment, loading rates, and horizontal separations are maintained. The proposed amendments were drafted to clearly identify the universe of options that must be considered and found unsuitable before a discharge permit can be considered. DPB recognized this as an increase in the cost of evaluating options. VDH believes there should be no increase in the evaluation costs for this process because the evaluation of a site is typically accomplished via site characterization, and the range of options is considered at the same time.

VDH believes that the proposed amendments will result in greater options for owners, reduced costs for owners, and a higher level of public health protection.

Summary:

*The proposed amendments (i) simplify the application process, (ii) amend administrative processes to eliminate inconsistencies with the Virginia Administrative Process Act, (iii) require new owners of alternative discharging systems to have an operation and maintenance manual, (iv) add wetlands as a potential discharge point, (v) expand the areas where systems may discharge under certain conditions, (vi) reduce the number of required analytical tests and maintenance visits for some homeowners, (vii) no longer allow homeowners to conduct sampling of their own systems, (viii) expand the types of systems that must be considered, evaluated, and found unsatisfactory before a discharging system permit may be issued, (ix) increase the time frame of a construction permit from 54 months to 60 months, and (x) allow licensed alternative onsite sewage system operators as a licensed operator group.*

Part I
General Provisions

**12VAC5-640-5. Definitions.**

The following words and terms when used in this chapter shall have the following meanings unless the context clearly indicates otherwise:

"Agent" means a legally authorized representative of the owner.

"All weather stream" means any stream that will, at all times, dilute point source discharge effluent from a pipe at least 10:1 as measured during a seven consecutive day average of a 10-year low flow (7-Q-10).

"Alternative discharging sewage treatment system" or "discharging system" means any device or system that results in a point source discharge of treated sewage for which the board may issue a permit authorizing construction and operation when such system is regulated by the SWCB pursuant to a general VPDES permit issued for an individual single family dwelling with flows less than or equal to 1,000 gallons per day on a monthly average.

"Alternative onsite sewage treatment system" means a treatment works that is not a conventional onsite sewage system and does not result in a point source discharge.

"Biochemical oxygen demand, five day" or "$BOD_5$" means the quantitative measure of the amount of oxygen consumed by bacteria while stabilizing, digesting, or treating biodegradable organic matter under aerobic conditions over a five-day incubation period; $BOD_5$ is expressed in milligrams per liter (mg/l).

"Biological treatment unit" means a method, technique, equipment, or process other than a septic tank or septic tanks that uses biological organisms to treat sewage to produce effluent of a specified quality.

"Board" means the State Board of Health.

"Combined Application" means a Virginia Department of Health Discharging System Application Form for Single Family Dwellings Discharging Sewage Less Than or Equal to 1,000 Gallons Per Day and a State Water Control Board Virginia Pollutant Discharge Elimination System General Permit Registration Statement for Domestic Sewage Discharges Less Than or Equal to 1,000 Gallons Per Day.

"Commissioner" means the State Health Commissioner or his subordinate who has been delegated powers in accordance with subdivision 2 of 12VAC5-640-80.

"Conventional onsite sewage system" means a treatment works consisting of one or more septic tanks with gravity, pumped, or siphoned conveyance to a gravity distributed subsurface drainfield.

"Dechlorination" means a process that neutralizes chlorine in the final effluent.

"Department" means the district or local health department with jurisdiction over the site or proposed site of the alternative discharging sewage treatment system.

"Disinfection" means a process used to destroy or inactivate pathogenic microorganisms in wastewater to render them noninfectious.

"Disinfection unit" means a separate treatment component that disinfects wastewater.

"District health department" means a consolidation of local health departments as authorized in § 32.1-31 C of the Code of Virginia.

"Division" means the Division of Onsite Sewage, Water Services, Environmental Engineering, and Marina Programs.

"Dry ditch" means a naturally occurring swale or channel that is topographically connected to an all weather stream. In some cases, a dry ditch may have a manmade component that provides a topographical connection to an existing, naturally occurring swale or channel. A dry ditch may have observable flow during or immediately after a storm event or snow melt. For the purposes of this chapter, all dry ditches shall have a well defined natural channel with sides that have at least a 1:10 (rise:run) slope.

"Emergency pump and haul" means an emergency condition to pump out the treatment systems tanks by a licensed sewage handler as needed to not allow a discharge to protect public health and the environment.

"Failing alternative discharging sewage treatment system" means any alternative discharging sewage treatment system that discharges effluent having a $BOD_{5,}$ total suspended solids, pH, chlorine residual, dissolved oxygen, or bacteria value that is out of compliance with the General Permit or fails to comply with 12VAC5-640-430. The failure to discharge due to exfiltration may indicate system failure.

"Failing onsite sewage disposal system" means an onsite sewage disposal system where the presence of raw or partially treated sewage on the ground's surface or in adjacent ditches or waterways or exposure to insects, animals, or humans is prima facie evidence of a system failure. Pollution of the groundwater or backup of sewage into plumbing fixtures may also indicate system failure.

"General approval" means that a treatment unit has been evaluated and approved for TL-2 effluent or TL-3 effluent in accordance with the requirements of this chapter and 12VAC5-610.

"General Permit" means a Virginia Pollutant Discharge Elimination System (VPDES) General Permit for domestic sewage discharges less than or equal to 1,000 gallons per day on a monthly average issued by the State Water Control Board.

"Intermittent stream" means any stream that will not, at all times, dilute point source discharge effluent at least 10:1 as measured during a seven consecutive day average of a 10-year low flow (7-Q-10). For the purposes of this section, an intermittent stream is identified as a dashed or dotted line on a U.S. Geological Survey 7.5 minute topographic map or an all weather stream that provides less than 10:1 dilution of the effluent based on 7-Q-10 flow.

"Local health department" means the department established in each city and county in accordance with § 32.1-30 of the Code of Virginia.

"Maintenance" means performing adjustments to equipment and controls and in-kind replacement of normal wear and tear parts such as light bulbs, fuses, filters, pumps, motors, or other like components. Maintenance includes pumping the tanks or cleaning the building sewer on a periodic basis.

"Modify" means to alter a treatment works, excluding actions taken to "operate" the treatment works and "maintenance" activities as those terms are defined in § 32.1-163 of the Code of Virginia.

"National Pollutant Discharge Elimination System" or "NPDES" means the national program for (i) issuing, modifying, revoking and reissuing, terminating, monitoring, and enforcing permits and (ii) imposing and enforcing pretreatment requirements under §§ 307, 402, 318, and 405 of the Clean Water Act (§ 33 USC § 1251 et seq.). The term includes an approved program.

"Operate" means the act of making a decision on one's own volition to (i) place into or take out of service a unit process or unit processes or (ii) make or cause adjustments in the operation of a unit process at a treatment works.

"Operation" means the biological, chemical, and mechanical processes of transforming sewage or wastewater to compounds or elements and water that no longer possess an adverse environmental or health impact.

"Owner" means the Commonwealth or any of its political subdivisions, including sanitary districts, sanitation district commissions and authorities, or any individual, any group of individuals acting individually or as a group, or any public or private institution, corporation, company, partnership, firm, or association that owns or proposes to own a sewerage system or treatment works.

"Person" means any and all persons, including individuals, firms, partnerships, associations, public or private institutions, municipalities or political subdivisions, governmental agencies, or private or public corporations organized under the law of this Commonwealth or any other state or country.

"Point source discharge" means any discernible, confined, and discrete conveyance including, but not limited to, any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, landfill leachate collection system, vessel, or other floating craft from which pollutants are or may be discharged. This term does not include return flows from irrigated agriculture or agricultural stormwater run-off.

"Post-aeration unit" means a treatment component that is designed to add oxygen to an effluent.

"Post-filtration unit" means a treatment component that physically removes total suspended solids.

"Reliability" means a measure of the ability of a component or system to perform its designated function without failure or interruption of service. Overflow criteria, such as an allowable period of a noncompliant discharge, are utilized solely for the establishment of reliability classification for design purposes and are not to be construed as authorization for, or defense of, an unpermitted discharge to state waters. The reliability classification shall be based on the water quality and public health and welfare consequences of a component or system failure.

"Reliability Class I" means a measure of reliability that requires a treatment system design to provide continuous satisfactory operation during power failures, flooding, peak loads, equipment failure, and maintenance shut-down. For the purposes of this chapter, continuous operability shall be defined as restoring proper operation or otherwise eliminating the out-of-compliance discharge within 24 hours. This class includes design features, such as additional electrical power sources, additional flow storage capacity, and additional treatment units that provide operation in accordance with the issued permit requirements.

"Reliability Class II" means a measure of reliability that requires a treatment design that limits out-of-compliance discharges due to power failures, flooding, peak loads, equipment failure, and maintenance shut-down to less than 36 hours. This class includes design features such as alarms with telemetry to the operator, additional treatment units, or additional flow storage capacity that provide operation in accordance with the issued permit requirements.

"Reliability Class III" means a measure of reliability that requires a treatment design that limits out-of-compliance discharges due to power failures, flooding, peak loads, equipment failure, and maintenance shut-down to less than 48 hours. This class includes design features such as onsite alarms and owner initiated operator notification to address the alarm condition to provide operation in accordance with the issued permit requirements.

"Sanitary survey" means an investigation of any condition that may affect public health.

"Sewage" means water carried and nonwater carried human excrement, kitchen, laundry, shower, bath, or lavatory wastes separately or together with such underground, surface, storm, and other water and liquid industrial wastes as may be present from residences, buildings, vehicles, industrial establishments, or other places.

"Site sketch" means a scale drawing of a proposed site for a discharge system, with pertinent distances shown. The scale shall typically be 1" = 50' for lots of three acres or less and 1" = 100' for larger lots. Site sketches may be made by the homeowner or any agent for the homeowner.

"Surface waters" means:

1. All waters that are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters that are subject to the ebb and flow of the tide;

2. All interstate waters, including interstate wetlands;

3. All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds and the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters:

a. That are or could be used by interstate or foreign travelers for recreational or other purposes;

b. From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

c. That are used or could be used for industrial purposes by industries in interstate commerce;

4. All impoundments of waters otherwise defined as surface waters under this definition;

5. Tributaries of waters identified in subdivisions 1 through 4 of this definition;

6. The territorial sea; and

7. Wetlands adjacent to waters, other than water that are themselves wetlands, identified in subdivisions 1 through 6 of this definition.

"SWCB" means the State Water Control Board and its designees.

"Total suspended solids" or "TSS" means solids in effluent samples that can be removed readily by standard filtering procedures in a laboratory and expressed as mg/l.

"Treatment level 2 effluent" or "TL-2 effluent" means effluent that has been treated to produce $BOD_5$ and TSS concentrations less than or equal to 30 mg/l each.

"Treatment level 3 effluent" or "TL-3 effluent" means effluent that has been treated to produce $BOD_5$ and TSS concentrations less than or equal to 10 mg/l each.

"Treatment system" means the combination of treatment components that together produce the required quality of effluent.

"Variance" means a conditional waiver of a specific regulation that is granted to a specific owner relating to a specific situation or facility and may be for a specified time period.

"VPDES permit" means a Virginia Pollutant Discharge Elimination System permit issued by the SWCB under the authority of the federal NPDES program.

"Water well" or "well" means any artificial opening or artificially altered natural opening, however made, by which ground water is sought or through which ground water flows under natural pressure or is intended to be artificially drawn. This definition shall not include wells drilled for the following purposes: (i) exploration or production of oil or gas, (ii) building foundation investigation and construction, (iii) elevator shafts, (iv) grounding of electrical apparatus, or (v) the modification or development of springs.

"Wetlands" means those areas that are inundated or saturated by surface water or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

~~Part I~~
~~General Framework for Regulations~~
~~Article 1~~
~~General Provisions~~

**12VAC5-640-10. ~~Authority for regulations.~~ (Repealed.)**

~~Title 32.1 of the Code of Virginia and specifically §§ 32.1-12, 32.1-163, and 32.1-164 provide that the State Board of Health, hereinafter referred to as the board, has the duty to protect the public health and the environment. In order to discharge this duty, the board is empowered to supervise and regulate the construction, location and operation of alternative discharging sewage treatment systems with flows less than or equal to 1,000 gallons per day on a yearly average for an individual single family dwelling within the Commonwealth when such a system is regulated by the Virginia State Water Control Board pursuant to a Virginia Pollutant Discharge Elimination System General Permit.~~

**12VAC5-640-20. Purpose of regulations.**

Title 32.1 of the Code of Virginia and specifically §§ 32.1-12, 32.1-163, and 32.1-164 of the Code of Virginia provide that the board has the duty to protect the public health and the environment. In order to discharge this duty, the board is empowered to supervise and regulate the construction, location, and operation of alternative discharging sewage treatment systems with flows less than or equal to 1,000 gallons per day on a monthly average for an individual single family dwelling within the Commonwealth when such a system is regulated by the Virginia State Water Control Board pursuant to a Virginia Pollutant Discharge Elimination System General Permit.

These regulations have been promulgated by the State Board of Health to:

1. Ensure that discharging systems are permitted, constructed, and operated in a manner which protects the environment and protects the public welfare, safety and health;

2. Guide the ~~State Health Commissioner~~ commissioner in his determination of whether a permit for construction and operation of a discharging system should be issued or denied;

3. Guide the owner or his agent in the requirements necessary to secure a permit for construction of a discharging system;

4. Guide the owner or his agent in the requirements necessary to secure an operation permit following construction;

5. Guide the owner or his agent in the requirements necessary to operate and maintain a discharging system;

6. Guide the ~~State Health Commissioner~~ commissioner in his determination of whether a discharging system is being operated in a manner which protects public health and the environment; and

7. Guide the ~~State Health Commissioner~~ commissioner in his determination of what actions are appropriate to correct violations of this chapter.

**12VAC5-640-30. Scope of regulations.**

A. ~~Systems served.~~ This chapter applies to all alternative discharging sewage treatment systems constructed and operated to serve an individual single family dwelling with flows less than or equal to 1,000 gallons per day on a ~~yearly~~ monthly average. This includes the following systems:

1. ~~New construction.~~ All new discharging systems described above when such ~~system is~~ systems are regulated by the State Water Control Board pursuant to a ~~Virginia Pollutant Discharge Elimination System~~ General Permit.

2. ~~Existing systems with individual VPDES permits.~~ All existing discharging sewage treatment systems, as described above, constructed prior to July 30, 1992, and ~~which were~~ permitted by the State Water Control Board

under its individual VPDES permit program shall be governed by this chapter, except ~~as to~~ for the monitoring requirements noted below, effective upon the expiration date of their individual VPDES permit and approval of the owner's registration statement by the SWCB under the General Permit. Upon approval under the General Permit, the owners of such systems need only ~~to~~ comply with the monitoring requirements of the General Permit and the monitoring requirements in 12VAC5-640-510, and not 12VAC5-640-490 and 12VAC5-640-500, until (i) a change in ownership or (ii) the discharging system violates the effluent limitations of the General Permit for two consecutive quarters, whichever occurs first. After either event, the owner shall comply with 12VAC5-640-490 and 12VAC5-640-500.

3. ~~Existing systems without individual VPDES permits.~~ All existing discharging sewage treatment systems as described above ~~which~~ that were operating without a valid VPDES permit on July 30, 1992, shall be governed by this chapter after the owner receives registration statement approval from the SWCB under the General Permit.

B. ~~Upgrading of existing systems.~~ Location criteria contained in this chapter shall not apply to systems legally installed prior to ~~this chapter~~ July 30, 1992. When extensive repairs, modifications, or replacement are required to bring a system into compliance with the discharge requirements of the General Permit, a construction permit and temporary operation permit must be obtained by the system owner. The construction permit and temporary operation permit shall be valid for the time specified on its face, at which time the repairs, modifications, or replacement must be completed.

C. Requirements for an operation and maintenance manual contained in this chapter shall only apply to alternative discharging systems with construction applications filed on or after (insert the effective date of this chapter).

~~C. Evaluation of other options required.~~ D. The department will not issue a permit to construct a discharging system, unless all options for conventional and alternative onsite sewage treatment ~~and disposal~~ systems have been evaluated and found unsatisfactory in accordance with this section. ~~The~~ For the purposes of this section, the consideration of all options ~~include~~ means site evaluation(s) conducted by the department ~~and when appropriate, a report prepared by a person having a special knowledge of soil science as defined in § 54.1-2200 of the Code of Virginia and the methods and principles of soil evaluation as acquired by education or experience in the formation, description and mapping of soils~~ or a licensed onsite soil evaluator or professional engineer indicating that no sewage disposal site exists on that property for the site and soil conditions allowed under the Sewage Handling and Disposal Regulations (12VAC5-610) or its successor including the use of TL-2 and TL-3 effluent to reduce footprint area as allowed under 12VAC5-613 or its successor. ~~Options include a conventional onsite septic system using a pump, low pressure distribution (LPD), or an elevated sand mound or other systems which may be approved by the department under the Sewage Handling and Disposal Regulations, 12VAC5-600-10 et seq.~~

E. Pursuant to § 32.1-163.6 of the Code of Virginia, this chapter establishes performance requirements and horizontal setbacks for alternative discharging systems that are necessary to protect public health and the environment.

**12VAC5-640-40. Relationship to the Virginia Sewage Handling and Disposal Regulations.**

This chapter is supplemental to the Sewage Handling and Disposal Regulations ~~(12VAC5-600-10 et seq.)~~ ~~which~~ (12VAC5-610) or its successor that govern the treatment and disposal of sewage utilizing onsite systems. The Sewage Handling and Disposal Regulations shall govern the materials and construction practices used to install alternative discharging sewage treatment systems and all appurtenances associated with systems including but not limited to pipes and fittings whenever specifications are not contained in this chapter.

**12VAC5-640-50. ~~Relationship to the proposed Sewage Collection and Treatment Regulations.~~ (Repealed.)**

~~The proposed Sewage Collection and Treatment Regulations, upon final adoption, shall be used to establish design and construction criteria for systems, and portions of systems, not otherwise explicitly regulated within this chapter or the Sewage Handling and Disposal Regulations, 12VAC5-610-10 et seq. Prior to the adoption of the Sewage Collection and Treatment Regulations, the Sewerage Regulations, 12VAC5-580-10 et seq., shall be used in their place.~~

**12VAC5-640-60. Relationship to the State Water Control Board.**

This chapter contains administrative procedures and construction, location, monitoring and maintenance requirements which are supplementary to the State Water Control Board's VPDES General Permit Regulation for domestic sewage discharges less than or equal to 1,000 gallons per day. This chapter applies only to individual single family dwellings with flows less than or equal to 1,000 gallons per day on a ~~yearly~~ monthly average registered under this General Permit. Single family dwellings are a subset of the systems regulated by the State Water Control Board under this General Permit.

**12VAC5-640-70. Relationship to the Uniform Statewide Building Code.**

This chapter is independent of, and in addition to, the requirements of the Uniform Statewide Building Code (13VAC5-63). All persons having obtained a construction permit under this chapter shall furnish a copy of the permit to the local building official, upon request, when making application for a building permit. Prior to obtaining an occupancy permit, an applicant shall furnish the local building official with a copy of the operation permit

demonstrating the system has been inspected and approved by the ~~district or local health~~ department.

**12VAC5-640-80. Administration of regulations.**

This chapter is administered by the following:

1. The State Board of Health has the responsibility to promulgate, amend, and repeal regulations necessary to ensure the proper construction, location, and operation of alternative discharging systems.

2. The ~~State Health Commissioner, hereinafter referred to as the~~ commissioner~~,~~ is the chief executive officer of the State Department of Health. The commissioner has the authority to act, within the scope of regulations promulgated by the board, and for the board when it is not in session. The commissioner may delegate his powers under this chapter ~~in writing~~ to any subordinate, with the exception of (i) his power to issue variances under § 32.1-12 of the Code of Virginia and 12VAC5-640-170~~,~~ and (ii) his power to issue orders under § 32.1-26 of the Code of Virginia and 12VAC5-640-140 and 12VAC5-640-150~~, and (iii) the power to suspend or revoke construction and operation permits under 12VAC5-640-280, which may only be delegated pursuant to 12VAC5-640-330~~. The commissioner has final authority to adjudicate contested case decisions of subordinates delegated powers under this section prior to appeal of such case decisions to the circuit court.

3. The State Department of Health~~, hereinafter referred to as the department,~~ is designated as the primary agent of the commissioner for the purpose of administering this chapter.

4. The district or local health departments are responsible for implementing and enforcing the ~~regulatory activities required by~~ requirements of this chapter.

~~Article 2~~
~~Definitions~~

**12VAC5-640-100. ~~Definitions.~~ (Repealed.)**

~~The following words and terms, when used in this chapter, shall have the following meaning unless the context clearly indicates otherwise.~~

~~"Aerobic treatment unit" or "ATU" means any mechanical sewage treatment plant, designed to treat sewage from a single family dwelling utilizing the process of extended aeration with or without a means to return sludge to the aeration chamber.~~

~~"Agent" means a legally authorized representative of the owner.~~

~~"All weather stream" means any stream which will, at all times, dilute point source discharge effluent (from a pipe) at least 10:1 as measured during a 7 consecutive day average of a 10 year low flow (7-Q-10).~~

~~"Alternative discharging sewage treatment system" or "discharging system" means any device or system which results in a point source discharge of treated sewage for which the Department of Health may issue a permit authorizing construction and operation when such system is regulated by the SWCB pursuant to a general VPDES permit issued for an individual single family dwelling with flows less than or equal to 1,000 gallons per day on a yearly average. Such a system is designed to treat sewage from a residential source and dispose of the effluent by discharging it to an all weather stream, an intermittent stream, a dry ditch, or other location approved by the department.~~

~~"Commissioner" means the State Health Commissioner or his subordinate who has been delegated powers in accordance with 12VAC5-640-80-2 of this chapter.~~

~~"Disinfection" means the reduction of pathogenic organisms to a level that complies with the discharge limits of the general permit.~~

~~"District health department" means a consolidation of local health departments as authorized in § 32.1-31-C of the Code of Virginia.~~

~~"Division" means the Division of Sanitarian Services.~~

~~"Dry ditch" means a naturally occurring (i.e., not man made) swale or channel which ultimately leads to an all weather stream. A dry ditch may have observable flow during or immediately after a storm event or snow melt. For the purposes of this chapter all dry ditches shall have a well defined natural channel with sides that have at least a 1:10 (rise:run) slope.~~

~~"Family" means the economic unit which shall include the owner, the spouse of the owner, and any other person actually and properly dependent upon or contributing to the family's income for subsistence.~~

~~A husband and wife who have been separated and are not living together, and who are not dependent on each other for support, shall be considered separate family units.~~

~~The family unit which is based on cohabitation is considered to be a separate family unit for determining if an application fee is waiverable. The cohabitating partners and any children shall be considered a family unit.~~

~~"Failing alternative discharging sewage treatment system" means any alternative discharging sewage treatment system which either fails to discharge due to exfiltration or discharges effluent having a $BOD_5$, suspended solids, pH, chlorine residual, dissolved oxygen or fecal coliform greater than allowed by the General Permit as measured at the outfall. However, chlorine residual and dissolved oxygen content shall not be used for the purposes of determining whether a particular class of discharging systems complies with the requirements of 12VAC5-640-380.~~

~~"Failing onsite sewage disposal system" means an onsite sewage disposal system that is backing up in a house, or is discharging untreated or partially treated effluent on the ground surface, into surface waters, or into ground water.~~

"Five-day biochemical oxygen demand ($BOD_5$)" means the quantity of oxygen used in the biochemical oxidation of organic matter in five days at 20°C under specified conditions and expressed as milligrams per liter (mg/l).

"General Permit" means a Virginia Pollutant Discharge Elimination System ("VPDES") General Permit for domestic sewage discharges less than or equal to 1,000 gallons per day on a yearly average issued by the State Water Control Board.

"Generic system design" means nonsite specific plans and specifications for a system designed to treat sewage flows of 1,000 GPD or less, or an equivalent $BOD_5$ loading rate, which have been reviewed and approved by the division for uses governed by this chapter.

"Income" means total cash receipts of the family before taxes from all sources. These include money wages and salaries before any deductions, but do not include food or rent in lieu of wages. These receipts include net receipts from nonfarm or farm self-employment (e.g., receipts from own business or farm after deductions for business or farm expenses). They include regular payments from public assistance (including Supplemental Security Income), social security or railroad retirement, unemployment and worker's compensation, strike benefits from union funds, veterans' benefits, training stipends, alimony, child support, and military family allotments or other regular support from an absent family member or someone not living in the household; private pensions, government employee pensions, and regular insurance or annuity payment; and income from dividends, interest, rents, royalties, or periodic receipts from estates or trusts. These receipts further include funds obtained through college work study programs, scholarships, and grants to the extent said funds are used for current living costs. Income does not include the value of food stamps, WIC checks, fuel assistance, money borrowed, tax refunds, gifts, lump sum settlements, inheritances or insurance payments, withdrawal of bank deposits, earnings of minor children, or money received from the sale of property. Income also does not include funds derived from college work study programs, scholarships, loans, or grants to the extent such funds are not used for current living costs.

"Intermittent sand filter system" means a system designed to treat sewage by causing the sewage to be dosed through a properly designed bed of graded sand media.

"Intermittent stream" means any stream which cannot, at all times, dilute point source discharge effluent (from a pipe) at least 10:1 as measured during a 7 consecutive day average of a 10 year low flow (7-Q-10).

"Local health department" means the department established in each city and county in accordance with § 32.1-30 of the Code of Virginia.

"Onsite sewage disposal system" means a sewerage system or treatment works designed not to result in a point source discharge.

"Owner" means any person, who owns, leases, or proposes to own or lease an alternative discharging sewage treatment system.

"Person" means any and all persons, including individuals, firms, partnerships, associations, public or private institutions, municipalities or political subdivisions, governmental agencies, or private or public corporations organized under the law of this Commonwealth or any other state or country.

"Proprietary system design" means any group of discharging sewage treatment systems manufactured and installed following substantially similar engineering plans and specifications designed to treat a specific volume of sewage or $BOD_5$ loading rate as determined by the division.

"Pump and haul" means the temporary (less than one year) disposal of sewage conducted under a valid pump and haul permit issued in accordance with the Sewage Handling and Disposal Regulations.

"Recirculating sand filter system" means a system which treats sewage effluent by repeatedly passing the sewage through a pump chamber and sand filter to achieve alternating wetting and drying cycles.

"Sanitary survey" means an investigation of any condition that may effect public health.

"Settleable solids" means solids which settle after 30 minutes and expressed as milligrams per liter (mg/l).

"Sewage" means water carried and nonwater carried human excrement, kitchen, laundry, shower, bath, or lavatory wastes separately or together with such underground, surface, storm and other water and liquid industrial wastes as may be present from residences, buildings, vehicles, industrial establishments or other places.

"Sewer" means any sanitary or combined sewer used to convey sewage or municipal or industrial wastes.

"Site sketch" means a scale drawing of a proposed site for a discharge system, with pertinent distances shown. The scale shall typically be 1" = 50' for lots of three acres or less and 1" = 100' for larger lots. Site sketches may be made by the homeowner or any agent for the homeowner.

"Subdivision" means multiple building lots derived from a parcel(s) of land in conformance with local zoning or subdivision requirements.

"Subsurface soil absorption" means a process which utilizes the soil to treat and dispose of sewage effluent.

"SWCB" means the State Water Control Board and its designees.

"Total suspended solids" means solids in effluent samples which can be removed readily by standard filtering procedures in a laboratory and expressed as mg/l.

"Variance" means a conditional waiver of a specific regulation which is granted to a specific owner relating to a specific situation or facility and may be for a specified time period.

~~"VPDES permit" means a Virginia Pollutant Discharge Elimination System permit issued by the SWCB under the authority of the federal NPDES program.~~

~~"Well" means any artificial opening or artificially altered natural opening, however made, by which ground water is sought or through which ground water flows under natural pressure or is intended to be artificially drawn; provided this definition shall not include wells drilled for the following purposes: (i) exploration or production of oil or gas, (ii) building foundation investigation and construction, (iii) elevator shafts, (iv) grounding of electrical apparatus, or (v) the modification or development of springs.~~

Part II

~~Procedural Regulations~~

~~Article 1~~

Procedures

**12VAC5-640-110. Compliance with the Administrative Process Act.**

The provisions of the Virginia Administrative Process Act (§ ~~9-6.14:1~~ 2.2-4000 et seq. of the Code of Virginia) shall govern the promulgation and administration of this chapter and shall ~~be applicable to the appeal of any case decision based upon this chapter~~ govern the procedures pertaining to the decisions of cases under this chapter.

**12VAC5-640-130. ~~Effective date of regulations.~~ (Repealed.)**

~~The effective date of these regulations is July 30, 1992. Those permits issued under the emergency regulation VR355-34-400 are hereby recognized as modified, valid and covered by these regulations.~~

**12VAC5-640-140. Emergency order.**

If an emergency exists the commissioner may issue an emergency order as is necessary for preservation of public health, safety, and welfare or to protect environmental resources. The emergency order shall state the reasons and precise factual basis upon which the emergency order is issued. The emergency order shall state the time period for which it is effective. Emergency orders will be publicized in a manner deemed appropriate by the commissioner. The provisions of 12VAC5-640-150 ~~C and D~~ shall not apply to emergency orders issued pursuant to this section.

**12VAC5-640-150. Enforcement of regulations.**

A. ~~Notice. Subject to the exceptions below, whenever~~ Whenever the commissioner or the ~~district or local health~~ department ~~has reason to believe a violation of any of this chapter has occurred or is occurring, the alleged violator shall be notified. Such notice shall be made in writing, shall be delivered personally or sent by certified mail, shall cite the regulation or regulations that are allegedly being violated, shall state the facts which form the basis for believing the violation has occurred or is occurring, shall include a request for a specific action by the recipient by a specified time and shall state the penalties associated with such violation.~~ notifies a named party of an alleged violation of this chapter, the procedures and content of such notice shall be as follows:

1. Any notice of alleged violation shall be made in writing and shall be delivered personally or sent by certified mail to the named party.

2. The notice shall cite the regulation or regulations that are applicable to the situation.

3. The notice shall state the factual basis for the issuance of the notice.

4. The notice shall include a request for a specific action by the recipient by a specified time.

5. The notice shall include information on the process for obtaining an informal fact finding conference to determine whether or not a violation has occurred.

The issuance of a notice of alleged violation by the commissioner or the department shall not be considered a case decision as defined in § 2.2-4001 of the Code of Virginia. When the commissioner deems it necessary, he may initiate criminal prosecution or seek civil relief through mandamus or injunction prior to giving notice.

B. ~~Orders. Pursuant to the authority granted in § 32.1-26 of the Code of Virginia, the~~ The commissioner may issue orders in accordance with Title 32.1 (§ 32.1-1 et seq.) of the Code of Virginia to require any owner, or other person, to comply with the provisions of this chapter. The order shall be signed by the commissioner and may require:

1. The immediate cessation and correction of the violation;

2. Appropriate remedial action to ensure that the violation does not recur;

3. The submission of a plan to prevent future violation to the commissioner for review and approval;

4. The submission of an application for a variance; or

5. Any other corrective action deemed necessary for proper compliance with the chapter.

~~C. Hearing before the issuance of an order. Before the issuance of an order described in 12VAC5-640-150 B, a hearing must be held, with at least 30 days notice by certified mail to the affected owner or other person of the time, place and purpose thereof, for the purpose of adjudicating the alleged violation or violations of this chapter. The procedures at the hearing shall be in accordance with 12VAC5-640-180 A and B and with §§ 9-6.14:11 through 9-6.14:14 of the Code of Virginia.~~

~~D. Order — when effective. All orders issued pursuant to 12VAC5-640-150 B shall become effective not less than 15 days after mailing a copy thereof by certified mail to the last known address of the owner or person violating this chapter. Violation of an order is a Class 1 misdemeanor. See § 32.1-27 of the Code of Virginia.~~

~~E. Compliance with effective orders. The commissioner may enforce all orders. Should any owner or other person fail to comply with any order, the commissioner may:~~

~~1. Apply to an appropriate court for an injunction or other legal process to prevent or stop any practice in violation of the order;~~

~~2. Commence administrative proceedings to suspend or revoke the applicable permit;~~

~~3. Request the Attorney General to bring an action for civil penalty, injunction, or other appropriate remedy; or~~

~~4. Request the commonwealth attorney to bring a criminal action.~~

~~F. Not exclusive means of enforcement. Nothing contained in 12VAC5-640-140 or 12VAC5-640-150 shall be interpreted to require the commissioner to issue an order prior to commencing administrative proceedings or seeking enforcement of any regulations or statute through an injunction, mandamus or criminal prosecution.~~

**12VAC5-640-170. Variances.**

Only the commissioner or the deputy commissioners may grant a variance to this chapter. (See §§ 32.1-12 and 32.1-22 of the Code of Virginia and 12VAC5-640-80 2.) The commissioner or the deputy commissioners shall follow the appropriate procedures set forth in this ~~subsection~~ subdivision in granting a variance.

~~A. Requirements for a variance.~~ 1. The commissioner may grant a variance if a thorough investigation reveals that the hardship imposed by this chapter outweighs the benefits that may be received by the public. Further, the granting of such a variance shall not subject the public to unreasonable health risks or jeopardize environmental resources.

~~B. Application for a variance.~~ 2. Any owner who seeks a variance shall apply in writing within the time period specified in 12VAC5-640-210 ~~B~~ C. The application shall be signed by the owner~~, addressed and sent to the commissioner at the State Department of Health in Richmond~~. The application shall include:

~~1.~~ a. A citation to the regulation from which a variance is requested;

~~2.~~ b. The nature and duration of the variance requested;

~~3.~~ c. Any relevant analytical results including results of relevant tests conducted pursuant to the requirements of this chapter;

~~4.~~ d. Statements or evidence why the public health and welfare and environmental resources would not be degraded if the variance were granted;

~~5.~~ e. Suggested conditions that might be imposed on the granting of a variance that would limit the detrimental impact on the public health and welfare or environmental resources;

~~6.~~ f. Other information, if any, believed pertinent by the applicant; and

~~7.~~ g. Such other information as the ~~district or local health~~ department or commissioner may require.

~~C. Evaluation of a variance application.~~

~~1. The commissioner shall act on any variance request submitted pursuant to 12VAC5-640-170 B within 60 calendar days of receipt of the request.~~

~~2.~~ 3. In the evaluation of a variance application, the commissioner shall consider the following factors:

a. The effect that such a variance would have on the construction, location, or operation of the discharging system;

b. The cost and other economic considerations imposed by this requirement;

c. The effect that such a variance would have on protection of the public health;

d. The effect that such a variance would have on protection of environmental resources; and

e. Such other factors as the commissioner may deem appropriate.

~~D. Disposition of a variance request.~~ 4. The commissioner may grant or deny a variance request in accordance with the requirements of this subdivision.

~~1.~~ a. The commissioner may deny any application for a variance by sending a denial notice to the applicant by certified mail. The notice shall be in writing and shall state the reasons for the denial.

~~2.~~ b. If the commissioner proposes to grant a variance request submitted pursuant to ~~12VAC5-640-170 B~~ subdivision 2 of this section the applicant shall be notified in writing of this decision. Such notice shall identify the variance~~,~~ and the discharging system covered, and shall specify the period of time for which the variance will be effective. The effective date of a variance shall be as stated in the variance.

~~3.~~ c. No owner may challenge the terms or conditions set forth in the variance after 30 calendar days have elapsed from the effective date of the variance.

~~E. Posting of variances.~~ 5. All variances granted to any discharging sewage treatment system are transferable from owner to owner unless otherwise stated. Each variance shall be attached to the permit to which it is granted. Each variance is revoked when the permit to which it is attached is revoked.

~~F. Hearings on disposition of variances.~~ 6. Subject to the time limitations specified in 12VAC5-640-210, informal conference or consultation proceedings or hearings on denials of an application for a variance or on challenges to the terms and conditions of a granted variance may be held pursuant to 12VAC5-640-180 A or B, except that informal ~~hearings~~ conference or consultation proceedings under 12VAC5-640-180 A shall be held before the commissioner or his designee.

**12VAC5-640-180. ~~Hearing types~~ Informal conferences and hearings.**

~~Hearings before the commissioner or the commissioner's designees shall include any of the following forms depending on the nature of the controversy and the interests of the parties involved.~~

A. ~~Informal hearings.~~ An informal ~~hearing~~ conference or consultation proceeding is a meeting ~~with a district or local health department with the district or local health director presiding and~~ held in conformance with § ~~9 6.14:11~~ 2.2-4019 of the Code of Virginia. The department shall ascertain the fact basis for its decisions of cases through informal conference or consultation proceedings unless the named party and the department consent to waive such a conference or proceeding to go directly to a formal hearing. ~~The district or local health department shall consider all evidence presented at the meeting which is relevant to the issue in controversy. Presentation of evidence, however, is entirely voluntary. The district or local health department shall have no subpoena power. No verbatim record need be taken at the informal hearing. The local or district health director shall review the facts presented and based on those facts render a decision. A written copy of the decision and the basis for the decision shall be sent to the appellant within 15 work days of the hearing, unless the parties mutually agree to a later date in order to allow the department to evaluate additional evidence. If the decision is adverse to the interests of the appellant, an aggrieved appellant may request an adjudicatory hearing pursuant to 12VAC5-640-180 B.~~

B. ~~Adjudicatory hearing.~~ The adjudicatory hearing is a formal, public adjudicatory proceeding ~~before the commissioner, or a designated hearing officer, and~~ held in conformance with § ~~9 6.14:12~~ 2.2-4020 of the Code of Virginia. The commissioner may afford opportunity for an adjudicatory hearing in any case to the extent that informal procedures under § 2.2-4019 and subsection A of this section have not been had or have failed to dispose of a case by consent. ~~An adjudicatory hearing includes the following features:~~

~~1. Notice. Notice which states the time and place and the issues involved in the prospective hearing shall be sent to the owner or other person who is the subject of the hearing. Notice shall be sent by certified mail at least 15 calendar days before the hearing is to take place.~~

~~2. Record. A record of the hearing shall be made by a court reporter. A copy of the transcript of the hearing, if transcribed, will be provided within a reasonable time to any person upon written request and payment of the cost.~~

~~3. Evidence. All interested parties may attend the hearing and submit oral and documentary evidence and rebuttal proofs, expert or otherwise, that are material and relevant to the issues in controversy. The admissibility of evidence shall be determined in accordance with § 9-6.14:12 of the Code of Virginia.~~

~~4. Counsel. All parties may be accompanied by and represented by counsel and are entitled to conduct such cross-examination as may elicit a full and fair disclosure of the facts.~~

~~5. Subpoena. Pursuant to § 9-6.14:13 of the Code of Virginia, the commissioner or hearing officer may issue subpoenas on behalf of himself or any person or owner for the attendance of witnesses and the production of books, papers or maps. Failure to appear or to testify or to produce documents without adequate excuse may be reported by the commissioner to the appropriate circuit court for enforcement.~~

~~6. Judgment and final order. The commissioner may designate a hearing officer or subordinate to conduct the hearing as provided in § 9-6.14:12 of the Code of Virginia, and to make written recommended findings of fact and conclusions of law to be submitted for review and final decision by the commissioner. The final decision of the commissioner shall be reduced to writing and will contain the explicit findings of fact upon which his decision is based. Certified copies of the decision shall be delivered to the owner affected by it. Notice of a decision will be served upon the parties and become a part of the record. Service may be by personal service or certified mail return receipt requested.~~

**12VAC5-640-190. ~~Request for hearing.~~ (Repealed.)**

~~A request for an informal hearing shall be made by sending the request in writing to the district or local health department. A request for an adjudicatory hearing shall be made in writing and directed to the commissioner at the State Department of Health in Richmond. Requests for hearings shall cite the reason(s) for the hearing request and shall cite the section(s) of this chapter involved.~~

**12VAC5-640-200. ~~Hearing as a matter of right.~~ (Repealed.)**

~~Except as provided in 12VAC5-640-330, any owner or other person whose rights, duties, or privileges have been, or may be affected by any decision of the board or its subordinates in the administration of this chapter shall have a right to both informal and adjudicatory hearings. The commissioner may require participation in an informal hearing before granting the request for a full adjudicatory hearing. Exception: No person other than an owner shall have the right to an adjudicatory hearing to challenge the issuance of either a construction permit or operation permit unless the person can demonstrate at an informal hearing that the minimum standards contained in this chapter have not been applied and that he will be injured in some manner by the issuance of the permit.~~

**12VAC5-640-210. Appeals.**

A. Any appeal from a denial of a construction or operation permit for a discharging system must be made in writing and

received by the department within ~~60~~ 30 days of the date of the denial.

~~A.~~ B. Any ~~request for hearing on~~ appeal from the denial of an application for a variance pursuant to subdivision 4 a of 12VAC5-640-170 ~~D 1~~ must be made in writing and received within ~~60~~ 30 days of receipt of the denial notice.

~~B.~~ C. Any request for a variance must be made in writing and received by the department prior to the denial of the discharging system permit, or within ~~60~~ 30 days after such denial.

~~C.~~ D. In the event a person applies for a variance within the ~~60-day~~ 30-day period provided by subsection ~~B above~~ C of this section, the date for appealing the denial of the permit, pursuant to subsection A of this section, shall commence from the date on which the department acts on the request for a variance.

~~D.~~ E. Pursuant to the Administrative Process Act (§ ~~9-6.14:1~~ 2.2-4000 et seq. of the Code of Virginia) an aggrieved owner may appeal a final decision of the commissioner to an appropriate circuit court.

**12VAC5-640-220. Permits; general.**

A. ~~Construction permit required. After July 30, 1992, no~~ No person shall construct, alter, rehabilitate, modify, or extend a discharging system or allow the construction, alteration, rehabilitation, or extension of a discharging system, without a written construction permit from the commissioner or the department. ~~Furthermore, except as provided in 12VAC5-640-30 A 2 and 12VAC5-640-220 B, no person or owner shall cause or permit any discharging system to be operated without a written operation permit issued by the commissioner which authorizes the operation of the discharging system.~~ Conditions may be imposed on the issuance of any construction ~~or operation~~ permit and no discharging system shall be constructed ~~or operated~~ in violation of those conditions.

B. Except as provided in 12VAC5-640-30, 12VAC5-640-280, and 12VAC5-640-290, construction permits for a discharging system shall be deemed valid for a period of 60 months from the date of issuance or until the expiration of the General Permit, whichever comes first.

~~B. Operation permit required.~~ C. Except as provided in ~~12VAC5-640-310~~ 12VAC5-640-30 A 2 and 12VAC5-640-266, no person shall place a discharging system in operation, or cause or allow a discharging system to be placed in operation, without obtaining a written operation permit. Conditions may be imposed on the issuance of any operation permit, and no discharging system shall be operated in violation of those conditions.

~~C. Construction permits validity. Except as provided in 12VAC5-640-30, 12VAC5-640-280 and 12VAC5-640-290, construction permits for a discharging system with general or preliminary system approval shall be deemed valid for a period of 54 months from the date of issuance. Construction permits for discharging systems with experimental approval shall be valid for 30 days except as provided in 12VAC5-640-30, 12VAC5-640-280 and 12VAC5-640-290.~~

D. ~~Operation permit validity.~~ Except as provided for in 12VAC5-640-280 and 12VAC5-640-290, operation permits shall be valid for a period of time not longer than the General Permit and the maintenance contract required pursuant to 12VAC5-640-500 B or the monitoring contract required pursuant to 12VAC5-640-490 ~~F~~ G, whichever expires first. The operation permit ~~may be renewed~~ shall remain valid upon written proof of a new or renewed maintenance contract or monitoring contract provided ~~they are all valid for not less than 24 months~~ the facility is otherwise in compliance with this chapter. The period of renewal shall coincide with the expiration date of the document with the shortest period of validity.

E. ~~Permits not transferable.~~ Construction and operation permits for discharging systems shall not be transferable ~~from one person to another or from one location to another. Each new owner shall make a written application for a permit. Application forms are available at all local health departments~~ except as provided below:

1. A construction permit for a specific discharging system will be issued to a new owner if the new owner (i) applies for the permit transfer on a form approved by the department, (ii) pays the applicable fee, (iii) provides the department with change of ownership documentation in accordance with the General Permit, and (iv) provides written certification that there are no new site conditions that will adversely impact the existing approved construction permit and documents or the original construction application.

2. An operation permit for a specific discharging system will be issued to a new owner if the new owner (i) applies for the permit transfer on a form approved by the department, (ii) pays the applicable fee, (iii) provides the department with change of ownership documentation in accordance with the General Permit, and (iv) provides a copy of a valid maintenance and monitoring contract as required.

**12VAC5-640-230. ~~Procedures~~ Application process for obtaining a ~~construction permit~~ Department of Environmental Quality General Permit using the Combined Application.**

~~The process for obtaining a construction permit for a discharging system consists of two steps. These are filing an application with fee to determine the suitability of a site and filing plans for the type of system being proposed.~~

~~A. Application fees. A fee of $50 shall be charged to the owner for filing an application for an alternative discharging sewage treatment system permit with the department. The fee shall be paid to the Virginia Department of Health by the owner or his agent at the time of filing the application and the application shall not be processed until the fee has been~~

~~collected. Applications shall be limited to one site specific proposal. When site conditions change, or the needs of an applicant change, or the applicant proposes and requests another site be evaluated, and a new site evaluation is conducted, a new application and fee are required.~~

~~1. Waiver of fees. An owner whose income of his family is at or below the 1988 Poverty Income Guidelines For All States (Except Alaska and Hawaii) And The District of Columbia established by the Department of Health and Human Services, 53 FR 4213 (1988), or any successor guidelines, shall not be charged a fee for filing an application for an alternative discharging sewage treatment system permit.~~

~~2. Determining eligibility.~~

~~a. An owner seeking a waiver of an application fee shall request the waiver on the application form. The department will require information as to income, family size, financial status and other related data. The department shall not process the application until final resolution of the eligibility determination for waiver.~~

~~b. It is the owner's responsibility to furnish the department with the correct financial data in order to be appropriately classified according to income level and to determine eligibility for a waiver of an application fee. The owner shall be required to provide written verification of income such as check stubs, written letter from an employer, W-2 forms, etc., in order to provide documentation for the application.~~

~~c. The proof of income must reflect current income which is expected to be available during the next 12 month period. Proof of income must include: name of employer, amount of gross earnings, pay period for stated earnings. If no pay stub, a written statement must include the name, address, telephone number and title of person certifying the income.~~

A. The process for obtaining a General Permit consists of (i) filing a Combined Application with fee to determine the suitability of a discharge point, (ii) obtaining confirmation of a suitable discharge point from the department, and (iii) obtaining coverage under the Department of Environmental Quality's General Permit. Once a General Permit registration has been received, the owner shall file an application for a construction permit as described in 12VAC5-640-240 and shall apply for an operation permit in accordance with 12VAC5-640-266 before a discharge is authorized.

B. ~~Written application required. Construction permits are issued by the authority of the commissioner.~~ All requests for ~~construction permits~~ review of a suitable discharge point for discharging systems shall be by written application on the Combined Application, signed by the owner or his agent, and shall be directed to the ~~district or local health~~ department. ~~All applications shall be made on the application form (Virginia Department of Health Discharging System Application Form for Single Family Dwellings Discharging Sewage Treatment Systems with Flows Less Than or Equal To 1,000 Gallons Per Day and State Water Control Board Virginia Pollutant Discharge Elimination System General Permit Registration Statement for Domestic Sewage Discharge Less Than or Equal to 1,000 Gallons Per Day)~~.

C. ~~Application completeness.~~ An application shall be deemed complete upon receipt by the ~~district or local health~~ department of a signed and dated application~~, together with~~ and the appropriate fee, containing the following information:

1. The property owner's name, address, and telephone number;

2. The applicant's name, address, and phone number (if different from subdivision 1 of this subsection);

3. A statement signed by the property owner, or his agent, granting the ~~Health Department~~ department access to the site for the purposes of evaluating the suitability of the site for a discharging system and allowing the department access to inspect the construction, maintenance and operation of the discharging system after it is installed. The applicant must secure and produce written permission for the department to enter on any property necessary to evaluate the application;

4. A site sketch on a survey plat showing the ~~location of existing or proposed houses, property boundaries, existing and proposed wells, actual or proposed discharging systems within 600 feet of the discharge point, recorded easements, the slope and side slope of any proposed dry ditch channels, setback distances of proposed system components (such as ATU's, sandfilters, and dry ditches) to property lines, wells and other discharging systems public water supply intakes, and swimming or recreational water use areas within five miles. The drawing should be approximately to scale (plus or minus 10%) or drawn on a United States Geological Survey 7.5 minute topographic map;~~ locations of and setback distances from the proposed discharge point and discharging system components to the following:

a. Location of existing or proposed houses and other structures;

b. Property boundaries;

c. Location of proposed discharge point;

d. Existing and proposed wells, springs, cisterns, or other sources of potable water within 200 feet upslope or 1,600 feet downslope of the proposed discharge point;

e. Actual or proposed discharging systems within 600 feet of the proposed discharge point;

f. Recorded and proposed easements;

g. Existing and proposed overhead and buried utilities such as water lines, electrical lines, phone lines, gas lines, etc;

h. Sink holes located within 1,600 feet downslope of the proposed discharge point;

i. Other topographical features such as wetlands, lakes, ponds, rivers, streams, drainage ways, and swales, within 200 feet upslope and 600 feet downslope of the proposed discharge point;

j. Slope and side slope of any proposed dry ditch channels;

k. Public water supply intakes; and

l. Swimming or recreational water use areas within one mile upstream or five miles downstream of the proposed discharge point shown on a United States Geological Survey 7.5 minute topographic map or surveyed plat.

The site sketch should be to scale and accompanied by a United States Geological Survey 7.5 minute topographic map to provide information relevant to offsite setbacks.

~~5. A written statement from the SWCB that the owner's registration statement has been approved under the General Permit regulation;~~

~~6.~~ 5. Copies of all easements required by subdivision 2 of 12VAC5-640-450 ~~B~~; however, at the discretion of the department ~~district health director or the district sanitarian~~, the submission of easements may be postponed until submission of the construction plan if the property owner submits the name, address, and property location of each person that must grant an easement to the owner; ~~and~~

6. If the discharge is to a wetlands, the application must contain a wetland delineation map of the geographic area for wetlands, stream, and open water on site and any other correspondence, approval, or certifications from the U.S. Army Corps of Engineers or the Department of Environmental Quality that wetlands were properly identified and delineated;

7. A letter of denial from the department or a certified site and soil evaluation report from a qualified person showing that the requirements of 12VAC5-640-30 D have been satisfied; and

~~7.~~ 8. Other information ~~which~~ that the department deems necessary to comply with the intent of this chapter.

~~D. Application assistance. It is the policy of the department to assist persons applying for a discharging system permit by maintaining a supply of all appropriate forms in each local office. Department personnel will assist individuals in understanding how to fill out the form and provide information on the administrative process and technical requirements involved in obtaining a permit.~~

~~E. Site review.~~ D. Upon receipt of a completed Combined Application ~~application~~ the department will conduct a site review to determine if the site meets the minimum ~~siting~~ criteria contained in Part III (12VAC5-640-390 et seq.) of this chapter. The owner may opt to have a licensed professional engineer conduct the site review and submit appropriate documentation with the application for review by the department. The department may opt to conduct a site review to verify an application submitted by a licensed professional engineer. Upon ~~completing~~ conducting the site evaluation or upon reviewing the site evaluation conducted by a licensed professional engineer, the department will advise the owner in writing of the results of the evaluation.

1. ~~Satisfactory site found.~~ When a satisfactory site is found for a discharging system, the written notice to the applicant shall include the type of discharge point found (i.e., wetland, all weather stream, intermittent stream, or dry ditch). The completed Combined Application and a copy of the documentation pursuant to 12VAC5-640-30 D shall be forwarded to the Department of Environmental Quality to complete the application process for a General Permit.

2. ~~No satisfactory site found.~~ When no satisfactory discharge point site is found the department shall deny the application in accordance with 12VAC5-640-270 ~~owner shall be notified of all limiting factors restricting the use of a discharging system. Further, the applicant shall be notified of his right to appeal and what steps are necessary to initiate the process.~~ The department shall send a copy of the denial to the Department of Environmental Quality.

**12VAC5-640-240. ~~Construction plan~~ Application for a construction permit.**

A. After a satisfactory site for a discharging system has been found and a General Permit has been obtained from the Department of Environmental Quality, the applicant shall submit ~~a construction plan~~ an application, the appropriate fee, construction plans, specifications, design criteria and calculations, and documentation that coverage under the General Permit has been obtained. The documentation shall include the cover letter and copy of the General Permit issued by the Department of Environmental Quality. If the discharge is to a wetland, the construction submittal must include documentation that a Virginia Water Protection Permit from the Department of Environmental Quality or a permit under the U.S. Army Corps of Engineers has been obtained as needed. The purpose of the construction ~~plan~~ submittal is to demonstrate how the effluent limitations established by the SWCB and the ~~remaining criteria~~ construction, location, and performance requirements of this chapter can be met. ~~At a minimum the construction plan must show the following:~~

B. All plans for alternative discharging systems shall bear a suitable title showing the name of the owner and shall show the scale in feet, a graphical scale, the north point, date, revision dates (when applicable), and the name of the licensed professional engineer by or under whom prepared. The cover sheet and each plan sheet shall bear the same general title identifying the overall sewage disposal project and each shall be numbered. Appropriate subtitles shall be included on the individual sheets.

The plans shall be clear and legible. Plans shall be drawn to a scale that permits all necessary information to be plainly shown. The size of the plans shall be no larger than 30 inches by 48 inches. Data used should be indicated. The precise location of the proposed system shall be shown on the plans.

Detailed plans shall consist of plan views, elevations, sections, and supplementary views that together with the specifications and general layouts provide the working information for the contract and construction of the work, including dimensions and relative elevations of structures, the location and outline form of equipment and components to be installed, the location and size of piping, water levels, ground elevations, and erosion control abatement facilities.

C. Complete technical specifications for the construction of the alternative discharging system and all appurtenances shall accompany the plans. The specifications accompanying construction drawings shall include, but not be limited to, all construction information not shown on the drawings, necessary to provide the installer with all detail of the design requirements as to the quality of material workmanship and fabrication of the project; type, size, strength, operating characteristics, and rating of equipment; allowable infiltration, machinery, valves, piping, and jointing of pipe; electrical apparatus, wiring, and meters; operating tools and construction materials; special filter materials such as stone, sand, gravel, or slag; miscellaneous appurtenances; chemicals when used; instructions for testing materials and equipment deemed necessary to meet design standards; and operational testing for the complete works and component units.

D. At a minimum, the construction submittal must show the following:

1. Information gathered in the site review evaluation;

~~1. Type of system. The~~ 2. For each system component, the plan shall note the type of ~~system~~ component and, where applicable, the manufacturer, model number, ~~NSF~~ approval ~~and~~, status in accordance with 12VAC5-640-432, hydraulic capacity, and ~~capacity in pounds of $BOD_5$ per day~~ treatment capacity;

~~2. Location~~ 3. The specific location of the property including the county tax map number (where available), a copy of the United States Geological Survey 7.5 minute topographic map showing the discharge point and ~~down stream~~ downstream for one mile, and directions to the property;

~~3. Grades~~ 4. The elevation of the house sewer line where it exits the house and the elevation of the inlet and outlet ports or tees on all treatment units. Where discharges are to dry ditches or intermittent streams the site plan shall show the elevation of the discharge point, the point 500' downgrade from the discharge point and points every 50 feet between the discharge point and 500' downstream. This requirement may be met by drawing a flow diagram showing all elements listed above;

~~4. Distances.~~ 5. The distance between all elevation points required by 12VAC5-640-240 ~~3~~ D 4 so that the grade and setback distances can be established;

~~5. Pump specifications~~ 6. If a pump is proposed, specifications must be provided ~~which~~ that include the manufacturer, model number, and a pump curve with a system curve overlain on the pump curve;

~~6. Flood plain~~ 7. The location of the 100-year flood plain. All portions of a discharging system, except for the discharge pipe and step type post aeration, if required, shall be located above the 100-year flood plain;

~~7. Plans and specifications. Plans and specifications showing compliance~~ 8. Compliance with ~~subsections B through N (inclusive) of 12VAC5-640-470~~ 12VAC5-640-430 through 12VAC5-640-470; and

9. Other information as deemed appropriate by the department to verify the design.

**12VAC5-640-250. Issuance of the construction permit.**

A construction permit shall be issued to the owner by the commissioner or the department after receipt and review of a complete application submitted under ~~12VAC5-640-230 and~~ 12VAC5-640-240, a satisfactory site and construction plan review, and ~~approval under 12VAC5-640-240~~ verification of issuance of a General Permit from the Department of Environmental Quality. The construction permit shall note whether the permitted system has ~~experimental, preliminary, or~~ general approval or is not in accordance with 12VAC5-640-432. ~~Further, the construction permit will indicate that the operation and maintenance of the system is the owner's responsibility and that discharges in excess of the limits established by the General Permit, now or in the future, may cause the department to mandate the repair, expansion or replacement of the discharging system.~~

**12VAC5-640-260. Exception for failing onsite sewage disposal systems.**

~~When a failing onsite sewage disposal system is identified, and the site location criteria in this chapter cannot be met, the site location criteria in Article 1 of Part III and 12VAC5-640-240 F, 12VAC5-640-470 H and the dimensions of the easement specified in 12VAC5-640-450 B of this chapter may be waived, provided the following conditions are met.~~

When a failing onsite sewage disposal system is identified and the site location criteria in 12VAC5-640-400, 12VAC5-640-410, 12VAC5-640-420, and 12VAC5-640-470 H, and the dimensions of the easement specified in subdivision 2 of 12VAC5-640-450 cannot be met, the department may issue a written waiver that specifies the criteria that are being waived and the rationale for the waiver. In order to obtain this waiver, the owner must provide a written request for the waiver that includes justification and specifies any mitigating measures used to offset the reduced site conditions. The following conditions must apply in order for the waiver to be considered:

~~A. Reduce health hazard or environmental impact.~~

1. The issuance of a discharging system permit will reduce an existing health hazard or will improve or negate environmental impacts associated with the existing discharge. This determination shall be made by the ~~district~~

~~health director or the district sanitarian manager~~ department.

~~B. No increase in waste load.~~

2. There will be no increase in the waste load generated by any additions to the dwelling except when necessary to provide for minimum facilities necessary for good sanitation. The minimum facilities for a single family dwelling are: a water closet, a bathroom sink, a bathtub or shower or both, and a kitchen sink. More than one bathroom may be added to a dwelling provided the potential occupancy of the structure is not increased.

~~C. Minimum facilities.~~

3. Where a failing onsite sewage disposal system already has more than the minimum facilities described above, the discharging system may be designed and permitted to accommodate the entire existing sewage flow. In no event shall the system designed and permitted exceed the existing sewage flow unless all conditions and criteria of this chapter are met.

**12VAC5-640-262. Statements required upon completion of construction.**

A. Upon completion of the construction, alteration, or rehabilitation of a discharging system, the owner or agent shall submit to the department a completion statement signed by the contractor responsible for the construction and a completion statement signed by the licensed professional engineer responsible for the design, upon forms approved by the department, that the system was installed and constructed in accordance with the construction permit and complies with all applicable state and local regulations, ordinances, and laws. These completion statements shall be based upon inspections of the treatment works during and after construction or modification that are adequate to ensure the truth of the statements. Should the treatment works be modified from the approved construction plan, the licensed professional engineer shall submit as built drawings documenting the changes. The licensed professional engineer's completion statement shall certify that the treatment works as modified will comply with all applicable state and local regulations, ordinances, and laws.

B. No discharging system shall be placed in operation, except for the purposes of testing the mechanical soundness of the system, until an operation permit is issued by the department in accordance with 12VAC5-640-266.

**12VAC5-640-264. Operation and maintenance manual.**

A. Prior to issuance of the operation permit, the owner shall submit an operation and maintenance (O&M) manual for the discharging system. The general purpose of the manual is to present both technical guidance and regulatory requirements to facilitate operation and maintenance of the discharging system for both normal conditions and generally anticipated adverse conditions. The manual shall be designed as a reference document, being as brief as possible while presenting the information in a readily accessible manner. The manual shall be tailored to the specific system. The manual must state the minimum required frequencies for routine maintenance, operation, sampling, and monitoring frequencies in this chapter, but additional maintenance visits, sampling, and monitoring may be added as needed, depending on the design of the system. The manual should reflect the minimum operation and maintenance activities required to properly maintain the system and ensure compliance with the General Permit requirements.

B. The manual shall include the following minimum items:

1. Basic information relevant to the discharging system design including treatment unit capacities, pump operating conditions, a list of the components comprising the discharging system, a dimensioned site drawing, sampling locations, and contact information for replacement parts and chemicals for each unit process;

2. Safety considerations;

3. A list of all control functions and how to use them;

4. All operation, maintenance, sampling, and inspection schedules for the discharging system including any requirements that exceed the minimum requirements of this chapter;

6. The General Permit effluent sampling and reporting schedule;

7. The sampling location for each of the required General Permit parameters and for informal (process control) testing parameters;

8. The expected ranges of any recommended informal (process control) tests;

9. The limits of the discharging system and how to operate the system within those design limits; and

10. Other information deemed necessary or appropriate by the designer.

**12VAC5-640-266. Issuance of the operation permit.**

A. Prior to issuance of the operation permit, the department may inspect the discharging system to determine if the installation is in substantial compliance with the construction permit and the requirements of this chapter. Minor deviations from the permit or proposed plans and specifications, excluding the manufacturer's design and installation specification, that do not affect the quality of the sewage treatment process or endanger public health or the environment may be approved by the department.

B. Before receipt of an operation permit, the owner shall:

1. Submit the completion statements and as built drawings as required under 12VAC5-640-262;

2. Submit the operation and maintenance manual as required under 12VAC5-640-264; and

3. Submit the maintenance and monitoring contracts as required under 12VAC5-640-490 G and 12VAC5-640-500 B.

C. Upon the owner's satisfactory completion of the requirements in subsection B of this section, the commissioner or department shall issue an operation permit to the owner. The issuance of an operation permit does not denote or imply any warranty or guarantee by the commissioner or department that the discharging system will function for any specified period of time. The operation permit shall note whether the permitted system has general or nongeneral approval.

**12VAC5-640-270. Denial of a construction or operation permit.**

A. ~~Construction permit.~~ If the commissioner or department determines ~~it is determined~~ that the proposed site does not comply with this chapter or that the design of the system would preclude the safe and proper operation of a discharging system, ~~or that~~ the installation and operation of the system would create an actual or potential health hazard ~~or nuisance~~, or the proposed design would adversely impact the environment, the permit shall be denied and the owner shall be notified in writing, by certified mail, of the basis for the denial, and a copy shall be sent to the Department of Environmental Quality. ~~The notification shall also state that the owner has the right to appeal the denial.~~

B. ~~Operation permit.~~ In addition to the grounds set forth in ~~12VAC5-640-270~~ subsection A of this section, the operation permit shall be denied if the discharging system is not constructed in accordance with the construction permit or the owner has failed to provide the completion ~~statement~~ statements required by ~~12VAC5-640-300~~ 12VAC5-640-262, ~~or~~ the operation and maintenance manual required by 12VAC5-640-264, and a copy of a valid maintenance contract required by 12VAC5-640-500 or a valid monitoring contract as required in 12VAC5-640-490 ~~F~~ G. The owner shall be notified in writing, by certified mail, of the basis for the denial, and a copy of the denial shall be sent to the Department of Environmental Quality. ~~The notification shall also state that the owner has the right to appeal the denial.~~

**12VAC5-640-280. ~~Suspension or revocation~~ Revocation of construction permits and operation permits.**

~~The~~ After providing the owner with the notice and the opportunity to participate in an informal conference or consultation proceeding in accordance with § 2.2-4019 of the Code of Virginia and 12VAC5-640-180, the commissioner may ~~suspend or~~ revoke a construction permit or operation permit for any of the following reasons:

1. Failure to comply with the conditions of the permit including, but not limited to, the monitoring and maintenance requirements in Article 4 (12VAC5-640-490 et seq.) of Part III of this chapter and the payment of the inspection fee ~~under 12VAC5-640-320~~;

2. Failure to keep a maintenance contract in force in accordance with 12VAC5-640-500, or keep a monitoring contract in force in accordance with 12VAC5-640-490 ~~F~~ G;

3. Violation of any requirement of this chapter for which no variance has been issued;

4. Facts become known which reveal that an actual or potential health hazard has been or would be created or that the environmental resources may be adversely affected by allowing the proposed discharging system to be installed or operated; or

5. Failure to comply with the effluent limitations set forth by the SWCB in the General Permit as determined by the monitoring required by Article 4 of Part III.

**12VAC5-640-290. Voidance of construction or operation permits.**

~~A. Null and void.~~

~~All~~ After providing the owner with the notice and the opportunity to participate in an informal conference or consultation proceeding in accordance with § 2.2-4019 of the Code of Virginia and 12VAC5-640-180, the commissioner or the department may declare a discharging ~~system~~ system's construction ~~permits are~~ or operation permit null and void when any of the following conditions occur:

1. Conditions such as house location, well location, discharging system location, discharge point, discharge system design, topography, drainage ways, or other site conditions are changed from those shown on the application or site plan;

2. Conditions are changed from those shown on the construction permit;

3. More than ~~54~~ 60 months elapse from the date the permit was issued; or

4. The ~~suspension,~~ revocation or expiration of the General Permit or of the owner's approved registration by the SWCB.

~~B. Reapplication.~~

~~Reapplication for the purposes of having an expired construction permit reissued shall be the responsibility of the owner, and such reapplication shall be handled as an initial application and comply fully with 12VAC5-640-230.~~

**12VAC5-640-300. ~~Statement required upon completion of construction.~~ (Repealed.)**

~~Upon completion of the construction, alteration, or rehabilitation of a discharging system, the owner or agent shall submit to the district or local health department a statement, signed by the contractor, upon the form set out in Appendix II, that the system was installed and constructed in accordance with the permit, and further that the system complies with all applicable state and local regulations, ordinances and laws.~~

**12VAC5-640-310. ~~Inspection and correction.~~ (Repealed.)**

~~No discharging system shall be placed in operation, except for the purposes of testing the mechanical soundness of the system, until inspected by the district or local health department, corrections made if necessary, and the owner has been issued an operation permit by the district or local health department.~~

**12VAC5-640-320. ~~Issuance of the operation permit.~~ (Repealed.)**

~~Upon satisfactory completion of the requirements of 12VAC5-640-300, 12VAC5-640-310, 12VAC5-640-490 F and 12VAC5-640-500 B, the commissioner shall issue an operation permit to the owner. The issuance of an operation permit does not denote or imply any warranty or guarantee by the department that the discharging system will function for any specified period of time. The operation permit shall note whether the permitted system has experimental, preliminary, or general approval. Further, the operation permit will indicate that the operation and maintenance of the system is the owner's responsibility and that discharges in excess of the limits established by the General Permit, now or in the future, may cause the department to mandate the repair, expansion or replacement of the discharging system.~~

~~A. Inspection fees. A fee of $50 shall be charged to the owner for each mandatory monitoring inspection of an alternative discharging sewage treatment system conducted by the department in accordance with 12VAC5-640-490 C, D, or E. The fee shall be paid to the Virginia Department of Health by the owner or his agent prior to receipt of the inspection results from the department. Each inspection fee shall apply to one site specific inspection of only one discharging system.~~

~~B. Waiver of fees. An owner whose income of his family is at or below the 1988 Poverty Income Guidelines For All States (Except Alaska and Hawaii) And The District of Columbia established by the Department of Health and Human Services, 53 Fed. Reg. 4213 (1988), or any successor guidelines, shall not be charged a fee for mandatory monitoring inspection of an alternative discharging sewage treatment system conducted by the Department of Health in accordance with 12VAC5-640-490 C, D, or E.~~

~~C. Determining eligibility.~~

~~1. An owner seeking a waiver of an inspection fee shall request the waiver in writing. The department will require information as to income, family size, financial status and other related data.~~

~~2. It is the owner's responsibility to furnish the department with the correct financial data in order to be appropriately classified according to income level and to determine eligibility for a waiver of an inspection fee. The owner shall be required to provide written verification of income such as check stubs, written letter from an employer, W-2 forms, etc., in order to provide documentation for the file.~~

~~3. The proof of income must reflect current income which is expected to be available during the next 12-month period. Proof of income must include: name of employer, amount of gross earnings, pay period for stated earnings. If no pay stub, a written statement must include the name, address, telephone number and title of person certifying the income.~~

**12VAC5-640-330. ~~Suspension of an operation permit.~~ (Repealed.)**

~~A. Suspension. The district health director or district sanitarian manager may suspend the operation permit held by the owner of any discharging system which discharges effluent in violation of the effluent limitations set forth in the General Permit provided the following conditions have been met:~~

~~1. The owner has received written notification, either in person or by certified mail, of the violation at least seven working days prior to the suspension;~~

~~2. The owner has been advised of the nature of the violation and, if known, what actions are necessary to correct the violation;~~

~~3. The owner has been advised of his right to a hearing pursuant to 12VAC5-640-180 B to appeal the suspension of the operation permit;~~

~~4. The owner has taken no significant demonstrable action to identify and correct the problem causing the system to fail; and~~

~~5. The owner has been issued an emergency pump and haul permit, or given another alternative method of sewage disposal, at least 24 hours prior to the suspension of the operation permit.~~

~~B. Discharge suspended. Upon suspension of an operation permit the owner shall immediately cease discharging effluent until corrections have been made to the discharging system which may be expected to bring the system into compliance with this chapter. The owner shall demonstrate to the health department that interim sewage disposal methods are in compliance with all federal, state and local laws governing public health and the environment. When pump and haul is utilized to prevent a discharge from occurring, the owner shall comply with the emergency pump and haul requirements found in the Sewage Handling and Disposal Regulations (12VAC5-610-10 et seq.) and provide the local health department with the name, address and phone number of the hauler and the frequency of pumping prior to initiating the emergency pump and haul process.~~

~~C. Modifications, alterations, or extensions. In addition to the remedies under 12VAC5-640-330 A and B, when any individual discharging system has exceeded its permitted discharge limitations three times in any one year or five times in any two consecutive years, the district health director or~~

district sanitarian manager may require modifications, alterations or extensions to the system in order to improve the effectiveness of the system.

**12VAC5-640-340. Reinstatement of an operation permit. (Repealed.)**

Upon completion of repairs, modifications, alterations, or extensions to the discharging system, which may be reasonably expected to correct the cause of the violation, the department shall reinstate the operation permit. Upon reinstating the operation permit, the pump and haul permit shall be rescinded. The notice of reinstatement of the operation permit and rescinding of the pump and haul permit shall be made in writing and delivered in person or by certified mail.

**12VAC5-640-350. System approval. (Repealed.)**

Discharging systems will be classified by the division according to the data available to indicate the performance limits and reliability of various discharging systems. Systems may be classified as having an experimental system approval, a preliminary system approval, or a general system approval. The type and frequency of testing for each class of approval is designed to reflect the certainty with which the system has demonstrated its ability to meet the limits of the General Permit. Approval of generic system designs or of individual proprietary systems will be made by the division.

A. Experimental system approval. Experimental system approval indicates that a system, process, technology, or design has not been rigorously tested and proven capable of meeting either the discharge limits of the General Permit or the standards for Class 1 systems as defined by ANSI/NSF (American National Standards Institute/National Sanitation Foundation) International Standard 40, revised July 1990 ("Standard 40") hereby incorporated by reference. Products which have not been field tested or demonstrated in use as described in 12VAC5-640-350 B or C shall be considered experimental.

1. Notification of owner. All owners proposing experimental discharging systems shall sign a waiver of liability relieving, and agreeing to indemnify, the Department of Health and its employees for all liability associated with the design, operation, and performance of the system. Further, the owner shall agree to replace the experimental system with a system that has either general approval or preliminary approval in the event the experimental system fails and cannot be repaired. The cost of all repairs to, or replacement of, any experimental system shall be the responsibility of the system owner and shall not lie with the department.

2. Limit of 25 systems. A maximum of 25 experimental discharging systems of any one type or design may be installed at any one time in the Commonwealth.

3. Time limit for experimental system status. Experimental approval shall not extend for more than 18 months after the 15th experimental system of one type or design has been installed. After 18 months the experimental process, technology or design shall be reviewed by the division and either granted preliminary system approval or the experimental approval shall be revoked. Preliminary system approval shall be granted if the system complies with the requirements of 12VAC5-640-350 B 1 c.

B. Preliminary system approval. Preliminary approval of a particular model of a discharging system indicates that the specific model uses a method, technology, process or combination of methods, technologies or processes that has been demonstrated in full scale systems under controlled test conditions. The results of these tests indicate that the system may have the potential to treat residential sewage under actual residential conditions to the level required by the General Permit. Demonstrated in situ performance, to the level of treatment required by the General Permit, is necessary to maintain system approval.

1. A discharging system may receive preliminary system approval by one of three methods:

a. ANSI/NSF testing. A system may be tested by an entity accredited by the American National Standards Institute and demonstrated to comply with Standard 40; or

b. Accepted engineering practice. System designs such as intermittent dosed sand filters, recirculating sand filters, and other system concepts which use design concepts and loading rates proven in accordance with accepted industry standards and practices and which have been routinely used and have associated test results meeting or exceeding those required for experimental systems to receive preliminary approval, may be granted preliminary approval by the division; or

c. Successful experimental system testing. A system may receive preliminary system approval by successfully demonstrating as an experimental system it can meet the following requirements:

(1) Replicates. At a minimum 15 systems of the same type or design shall be tested under residential conditions for a minimum period of one year each (i.e., no individual system shall be tested for less than one year);

(2) Data collection. Data shall be collected and reported to the Division for each system in accordance with the requirements of 12VAC5-640-490; and

(3) Results. The data shall demonstrate that during the previous year, not less than 95% of all systems of any one type or design were functioning properly during any quarter. That is, during the previous one year there were no data indicating the need to suspend the preliminary system approval.

2. Time limit for preliminary system approval. Preliminary system approval shall not extend for more

than 60 months after the 25th preliminary system of one type or design has been installed. After 60 months the preliminary system approval status shall be reviewed by the division and the system either granted general system approval or the preliminary system approval shall be revoked. General system approval shall be granted if the system complies with the requirements of 12VAC5-640-350.

C. General system approval. Systems that have demonstrated in actual residential use that they can consistently meet the limits of the General Permit shall be eligible for general system approval. To meet the intent of this section the system shall meet the following requirements:

1. Replicates. At a minimum 25 systems shall be tested under residential conditions for a minimum period of five years each (i.e., no individual system shall be tested for less than five years);

2. Data collection. Data shall be collected and reported to the district health department for each system in accordance with the requirements of 12VAC5-640-490; and

3. Results. The data shall demonstrate that during the previous five years, not less than 95% of all systems of any one type or design were functioning properly during any quarter. That is, during the previous five years there were no data indicating the need to suspend the preliminary system approval. All systems installed and tested at the time of evaluation shall be included in the review. Nothing shall limit the department to basing its evaluation only on the first 25 systems installed.

**12VAC5-640-360. ~~Product registration.~~ (Repealed.)**

All aerobic treatment units shall be registered with the Division of Sanitarian Services in order to receive preliminary approval. In order to register a product, the manufacturer shall submit documentation showing the results of the Standard 40 testing and detailed plans and specifications of the product. Detailed plans and specifications shall include at a minimum a plan view of the ATU, a cross section of the ATU and any supplementary views which together with the specification and general installation guidelines will provide sufficient information for sanitarians to issue permits.

A. Health department review. The Division of Sanitarian Services will review requests for preliminary approval within 30 work days of receipt and respond to the applicant in writing. The department may approve, deny, conditionally approve, or request additional information on any request. When additional information is requested the division shall respond to the additional information within 30 days of receipt.

B. Certification mark or seal. All Class I ATU's in compliance with ANSI/NSF International Standard 40 shall have a registered certification mark or seal which must be affixed in a conspicuous location on the unit.

**12VAC5-640-370. ~~Submission of plans.~~ (Repealed.)**

A. Intermittent sand filter. All plans for an intermittent sand filter must use a design prepared by a professional engineer licensed to practice in Virginia, except for generic system designs which have been approved by the division. All plans and specifications shall bear the name, address, and occupation of the author and date of design.

B. Recirculating sand filter. All recirculating sand filters must use a design prepared by a professional engineer licensed to practice in Virginia, except for generic system designs which have been approved by the division. All plans and specifications shall bear the name, address, and occupation of the author and date of design.

C. Constructed wetlands. Constructed wetlands are considered experimental and will be considered on a case by case basis by the department. All constructed wetland systems shall be designed to meet or exceed 10 mg/l $BOD_5$ and 10 mg/l suspended solids.

**12VAC5-640-380. ~~Suspension and revocation of system approval.~~ (Repealed.)**

A. General. The experimental and preliminary approval of systems cited in 12VAC5-640-350 is based on the capability, or theoretical capability, of a particular method, technology or design to treat sewage under controlled conditions. Designs having general system approval have demonstrated their ability to meet the discharge limits of the General Permit; however, these systems still require routine maintenance and attention to their proper use such that they operate in a safe and sanitary manner. In order to protect public health and the environment, these systems must also be capable working properly under normal field conditions.

B. Suspension of approval. Anytime more than 5.0%, as measured statewide, of the discharging systems of any approved generic system or of any approved proprietary system design are found to be failing for two consecutive quarters, the approval of that design or model shall be suspended. Failure for the purposes of this section means the discharge of effluent that does not meet the effluent limitations set forth in the State Water Control Board's General Permit for all constituents except residual chlorine and dissolved oxygen.

1. When less than 100 systems of a single design have been installed, Table 2.1 shall be used determine the maximum acceptable failure rate. The 5.0% rule shall not apply because a small number of failures, or even a single failure, may violate this percentage without unduly endangering public health or the environment.

2. When the approval of a system has been suspended, no additional systems of that design or model shall be installed or approved unless construction or installation is already in

progress and the system or materials to construct the system are already on the job site.

TABLE 2.1

| Number of systems Installed in VA | No. not to exceed for suspension | No. not to exceed for revocation |
|---|---|---|
| 0-10 | 1 | 3 |
| 11-25 | 2 | 6 |
| 26-50 | 3 | 9 |
| 51-75 | 4 | 12 |
| 76-99 | 5 | 15 |

C. Reinstatement of approval for a suspended system. The approval of a system under suspension may be reinstated by the division after the following conditions have been met:

1. Repairs have been made to all failing systems, and

2. Follow-up testing, performed in accordance with 12VAC5-640-490-D-1, reveals that less than 2.0% of the systems are failing. When less than 100 systems have been installed, approval may be reinstated when repairs and testing as described above has been completed on all failing systems and the number of failures is less than that shown in Table 2.1.

D. Revocation of approval. Anytime more than 15%, as measured statewide, of the discharging systems of any approved generic system or of any approved proprietary system design are found to be failing for two consecutive quarters, the approval of that design shall be revoked. Failure for the purposes of this section means the discharge of effluent that does not meet the effluent limitations set forth in the State Water Control Board's General Permit for all constituents except residual chlorine and dissolved oxygen. Further, the division shall revoke the approval of any Class I ATU which fails to meet Standard 40 upon retesting for continued certification, when such testing has been performed by NSF or other third party which has been accredited by the American National Standards Institute.

1. When less than 100 systems of a single design have been installed, Table 2.1 shall be used determine the maximum acceptable failure rate. The 15% rule shall not apply because a small number of failures, or even a single failure, may violate this percentage without unduly endangering public health or the environment.

2. When the approval of a system has been revoked, no additional systems of that type shall be installed or approved.

E. Reinstatement of a revoked system. The approval of a system that has had its approval revoked may be reinstated by the division after the following conditions have been met:

1. Design flaws which led to the excessive failure rate have been corrected;

2. Repairs have been made to all systems to correct the design flaws;

3. Follow-up testing, performed in accordance with 12VAC5-640-490-D-1 reveals that less than 2.0% of the systems are failing. When less than 100 systems have been installed, approval may be reinstated when repairs and testing as described above has been completed on all failing systems and the number of failures is less than that shown in Table 2.1; and

4. Retesting and recertification of any Class I ATU under Standard 40.

F. Notification by the department. When the approval for a system is suspended, or is revoked, the department will send notice of the suspension to all regional and district offices of the Health Department, the manufacturer (if applicable), and other interested parties who have notified the department in writing that they wish to be notified. The notice shall include the system name, failure rate, location of failing systems and what actions are necessary to return to an approved status.

**12VAC5-640-400. Classifications of discharge ~~point~~ points.**

The nature of the discharge point will determine what precautions must be taken to protect public health and environmental resources. ~~These regulations identify two classifications of discharge points.~~

~~A. All~~ 1. Where an all weather stream ~~required if possible~~ is available, it shall be used rather than discharging to an intermittent stream, dry ditch, or wetland. ~~The preferred point of discharge is an~~ An all weather stream ~~where effluent~~ can ~~be~~ readily ~~diluted~~ dilute the effluent at least 10:1 ~~as measured during a 7~~ at the seven consecutive day average of a ~~10 year~~ 10-year low flow (7-Q-10) and thereby minimize public health and water quality impacts. ~~Where an all weather stream is available for use it shall be used rather than discharging to an intermittent stream or dry ditch.~~

~~B. Stream type identification on USGS maps.~~ 2. An all weather stream ~~may generally be identified~~ is represented by a solid blue line on the most recently published 7.5 minute United States Geologic Survey ~~(U.S.G.S.)~~ topographic map and has a 7-Q-10 flow that can provide 10:1 dilution of the effluent. ~~The site evaluation shall include a review to verify that the stream is flowing at the time of the site evaluation. The USGS map shall not be the sole and final factor used to determine if a stream is an all weather stream when the department observes otherwise.~~ Intermittent streams ~~may be identified~~ are represented by a dotted and dashed blue line on the most recently published 7.5 minute United States Geologic Survey topographic map. An all weather stream that provides less than 10:1 dilution of the effluent based on 7-Q-10 flow shall be

considered an intermittent stream. Intermittent streams and dry ditches have an assigned stream flow 7-Q-10 of zero.

~~C. Other means of determining stream flow.~~ 3. An owner may submit to the division additional hydrologic data, including but not limited to stream records and anecdotal evidence of long time residents, to support that a stream can provide a dilution ratio of 10:1. When in the opinion of the division, the evidence warrants a change, the division may determine that a stream is an all weather stream for the purposes of this chapter. The owner may also request site specific stream flow determinations from the Department of Environmental Quality.

~~D. Intermittent streams or dry ditches.~~ 4. Discharges into intermittent streams or dry ditches ~~which~~ that do not have the dilution capability cited in ~~12VAC5-640-400 A~~ subdivision 1 of this section shall be located entirely within the owner's property, or within a recorded easement as described in subdivision 2 of 12VAC5-640-450 ~~B or a combination of the two~~.

~~1. Average slope.~~ a. The average slope for any intermittent stream or dry ditch discharge receiving effluent from a discharging system shall be ~~between~~ a minimum of 2.0% ~~and 30%~~ for the first 500 feet from the point of discharge. The intermittent stream or dry ditch shall be protected from erosion by the discharge as needed.

~~2. Minimum slope.~~ b. In order to prevent ponding, the minimum slope shall not be less than 1.0% at any point.

~~3. Grading of slopes.~~ c. All slope measurements described in subdivisions 1 and 2 of this subsection shall be made prior to initiating any grading and are intended to reflect naturally occurring swales and drainage ways. Nothing contained herein however, is intended to prohibit a property owner from making minor grading improvements to prevent ponding in areas with minimal slopes. Naturally occurring swales and drainage ways may be extended with an engineered channel on a case-by-case basis, but any engineered channel must tie into the existing natural swale or drainage.

5. Wetlands shall be confirmed by the U.S. Army Corps of Engineers or the Department of Environmental Quality, as appropriate, based on the type of wetland. Confirmation of delineated wetlands shall be provided, and include a wetland delineation map, wetland field data sheets, and any other documentation from the U.S. Army Corps of Engineers or the Department of Environmental Quality indicating their approval of the wetland boundary. 7-Q-10 flows cannot be calculated for wetlands and therefore the assigned 7-Q-10 flow value is zero. Discharges to wetlands shall be located entirely within the owner's property, or within a recorded easement as described in subdivision 2 of 12VAC5-640-450.

**12VAC5-640-420. Setback distances from discharge points and downstream channels for the protection of public health.**

A. ~~Water supply intakes and recreational uses.~~ Discharges proposed within one mile (upstream or up channel) of any public water intake ~~or one mile (upstream or up channel) of any area explicitly designated for public swimming~~ shall not be permitted.

B. Discharges proposed within one mile upstream or up channel of any area explicitly designated for public swimming shall not be permitted.

C. When any river, stream, or other potential discharge area appears to receive significant primary contact use, such as, but not limited to, swimming, water skiing, tubing, or wet-wading, so that the discharge will pose a significant threat to public health ~~or create a nuisance~~, the district health director may require a higher level of treatment and reliability class for the permitted discharge facility.

D. The district health director, in consultation with the local governing authority and the department, may prohibit discharges into specified portions of the river, stream, or other potential discharge area. Prior to taking such action, the health director shall take the following steps:

1. Publish a notice announcing the department's intention to consider areas for restricting the use of discharging systems, establishing the date, time and location(s) of the public meeting(s), and soliciting public comment on the proposed area or areas being reviewed;

2. Request the opinion of the local governing body and other appropriate government agencies concerning proposed restrictions to be submitted before the close of the public comment period;

3. Have a public comment period on the proposal of not less than 30 days;

4. Hold at least one public meeting, 30 days or more after publication of the notice specified in subdivision 1 of this section; and

5. Evaluate the public comments received and staff evaluations regarding the use of the proposed area or areas for primary contact uses.

When in the best professional opinion of the health director the area or areas under consideration receives, for 30 days or more per year, significant primary contact uses, such that the discharge will pose a significant threat to public health ~~or create a nuisance~~, the director may designate areas where discharge systems are prohibited. Prohibited discharge areas may include areas upstream in the main channel and tributaries, from the area under review, for distances up to one mile if warranted by the evidence. Prohibited discharge areas shall be clearly defined in writing and delineated on a United States Geological Survey 7.5 minute topographic map. The prohibition on discharges, if any are found necessary,

shall be effective upon notice after completion of the elements contained in this section.

~~B. Private and public water supplies.~~ E. The wastewater treatment system ~~(ATU, sandfilter etc.)~~ (tankage and components), shall be a minimum of 50 feet from private and public water wells and private cisterns. The discharge point and the channel of treated effluent flow shall be located in accordance with the distances given in Table 3.1 from private and public water ~~supplies~~ wells and cisterns. Where the bottom elevation of a cistern is located above the elevation of the discharge point, the setback distances shall not apply. The set back distances between the water ~~supply~~ well or cistern and the downstream channel established in Table 3.1 shall apply for 50 feet downstream of the discharge point for all weather streams and 500 feet downstream for intermittent stream or dry ditch discharges. For wetlands where the flow path can be established, generally where the slope is 10% or greater, the setback distances between the water well or the cistern and the "downstream channel" shall apply for 250 feet downstream of the discharge point. For wetlands where the flow path cannot be established, generally where the slope is less than 10%, then the distance shall be measured radially for 250 feet from the point of discharge.

F. Setback distances to other wells not covered in Table 3.1 of this section, such as geothermal and gas wells, will be determined on a case-by-case basis.

~~C. Springs.~~ G. No discharging system ~~nor~~ or any portion of the channel carrying the treated effluent flow shall be within 100 feet of a spring. Further, no discharging system shall discharge within 1,500 feet upstream or 100 feet downstream of any spring used for human consumption.

~~D. Sink holes.~~ H. Discharging systems are prohibited from discharging directly into sink holes or into dry ditches, intermittent streams, wetlands, streams, or other waterways that flow into sink holes within 1,500 feet from the point of discharge~~, and dry ditches that flow into sink holes within one mile from the point of discharge~~.

~~E. Limestone outcrops.~~ I. Dry ditch discharges ~~to swales or drainage ways which have~~ shall not have limestone outcrops within ~~25 feet of~~ the dry ditch channel ~~bottom are prohibited~~. This provision shall apply for ~~the entire distance required for ownership or easement in 12VAC5-640-450 B~~ a distance of 50 feet along the channel.

~~F. Proximity to other discharge points. The~~ J. Except as noted below, the department will not approve discharging systems except where discharge points will be at least 500 feet apart. ~~If the proposed system utilizes aerobic biological treatment followed by sand filtration this distance may be reduced to 250 feet apart.~~ The separation distance may be reduced to 250 feet between discharge points in accordance with the following:

1. For discharges to an all weather stream, the distance may be reduced to 250 feet by providing a Reliability Class II facility.

2. For discharges to a dry ditch or intermittent stream, the distance may be reduced to 250 feet by providing a Reliability Class I system that produces a TL-3 effluent and a fecal coliform concentration of 100 col/100 ml or less.

3. No reduction in the distance between discharge points is allowed for discharges to wetlands.

~~G. Shellfish waters.~~ K. No discharge shall be permitted under this chapter which will result in the condemnation of shellfish waters or the continued condemnation of shellfish waters closed only because of inadequate water quality.

TABLE 3.1 SETBACK DISTANCES FROM PRIVATE AND PUBLIC WATER ~~SUPPLIES~~ WELLS AND CISTERNS
(All distances are in feet)

| Type of Water ~~Channel~~ Supply ~~Stream~~ | Distance from Point of Discharge | Distance from Downstream Channel | |
|---|---|---|---|
| | | ~~Downstream Channel With 7-Q-10~~ Discharge to All Weather Stream | ~~Downstream~~ Discharge to Wetland[2], Intermittent Stream, or Dry Ditch |
| Class I and II[1] Wells | 100 | 100 | 100 |
| Class IIIA Well | 50 | 50 | 50 |
| Class IIIB Well | 50 | 50 | 50 |
| Class IIIC Well | 100 | 50 | 100 |
| Class IV Well | 100 | ~~25~~ 50 | ~~50~~ 100 |
| Cistern | 100 | 50 | 100 |

[1]Class I and II well specifications are found in the Waterworks Regulations (12VAC5-590). All other well specifications may be found in the Private Well Regulations (12VAC5-630).

[2]The downstream 'channel' of a wetland where the flow path can be established shall be a minimum of 25 feet wide and approximately centered on the flow path. Where the flow path cannot be established in a wetland, then the distance shall be measured radially from the point of discharge.

Article 2

Design Requirements

**12VAC5-640-430. Performance requirements.**

A. ~~Discharge limits.~~ All systems operated under this chapter shall meet the effluent limitations set forth by the State Water Control Board in the General Permit. All systems operated under this chapter shall maintain the treatment system in accordance with the approved construction permit or as modified by the final construction permit in accordance with

the operation permit, "as built" plans, and the operation and maintenance manual.

B. ~~Bypass flow.~~ No system shall be approved for use which provides a bypass pipe, or otherwise allows untreated or partially treated effluent to discharge in the event of a system failure.

**12VAC5-640-432. Treatment unit and additional system component classifications.**

A. Biological treatment units will be classified by the division according to the data available to demonstrate the performance limits and reliability of those treatment units. The division may classify treatment units as generally approved or not generally approved. The type and frequency of testing for each approval class is designed to reflect the certainty with which the system has demonstrated its ability to meet the limits of the General Permit or the performance requirements of this chapter.

1. General approval may be issued by the division for both TL-2 and TL-3 treatment units in accordance with the current policies of the division. Generally approved units shall be listed on the division's website.

2. Nongenerally approved biological treatment unit designs shall be properly supported with design calculations and one or more of the following:

a. Documentation from applicable engineering standards, texts, or other publications;

b. Relevant peer-reviewed research;

c. Technical guidance from other states (may be considered on a case-by-case basis); or

d. Technical guidance from the U.S. Environmental Protection Agency.

Scale drawings of the treatment unit, appropriate design calculations, and control system details shall be provided that demonstrate the ability of the unit to meet the required effluent limits and reliability standards at the proposed design flow.

B. Additional system components for discharging systems will be classified by the division as generally approved or not generally approved.

1. The division shall consider additional system components such as post-filtration, disinfection, dechlorination, and post-aeration to be generally approved if the unit has been tested and approved under a National Sanitation Foundation (NSF) or other recognized protocol for the proposed wastewater use or if the design complies with the design standards in 12VAC5-640-460.

2. Nongenerally approved system component designs shall be properly supported with design calculations and one or more of the following:

a. Documentation from applicable engineering standards, texts, or other publications;

b. Relevant peer-reviewed research;

c. Technical guidance from other states (may be considered on a case-by-case basis); or

d. Technical guidance from the U.S. Environmental Protection Agency.

Scale drawings of the treatment unit, appropriate design calculations, and control system details shall be provided that demonstrate the ability of the unit to meet the required effluent limits and reliability standards at the proposed design flow.

C. Discharging systems that are comprised entirely of generally approved treatment biological treatment units and system components as described in this section are considered generally approved treatment systems.

**12VAC5-640-434. Reliability.**

A. Reliability is a measure of the ability of a component or system to perform its designated function without failure or interruption of service. Overflow criteria, such as the allowable period of noncompliant discharge, are utilized solely for the establishment of reliability classification for design purposes and are not to be construed as authorization for, or defense of, an unpermitted discharge to state waters. The reliability classification shall be based on the water quality and public health and welfare consequences of a component or system failure.

B. Reliability Class I is required for dry ditch and intermittent stream discharges with 250 feet of easement available and wetland discharges with 100 feet of easement available.

1. For biological treatment processes, Reliability Class I shall be met by providing one of the following:

a. A passive, backup biological treatment system (e.g., an intermittent sand, peat, or media filter or a constructed wetlands);

b. A generator for the treatment system with automatic transfer switch;

c. A 24-hour holding tank for raw wastewater with telemetry system to immediately notify the operator of system failure; or

d. Any alternative means that limits the discharge of a noncompliant effluent to a maximum of 24 hours.

2. For disinfection, a Reliability Class I design shall ensure that the effluent is continually disinfected by providing electronic or mechanical means of monitoring the process such that failure of disinfection systems may be corrected within 24 hours.

C. Reliability Class II is required for dry ditch and intermittent stream discharges with 500 feet of easement available and wetland discharges with 250 feet of easement available. Reliability Class II is also required for the reduction of the distance between discharge points to 250 feet on an all weather stream.

1. For biological treatment processes, Reliability Class II shall be met by providing:

a. A fixed film biological treatment process such as an intermittent sand filter, recirculating media filter, or a peat filter;

b. A suspended growth biological system followed by post-filtration;

c. Telemetry to relay alarm conditions to the operator; or

d. Any alternative means that limits the discharge of a noncompliant effluent to a maximum of 36 hours.

2. For disinfection, a Reliability Class II design shall ensure that the effluent is continually disinfected by providing electronic or mechanical means of monitoring the process such that failure of disinfection systems may be corrected within 36 hours.

D. Reliability Class III is required for all weather stream discharges with a separation distance between discharge points of 500 feet or greater. For the purposes of this chapter, noncompliant discharges must be limited to a maximum of 48 hours in accordance with 12VAC5-640-500 C.

**12VAC5-640-440. ~~Factors~~ Special factors affecting system design.**

Each type of discharging system has its own unique advantages and disadvantages. These unique characteristics define the situations where a system may be used to advantage. The design of the system must be appropriate for the intended use and the site conditions where ~~it is placed.~~ the system is to be installed. Subdivisions 1 through 6 of this section contain a list of factors that will require special design consideration. This list should not be considered all encompassing. There may be other design factors that require special consideration. A preliminary engineering conference may be scheduled with the department to discuss such factors prior to submitting designs for department review.

~~A. Discharge to a dry ditch or intermittent stream.~~ 1. When a discharge is proposed to a wetland, dry ditch, or intermittent stream, ~~the department shall require~~ restricted access to the wetland, dry ditch, or intermittent stream in accordance with 12VAC5-640-450 to protect public health.

~~B. Intermittent use.~~ 2. Intermittent use for the purposes of this chapter constitutes use of the system for less than three consecutive months. Systems serving weekend cottages~~,~~ or other intermittent uses ~~will not reliably treat effluent prior to discharge. Therefore, the use of discharging systems for dwellings subject to intermittent use is prohibited~~ require special design, operation, and maintenance consideration.

~~C. Infiltration.~~ 3. When a discharging system is proposed to be located in an area subject to infiltration by surface water or shallow ground water, the department may require additional protection from infiltration, inflow, and flotation, including placement of the system above natural grade.

~~D. Erosion.~~ 4. Erosion must be controlled by the owner of the discharging system in accordance with any local erosion control ordinances ~~or the Soil Conservation Services recommendations~~.

~~E. Sewage design flows.~~ 5. All systems shall normally be designed to treat the $BOD_5$ loading rate of 0.4 lbs/day per bedroom and a flow of 150 gallons per day per bedroom for systems up to three bedrooms. Systems serving single family dwellings having more than three bedrooms shall be permitted and designed to treat the anticipated loading rate based on $BOD_5$ and be capable of handling anticipated peak loading and flow rates. All systems shall be designed to operate over the range of anticipated flow and loading rates. When a system is permitted with a design less than the maximum capacity of the dwelling, the owner shall have the construction permit recorded and indexed in the grantor index under the owner's name in the land records of the clerk of the circuit court having jurisdiction over the site of the discharging system.

6. All system designs must include protection of the components from freezing or other adverse weather conditions and ensure that the system will function properly year round.

**12VAC5-640-450. ~~Criteria~~ Design criteria for the use of intermittent streams ~~or~~, dry ditches, or wetlands.**

All owners of systems discharging to an intermittent stream, ~~or~~ dry ditch, or wetland shall ensure the following conditions are met:

1. ~~Restricted access.~~ Direct contact between minimally diluted effluent and insects, animals, and humans must be restricted for the life of the system. This will be achieved by reducing the chance of ponding and run-off and limiting access to the effluent. The department shall require fencing, rip-rap, or other barriers to restrict access to effluent discharging to a dry ditch, ~~or~~ intermittent stream, or wetland as deemed necessary to protect public health. This determination shall be made by the ~~district health director or district sanitarian~~ department on a case by case basis.

~~The~~ a. For dry ditch and intermittent stream discharges, the restricted access area shall begin at the point where the effluent is discharged and continue for 500 feet, ~~or~~ until the effluent discharges into an all weather stream or is no longer visible during the wet season. The design shall provide justification for the length of the restricted access channel if less than 500 feet.

b. For wetland discharges, the restricted access shall extend for a distance of 250 feet along the flow path of the discharge unless a 10:1 dilution with the wetland can be achieved. If the flow path cannot be established and a 10:1 dilution cannot be obtained, then access shall be restricted for 100 feet radially from the point of discharge. For wetland discharges, the access barrier may be a subsurface discharge point, but in no case shall the

discharge point and diffuser be greater than 18 inches below the natural wetland surface.

2. ~~Ownership and easements.~~ When effluent is discharged to a dry ditch, ~~or~~ intermittent stream, or wetland, the owner shall ~~either~~ own the land or ~~have~~ acquire an easement from the downstream or downgradient land owner to discharge on all land below the point of discharge for the distance shown in Table 3.2. To allow for system construction and repair ~~of~~ within the restricted access area, ~~as well as~~ and to facilitate maintenance and monitoring, the ~~width of the~~ easement shall be a minimum of 25 feet wide and approximately centered on ~~either side of~~ the low point of the dry ditch or intermittent stream for the entire length of the restricted access area. For wetlands, the easement shall be measured radially from the point of discharge unless flow direction can be established. In those cases where flow direction can be established, the easement shall be a minimum of 25 feet wide and approximately centered on the discharge path and extend for a distance along the flow path as described in Table 3.2. If the slope across the discharge site is equal to or greater than 10%, the flow direction can be determined by observation. For slopes less than 10%, a site specific study must be conducted to document the direction of flow. All easements must be in perpetuity and shall be recorded by the owner with the clerk of the circuit court having jurisdiction over the property prior to issuance of the construction permit. For the purposes of complying with this chapter, ~~a CE-7 permit issued~~ written approval to utilize an easement owned by the Virginia Department of Transportation shall be ~~considered as equivalent to an easement in perpetuity~~ recorded by the owner with the clerk of the circuit court office having jurisdiction over the property.

~~TABLE 3.2~~
~~REQUIREMENTS FOR OWNERSHIP OR EASEMENTS DOWNSTREAM FROM DISCHARGING SYSTEMS~~

| | ~~Downstream or Down Channel Distance (feet)~~ | |
|---|---|---|
| ~~Process~~ | ~~No spring below~~ | ~~Spring below~~ |
| ~~Sandfilter, aerobic system (w/post filtration), constructed wetland, or other single process system~~ | ~~500'~~ | ~~1,500'~~ |
| ~~Aerobic system w/sand filter, or other combination process with equal treatment~~ | ~~250'~~ | ~~1,500'~~ |

3. ~~Public health and environmental impact reduction and nuisance abatement.~~ Each discharging system ~~which~~ that discharges to a dry ditch, ~~or~~ intermittent stream, or wetland must receive additional treatment beyond that required by the General Permit in order to reduce the increased potential for public health ~~and nuisance~~ problems which may result when partially treated effluent is not diluted. Such additional treatment shall be capable of producing an effluent with a quality of 10 mg/l of $BOD_5$, 10 mg/l of suspended solids and a fecal coliform level of less than or equal to 100 colonies per 100 ml. Treatment units approved as TL-3 are recognized as having the ability to meet this $BOD_5$ and TSS standard, but have not been tested for compliance with the fecal coliform standard. Therefore, the following reliability classifications in Table 3.2 must be met when designing discharge systems intended to discharge into dry ditches, intermittent streams, or wetlands.

TABLE 3.2
REQUIREMENTS FOR RELIABILITY CLASSIFICATION AND OWNERSHIP OR EASEMENTS DOWNSTREAM FROM SYSTEMS THAT DISCHARGE TO DRY DITCHES, INTERMITTENT STREAMS, OR WETLANDS

| Reliability Class | Downstream or Down Channel Distance for Dry Ditches or Intermittent Streams (feet) | | Wetlands from Discharge Point along Flow Path or Radially from Discharge Point |
|---|---|---|---|
| | No spring below | Spring below | |
| Reliability Class I | 250 ft | 1,500 ft | 100 ft |
| Reliability Class II | 500 ft | 1,500 ft | 250 ft |

**12VAC5-640-460. ~~Disinfection~~ Design requirements for system components.**

A. All discharging systems shall be equipped with a means of disinfecting the effluent which is acceptable to the division and meets the performance requirements of this chapter.

~~A.~~ 1. All discharging systems utilizing chlorine as a disinfectant shall be equipped with a chlorinator and contact chamber. Dechlorination is to be supplied if required by the General Permit.

a. Chlorinator capacity shall be based on the degree of treatment, flow variations, and other variables in the treatment processes. For disinfection, the capacity shall be adequate to maintain a total chlorine residual between 1.0 mg/l and 3.0 mg/l in the effluent after the required contact period. All chlorinators shall be designed to provide the appropriate dose of chlorine and mix the chlorine with the effluent. All chlorine products used to

disinfect effluent from a discharging system shall be approved by the U.S. Environmental Protection Agency for use as a sewage disinfectant; products unapproved for wastewater disinfection are not acceptable. Use of unapproved products shall constitute a violation of this chapter.

b. The chlorine contact chamber shall have a length to width ratio of 20:1 and shall ~~be capable of maintaining a total chlorine residual between 1.0 mg/l and 3.0 mg/l in the effluent within the chlorine contact chamber for~~ provide a contact time of 30 minutes based on peak hourly flow, or 60 minutes based on peak daily flow. The length to width ratio may be reduced on a case by case basis when increased chlorine contact times are utilized.

c. When required by the General Permit, dechlorination capacity shall be adequate to dechlorinate the maximum chlorine residual anticipated and achieve the required General Permit effluent limits for total residual chlorine by providing at least 1-1/2 parts sulfite salt to one part chlorine. Provisions shall be made to thoroughly mix the dechlorinating agent with the contact tank effluent within a period of approximately one minute.

d. To meet Reliability Class I or Class II, all chlorination and dechlorination units shall be alarmed to notify the operator when tablets are not present in the dosing chamber or equipped with duplicate units that automatically switch over to the redundant unit if the primary unit is not operating.

2. Disinfection can be achieved through exposure of microorganisms to a sufficient level of ultraviolet light (UV) irradiation at the germicidal wavelength for an adequate period of time.

a. UV disinfection equipment shall be capable of providing a minimum average calculated dose of 50,000 microwatt-seconds per square centimeter after the UV lamps have been in operation for 7,500 hours or more and at a 65% transmissivity. The dosage may be reduced on a case-by-case basis when sufficient information is provided to demonstrate that the required level of disinfection can be obtained at a lower dose level through test data.

b. UV lamps shall produce 90% or more of their emitted light output at the germicidal wavelength of 253.7 nanometers.

c. UV lamp assemblies shall be so located as to provide convenient access for lamp maintenance and removal.

d. UV lamps should not be viewed in the ambient air without proper eye protection as required by VOSH and other applicable regulations. The system design should prevent exposure of bare skin to UV lamp emission for durations exceeding several minutes.

e. An elapsed time meter shall be provided to indicate the total operating time of the UV lamps.

f. UV systems are sensitive to color and suspended solids. Precautions should be taken to protect the UV system from both color and excessive suspended solids.

g. To meet Reliability Class I or Class II, all UV units shall be equipped with sensors to detect bulb failure with an alarm or equipped with duplicate units that automatically switchover if the primary unit is not operating.

~~B. All chlorine used to disinfect effluent from a discharging system shall be approved by the Environmental Protection Agency for use as a sewage disinfectant.~~

~~C. Other methods of disinfection for the removal of bacteria and viruses, which have been demonstrated effective under field use, may be approved by the division.~~

B. Post-aeration as required by the General Permit shall be provided to ensure that the final effluent complies with the dissolved oxygen effluent limits in the General Permit. Post-aeration may involve diffused aeration or cascade type aeration. All post-aeration designs shall assume a zero dissolved oxygen concentration in the influent wastewater to the post-aeration unit.

1. Effluent post-aeration may be achieved by the introduction of diffused air into the effluent.

a. Diffused aeration basins shall be designed to eliminate short-circuiting and the occurrence of dead spaces. For maximum efficiencies, sufficient detention time shall be provided to allow the air bubbles to rise to the surface of the wastewater prior to discharge from the basin.

b. When the detention time in the aeration basin exceeds 30 minutes, consideration shall be given to the oxygen requirements resulting from biological activity in the aeration unit.

c. Diffused air aeration systems shall be designed utilizing Fick's Law (the rate of molecular diffusion of a dissolved gas in a liquid) in the determination of oxygen requirements. Supporting experimental data shall be included with the submission of any proposal for the use of diffusers that are considered nonconventional. Such proposals will be evaluated on a case-by-case basis by the division.

d. Alternatively, an airflow of one cubic foot per minute at a diffuser submergence of one foot is sufficient to increase the dissolved oxygen of 1000 gallons per day of effluent to greater than five mg/l dissolved oxygen at 25°C.

e. If airflow is to be siphoned off the blower for the biological treatment unit, calculations shall be submitted to verify that there is sufficient air for both uses.

2. Effluent post-aeration may be achieved through a turbulent liquid-air interface established by passing the effluent downstream over either a series of constructed steps that produces a similar opportunity for transfer of

dissolved oxygen to the effluent, otherwise known as cascade or step aeration.

a. The following equation shall be used in the design of cascade/step type aerators:

$r^n = (C_s-C_a)/(C_s-C_b)$

| | | |
|---|---|---|
| where: r | = | Deficit ratio |
| $C_s$ | = | Dissolved oxygen saturation (mg/l) |
| $C_a$ | = | Dissolved oxygen concentration above the weir, assumed to be 0.0 mg/l |
| $C_b$ | = | Dissolved oxygen concentration in the effluent from the last or preceding step |
| n | = | The number of equal size steps |
| r | = | 1 + (0.11) (ab) (1 + 0.046 T) (h) |
| where: T | = | Water temperature (°C) |
| h | = | Height of one step (ft) |
| a | = | 1.0 for effluents ($BOD_5$ of less than 15 mg/l) or 0.8 for effluents ($BOD_5$ of 15 mg/l to 30 mg/l) |
| b | = | 1.0 for free fall and 1.3 for step weirs |

b. The equation for determining the number of steps is dependent upon equidistant steps, and if unequal steps are used, transfer efficiencies must be determined for each separate step.

c. The effluent discharge to a cascade type aerator shall be over a sharp weir to provide for a thin sheet of wastewater. Consideration shall be given to prevention of freezing.

d. The final step of the cascade type aerator shall be above normal stream flow elevation and the cascade aerator shall be protected from erosion damage due to storm water drainage or flood/wave action.

e. When pumping is necessary prior to discharge over the cascade aerator, the range of the flow rate to the post-aeration unit must be accounted for in the design.

f. A step aerator with multiple steps each less than or equal to one foot and a total drop of five feet is sufficient to increase the dissolved oxygen in an effluent at 25°C to greater than five mg/l.

C. Post-filtration may be used to ensure compliance with the reliability standards in 12VAC5-640-434 and generally follow the biological treatment unit and are prior to disinfection in the treatment process. For granular media filters, the media depth shall not be less than 30 inches. Sand media for intermittently dosed and recirculated effluent, shall have an effective size of 0.30 mm to 1.0 mm and 0.8 mm to 1.5 mm, respectively. The uniformity coefficient should not exceed 4.0. No more than 2.0% shall be finer than 0.177 mm (80 mesh sieve) and not more than 1.0% shall be finer than 0.149 mm. No more than 2.0% shall be larger than 4.76 mm (4 mesh sieve). Larger granular media up to five mm in effective size may be considered on a case-by-case basis. The filter shall be equipped with an underdrain. The surface of the filter shall be accessible for maintenance. For the purposes of a filtration unit, the maximum surface hydraulic loading rate is 15 gpd/sf.

D. Constructed wetlands that are used as a passive backup biological treatment unit for the purposes of meeting Reliability Class I requirements of 12VAC5-640-350 shall be lined with a minimum surface area of 100 square feet, a depth of 18 inches, a length to width ratio of about 4 to 1, and shall have subsurface flow. Wastewater shall be disinfected prior to entering the constructed wetlands and sampling ports shall be provided to allow monitoring of the influent to the wetlands. Effluent dechlorination prior to entering the wetlands may be necessary to protect the plants from toxic levels of chlorine.

Article 3
Construction Requirements

**12VAC5-640-470. ~~Installation review~~ General construction requirements.**

A. ~~General.~~ No portion of any system may be covered or used until inspected, corrections made if necessary, and approved, by the ~~local health~~ department or unless expressly authorized in writing by ~~the local health~~ department. All applicable sections contained in the Sewage Handling and Disposal Regulations, ~~12VAC5-610-10 et seq.~~ 12VAC5-610, shall be used to establish design and construction criteria not contained in this chapter.

B. ~~Slope.~~ Gravity sewer lines and lines between components of the system shall be schedule 40 pipe and shall have a minimum grade of ~~1.35"~~ 1.25 inches per ~~10'~~ ten feet for ~~3"~~ three-inch and ~~4"~~ four-inch sewer lines. Discharge lines after primary or secondary treatment units shall have a minimum grade of ~~6"~~ six inches per ~~100'~~ 100 feet. Where minimum grades cannot be maintained, detailed pump specifications shall be shown on the site plan in accordance with Article 4 (12VAC5-610-598 et seq.) of Part IV of the Sewage Handling and Disposal Regulations, 12VAC5-610-10 et seq.

C. ~~Location.~~ The treatment unit and all piping and appurtenances shall be located in conformance with the approved plans. All changes in location shall be approved by the local department prior to the installation of the system.

D. ~~Pumps.~~ All pumps and appurtenances to the pump shall be installed according to the plans and specifications approved by the department and referenced in the permit.

E. ~~Electrical.~~ All wiring shall be approved by the local building official and shall be weather tight and permanent in nature (hard wired).

F. ~~Controls.~~ The control panel for the system shall be located within 15 feet of the treatment unit and shall be provided with a manual override switch. Each pumping station shall be provided with controls for automatically starting and stopping the pumps based on water level. When float type controls are utilized they shall be placed so as to be unaffected by the flow entering the wet well.

G. ~~Alarm.~~ All mechanical treatment units shall be provided with an alarm system on a separate electrical circuit from the remainder of the treatment unit. The alarm shall be both audio and visual and shall be located in an inhabited portion of the dwelling. Examples of alarm conditions to be monitored include aerator failure, blower failure, and high water level.

~~All ATU's shall be equipped with an alarm that detects aerator failure and a high water alarm to warn against the back-up or overflow of sewage.~~

H. ~~Flood plain.~~ Except for the discharge pipe, and step type post aeration if ~~required~~ used for post-aeration, no portion of the discharging system may be located in the 100-year flood plain.

~~I. Sampling ports. All discharging systems shall be equipped with a six inch (or larger) sampling port connected to an approved effluent collection box at the chlorine contact chamber after the 30- or 60-minute contact time (i.e., the sampling port shall be located at the outlet end of the chamber. Additionally, a separate sampling port shall be required after the dechlorination unit. Other sampling ports may be required elsewhere on a case by case basis as required by the system design.~~

I. The design must allow for sampling to confirm the efficacy of the treatment process. Sampling ports shall be identified on the construction documents and shall meet the following minimum requirements:

1. All discharging systems utilizing chlorine as a disinfectant shall be equipped with a four inch or larger sampling port connected to an approved effluent collection box at the chlorine contact chamber after the 30-minute or 60-minute contact time (i.e., the sampling port shall be located at the outlet end of the chamber).

2. A separate sampling port shall be required after the dechlorination unit.

3. The sampling location is to be identified and a port provided if needed for sampling the final effluent prior to the effluent entering the discharge channel.

4. Other sampling ports may be required on a case-by-case basis due to the system design.

J. ~~Clean out port.~~ All discharging systems shall have a clean out port, accessible from the surface of the ground within ~~10'~~ 10 feet of the influent invert of the treatment unit.

K. ~~Ventilation.~~ Positive ventilation shall be provided at pumping stations when personnel are required to enter the station for routine maintenance.

L. ~~Filter liners.~~ Sand filter liners shall be constructed of clay having a permeability of $10^{-6}$ cm/sec. or less, a 28 mil vinyl or PVC plastic liner, concrete, or other material approved by the division. A watertight seal shall be provided where underdrain piping exits the filter.

~~M. Filter materials. Sandfilter materials shall meet the specifications described in 12VAC5-580-760 B of the Sewerage Regulations, or as amended.~~

~~N. Posting of discharge pipe.~~ M. The owner of each discharging system ~~that discharges to state waters, including either an all weather stream or an intermittent stream,~~ shall post a permanent sign at the point of discharge with the following notice:

> This pipe carries treated sewage effluent and is not suitable for human consumption. This system is owned by (FULL NAME OF PERMIT HOLDER) and is maintained by (NAME AND PHONE NUMBER OF MAINTENANCE PROVIDER IN MAINTENANCE CONTRACT).

The sign shall be posted within three feet of the discharge pipe, ~~and~~ shall be plainly visible to the public, and shall be constructed of durable material. All lettering shall be at least one-inch high and shall be clearly legible. The sign shall have black letters on a white background (or be painted in other contrasting colors) and be plainly visible at a distance of 25 feet to a person with normal vision. Failure to maintain this sign shall be grounds for suspending the owner's operation permit.

**12VAC5-640-480. ~~Compliance with plans.~~ (Repealed.)**

~~Prior to the issuance of an operation permit all discharging systems must be inspected by the health department and found to substantially comply with the intent of the chapter. Minor deviations from the permit or proposed plans and specifications (excluding the manufacturer's design and installation specifications) that do not affect the quality of the sewage treatment process or endanger public health or the environment may be approved. Where engineering plans were submitted and were incorporated in the construction permit, the design engineer, or other professional engineer designated by the design engineer, shall inspect the installation and submit written comments concerning the compliance of the installation with the design specifications prior to the issuance of the operation permit.~~

Article 4
Monitoring and Maintenance Requirements

**12VAC5-640-490. Monitoring.**

A. ~~General.~~ Discharging systems that discharge improperly treated effluent can endanger public health and threaten

environmental resources. All discharging systems shall be routinely inspected and the effluent sampled to determine compliance with the effluent limitations set forth by the State Water Control Board in the General Permit and in accordance with 12VAC5-640-430 and 12VAC5-640-510. All testing requirements contained in this chapter are the responsibility of the system owner to have collected, analyzed, and reported to the department.

B. ~~Types of testing.~~ There are two types of testing recognized by this chapter: formal compliance testing and informal (process control) testing. Formal testing is conducted to determine either compliance or noncompliance with ~~this chapter~~ the General Permit. Informal testing is conducted to assess the treatment system's performance ~~determine compliance with this chapter~~ and to determine when additional formal compliance testing is necessary. Informal testing may support but shall not be the sole basis for ~~suspending an operation permit pursuant to 12VAC5-640-330 or to suspend or revoke~~ suspending or revoking the approval of the system pursuant to ~~12VAC5-640-380 of this chapter~~ 12VAC5-640-280.

~~1. Formal compliance testing. Effluent from all discharging systems shall be tested for the following parameters at a frequency specified in Table 3.4: Five-day biochemical oxygen demand ($BOD_5$), total suspended solids, fecal coliform bacteria, dissolved oxygen and total chlorine residual (measured at the outfall and in the chlorine contact chamber if dechlorination is required). The tests shall be analyzed by a laboratory certified by the E.P.A. or the SWCB to conduct self monitoring analysis to determine compliance limits for VPDES permit discharge limits. Samples shall be collected, stored, transported and analyzed in accordance with requirements set forth in Guidelines Establishing Test Procedures for the Analysis of Pollutants Under the Clean Water Act as published in 40 CFR Part 136 (July 1, 1991).~~

~~2. Informal testing. The following tests will be conducted on the effluent, except as noted, at a frequency specified in Table 3.4; 30-minute settleable solids (conducted on the mixed liquor suspended solids), odor, color, pH, and chlorine (after the chlorine contact chamber). In addition, systems requiring effluent dechlorination shall be tested for dechlorination at the point of discharge. These tests shall be run in the field during routine monitoring inspections. The criteria for satisfactory informal testing are contained in Table 3.3.~~

~~TABLE 3.3~~
~~INFORMAL TESTING CRITERIA~~
~~(FOR ALL CLASSES OF DISCHARGING SYSTEMS)~~

| | |
|---|---|
| ~~Settleable solids~~ | ~~less than 65% (mixed liquor suspended solids)~~ |
| ~~Odor~~ | ~~Slight musky odor (MLSS not septic)~~ |
| ~~Color~~ | ~~less than 15 units (measured at outfall - no solids present)~~ |
| ~~pH~~ | ~~Same as formal compliance test limits~~ |
| ~~Chlorine~~ | ~~1.0 mg/1 3.0 mg/1 (measured after chlorinator)~~<br>~~None detected (measured at the outfall)~~ |

~~C. Frequency of mandatory testing.~~

~~1. Formal compliance testing. Formal compliance testing as described in12VAC5-640-490 B 1, shall be conducted at the frequency listed in Table 3.4 for all discharging systems for all constituents listed under 12VAC5-640-490 B 1. Additionally, formal compliance testing may be required anytime informal testing indicates a discharging system appears to be discharging effluent that exceeds the effluent limitations set forth in the State Water Control Board's General Permit. Compliance monitoring conducted pursuant to the SWCB General Permit requirements may be submitted for one of the mandatory tests to comply with this chapter.~~

~~2. Informal testing. Informal testing, as described in 12VAC5-640-490 B 2, shall be used as an inexpensive screening method to identify systems that are potentially in violation of the effluent limitations set forth in the State Water Control Board's General Permit. Informal testing shall be conducted monthly for at least six consecutive months beginning the second full month after the issuance of the operation permit. After a discharging system has met the permit limits for six consecutive months the testing shall be conducted at the frequency listed in Table 3.4.~~

~~TABLE 3.4~~
~~FREQUENCY OF MANDATORY TESTING~~
~~BEGINNING SIX MONTHS~~
~~AFTER SYSTEM START-UP~~

| ~~System Approval Testing~~ | ~~Formal Testing~~ | ~~Informal Testing~~ |
|---|---|---|
| ~~Experimental[1]~~ | ~~Quarterly[2]~~ | ~~Monthly~~ |
| ~~Preliminary~~ | ~~Semi-Annually[2]~~ | ~~Quarterly~~ |
| ~~General~~ | ~~Annually[2]~~ | ~~Semi-Annually~~ |

~~[1]Testing on systems with experimental approval shall begin 3 months after installation and continue for 12 or more~~

~~consecutive months. The initial sample testing at three months shall be formal testing and the formal testing shall continue quarterly from that time forward.~~

~~[2] Also see 12VAC5-640-490 D 1.~~

C. All treatment systems shall undergo startup testing to assess the ability of the system to comply with the established performance requirements.

1. Treatment systems are considered generally approved for the purposes of establishing startup testing requirements only when all treatment components (i.e., biological treatment unit, disinfection, dechlorination, post-aeration, etc.) of the system are considered generally approved as described in 12VAC5-640-432.

2. All new discharging systems shall undergo formal startup compliance testing for parameters limited by the General Permit. The collection, storage, transportation, and analysis of all formal compliance samples shall be in accordance with the requirements of the General Permit.

a. For generally approved systems, the first formal compliance testing event shall occur 45 to 90 days after the system begins discharging. If the formal compliance test data indicate the system is in compliance with the General Permit, then the system will revert to annual formal compliance sampling in accordance with the General Permit. The initial sample may be used to comply with the first annual sampling requirement. If the testing data indicates that any parameter is out of compliance, subsection E of this section shall apply.

b. For nongenerally approved systems, the first formal compliance testing event shall occur 45 to 90 days after the system begins discharging. Three additional formal compliance testing events are to occur quarterly and at least 60 days apart. If the four startup compliance test data indicate the system is in compliance with the General Permit, then the system will revert to annual formal compliance sampling in accordance with the General Permit. If the testing data indicates that any parameter is out of compliance, subsection E of this section shall apply.

3. Informal (process control) testing shall be conducted monthly for at least six consecutive months beginning the second full month after the issuance of the operation permit. After successful startup of the treatment system, informal testing shall be conducted semiannually at a minimum and any time formal testing is conducted. Informal testing shall be in accordance with the approved operation and maintenance manual, which shall include at a minimum the tests listed in Table 3.3. The specific test, sample location, and frequency shall be itemized in the operation and maintenance manual for the treatment system.

D. Both formal and informal routine monitoring is required after a system successfully completes startup testing.

1. After a system successfully completes startup testing, the system formal testing reverts to the General Permit monitoring frequency for the parameters limited by the General Permit. The collection, storage, transportation, and analysis of all formal testing shall be in accordance with the requirements of the General Permit.

2. Informal (process control) testing shall be conducted during routine maintenance visits. The specific test, sample location, and frequency shall be itemized in the operation and maintenance manual for the treatment system. When an operation and maintenance manual is not available, informal testing shall be sufficient to assess the treatment system's performance. Table 3.3 contains the minimum informal testing that must be conducted as appropriate for a given system.

TABLE 3.3
INFORMAL (PROCESS CONTROL) TESTING

| Treatment Unit | Informal Tests |
|---|---|
| Septic tank/trash tank | Sludge depth |
| Suspended growth biological treatment unit | Dissolved oxygen, settleabilty, pH, odor |
| Fixed film biological treatment unit | Dissolved oxygen (effluent from unit), pH, odor |
| Chlorine disinfection/dechlorination | TRC at end of contact tank (>1.0 mg/l), TRC after dechlorination |
| Ultraviolet disinfection | Turbidity prior to UV |
| Final effluent | Dissolved oxygen, pH, odor, color |

~~D. Nonroutine mandatory testing and inspection.~~ E. The ~~district health director or district sanitarian manager~~ department may require additional formal compliance testing or informal testing, or both, as necessary to protect public health and the environment. Additional testing shall be based on observed problems and shall not be implemented routinely on all discharging systems.

1. Anytime a discharging system is found to ~~exceed~~ be out of compliance with the effluent limitations of the General Permit, follow-up formal compliance testing shall be repeated between 45 and 90 days after the original samples were collected and the results reported to the local health department. ~~This follow-up formal compliance testing shall constitute a subsequent consecutive quarter for the purposes of determining compliance with12VAC5-640-380 B and D.~~ Prior to resampling, the operator should attempt to determine the reason for the noncompliance and take corrective actions.

2. Anytime an informal test reveals ~~an apparent~~ a potential problem, additional formal or informal testing may be conducted to review the effectiveness of any repairs or adjustments.

3. Anytime the results of two consecutive formal compliance tests as specified in ~~12VAC5-640-490-B-1~~ subdivision C 2 or D 1 of this section result in a ~~violat1on~~ violation of the effluent limitations of the General Permit, informal testing shall revert to monthly frequency until satisfactory results are obtained for six consecutive months. Nothing in this section shall preclude requiring the collection of samples for formal compliance testing as described in ~~12VAC5-640-490-B-1~~ subdivisions C 2 and ~~C~~ D 1 of this section to determine compliance with the effluent limitations set forth in the General Permit.

~~E. Responsibility for testing.~~ F. The owner of each system is responsible for ensuring that the collection, analysis, and reporting of all effluent sample tests are completed in a timely fashion and in accordance with ~~12VAC5-640-490~~ this section and 12VAC5-640-510. ~~In addition to the mandated testing requirements contained in this chapter, the~~ The department shall conduct~~, at a minimum,~~ an annual inspection~~, which may include formal or informal testing at the option of the department~~ and may conduct additional inspections at its discretion. Furthermore, the department may conduct or mandate formal or informal testing as deemed appropriate by the department. ~~Nothing contained herein shall be construed to prohibit the department from mandating additional formal and informal testing as deemed appropriate by the department. Further, the department at its discretion may require split samples be collected at any time (i.e., for routine or nonroutine testing).~~

~~F. Monitoring contract.~~ G. In order to assure that monitoring is performed in a timely and competent fashion, the owner of each system shall have a contract for the performance of all mandated sampling with a person capable of performing the sampling and analysis of the samples. This requirement may be met by including the performance of all testing and monitoring as part of the maintenance contract in accordance with 12VAC5-640-500 C 1. Failure to obtain or renew a monitoring contract shall result in the ~~suspension or~~ revocation of the operation permit as described in 12VAC5-640-280. ~~When the district health director or the sanitarian manager find that the homeowner is capable of collecting and transporting samples to an approved laboratory in compliance with this chapter, the requirement for having a valid monitoring contract may be waived. Waiving of this requirement shall be done only on an individual basis and shall reflect the competency of the individual based on profession, training or other educational experience.~~ Owners with existing waivers to the monitoring contract as of the effective date of the amendment to the regulations may be extended, but no new waivers shall be issued. In the event the individual for whom this section is waived fails to collect three or more of any of the required samples in any five-year period, the ~~district sanitarian or the health director~~ department may reinstate the requirement for a monitoring contract.

**12VAC5-640-500. Maintenance.**

A. ~~General.~~ Due to the potential for degrading surface water and ground water quality or jeopardizing the public health, or both, routine maintenance of discharging systems is required. In order to assure maintenance is performed in a timely manner a maintenance contract between the permit holder and a person capable of performing maintenance as defined in subsection E of this section is required.

B. ~~Maintenance contract.~~ A maintenance contract shall be kept in force at all times. Failure to obtain or renew a maintenance contract shall result in the ~~suspension or~~ revocation of the operation permit as described in 12VAC5-640-280. The operation permit holder shall be responsible for ensuring that the local health department has a current copy of a valid maintenance agreement. When a maintenance contract expires or is canceled or voided, by any party to the contract, the owner and maintenance provider shall report the occurrence to the local health department within 10 work days.

C. ~~Elements of a maintenance contract.~~ At a minimum each maintenance contract shall provide for the following:

1. Performance of all testing required in ~~12VAC5-640-490 B~~ either Part I A or Part I B of the General Permit, as appropriate, and in this chapter, unless the owner maintains a separate monitoring contract in accordance with 12VAC5-640-490 ~~F~~ G. Note: The treatment works should be sampled during normal discharging operations or normal discharging conditions (i.e., operations that are normal for that facility). The owner or maintenance provider should not force a discharge in order to collect a formal sample, but the informal sampling should be used to identify any operational problems;

2. ~~Full and complete repairs to the system within 48 hours of notification that repairs are needed. Any deductible provision in a maintenance agreement shall not exceed $500 in any given year for repairs (including parts and labor).~~ Periodic (at least semiannual) inspections of the treatment works or as needed to keep the treatment system functional and in compliance;

3. ~~Twenty four months of consecutive coverage shall be the minimum time period a maintenance contract may be valid.~~ A written notification to the owner within 24 hours whenever the contract provider becomes aware that maintenance or repair of the owner's treatment works is necessary. The owner is responsible for prompt maintenance and repair of the treatment works including all costs associated with the maintenance or repair. Immediately upon receipt of notice that repair or maintenance is required, the owner shall begin emergency pump and haul of all sewage generated in the dwelling if full and complete repairs cannot be accomplished within 48 hours; and

4. Electronic reporting to the department in accordance with 12VAC-640-510.

D. ~~Public utility.~~ In localities where a public service authority, sanitary district, or other public utility exists which monitors or maintains the systems, ~~or monitors and maintains the systems,~~ permitted under this chapter, the requirements for the monitoring or maintenance contract or both may be waived by the division provided the owner of the system subscribes to the service and the utility meets the minimum elements described in 12VAC5-640-490 and 12VAC5-640-500.

E. ~~Qualifications to perform maintenance.~~ In order to competently evaluate system performance, collect samples, ~~and~~ interpret sample results, ~~as well as~~ and repair and maintain discharging systems, an individual must be knowledgeable in sewage treatment processes. ~~Therefore, after July 1, 1994, all~~ All individuals who perform maintenance on discharging systems pursuant to 12VAC5-640-500~~,~~ are required to hold a valid Class IV or higher wastewater works operator license or an alternative onsite sewage system operator license issued by the Board for Waterworks and Wastewater Works Operators and Onsite Sewage System Professionals. ~~Until July 1, 1994, individuals that can demonstrate two years of practical experience with discharging systems, with flows under 1,000 GPD, may conduct maintenance on all systems.~~

**12VAC5-640-510. Information to be reported electronically.**

A. ~~Who is responsible for reporting. All owners~~ Every owner issued an operation permit for a discharging system ~~are~~ is responsible for ~~reporting~~ having the results of all mandated testing and inspections submitted to the department in the form and format acceptable to the department.

B. ~~What must be reported.~~ All formal compliance testing, informal testing, repairs, modifications, alterations, expansions and routine maintenance must be reported.

C. ~~When reports are due.~~ All reports and test results must be submitted ~~within 15 working days of the sample collection~~ by the 15th of the month following the month in which the activity occurred.

D. ~~Where to report results.~~ All reports and test results shall be submitted ~~to the local or district office of the health department~~ electronically. When formal testing indicates that a discharge limit established in the General Permit is being exceeded or when informal testing indicates a discharging system may be in violation of the General Permit requirements, the owner shall notify the maintenance provider and the department ~~shall be notified by the owner~~ within 24 hours.

**12VAC5-640-520. Failure to submit information.**

Failure to conduct mandatory monitoring or to report monitoring results as required in 12VAC5-640-490 and 12VAC5-640-510 may result in the ~~suspension or~~ revocation of the owner's operation permit. The department shall notify the Department of Environmental Quality of the revocation of the operation permit.

NOTICE: The following forms used in administering the regulation were filed by the agency. The forms are not being published; however, online users of this issue of the Virginia Register of Regulations may click on the name of a form with a hyperlink to access it. The forms are also available from the agency contact or may be viewed at the Office of the Registrar of Regulations, General Assembly Building, 2nd Floor, Richmond, Virginia 23219.

FORMS (12VAC5-640)

~~Appendix I Combined Application Virginia Department of Health Discharging System Application Form for Single Family Dwellings Discharging Sewage Treatment Systems With Flows Less Than or Equal to 1,000 Gallons Per Day and State Water Control Board Virginia Pollutant Discharge Elimination System General Permit Registration Statement for Domestic Sewage Discharges Less Than or Equal to 1,000 Gallons Per Day.~~

~~Appendix II Completion Statement.~~

Combined Application-Virginia Department of Health Discharging System Application for Single Family Dwellings Discharging Sewage Less Than or Equal to 1,000 Gallons Per Day and State Water Control Board Virginia Pollutant Discharge Elimination System General Permit Registration Statement for Domestic Sewage Discharges Less Than or Equal to 1,000 Gallons Per Day (rev. 9/11)

Permit Transfer under 12 VAC 5-640-220 E (undated)

Completion Statement (undated)

VA.R. Doc. No. R11-2735; Filed November 18, 2013, 4:43 p.m.

## DEPARTMENT OF MEDICAL ASSISTANCE SERVICES

### Fast-Track Regulation

Title of Regulation: **12VAC30-60. Standards Established and Methods Used to Assure High Quality Care (amending 12VAC30-60-303).**

Statutory Authority: § 32.1-325 of the Code of Virginia.

Public Hearing Information: No public hearings are scheduled.

Public Comment Deadline: January 16, 2014.

Effective Date: February 1, 2014.

Agency Contact: Brian McCormick, Regulatory Supervisor, Department of Medical Assistance Services, 600 East Broad Street, Suite 1300, Richmond, VA 23219, telephone (804) 371-8856, FAX (804) 786-1680, or email brian.mccormick@dmas.virginia.gov.

Basis: Section 32.1-325 of the Code of Virginia grants the Board of Medical Assistance Services the authority to administer and amend the Plan for Medical Assistance.

Sections 32.1-324 and 32.1-325 of the Code of Virginia authorize the Director of the Department of Medical Assistance Services (DMAS) to administer and amend the Plan for Medical Assistance according to the board's requirements. The Medicaid authority as established by § 1902(a) of the Social Security Act (42 USC § 1396a) provides governing authority for payments for services.

Section 32.1-330 of the Code of Virginia states:

> "All individuals who will be eligible for community or institutional long-term care services as defined in the state plan for medical assistance shall be evaluated to determine their need for nursing facility services as defined in that plan. The Department shall require a preadmission screening of all individuals who, at the time of application for admission to a certified nursing facility as defined in § 32.1-123, are eligible for medical assistance or will become eligible within six months following admission. For community-based screening, the screening team shall consist of a nurse, social worker and physician who are employees of the Department of Health or the local department of social services or a team of licensed physicians, nurses, and social workers at the Woodrow Wilson Rehabilitation Center (WWRC) for WWRC clients only. For institutional screening, the Department shall contract with acute care hospitals."

This preadmission screening requirement originated in the Code of Virginia in 1984 (Chapter 781 of the 1984 Acts of the Assembly).

Purpose: The purpose of this regulatory action is to provide the force and effect of administrative law to guidance material designed to assist preadmission screening teams and hospital-based screeners, pursuant to § 32.1-330 of the Code of Virginia, in accurately and consistently applying the Uniform Assessment Instrument (UAI) to individuals 21 years of age or younger who are applying for medical assistance coverage of long-term care services. Over the 18 years since DMAS first adopted the UAI for screening of adults, the numbers of young people requiring long-term care services have steadily increased. Since all persons who may need long-term care services covered by DMAS must first be screened, the need to apply the UAI to children has also increased.

This regulatory action is not required to accurately and consistently protect the health, safety, or welfare of citizens. However, its adoption will ensure the consistent and equitable use of existing policies for all applicants, regardless of their ages, of long-term care services.

Rationale for Using Fast-Track Process: This regulatory action is expected to be noncontroversial because it has been specifically requested by community preadmission screeners who seek to assist individuals who are seeking Medicaid funding for their long-term care needs. DMAS posted a notice of periodic review on the Virginia Regulatory Town Hall for a comment period from March 26, 2012, through April 16, 2012. A supportive comment was received from the Virginia Department of Social Services.

Substance: Effective June 29, 1994, DMAS adopted the current criteria and standards set out in 12VAC30-60-300 and 12VAC30-60-303 regarding individuals' assessments for long-term care services. The purpose of that action was to establish an equitable, consistent, and uniform set of standards to be applied throughout localities statewide to determine which individuals qualified for Medicaid coverage of their long-term care services.

These standards and criteria are still in use today and are not being changed by this action. For an individual to be determined eligible for nursing facility care, he must need help with a specified part of his activities of daily living (ADLs) and must also have medical or nursing needs. For an individual to be determined as eligible for community-based care services, he must need help with a specified part of his ADLs, have medical or nursing needs, and be at risk of nursing facility placement within 30 days of the assessment in the absence of community services.

ADLs are defined as personal care tasks, such as bathing, dressing, toileting, transferring, and eating/feeding. An individual's degree of independence in performing these activities is part of determining his appropriate level of care and service needs.

Based on the ages and developmental stages of infants and young children, they may not be able to perform any or very many of the ADLs for themselves but may still be normal and healthy. In other words, a normal, healthy infant's degree of dependence in performing personal care tasks should not qualify him to receive Medicaid-covered long-term care services.

In light of the fact that infants and children with disabilities are living longer and requiring more services, DMAS has developed guidance material for use by preadmission screening teams and hospital-based screening teams. This guidance document, which is incorporated by reference in DMAS' existing regulations, has been piloted through a field test by the affected entities that will have to apply it.

DMAS' Division of Long-Term Care, in association with community partners at the Virginia Department of Health and the Virginia Department of Social Services, field tested the proposed criteria for children with the community preadmission screening teams as well as hospital-based screening teams. The overall guidance document was well-received by the pilot screening teams (who were from six different localities and two different acute care settings, one of which specialized in the treatment of children) in the Commonwealth.

DMAS performed a survey of the pilot screening teams as part of the post review of the process and received only positive comments from the teams. Some clarifications were made to the criteria based upon the pilot use that have been incorporated into the process. The overall results of the pilot

project were positive, and the pilot screening teams found the guidelines to be clear, concise, and appropriate for the screening process. DMAS allowed for a 60-day pilot test of the proposed guidelines. Screening teams were instructed to screen children using the existing criteria and then to rescreen the children using the proposed guidelines to see if the outcomes of the screening would differ.

Issues: The primary advantage to preadmission screening teams is that they will now have the guidance that they have requested to interpret a child's disability to determine the child's degree of dependence with his ADLs. There are no disadvantages for these teams. In fact, the absence of such guidance has been a significant disadvantage for them.

Application of this guidance will result in uniform, consistent, and equitable decisions for all children across the Commonwealth who apply for Medicaid coverage of long-term care services. It is expected that such uniform application of these standards will reduce potential appeals that create costly administrative expenses for DMAS.

DMAS based this interpretive guidance on a similar action of the Colorado Medicaid program.

Department of Planning and Budget's Economic Impact Analysis:

Summary of the Proposed Amendments to Regulation. The Board of Medical Assistance Services (Board) proposes to incorporate into these regulations guidance material concerning the interpretation and application of the Uniform Assessment Instrument when an individual 21 years of age or younger is being evaluated for long-term care services, either nursing facility or home and community based services.

Result of Analysis. The benefits likely exceed the costs for all proposed changes.

Estimated Economic Impact. Effective June 29, 1994, the Board adopted the current criteria and standards set out in 12VAC30-60-300 and 12VAC30-60-303 regarding individuals' assessments for long-term care services. The purpose of that action was to establish an equitable, consistent, and uniform set of standards to be applied throughout localities statewide to determine which individuals qualified for Medicaid coverage of their long-term care services.

These standards and criteria are still in use today and are not being changed by this action. For an individual to be determined eligible for nursing facility care, he must need help with a specified part of his Activities of Daily Living (ADLs) and must also have medical or nursing needs. For an individual to be determined as eligible for community-based care services, he also must need help with a specified part of his ADLs, also have medical or nursing needs, and be at risk of nursing facility placement within 30 days of the assessment in the absence of community services.

ADLs are defined as personal care tasks, such as bathing, dressing, toileting, transferring, eating/feeding. An individual's degree of independence in performing these activities is part of determining his appropriate level of care and service needs.

Based on the ages and developmental stages of infants and young children, they may not be able to perform any or very many of the ADLs for themselves but still be normal and healthy. In other words, a normal, healthy infant's degree of dependence in performing personal care tasks should not qualify him to receive Medicaid-covered long-term care services.

In light of the fact that infants and children with disabilities are living longer and requiring more services, the Department of Medical Assistance Services has developed guidance material in a document for use by preadmission screening teams and hospital-based screening teams. The Board proposes to incorporate this guidance document by reference into these regulations.

The guidance is expected to reduce confusion and perhaps save time for preadmission teams. Since the criteria are not changing, there is not expected to be either a net increase or decrease in the number of individuals deemed eligible. Thus, adding the proposed language to these regulations should produce a net benefit.

Businesses and Entities Affected. The proposed amendment affects 122 pre-admission screening teams and 90 hospitals. The screening teams consist of community teams (representative from local Departments of Social Services and the nurse and medical director from the local health departments) and acute care teams (hospital discharge planning staff and the hospital physician who discharges the patient).

Localities Particularly Affected. The proposed amendments do not disproportionately affect particular localities.

Projected Impact on Employment. The proposal amendments are unlikely to significantly affect employment.

Effects on the Use and Value of Private Property. The proposed amendments are unlikely to significantly affect the use and value of private property.

Small Businesses: Costs and Other Effects. The proposed amendments are unlikely to significantly affect small businesses.

Small Businesses: Alternative Method that Minimizes Adverse Impact. The proposed amendments are unlikely to significantly affect small businesses.

Real Estate Development Costs. The proposed amendments are unlikely to significantly affect real estate development costs.

Legal Mandate. The Department of Planning and Budget (DPB) has analyzed the economic impact of this proposed regulation in accordance with § 2.2-4007.04 of the Administrative Process Act and Executive Order Number 14 (10). Section 2.2-4007.04 requires that such economic impact analyses include, but need not be limited to, a determination

of the public benefit, the projected number of businesses or other entities to whom the regulation would apply, the identity of any localities and types of businesses or other entities particularly affected, the projected number of persons and employment positions to be affected, the projected costs to affected businesses or entities to implement or comply with the regulation, and the impact on the use and value of private property. Further, if the proposed regulation has an adverse effect on small businesses, § 2.2-4007.04 requires that such economic impact analyses include (i) an identification and estimate of the number of small businesses subject to the regulation; (ii) the projected reporting, recordkeeping, and other administrative costs required for small businesses to comply with the regulation, including the type of professional skills necessary for preparing required reports and other documents; (iii) a statement of the probable effect of the regulation on affected small businesses; and (iv) a description of any less intrusive or less costly alternative methods of achieving the purpose of the regulation. The analysis presented above represents DPB's best estimate of these economic impacts.

Agency's Response to Economic Impact Analysis: The agency has reviewed the economic impact analysis prepared by the Department of Planning and Budget and concurs with this analysis.

Summary:

*The amendments incorporate a Medicaid memo concerning the interpretation and application of the Uniform Assessment Instrument when an individual 21 years of age or younger is being evaluated for long-term care services.*

**12VAC30-60-303. Preadmission screening criteria for long-term care.**

A. Functional dependency alone is not sufficient to demonstrate the need for nursing facility care or placement or authorization for community-based care.

B. An individual shall only be considered to meet the nursing facility criteria when both the functional capacity of the individual and his medical or nursing needs meet the following requirements. Even when an individual meets nursing facility criteria, placement in a ~~non-institutional~~ noninstitutional setting shall be evaluated before actual nursing facility placement is considered.

1. Functional capacity.

a. When documented on a completed state-designated preadmission screening assessment instrument ~~which~~ that is completed in a manner consistent with the definitions of activities of daily living and directions provided by DMAS for the rating of those activities, individuals may be considered to meet the functional capacity requirements for nursing facility care when one of the following describes their functional capacity:

(1) Rated dependent in two to four of the Activities of Daily Living, and also rated semi-dependent or dependent in Behavior Pattern and Orientation, and semi-dependent in Joint Motion or dependent in Medication Administration.

(2) Rated dependent in five to seven of the Activities of Daily Living, and also rated dependent in Mobility.

(3) Rated semi-dependent in two to seven of the Activities of Daily Living, and also rated dependent in Mobility and Behavior Pattern and Orientation.

b. The rating of functional dependencies on the ~~pre-admission~~ preadmission screening assessment instrument must be based on the individual's ability to function in a community environment, not including any institutionally induced dependence. The following abbreviations shall mean: I = independent; d = semi-dependent; D = dependent; MH = mechanical help; HH = human help.

(1) Bathing

(a) Without help (I)

(b) MH only (d)

(c) HH only (D)

(d) MH and HH (D)

(e) Performed by Others (D)

(2) Dressing

(a) Without help (I)

(b) MH only (d)

(c) HH only (D)

(d) MH and HH (D)

(e) Performed by Others (D)

(f) Is not Performed (D)

(3) Toileting

(a) Without help day or night (I)

(b) MH only (d)

(c) HH only (D)

(d) MH and HH (D)

(e) Performed by Others (D)

(4) Transferring

(a) Without help (I)

(b) MH only (d)

(c) HH only (D)

(d) MH and HH (D)

(e) Performed by Others (D)

(f) Is not Performed (D)

(5) Bowel Function

(a) Continent (I)

(b) Incontinent less than weekly (d)

(c) External/Indwelling Device/Ostomy -- self care (d)

(d) Incontinent weekly or more (D)

(e) Ostomy -- not self care (D)

(6) Bladder Function

(a) Continent (I)

(b) Incontinent less than weekly (d)

(c) External device/Indwelling Catheter/Ostomy -- self care (d)

(d) Incontinent weekly or more (D)

(e) External device -- not self care (D)

(f) Indwelling catheter -- not self care (D)

(g) Ostomy -- not self care (D)

(7) Eating/Feeding

(a) Without help (I)

(b) MH only (d)

(c) HH only (D)

(d) MH and HH (D)

(e) Spoon fed (D)

(f) Syringe or tube fed (D)

(g) Fed by IV or clysis (D)

(8) Behavior Pattern and Orientation

(a) Appropriate or Wandering/Passive less than weekly + Oriented (I)

(b) Appropriate or Wandering/Passive less than weekly + Disoriented -- Some Spheres (I)

(c) Wandering/Passive Weekly/or more + Oriented (I)

(d) Appropriate or Wandering/Passive less than weekly + Disoriented -- All Spheres (d)

(e) Wandering/Passive Weekly/Some or more + Disoriented -- All Spheres (d)

(f) Abusive/Aggressive/Disruptive less than weekly + Oriented or Disoriented (d)

(g) Abusive/Aggressive/Disruptive weekly or more + Oriented (d)

(h) Abusive/Aggressive/Disruptive + Disoriented -- All Spheres (D)

(9) Mobility

(a) Goes outside without help (I)

(b) Goes outside MH only (d)

(c) Goes outside HH only (D)

(d) Goes outside MH and HH (D)

(e) Confined -- moves about (D)

(f) Confined -- does not move about (D)

(10) Medication Administration

(a) No medications (I)

(b) Self administered -- monitored less than weekly (I)

(c) By lay persons, Administered/Monitored (D)

(d) By Licensed/Professional nurse Administered/Monitored (D)

(11) Joint Motion

(a) Within normal limits or instability corrected (I)

(b) Limited motion (d)

(c) Instability -- uncorrected or ~~Immobile (I)~~ immobile (D)

c. An individual with medical or nursing needs is an individual whose health needs require medical or nursing supervision or care above the level ~~which~~ that could be provided through assistance with Activities of Daily Living, Medication Administration, and general supervision and is not primarily for the care and treatment of mental diseases. Medical or nursing supervision or care beyond this level is required when any one of the following describes the individual's need for medical or nursing supervision:

(1) The individual's medical condition requires observation and assessment to assure evaluation of the person's need for modification of treatment or additional medical procedures to prevent destabilization, and the person has demonstrated an inability to self observe or evaluate the need to contact skilled medical professionals;

(2) Due to the complexity created by the person's multiple, interrelated medical conditions, the potential for the individual's medical instability is high or medical instability exists; or

(3) The individual requires at least one ongoing medical or nursing service. The following is a ~~non-exclusive~~ nonexclusive list of medical or nursing services ~~which~~ that may, but need not necessarily, indicate a need for medical or nursing supervision or care:

(a) Application of aseptic dressings;

(b) Routine catheter care;

(c) Respiratory therapy;

(d) Supervision for adequate nutrition and hydration for individuals who show clinical evidence of malnourishment or dehydration or have recent history of weight loss or inadequate hydration ~~which~~ that, if not supervised, would be expected to result in malnourishment or dehydration;

(e) Therapeutic exercise and positioning;

(f) Routine care of colostomy or ileostomy or management of neurogenic bowel and bladder;

(g) Use of physical (e.g., side rails, poseys, locked wards) and/or chemical restraints;

(h) Routine skin care to prevent pressure ulcers for individuals who are immobile;

(i) Care of small uncomplicated pressure ulcers~~,~~ and local skin rashes;

(j) Management of those with sensory, metabolic, or circulatory impairment with ~~denstrated~~ demonstrated clinical evidence of medical instability;

(k) Chemotherapy;

(l) Radiation;

(m) Dialysis;

(n) Suctioning;

(o) Tracheostomy care;

(p) Infusion ~~Therapy~~ therapy;

(q) Oxygen.

d. Even when an individual meets nursing facility criteria, provision of services in a noninstitutional setting shall be considered before nursing facility placement is sought.

C. When assessing an individual 21 years of age or younger, the teams who are conducting preadmission screenings for long-term care services shall utilize the Uniform Assessment Instrument as contained in DMAS' Medicaid Memo dated October 3, 2012, entitled "Development of Special Criteria for the Purposes of Pre-Admission Screening," which can be accessed on the DMAS website at https://www.virginiamedicaid.dmas.virginia.gov/wps/portal/MedicaidMemostoProviders.

DOCUMENTS INCORPORATED BY REFERENCE (12VAC30-60)

Department of Medical Assistance Services Provider Manuals (https://www.virginiamedicaid.dmas.virginia.gov/wps/portal/ProviderManuals):

Virginia Medicaid Nursing Home Manual~~, Department of Medical Assistance Services~~

Virginia Medicaid Rehabilitation Manual~~, Department of Medical Assistance Services~~

Virginia Medicaid Hospice Manual~~, Department of Medical Assistance Services~~

Virginia Medicaid School Division Manual~~, Department of Medical Assistance Services~~

Development of Special Criteria for the Purposes of Pre-Admission Screening, Medicaid Memo, October 3, 2012, Department of Medical Assistance Services

Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV-TR), copyright 2000, American Psychiatric Association

Patient Placement Criteria for the Treatment of Substance-Related Disorders (ASAM PPC-2R), Second Edition, copyright 2001, American Society on Addiction Medicine, Inc

VA.R. Doc. No. R14-3195; Filed November 26, 2013, 9:48 a.m.

# TITLE 18. PROFESSIONAL AND OCCUPATIONAL LICENSING

## VIRGINIA BOARD FOR ASBESTOS, LEAD, AND HOME INSPECTORS

### Proposed Regulation

Title of Regulation: **18VAC15-30. Virginia Lead-Based Paint Activities Regulations (amending 18VAC15-30-162, 18VAC15-30-163).**

Statutory Authority: §§ 54.1-201 and 54.1-501 of the Code of Virginia.

Public Hearing Information:

December 18, 2013 - 9:30 a.m. - Department of Professional and Occupational Regulation, 9960 Mayland Drive, Suite 200, Board Room 2, Richmond, VA 23233

Public Comment Deadline: February 14, 2014.

Agency Contact: Trisha Henshaw, Executive Director, Virginia Board for Asbestos, Lead, and Home Inspectors, 9960 Mayland Drive, Suite 400, Richmond, VA 23233, telephone (804) 367-8595, FAX (866) 350-5354, or email alhi@dpor.virginia.gov.

Basis: Section 54.1-113 of the Code of Virginia (commonly referred to as the Callahan Act) requires regulatory boards to periodically review and adjust fees; § 54.1-201 A 4 of the Code of Virginia authorizes regulatory boards to levy and collect fees; subdivision 3 of § 54.1-304 of the Code of Virginia describes the authority of the Department of Professional and Occupational Regulation (DPOR) to collect and account for fees; and § 54.1-308 of the Code of Virginia requires costs to be paid by regulatory boards.

Purpose: The proposed amendments increase licensing fees for regulants of the Board for Asbestos, Lead, and Home Inspectors. The board must establish fees adequate to support the costs of board operations and a proportionate share of DPOR's operations. By the close of the next biennium, fees will not provide adequate revenue for those costs.

DPOR receives no general fund money but, instead, is funded almost entirely from revenue collected from license and certificate application fees, renewal fees, examination fees, and other licensing fees. DPOR serves to protect the health, safety, and welfare of the public by administering regulatory programs for certain professions or occupations that are deemed by the General Assembly as needing to be regulated. Such programs are designed to ensure minimum competency of practitioners who elect to enter these professions by verifying applicants' compliance with specified entry standards (education, experience, and examination). DPOR is self-supporting and must collect adequate revenue to support

its mandated and approved activities and operations. Fees must be established at amounts that will provide that revenue. Fee revenue collected on behalf of the various boards funds DPOR's authorized special revenue appropriation.

The Board for Asbestos, Lead, and Home Inspectors has no other source of revenue from which to fund its operations.

Substance: The Board for Asbestos, Lead, and Home Inspectors reviewed the fees listed in 18VAC15-30-162 and 18VAC15-30-163 and, based on projected revenues and expenses, developed a fee schedule that meets the requirements of the applicable statutes while being the least burdensome to the regulant population.

| Fee Type | | Current Fees | Proposed Fees |
|---|---|---|---|
| Application | Individuals | 25 | 80 |
| Application | Contractors | 40 | 110 |
| Application | Training courses | 400/day | 500/day |
| Renewal | Individuals | 25 | 45 |
| Renewal | Contractors | 40 | 70 |
| Renewal | Training courses | 100 | 125 |
| Late Renewal | Individuals | 25 | 35 |
| Late Renewal | Contractors | 25 | 35 |
| Late Renewal | Training courses | 25 | 35 |

Issues: The primary issue for the proposed fee increase is DPOR's statutory requirement to comply with the Callahan Act. The Callahan Act requires DPOR to review each board's expenditures at the close of each biennium and to adjust fees if necessary. The Board for Asbestos, Lead, and Home Inspectors is expected to incur a deficit of $82,268 by the end of the 2012-2014 biennium and to have a Callahan Act percentage of -11.5%.

The regulatory review process generally takes a minimum of 18 months, so it is essential to consider fee increases now to avoid a greater deficit than currently projected. In order to address the deficit as currently projected, new fees will need to become effective by late in fiscal year 2014. Otherwise, the board's deficit will increase to the point that the new fees would be inadequate to provide sufficient revenue for upcoming operating cycles, which could result in the board having to consider additional fee increases in the near future.

The advantage of these changes is that the regulatory program will be able to continue to function in order to protect the public. The disadvantage is that these changes will increase the cost of the license to the regulated population; however, the impact of these changes on the income of the regulated population should not be of a great significance compared to their level of income.

Department of Planning and Budget's Economic Impact Analysis:

Summary of the Proposed Amendments to Regulation. The Board for Asbestos, Lead, and Home Inspectors (Board) proposes to increase all fees paid by licensees, certificate holders and registrants that are subject to the Board's authority.

Result of Analysis. There is insufficient information to accurately gauge whether benefits are likely to outweigh costs for these proposed changes.

Estimated Economic Impact. Under current regulations, lead paint removal workers, supervisors, inspectors, risk assessors or project designers pay an initial licensure fee of $25, an annual renewal fee of $25 and a late renewal fee of $50 (if they renew between 30 days and 6 months after the renewal date). Lead contractors currently pay $40 for initial licensure, $40 annually for license renewal and $65 for late renewal. Lead training programs currently pay $400 per day of training for program approval, $100 for renewal of program approval and $125 for late renewal of program approval. Lead refresher training programs currently pay $400 for program approval. Lead project designer refresher training programs currently pay $200 for program approval. The Board now proposes to increase all of these fees.

Below is a comparison table for current and proposed fees:

| FEE TYPE | CURRENT FEE | PROPOSED FEE | % INCREASE |
|---|---|---|---|
| Fee for Worker, Supervisor, Inspector, Risk Assessor or Project Designer Initial Licensure | $25 | $80 | 220% |
| Lead Contractor Initial Licensure | $40 | $110 | 175% |
| Accredited Lead Training Program Initial Approval (per day of training) | $400 | $500 | 25% per day |

| | | | |
|---|---|---|---|
| Accredited Lead Refresher Training Program Initial Approval | $400 | $500 | 25% |
| Accredited Lead Project Designer Refresher Training Program Initial Approval | $200 | $250 | 25% |
| Renewal of Worker, Supervisor, Inspector, Risk Assessor or Project Designer Licensure | $25 | $45 | 80% |
| Renewal of Lead Contractor Licensure | $40 | $70 | 75% |
| Renewal of Accredited Lead Training Program Approval | $100 | $125 | 25% |
| Late Renewal of Worker, Supervisor, Inspector, Risk Assessor or Project Designer Licensure | $50 | $80 | 60% |
| Late Renewal of Lead Contractor Licensure | $65 | $105 | 61.5% |
| Late Renewal of Accredited Lead Training Program Approval | $125 | $160 | 28% |

Board staff reports that fees were reduced in 2000 because they were set at a level that was too high to be justified by Board expenditures. As a consequence of high fees prior to 2000, the Board had a large surplus that has offset fees that since then were too low to cover all Board expenses. Absent some fee increase, Board staff reports that the Board will run a deficit in the next biennium. In addition to a large surplus finally being depleted, Board staff reports that fees will need to be raised because expenses for developing Department of Professional and Occupational Regulation's (DPOR's) new customer support and licensure software have greatly increased information technology costs over the last several years.

While the number of entities that the Board regulates has increased, other things being equal, the fees from additional regulants would be expected to cover application costs, customer support services costs and any other expenses that the Board might incur in regulating them. Because fees have been kept artificially low for the last decade so that the Board could use up the very large surplus that it had accrued, fees from each new licensee, certificate holder or registrant may not, in this instance, be enough to cover the per person application and customer support costs. This notwithstanding, it is likely that the necessity of raising fees would not be as urgent as it now is without large and continuing increases in information technology (IT) expenses over the last few years.

Board staff reports that DPOR has already paid $3.6 million, and expects to pay an additional $1.6 million, for its new automated licensure system. These costs are additional to other IT (VITA) costs which have increased for all state agencies. It is likely that most of the per regulant expenditure increase in the last decade is due to these increased information systems costs. In FY2005, the Board spent $32.13 per regulant; in FY2006, per regulant spending was $31.40 and in FY2007 it was $29.07. In FY2008 per regulant spending jumped to $45.45. During FY2012, per regulant spending was to $50.37. Board staff expect per regulant spending to increase further in FY2013 (to $57.07). Given this information, it is not at all clear that these increased information systems costs represent a net benefit for the Board's regulated entities.

Increasing fees will increase the cost of being licensed, certified or registered, and so may slightly decrease the number of people who choose to be remain in these jobs or businesses. To the extent that the public benefits from the Board regulating these professional populations, they will also likely benefit from the Board's proposed action given that the regulating will continue. There is insufficient information to ascertain whether the benefits of the continued regulation will outweigh the costs with higher fees.

Businesses and Entities Affected. Board staff reports that the Board currently regulates 5,808 individuals, contractors, labs and training programs.

Localities Particularly Affected. No locality will be particularly affected by this proposed regulatory action.

Projected Impact on Employment. Fee increases in this regulatory action may marginally decrease the number of individuals who choose to work in professional fields that are regulated by the Board. Individuals who work part time or whose earnings are only slightly higher in these regulated fields than they would be in other jobs that do not require licensure or registration will be more likely to be affected.

Effects on the Use and Value of Private Property. Fee increases will likely slightly decrease business profits and make affected businesses slightly less valuable.

Small Businesses: Costs and Other Effects. Board staff reports that most of the entities regulated by the Board likely qualify as small businesses. Affected small businesses will bear the costs of proposed increased fees.

Small Businesses: Alternative Method that Minimizes Adverse Impact. Outside of increasing the efficiency of the business practices of DPOR or lowering other expenses charged to the department, particularly information technology related, there are no clear alternative methods that would reduce the adverse impact on small businesses from the proposed fee increases.

Real Estate Development Costs. This regulatory action will likely have no effect on real estate development costs in the Commonwealth.

Legal Mandate. The Department of Planning and Budget (DPB) has analyzed the economic impact of this proposed regulation in accordance with § 2.2-4007.04 of the Administrative Process Act and Executive Order Number 14 (10). Section 2.2-4007.04 requires that such economic impact analyses include, but need not be limited to, the projected number of businesses or other entities to whom the regulation would apply, the identity of any localities and types of businesses or other entities particularly affected, the projected number of persons and employment positions to be affected, the projected costs to affected businesses or entities to implement or comply with the regulation, and the impact on the use and value of private property. Further, if the proposed regulation has adverse effect on small businesses, § 2.2-4007.04 requires that such economic impact analyses include (i) an identification and estimate of the number of small businesses subject to the regulation; (ii) the projected reporting, recordkeeping, and other administrative costs required for small businesses to comply with the regulation, including the type of professional skills necessary for preparing required reports and other documents; (iii) a statement of the probable effect of the regulation on affected small businesses; and (iv) a description of any less intrusive or less costly alternative methods of achieving the purpose of the regulation. The analysis presented above represents DPB's best estimate of these economic impacts.

Agency's Response to Economic Impact Analysis: The Board for Asbestos, Lead, and Home Inspectors concurs with the approval. However, the board would like to address the statement regarding the efficiency of DPOR's business practices.

DPOR serves to protect the health, safety, and welfare of the public by establishing and administering regulatory programs for certain professions or occupations that are deemed by the General Assembly as needing to be regulated. Such programs are designed to ensure minimum competency of practitioners who elect to enter these professions by verifying applicants' compliance with specified entry standards (education, experience, and examination).

DPOR is mindful of the need to keep costs to a minimum while still maintaining its charge of allowing minimally competent individuals and companies to begin working in their chosen fields as quickly as possible and resolving complaints against licensees in a timely manner. DPOR's staff continuously strives to improve its processes to find more efficient methods of conducting its work. In addition, staff works with its regulatory boards to develop regulations and policies that minimize burdens on its regulants, including minimizing costs associated with licensure, certification, and registration.

Summary:

*The amendments increase application and renewal fees paid by licensees, certificate holders, and registrants subject to the authority of the Board for Asbestos, Lead, and Home Inspectors.*

**18VAC15-30-162. Application fees.**

Application fees are as follows:

| Fee Type | Fee Amount | When Due |
|---|---|---|
| Application for worker, supervisor, inspector, risk assessor or project designer license | ~~$25~~ $80 | With application |
| Application for a lead contractor license | ~~$40~~ $110 | With application |
| Application for accredited lead training program approval | ~~$400~~ $500 per day of training | With application |
| Application for accredited lead refresher training program approval except for project designer refresher | ~~$400~~ $500 | With application |
| Application for accredited lead project designer refresher training program approval | ~~$200~~ $250 | With application |

**18VAC15-30-163. Renewal and late renewal fees.**

Renewal and late renewal fees are as follows:

| Fee Type | Fee Amount | When Due |
|---|---|---|
| Renewal for worker, supervisor, inspector, risk assessor or project designer license | ~~$25~~ $45 | With renewal application |
| Renewal for lead [ ~~contractor's~~ contractor ] license | ~~$40~~ $70 | With renewal application |
| Renewal for accredited asbestos training program approval | ~~$100~~ $125 | With renewal application |
| Late renewal for worker, supervisor, inspector, risk assessor or project designer license (includes a ~~$25~~ $35 late renewal fee in addition to the regular ~~$25~~ $45 renewal fee) | ~~$50~~ $80 | With renewal application |
| Late renewal for lead [ ~~contractor's~~ contractor ] license (includes a ~~$25~~ $35 late renewal fee in addition to the regular ~~$40~~ $70 renewal fee) | ~~$65~~ $105 | With renewal application |
| Late renewal for accredited lead training program approval (includes a ~~$25~~ $35 late renewal fee in addition to the regular ~~$100~~ $125 renewal fee) | ~~$125~~ $160 | With renewal application |

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## COMMON INTEREST COMMUNITY BOARD

### Proposed Regulation

Titles of Regulations: **18VAC48-20. Condominium Regulations (repealing 18VAC48-20-10 through 18VAC48-20-800).**

**18VAC48-30. Condominium Regulations (adding 18VAC48-30-10 through 18VAC48-30-690).**

Statutory Authority: §§ 54.1-2349 and 55-79.98 of the Code of Virginia.

Public Hearing Information:

December 18, 2013 - 10 a.m. - Department of Professional and Occupational Regulation, Perimeter Center, 9960 Mayland Drive, Suite 200, Board Room 2, Richmond, VA 23233

Public Comment Deadline: February 14, 2014.

Agency Contact: Trisha Henshaw, Executive Director, Common Interest Community Board, Department of Professional and Occupational Regulation, 9960 Mayland Drive, Suite 400, Richmond, VA 23233, telephone (804) 367-8510, FAX (866) 490-2723, or email cic@dpor.virginia.gov.

Basis: Section 55-79.98 states, in part, that the Common Interest Community Board shall prescribe reasonable rules and regulations in compliance with law applicable to the administrative procedure of agencies of government. Further, the rules shall include but not be limited to provisions for advertising standards to assure full and fair disclosure, provisions for operating procedures, and other rules as are necessary and proper to accomplish the purposes of Chapter 4.2 (§ 55-79.39 et seq.) of Title 55 of the Code of Virginia.

Section 54.1-2349 of the Code of Virginia provides that, in addition to the provisions of §§ 54.1-201 and 54.1-202 of the Code of Virginia, the board shall promulgate regulations necessary to carry out the requirements of Chapter 23.3 (§ 54.1-2345 et seq.) of Title 54.1 of the Code of Virginia in accordance with the provisions of the Administrative Process Act (§ 2.2-4000 et seq.) to include but not be limited to the prescription of fees, procedures, and qualifications for the issuance and renewal of common interest community manager licenses; establishment of standards of conduct for common interest community managers and certain employees; and establishment of an education-based certification program for persons who are involved in the business or activity of providing management services for compensation to common interest communities.

Purpose: Changes are made annually to the Condominium Act by the General Assembly. In 2008, the regulatory authority was moved from the Real Estate Board to the newly created Common Interest Community Board. Since the regulations have not undergone substantial revision since 1988, a thorough review was necessary to ensure that the regulation complements the current Condominium Act, provides minimal burdens on regulants while still protecting the public, and reflects current procedures and policies of the Department of Professional and Occupational Regulation.

Substance: Proposed changes clarify the regulations, ensure consistency with current practices and legal requirements, and ensure full and fair disclosure to potential and actual purchasers of condominium units, all to better protect the health, safety, and welfare of citizens of the Commonwealth. As a result of this thorough review, it was determined that sections pertaining to Time-Share Condominiums and Horizontal Property Regimes were no longer relevant. A new section was added outlining the board's authority and standards of conduct. Additionally, sections were added to address the procedures for notifying the board of various changes that commonly occur during the development of the condominium and for termination of condominium registrations, both administratively and by the declarant.

Issues: The primary advantage to the public is that the revisions clarify the regulations, ensure consistency with current practices and legal requirements, and ensure full and fair disclosure to potential and actual purchasers of condominium units, all to better protect the health, safety, and welfare of citizens of the Commonwealth.

The primary advantage to the Commonwealth is that the revisions to the regulations reflect the importance that Virginia places on ensuring that potential and actual purchasers of condominium units have been provided with full and fair disclosure of their most significant purchase. No disadvantages to the Commonwealth could be identified.

Department of Planning and Budget's Economic Impact Analysis:

Summary of the Proposed Amendments to Regulation. The Condominium Regulations have not undergone substantial revision since 1988. Since then the General Assembly has made numerous changes to the Condominium Act. The Common Interest Community Board (Board) thus proposes many changes in language to reflect the statutory changes and for clarification. Additionally, the board proposes to specify that several items not referenced in the current regulations be included in the declarant's[1] public offering statement. The board proposes to make these changes via repealing 18VAC48-20 and promulgating 18VAC48-30 with the same name, "Condominium Regulations."

Result of Analysis. The benefits likely exceed the costs for all proposed changes.

Estimated Economic Impact. Adding or changing language to the regulations to reflect current statutes in the Code of Virginia (Condominium Act) will have no impact beyond improving clarity as toward the law for the public since if there is ever any conflict between the Code of Virginia and Virginia regulations, the Code prevails. Thus the board's proposal to change language to reflect the statutory changes will only be beneficial. Other proposed changes by the Board for clarity are similarly beneficial. The Board proposes to specify that several items not referenced in the current regulations be included in the declarant's public offering statement. According to the Department of Professional and Occupational Regulation, in practice most condominium public offering statements already include all of the items specified in the proposed amendments. Thus this proposal will not affect most declarants or potential purchasers. Adding the proposed language to the regulations will be beneficial in that ensuring that this standard information is included in public offering statements will help reduce the risk of potential purchasers not understanding all the relevant information associated with their potential purchase.

Businesses and Entities Affected. The proposed changes affect condominium projects registered with the Board as well as declarants who offer to dispose of condominium units. As of July 1, 2012, there were approximately 470 condominium projects registered with the board.[2]

Localities Particularly Affected. The proposed amendments do not disproportionately affect particular localities.

Projected Impact on Employment. The proposed amendments are unlikely to significantly affect employment.

Effects on the Use and Value of Private Property. The proposed amendments are unlikely to significantly affect the use and value of private property.

Small Businesses: Costs and Other Effects. The proposed amendments are unlikely to significantly affect small businesses.

Small Businesses: Alternative Method that Minimizes Adverse Impact. The proposed amendments are unlikely to significantly adversely affect small businesses.

Real Estate Development Costs. The proposed amendments are unlikely to significantly affect real estate development costs.

Legal Mandate. The Department of Planning and Budget (DPB) has analyzed the economic impact of this proposed regulation in accordance with § 2.2-4007.04 of the Administrative Process Act and Executive Order Number 14 (10). Section 2.2-4007.04 requires that such economic impact analyses include, but need not be limited to, the projected number of businesses or other entities to whom the regulation would apply, the identity of any localities and types of businesses or other entities particularly affected, the projected number of persons and employment positions to be affected, the projected costs to affected businesses or entities to implement or comply with the regulation, and the impact on the use and value of private property. Further, if the proposed regulation has adverse effect on small businesses, § 2.2-4007.04 requires that such economic impact analyses include (i) an identification and estimate of the number of small businesses subject to the regulation; (ii) the projected reporting, recordkeeping, and other administrative costs required for small businesses to comply with the regulation, including the type of professional skills necessary for preparing required reports and other documents; (iii) a statement of the probable effect of the regulation on affected small businesses; and (iv) a description of any less intrusive or less costly alternative methods of achieving the purpose of the regulation. The analysis presented above represents DPB's best estimate of these economic impacts.

[1] The Condominium Act (§ 55-79.41) defines "declarant" as any person, or group of persons acting in concert, that (i) offers to dispose of his or its interest in a condominium unit not previously disposed of, including an institutional lender which may not have succeeded to or accepted any special declarant rights pursuant to § 55-79.74:3; (ii) reserves or succeeds to any special declarant right; or (iii) applies for registration of the condominium. However, for the purposes of clauses (i) and (iii), the term "declarant" shall not include an institutional lender which acquires title by foreclosure or deed in lieu thereof unless such lender offers to dispose of its interest in a condominium unit not previously disposed of to anyone not in the business of selling real estate for his own account, except as otherwise provided in § 55-79.74:3. The term "declarant" shall not include an individual who acquires title to a condominium unit at a foreclosure sale.

[2] Source: Department of Professional and Occupational Regulation.

Agency Response to the Department of Planning and Budget's economic impact analysis: The board concurs with the approval.

Summary:

*The proposed amendments repeal the existing regulations (18VAC48-20) and replace them with a new chapter (18VAC48-30) to reflect statutory changes and current procedures. The new chapter (i) establishes the requirements and application procedures for registration of a condominium; (ii) establishes requirements for public offering statements; (iii) addresses conversion condominiums; (iv) establishes post-registration provisions, including procedures for the termination of condominium registrations both administratively and by the declarant; and (v) outlines the board's authority and standards of conduct. The new chapter does not include provisions pertaining to time-share condominiums and horizontal property regimes.*

CHAPTER 30
CONDOMINIUM REGULATIONS

Part 1
General

**18VAC48-30-10. Purpose.**

This chapter governs the exercise of powers granted to and the performance of duties imposed upon the Common Interest Community Board by the Condominium Act (§ 55-79.39 et seq. of the Code of Virginia) as the act pertains to the registration of condominiums.

**18VAC48-30-20. Definitions.**

A. Section 54.1-2345 of the Code of Virginia provides definitions of the following terms and phrases as used in this chapter:

"Association"

"Board"

B. Section 55-79.41 of the Code of Virginia provides definitions of the following terms and phrases as used in this chapter:

"Common elements"

"Common expenses"

"Condominium"

"Condominium instruments"

"Condominium unit"

"Conversion condominium"

"Convertible land"

"Convertible space"

"Declarant"

"Dispose" or "disposition"

"Executive organ"

"Expandable condominium"

"Identifying number"

"Land"

"Leasehold condominium"

"Limited common element"

"Nonbinding reservation agreement"

"Offer"

"Person"

"Purchaser"

"Special declarant rights"

"Unit"

"Unit owner"

C. The following words, terms, and phrases, when used in this chapter, shall have the following meanings unless the context clearly indicates otherwise.

"Annual report" means a completed, board-prescribed form and required documentation submitted in compliance with § 55-79.93 of the Code of Virginia.

"Application" means a completed, board-prescribed form submitted with the appropriate fee and other required documentation in compliance with § 55-79.89 of the Code of Virginia.

"Class of physical assets" means two or more physical assets that are substantially alike in function, manufacture, date of construction or installation, and history of use and maintenance.

"Condominium Act" means Chapter 4.2 (§ 55-79.39 et seq.) of Title 55 of the Code of Virginia.

"Department" means the Department of Professional and Occupational Regulation.

"Expected useful life" means the estimated number of years from the date on which such estimate is made until the date when, because of the effects of time, weather, stress, or wear, a physical asset will become incapable of performing its intended function and will have to be replaced.

"Firm" means a sole proprietorship, association, partnership, corporation, limited liability company, limited liability partnership, or any other form of business organization recognized under the laws of the Commonwealth of Virginia.

"Full and fair disclosure" means the degree of disclosure necessary to ensure reasonably complete and materially accurate representation of the condominium in order to protect the interests of purchasers.

"Limited common expense" means any common expense against one or more, but less than all, of the units.

"Major utility installation" means a utility installation or portion thereof that is a common element or serves more than one unit.

"Material change" means a change in any information or document disclosed in the application for registration, including the public offering statement or an attachment thereto, that renders inaccurate, incomplete, or misleading any information or document in such a way as to affect substantially a purchaser's rights or obligations or the nature of a unit or appurtenant limited common element or the amenities of the project available for the purchaser's use as described in the public offering statement.

"Offering" means the continuing act of the declarant in making condominium units owned by the declarant within a particular condominium available for acquisition by

purchasers or, where appropriate, to the aggregate of the condominium units thus made available.

"Offering literature" means any written promise, assertion, representation, or statement of fact or opinion made in connection with a condominium marketing activity mailed or delivered directly to a specific prospective purchaser, except that information printed in a publication shall not be deemed offering literature solely by virtue of the fact that the publication is mailed or delivered directly to a prospective purchaser.

"Personal communication" means a communication directed to a particular prospective purchaser that has not been and is not intended to be directed to any other prospective purchaser.

"Physical asset" means either a structural component or a major utility installation.

"Present condition" means condition as of the date of the inspection by means of which condition is determined.

"Registration file" means the application for registration, supporting materials, annual reports, and amendments that constitute all information submitted and reviewed pertaining to a particular condominium registration. A document that has not been accepted for filing by the board is not part of the registration file.

"Regular common expense" means a common expense apportioned among and assessed to all of the condominium units pursuant to subsection D of § 55-79.83 of the Code of Virginia or similar law or condominium instrument provision.

"Replacement cost" means the expenditure that would be necessary to replace a physical asset with an identical or substantially equivalent physical asset as of the date on which replacement cost is determined and includes all costs of (i) removing the physical asset to be replaced, (ii) obtaining its replacement, and (iii) erecting or installing the replacement.

"Structural component" means a component constituting any portion of the structure of a unit or common element.

"Structural defect" shall have the meaning given in subsection B of § 55-79.79 of the Code of Virginia.

"Substituted public offering statement" means a document originally prepared in compliance with the laws of another jurisdiction and modified in accordance with the provisions of this chapter to fulfill the disclosure requirements established for public offering statements by subsection A of § 55-79.90 of the Code of Virginia and, if applicable, subsection A of § 55-79.94 of the Code of Virginia.

**18VAC48-30-30. Explanation of terms.**

Each reference in this chapter to a "declarant," "purchaser," and "unit owner" or to the plural of those terms shall be deemed to refer, as appropriate, to the masculine and the feminine, to the singular and the plural, and to natural persons and organizations. The term "declarant" shall refer to any successors to the persons referred to in § 55-79.41 of the Code of Virginia who come to stand in the same relation to the condominium as their predecessors in that they assumed rights reserved for the benefit of a declarant that (i) offers to dispose of his interest in a condominium unit not previously disposed of, (ii) reserves or succeeds to any special declarant right, or (iii) applies for registration of the condominium.

**18VAC48-30-40. Condominiums located outside of Virginia.**

A. In any case involving a condominium located outside of Virginia in which the laws or practices of the jurisdiction in which such condominium is located prevent compliance with a provision of this chapter, the board shall prescribe, by order, a substitute provision to be applicable in such case that is as nearly equivalent to the original provision as is reasonable under the circumstances.

B. The words "declaration," "bylaws," "plats," and "plans," when used in this chapter with reference to a condominium located outside of Virginia, shall refer to documents, portions of documents, or combinations thereof, by whatever name denominated, that have a content and function identical or substantially equivalent to the content and function of their Virginia counterparts.

C. The words "recording" or "recordation," when used with reference to condominium instruments of a condominium located outside of Virginia, shall refer to a procedure that, in the jurisdiction in which such condominium is located, causes the condominium instruments to become legally effective.

D. This chapter shall apply to a contract for the disposition of a condominium unit located outside of Virginia only to the extent permissible under the provisions of subsection B of § 55-79.40 of the Code of Virginia.

**18VAC48-30-50. Exemptions from registration.**

A. The exemption from registration of condominiums in which all units are restricted to nonresidential use provided in subsection B of § 55-79.87 of the Code of Virginia shall not be deemed to apply to any condominium as to which there is a substantial possibility that a unit therein other than a unit owned by the declarant or the unit owners' association will be used as permanent or temporary living quarters or as a site upon which vehicular or other portable living quarters will be placed and occupied. Residential use for the purposes of this chapter includes transient occupancy.

B. Nothing in this chapter shall apply in the case of a condominium exempted from registration by § 55-79.87 of the Code of Virginia or condominiums located outside of Virginia as provided in subsection B of § 55-79.40 of the Code of Virginia for which no contracts are to be signed in Virginia.

**18VAC48-30-60. Preregistration offers prohibited.**

No condominium marketing activity shall be deemed an offer unless, by its express terms, it induces, solicits, or encourages a prospective purchaser to execute a contract of sale of the condominium unit or lease of a leasehold

condominium unit or perform some other act that would create or purport to create a legal or equitable interest in the condominium unit other than a security interest in or a nonbinding reservation of the condominium unit.

Part II
Marketing

**18VAC48-30-70. Condominium marketing activities.**

Condominium marketing activities shall include every contact for the purpose of promoting disposition of a condominium unit. Such contacts may be personal, by telephone, by mail, or by advertisement. A promise, assertion, representation, or statement of fact or opinion made in connection with a condominium marketing activity may be oral, written, or graphic.

**18VAC48-30-80. Offering literature.**

A. Offering literature mailed or delivered prior to the registration of the condominium that is the subject of the offering literature shall bear a conspicuous legend containing the substance of the following language:

"The condominium has not been registered by the Common Interest Community Board. A condominium unit may be reserved on a nonbinding reservation agreement, but no contract of sale or lease may be entered into prior to registration."

B. Offering literature or marketing activities violative of the Virginia Fair Housing Law (§ 36-96.1 et seq. of the Code of Virginia) and subsection C of § 55-79.52 of the Code of Virginia is prohibited.

C. Offering literature shall indicate that the property being offered is under the condominium form of ownership. The requirement of this subsection is satisfied by including the full name of the condominium in all offering literature.

Part III
Application for Registration

**18VAC48-30-90. Application procedures.**

A declarant seeking registration of a condominium pursuant to Chapter 4.2 (§ 55-79.39 et seq.) of Title 55 of the Code of Virginia shall submit an application on the appropriate form provided by the board, along with the appropriate fee specified in 18VAC48-30-100.

By submitting the application to the board, the declarant certifies that the declarant has read and understands the applicable statutes and the board's regulations.

The receipt of an application and the deposit of fees by the board do not indicate approval or acceptance of the application by the board.

The board may make further inquiries and investigations to confirm or amplify information supplied. All applications shall be completed in accordance with the instructions contained in this section and on the application. Applications will not be considered complete until all required documents are received by the board.

Applications that are not approved within 12 months after receipt of the application in the board's office will be purged and a new application and fee must be submitted in order to be reconsidered for registration.

**18VAC48-30-100. Fee requirements.**

All fees are nonrefundable and shall not be prorated. The date on which the fee is received by the board or its agent will determine whether the fee is timely. Checks or money orders shall be made payable to the Treasurer of Virginia.

1. Each application for registration of a condominium shall be accompanied by a fee in an amount equal to $35 per unit, except that the fee shall not be less than $1,750 or more than $3,500.

2. Each phase filing application shall be accompanied by a fee in an amount equal to $35 per unit, except that the fee for each phase filing shall not be less than $875 or more than $3,500.

**18VAC48-30-110. Review of application for registration.**

A. Upon receipt of an application for registration, the board shall issue the notice of filing required by subsection A of § 55-79.92 of the Code of Virginia.

B. Upon the review of the application for registration, if the requirements of §§ 55-79.89 and 55-79.91 of the Code of Virginia have not been met, the board shall notify the applicant as required by subsection C of § 55-79.92 of the Code of Virginia.

C. A request for an extension of the 60-day application review period described in § 55-79.92 of the Code of Virginia shall be in writing and shall be delivered to the board prior to the expiration of the period being extended. The request shall be for an extension of definite duration. The board may grant in writing a request for an extension of the application review period, and it may limit the extension to a period not longer than is reasonably necessary to permit correction of the application. An additional extension of the application review period may be obtained, subject to the conditions applicable to the initial request. A request for an extension of the application review period shall be deemed a consent to delay within the meaning of subsection A of § 55-79.92 of the Code of Virginia.

D. If the requirements for registration are not met within the application review period or a valid extension thereof, the board shall, upon the expiration of such period, enter an order rejecting the registration as required by subsection C of § 55-79.92 of the Code of Virginia.

E. An applicant may submit a written request for an informal conference in accordance with § 2.2-4019 of the Code of Virginia at any time between receipt of a notification pursuant to subsection B of this section and the effective date of the order of rejection entered pursuant to subsection D of this section. A request for such proceeding shall be deemed a consent to delay within the meaning of subsection A of § 55-79.92 of the Code of Virginia.

F. The board shall receive and act upon corrections to the application for registration at any time prior to the effective date of an order rejecting the registration. If the board determines after review of the corrections that the requirements for registration have not been met, the board may proceed with an informal conference in accordance with § 2.2-4019 of the Code of Virginia to allow reconsideration of whether the requirements for registration are met. If the board does not opt to proceed with an informal conference, the applicant may submit a written request for an informal conference in accordance with § 2.2-4019 of the Code of Virginia to reconsider whether the requirements for registration are met. If the board does not proceed with an informal conference and no request for an informal conference is received from the applicant, an amended order of rejection stating the factual basis for the rejection shall be issued. A new 20-day period for the order of rejection to become effective shall commence.

G. At such time as the board affirmatively determines that the requirements of §§ 55-79.89 and 55-79.91 of the Code of Virginia have been met, the board shall enter an order registering the condominium and shall designate the form, content, and effective date of the public offering statement, substituted public offering statement, or prospectus to be used.

**18VAC48-30-120. Prerequisites for registration.**

The following provisions are prerequisites for registration and are supplementary to the provisions of § 55-79.91 of the Code of Virginia.

A. The declarant shall own or have the right to acquire an estate in the land constituting or to constitute the condominium that is of at least as great a degree and duration as the estate to be conveyed in the condominium units.

B. The condominium instruments must be adequate to bring a condominium into existence upon recordation except that the certification requirements of § 55-79.58 of the Code of Virginia need not be complied with as a prerequisite for registration. This subsection does not apply to condominium instruments that may be recorded after the condominium has been created.

C. The declarant shall have filed with the board reasonable evidence of its financial ability to complete all proposed improvements on the condominium. Such evidence may include (i) financial statements and a signed affidavit attesting that the declarant has sufficient funds to complete all proposed improvements on the condominium and that the funds will be used for completion of the proposed improvements or (ii) proof of a commitment of an institutional lender to advance construction funds to the declarant and, to the extent that any such commitments will not furnish all the necessary funds, other evidence, satisfactory to the board, of the availability to the declarant of necessary funds. A lender's commitment may be subject to such conditions, including registration of the condominium units and presale requirements, as are normal for loans of the type and as to which nothing appears to indicate that the conditions will not be complied with or fulfilled.

1. In the case of a condominium located in Virginia, "proposed improvements" are improvements that are not yet begun or not yet complete and that the declarant is affirmatively and unconditionally obligated to complete under §§ 55-79.58 and 55-79.67 (a1) of the Code of Virginia and applicable provisions of the condominium instruments or that the declarant would be so obligated to complete if plats and plans filed with the board in accordance with 18VAC48-30-140 A were recorded.

2. In the case of a condominium located outside of Virginia, "proposed improvements" are improvements that are not yet begun or not yet complete and that the declarant represents, without condition or limitation, will be built or placed in the condominium.

D. The current and planned condominium marketing activities of the declarant shall comply with § 18.2-216 of the Code of Virginia, 18VAC48-30-80, and 18VAC48-30-660.

E. The declarant shall have filed with the board (i) a proposed public offering statement that complies with this chapter and subsection A of § 55-79.90 of the Code of Virginia and, if applicable, subsection A of § 55-79.94 of the Code of Virginia; (ii) a substituted public offering statement that complies with this chapter; or (iii) a prospectus that complies with this chapter.

F. Declarants may be organized as individuals or firms. Firms shall be organized as business entities under the laws of the Commonwealth of Virginia or otherwise authorized to transact business in Virginia. Firms shall register any trade or fictitious names with the State Corporation Commission or the clerk of court in the jurisdiction where the business is to be conducted in accordance with §§ 59.1-69 through 59.1-76 of the Code of Virginia before submitting an application to the board.

**18VAC48-30-130. Minimum requirements for registration.**

Applications for registration shall include the following:

1. The documents and information contained in § 55-79.89 of the Code of Virginia.

2. The application fee specified in 18VAC48-30-100.

3. The following documents shall be included as exhibits. All exhibits shall be labeled as indicated and submitted in hardcopy form and electronically in a format acceptable to the board.

a. Exhibit A: A copy of the certificate of incorporation or certificate of authority to transact business in Virginia issued by the Virginia State Corporation Commission or other entity formation documents.

b. Exhibit B: A copy of the title opinion, title policy, or a statement of the condition of the title to the condominium

project including encumbrances as of a specified date within 30 days of the date of application by a title company or licensed attorney who is not a salaried employee, officer, or director of the declarant or owner, in accordance with subdivision A 5 of § 55-79.89 of the Code of Virginia.

c. Exhibit C: A copy of the instruments that will be delivered to a purchaser to evidence the purchaser's interest in the unit and of the contracts and other agreements that a purchaser will be required to agree to or sign.

d. Exhibit D: A narrative description of the promotional plan for the disposition of the condominium units.

e. Exhibit E: A copy of documentation demonstrating the declarant's financial ability to complete the project in accordance with 18VAC48-30-140.

f. Exhibit F: A copy of the proposed public offering statement that complies with subsection A of § 55-79.90 and subsection A of § 55-79.94 of the Code of Virginia, as applicable, and this chapter. A substitute public offering statement or a prospectus pursuant to 18VAC48-30-370 and 18VAC48-30-380 respectively may be submitted for a condominium formed in another jurisdiction.

g. Exhibit G: Copies of bonds required by §§ 55-79.58:1, 55.79.84:1, and 55-79.95 of the Code of Virginia, as applicable.

h. Exhibit H: A list with the name of every officer of the declarant who is directly responsible for the project or person occupying a similar status within, or performing similar functions for, the declarant. The list must include each individual's address, principal occupation for the past five years, and extent and nature of the individual's interest in the condominium as of a specified date within 30 days of the filing of the application.

i. Exhibit I: Plats and plans of the condominium that (i) comply with the provisions of § 55-79.58 of the Code of Virginia and 18VAC48-30-140 other than the certification requirements and (ii) show all units and buildings containing units to be built anywhere within the submitted land other than within the boundaries of any convertible lands. Hardcopy submittals of plats and plans must be no larger than 11 inches by 17 inches.

j. Exhibit J: Conversion condominiums must attach (i) a copy of the general notice provided to tenants of the condominium at the time of application pursuant to subsection B of § 55-79.94 of the Code of Virginia, (ii) a copy of the formal notice to be sent at the time of registration to the tenants, if any, of the building or buildings, and (iii) the certified statement required in accordance with subsection C of § 55-79.94 of the Code of Virginia.

**18VAC48-30-140. Requirements for plats and plans.**

A. Except as provided in subsection C of this section, all plats and plans submitted with the application for registration shall comply with § 55-79.58 of the Code of Virginia but the certification need not be signed until recordation. The plats and plans filed with the application for registration shall be the same as the plats and plans the declarant intends to record. A material change to the plats and plans shall be submitted to the board in accordance with Part VI (18VAC48-30-460 et seq.) of this chapter. Once recorded, copies of plats and plans as recorded shall be filed with the board in accordance with Part VI of this chapter.

B. In the case of units that are substantially identical, the requirement to show the location and dimensions (within normal construction tolerances) of the boundaries of each unit pursuant to subsection B of § 55-79.58 of the Code of Virginia may be deemed satisfied by depiction of the location and dimensions of the vertical boundaries and horizontal boundaries, if any, of one such unit. The identifying numbers of all units represented by such depiction shall be indicated. Each structure within which any such units are located shall be depicted so as to indicate the exact location of each such unit within the structure.

C. In the case of a condominium located outside Virginia, certain materials may be filed with the application for registration in lieu of plats and plans complying with the provisions of § 55-79.58 of the Code of Virginia. Such materials shall contain, as a minimum, (i) a plat of survey depicting all existing improvements, and all improvements that the declarant represents, without condition or limitation, will be built or placed in the condominium; and (ii) legally sufficient descriptions of each unit. Any improvements whose completion is subject to conditions or limitations shall be appropriately labeled to indicate that such improvements may not be completed. Unit descriptions may be written or graphic, shall demarcate each unit vertically and, if appropriate, horizontally, and shall indicate each unit's location relative to established points or datum.

D. The plats and plans must bear the form of the certification statement required by subsections A and B § 55-79.58 of the Code of Virginia. However, as stated in subsection A of this section, the statement need not be executed prior to recordation. The certification statement may appear in a separate document that is recorded, or to be recorded.

**18VAC48-30-150. Application for registration of expandable condominium.**

The declarant may include in the application for registration all units for which development rights have been reserved.

Part IV
Public Offering Statement

**18VAC48-30-160. Public offering statement requirements, generally.**

In addition to the provisions of § 55-79.90 of the Code of Virginia, the following will be considered, as applicable, during review of the public offering statement.

1. The public offering statement shall provide full and fair disclosure in accordance with 18VAC48-30-170.

2. The public offering statement shall pertain to a single offering and to the entire condominium in which the condominium units being offered are located.

3. The public offering statement shall be clear, organized, and legible.

4. Except for brief excerpts, the public offering statement may refer to, but should not incorporate verbatim, portions of the condominium instruments, the Condominium Act, or this chapter. This does not preclude compliance with 18VAC48-30-180.

**18VAC48-30-170. Full and fair disclosure.**

A. The provisions of § 55-79.90 and subsection A of § 55-79.94 of the Code of Virginia and this chapter shall be strictly construed to promote full and fair disclosure in the public offering statement. In addition, the following will be considered, as applicable, during review to assure full and fair disclosure:

1. The information shall be presented in a manner that is clear and understandable to a reasonably informed consumer, while maintaining consistency with the requirements of this chapter and the Condominium Act.

2. In addition to specific information required by this chapter and the Condominium Act, the public offering statement shall disclose any other information necessary for full and fair disclosure.

3. No information shall be incorporated by reference to an outside source that is not reasonably available to a prospective purchaser.

4. If required information is not known or not reasonably available, such fact shall be stated and explained in the public offering statement.

B. The board has the sole discretion to require additional information or amendment of existing information as it finds necessary to ensure full and fair disclosure.

**18VAC48-30-180. Contents of public offering statement.**

A. A cover, if used, must be blank or bear identification information only.

B. The first page of the public offering statement shall be substantially as follows:

**PURCHASER SHOULD READ THIS DOCUMENT FOR THE PURCHASER'S PROTECTION**

**PUBLIC OFFERING STATEMENT**

NAME OF CONDOMINIUM: _____

LOCATION OF CONDOMINIUM: _____

NAME OF DECLARANT: _____

ADDRESS OF DECLARANT: _____

EFFECTIVE DATE OF PUBLIC OFFERING STATEMENT: _____

REVISED: _____

**THE PURCHASER SHOULD READ THIS DOCUMENT FOR THE PURCHASER'S OWN PROTECTION. Living in a common interest community carries with it certain rights, responsibilities, and benefits, including certain financial obligations, rights, and restrictions concerning the use and maintenance of units and common elements, and decisionmaking authority vested in the unit owners' association. The purchaser will be bound by the provisions of the condominium instruments and should review the Public Offering Statement, the condominium instruments, and other exhibits carefully prior to purchase.**

This Public Offering Statement presents information regarding condominium units being offered for sale by the declarant. Virginia law requires that a Public Offering Statement be given to every Purchaser in order to provide full and fair disclosure of the significant features of the condominium units being offered. The Public Offering Statement is not intended, however, to be all-inclusive. The Purchaser should consult other sources for details not covered by the Public Offering Statement.

The Public Offering Statement summarizes information and documents furnished by the declarant to the Virginia Common Interest Community Board. The Board has carefully reviewed the Public Offering Statement to ensure that it contains required disclosures, but the Board does not guarantee the accuracy or completeness of the Public Offering Statement. In the event of any inconsistency between the Public Offering Statement and the material it is intended to summarize, the latter will control.

Under Virginia law a purchaser of a condominium unit is afforded a 10-day period during which the purchaser may cancel the purchase contract of sale and obtain a full refund of any sums deposited in connection with the purchase contract. The 10-day period begins on the purchase contract date or the

date of delivery of a Public Offering Statement, whichever is later. The purchaser may, if practicable, inspect the condominium unit and the common elements and obtain professional advice. If the purchaser elects to cancel, the purchaser must deliver notice of cancellation to the declarant pursuant to § 55-79.88 of the Code of Virginia.

Allegations of violation of any law or regulation contained in the Condominium Act or the Condominium Regulations should be reported to the Virginia Common Interest Community Board, Perimeter Center, Suite 400, 9960 Mayland Drive, Richmond, Virginia 23233.

C. A summary of important considerations shall immediately follow the first page for the purpose of reinforcing the disclosure of significant information. The summary shall be titled as such and shall be introduced by the following statement:

"Following are important matters to be considered in acquiring a condominium unit. They are highlights only. The Public Offering Statement should be examined in its entirety to obtain detailed information."

Appropriate modifications shall be made to reflect facts and circumstances that may vary. The summary shall consist of, but not be limited to, the following, as applicable:

1. A statement on the governance of the condominium wherein unit owners are allocated votes for certain decisions of the association. In addition, the statement shall include that all unit owners will be bound by the decisions made by the association, even if the individual unit owner disagrees.

2. A statement concerning the decision-making authority of the executive organ of the unit owners' association.

3. A statement regarding the payment of expenses of the association on the basis of a periodic budget, to include a disclosure of any provision for reserves, including a statement if there are no reserves.

4. A statement detailing the requirement for each unit owner to pay a periodic assessment and the inability to reduce the amount of an assessment by refraining from the use of the common elements.

5. A statement of the unit owner's responsibility to pay additional assessments, if any.

6. A statement regarding the consequences for failure to pay an assessment when due. The statement shall include reference to the enforcement mechanisms available to the association, including obtaining a lien against the condominium unit, pursuing civil action against the unit owner, and certain other penalties.

7. A statement that the declarant must pay assessments on unsold condominium units.

8. A statement indicating whether the declarant, its predecessors, or principal officer have undergone a debtor's relief proceeding.

9. A statement that the declarant will retain control of the unit owners' association for an initial period.

10. A statement indicating whether a managing agent will perform the routine operations of the unit owners' association. The statement shall include whether the managing agent is related to the declarant, director, or officer of the unit owners' association.

11. A statement indicating whether the declarant may lease unsold condominium units and a statement indicating whether the right of a unit owner to lease that owner's unit to another is subject to restrictions.

12. A statement indicating whether the declarant may expand or contract the condominium or convert convertible land or space without the consent of any unit owner.

13. A statement indicating whether the right of the unit owner to resell the owner's condominium unit is subject to restrictions.

14. A statement indicating whether the units are restricted to residential use and whether the units may be utilized for commercial, retail, or professional use. The statement shall provide detail if units have different voting rights. Further, the statement shall also detail whether the allocation of rights and responsibilities among commercial, retail, professional, or residential use units are the same.

15. A statement indicating whether approval of the declarant or unit owners' association is necessary in order for a unit owner to alter the structure of the unit or modify the exterior of the unit.

16. A statement regarding the obligation of the unit owners' association to obtain certain insurance benefiting the unit owner, along with the necessity for a unit owner to obtain other insurance.

17. A statement regarding the unit owner's obligation to pay real estate taxes.

18. A statement regarding any limits the declarant asserts on the association or the unit owner's right to bring legal action against the declarant. Nothing in this statement shall be deemed to authorize such limits where those limits are otherwise prohibited by law.

19. A statement that the association or unit owners are members of another association or obligated to perform duties or pay fees or charges to that association or entity.

20. A statement indicating whether the condominium is subject to development as a time-share.

21. A statement affirming that marketing and sale of condominium units will be conducted in accordance with the Virginia Fair Housing Law (§ 36-96.1 et seq. of the Code of Virginia) and the Condominium Act (Chapter 4.2 (§ 55-79.39 et seq.) of Title 55 of the Code of Virginia).

D. The content after the summary of important considerations shall include the narrative sections in

18VAC48-30-190 through 18VAC48-30-360. Supplementary sections may be included as necessary.

E. Clear and legible copies of the following documents shall be attached as exhibits to the public offering statement:

1.The declaration;

2. The bylaws;

3. The projected budget;

4. Rules and regulations of the unit owners' association, if available;

5. Master association documents, if applicable;

6. Any management contract, along with the license number of the common interest community manager, if applicable;

7. Depiction of unit layouts;

8. Any lease of recreational areas;

9. Any contract or agreement affecting the use, maintenance, or access of all or any portion of the condominium, the nature, duration, or expense of which has a material impact on the operation and administration of the condominium;

10. Warranty information, if applicable; and

11. Other documents obligating the association or unit owner to perform duties or obligations or pay charges or fees.

F. Other information and documentation may be included as necessary to ensure full and fair disclosure. The board may also require additional information as necessary to ensure full and fair disclosure.

**18VAC48-30-190. Narrative sections; condominium concept.**

The public offering statement shall contain a section captioned "The Condominium Concept." The section shall consist of a brief discussion of the condominium form of ownership. The section shall discuss the distinction among units, common elements and limited common elements, if any, and shall explain ownership of an undivided interest in the common elements. Attention shall be directed to any features of ownership of the condominium units being offered that are different from typical condominium unit ownership.

**18VAC48-30-200. Narrative sections; creation of condominium.**

The public offering statement shall contain a section captioned "Creation of the Condominium." The section shall briefly explain the manner in which the condominium was or will be created, the locality wherein the condominium instruments will be or have been recorded, and each of the condominium instruments, their functions, and the procedure for their amendment. The section shall indicate where each of the condominium instruments or copies thereof may be found. In the case of a condominium located in Virginia or in a jurisdiction having a law similar to § 55-79.96 of the Code of Virginia, the section shall indicate that the purchaser will receive copies of the recorded declaration and bylaws, including amendments, as appropriate, within the time provided in the applicable statute.

**18VAC48-30-210. Narrative sections; description of condominium.**

A. The public offering statement shall contain a section captioned "Description of the Condominium." The description shall include statements of (i) the land area of the condominium to include either the square footage or the acreage, (ii) the number of units in the condominium, (iii) the number of units in the offering, (iv) the number of units in the condominium planned to be rented, and (v) the percentage of units the declarant intends to sell to persons who do not intend to occupy the units as their primary residence.

B. If the condominium is contractable, expandable, or includes convertible land or space, the section shall contain a brief description of each such feature, including the land area to include either the square footage or acreage, and the maximum number of units or maximum number of units per acre that may be added, withdrawn, or converted, as applicable, together with a statement of the declarant's plans for the implementation of each such feature. In the case of a contractable or expandable condominium, the section shall contain the substance of the following statement:

"At the declarant's option, the construction and development of the condominium may be abandoned or altered prior to completion, and land or buildings originally intended for condominium development may be put to other uses or sold."

In the case of a condominium including convertible land, the section shall contain the substance of the following statements:

"Until such time as the declarant converts the convertible land into units or limited common elements, the declarant is required by the Virginia Condominium Act to pay for the upkeep of the convertible land. Once the convertible land has been converted, maintenance and other financial responsibilities associated with the land so designated become the responsibility of the unit owners and, therefore, may be reflected in the periodic assessment for the condominium."

If the common expense assessments are expected to increase should convertible land be converted, this section shall also disclose an estimate of the approximate percentage by which such assessments are expected to increase as a result of such conversion.

C. The section shall state whether the units are restricted solely to residential use and shall identify where use and occupancy restrictions are found in the condominium instruments. If nonresidential use is permitted, the section shall identify the types of units and proportion of each, if known or reasonably anticipated.

D. The section shall state whether the project, as of the effective date of the public offering statement, is intended to comply with the underwriting guidelines of the secondary mortgage market agencies, including but not limited to the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, and the Virginia Housing Development Authority.

**18VAC48-30-220. Narrative section; individual units.**

The public offering statement shall contain a section captioned "Individual Units." The section shall contain a general description of the various types of units being offered to include the square footage, or number of bedrooms, or both, together with the dates on which substantial completion of unfinished units is anticipated. The section shall state any restrictions regarding changes unit owners may make to the structure or exterior of the units, regardless of whether the exterior is a portion of the common elements.

**18VAC48-30-230. Narrative sections; common elements.**

A. The public offering statement shall contain a section captioned "Common Elements." The section shall contain a general description of the common elements.

B. For any common elements that are not completed or not expected to be substantially complete when the units are complete, a statement of the anticipated completion dates of unfinished common elements shall be included.

C. In the case of a condominum located in Virginia, if common elements are not expected to be substantially complete when the units are completed, the section shall state the nature, source, and extent of the obligation to complete such common elements that the declarant has incurred or intends to incur upon recordation of the condominium instruments pursuant to §§ 55-79.58 A and 55-79.67 (a1) of the Code of Virginia and applicable provisions of the condominium instruments. In addition the section shall state that pursuant to § 55-79.58:1 of the Code of Virginia, the declarant has filed with the board a bond to insure completion of improvements to the common elements that the declarant is obligated as stated in the declaration.

D. In the case of a condominium located outside of Virginia, a description of the nature, source, and extent of the obligation to complete such common elements that the declarant has incurred or intends to incur under the law of the jurisdiction in which the condominium is located shall be included.

E. The section shall describe any limited common elements that are assigned or that may be assigned and shall indicate the reservation of exclusive use. In the case of limited common elements that may be assigned, the section shall state the manner of such assignment or reassignment.

F. The section shall indicate the availability of vehicular parking spaces including the number of spaces available per unit and restrictions on or charges for the use of spaces.

**18VAC48-30-240. Narrative sections; maintenance, repair, and replacement responsibilities.**

The public offering statement shall contain a section captioned "Maintenance, Repair, and Replacement Responsibilities." The section shall describe the basic allocation of maintenance, repair, and replacement responsibilities between the unit owner and the association as well as any unusual items to be maintained by the unit owner. The section shall refer to the location of the maintenance, repair, and replacement responsibility requirements in the condominium instruments.

**18VAC48-30-250. Narrative sections; declarant.**

A. The public offering statement shall contain a section captioned "The Declarant." The section shall contain a brief history of the declarant with emphasis on its experience in condominium development.

B. The following information shall be stated with regard to persons immediately responsible for the development of the condominium: (i) name, (ii) length of time associated with the declarant, (iii) role in the development of the condominium, and (iv) experience in real estate development. If different from the persons immediately responsible for the development of the condominium, the principal officers of the declarant shall also be identified.

C. The section shall describe the type of legal entity of the declarant and explain if any other entities have any obligation to satisfy the financial obligations of the declarant.

D. If the declarant or its parent or predecessor organization has, during the preceding 10 years, been adjudicated a bankrupt or has undergone any proceeding for the relief of debtors, such fact or facts shall be stated. If any of the persons identified pursuant to subsection B of this section has, during the preceding three years, been adjudicated a bankrupt or undergone any proceeding for the relief of debtors, such fact or facts shall be stated.

E. The section shall indicate any final action taken against the declarant, its principals, or the condominium by an administrative agency, civil court, or criminal court where the action reflected adversely upon the performance of the declarant as a developer of real estate projects. The section shall also indicate any current or past proceedings brought against the declarant by any condominium unit owners' association or by its executive organ or any managing agent on behalf of such association or that has been certified as a class action on behalf of some or all of the unit owners. For the purposes of the previous sentence with respect to past proceedings, if the ultimate disposition of those proceedings was one that reflected adversely upon the performance of the declarant, that disposition shall be disclosed. If the ultimate disposition was resolved favorably towards the declarant, its principals, or the condominium, the final action does not need to be disclosed. The board has the sole discretion to require additional disclosure of any proceedings where it finds such disclosure necessary to assure full and fair disclosure.

**18VAC48-30-260. Narrative sections; terms of the offering.**

A. The public offering statement shall contain a section captioned "Terms of the Offering." The section shall discuss the expenses to be borne by a purchaser in acquiring a condominium unit and present information regarding the settlement of purchase contracts as provided in subsections B through H of this section.

B. The section shall indicate the offering prices for condominium units or a price range for condominium units, if either is established.

C. The section shall set forth the significant terms of any financing offered by or through the declarant to purchasers. Such discussion shall include the substance of the following statement:

"Financing is subject to additional terms and conditions stated in the loan commitment or instruments."

D. The section shall discuss in detail any costs collected by or paid to the declarant, association, or master association that are not normal for residential real estate transactions including, without limitation, any contribution to the initial or working capital of the unit owners' association, including any master association, to be paid by a purchaser.

E. The section shall discuss any penalties or forfeitures to be incurred by a purchaser upon default in performance of a purchase contract that are not normal for residential real estate transactions. Penalties or forfeitures to be discussed include, without limitation, the declarant's right to retain sums deposited in connection with a purchase contract in the event of a refusal by a lending institution to provide financing to a purchaser who has made proper application for same.

F. The section shall discuss the right of the declarant to cancel a purchase contract upon failure of the declarant to obtain purchase contracts on a given number or percentage of condominium units being offered or upon failure of the declarant to meet other conditions precedent to obtaining necessary financing.

G. The section shall discuss the process for cancellation of a purchase contract by a purchaser in accordance with subdivision 2 of § 55-79.88 of the Code of Virginia. The section shall include a statement as to whether deposits will be held in an escrow fund or if a bond or letter of credit will be filed with the board in lieu of escrowing deposits, all in accordance with § 55-79.95 of the Code of Virginia.

H. The section shall set forth any restrictions in the purchase contract that limit the unit owner's right to bring legal action against the declarant or the association. The section shall set forth the paragraph or section and page number of the purchase contract where such provision is located. Nothing in this statement shall be deemed to authorize such limits where those limits are otherwise prohibited by law.

**18VAC48-30-270. Narrative sections; encumbrances.**

A. The public offering statement shall contain a section captioned "Encumbrances" that shall include the significant terms of any encumbrances, easements, liens, and matters of title affecting the condominium other than those contained in the condominium instruments and disclosed elsewhere in the public offering statement, as provided in subsections B through J of this section.

B. Except to the extent that such encumbrances are required to be satisfied or released by subsection A of § 55-79.46 of the Code of Virginia, or a similar law, the section shall describe every mortgage, deed of trust, other perfected lien, or choate mechanics or materialmen's lien affecting all or any portion of the condominium other than those placed on condominium units by their purchasers or owners. Such description shall (i) identify the lender secured or the lienholder, (ii) state the nature and original amount of the obligation secured, (iii) identify the party having primary responsibility for performance of the obligation secured, and (iv) indicate the practical effect upon unit owners of failure of the party to perform the obligation.

C. Normal easements for utilities, municipal rights-of-way, and emergency access shall be described only as such, without reference to ownership, location, or other details.

D. Easements reserved to the declarant to facilitate conversion, expansion, or sales shall be briefly described.

E. Easements reserved to the declarant or to the unit owners' association or to either entity's representatives or agents for access to units shall be briefly described. In the event that access to a unit may be had without notice to the unit owner, such fact shall be stated.

F. Easements across the condominium reserved to the owners or occupants of land located in the vicinity of the condominium, or across adjacent land benefitting the condominium including, without limitation, easements for the use of recreational areas shall be briefly described.

G. Covenants, servitudes, or other devices that create an actual restriction on the right of any unit owner to use and enjoy the unit or any portion of the common elements other than limited common elements shall be briefly described.

H. Any matter of title that is not otherwise required to be disclosed by the provisions of this section and that has or may have a substantial adverse impact upon unit owners' interests in the condominium shall be described. Under normal circumstances, normal and customary utility easements, easements for encroachments, and easements running in favor of unit owners for ingress and egress across the common elements shall be deemed not to have a substantial adverse impact upon unit owners' interest in the condominium.

I. The section need not include any information required to be disclosed by 18VAC48-30-210 C, 18VAC48-30-220, or 18VAC48-30-280.

J. In addition to the description of easements required in this section, pertinent easements that can be located shall be shown on the condominium plats and plans.

**18VAC48-30-280. Narrative sections; restrictions on transfer.**

The public offering statement shall include a section captioned "Restrictions on Transfer." The section shall describe and explain any rights of first refusal, preemptive rights, limitations on leasing, or other restraints on free alienability created by the condominium instruments or the rules and regulations of the unit owners' association that affect the unit owners' right to resell, lease, or otherwise transfer an interest in the condominium unit.

**18VAC48-30-290. Narrative sections; unit owners' association.**

A. The public offering statement shall contain a section captioned "Unit Owners' Association." The section shall discuss the manner in which the condominium is governed and administered and shall include the information required by subsections B through K of this section.

B. The section shall summarize the functions of the unit owners' association.

C. The section shall describe the organizational structure of the unit owners' association. Such description shall indicate (i) the existence of or provision for an executive organ, officers, and managing agent, if any; (ii) the relationships between such persons or bodies; (iii) the manner of election or appointment of such persons or bodies; and (iv) the assignment or delegation of responsibility for the performance of the functions of the unit owners' association.

D. The section shall describe the method of allocating votes among the unit owners.

E. The section shall describe any retention by the declarant of control over the unit owners' association, including the time period of declarant control. The section shall state that the association shall register with the Common Interest Community Board upon transition of declarant control by filing the required annual report in accordance with § 55-79.93:1 of the Code of Virginia.

F. The managing agent, if any, shall be identified. If a managing agent is to be employed in the future, the criteria, if any, for selection of the managing agent shall be briefly stated. The section shall indicate any relationship between the managing agent and the declarant or a member of the executive organ or an officer of the unit owners' association. The duration of any management agreement shall be stated.

G. Except to the extent otherwise disclosed in connection with discussion of a management agreement, the significant terms of any lease of recreational areas or similar contract or agreement affecting the use, maintenance, or access of all or any part of the condominium shall be stated. The section shall include a brief narrative statement of the effect of each such agreement upon a purchaser.

H. Rules and regulations of the unit owners' association and the authority to promulgate rules and regulations shall be discussed. Particular provisions of the rules and regulations need not be discussed except as required by other provisions of this chapter. The purchaser's attention shall be directed to the copy of rules and regulations, if any, attached to the public offering statement.

I. Any standing committees established or to be established to perform functions of the unit owners' association shall be discussed. Such committees include, without limitation, architectural control committees and committees having the authority to interpret condominium instruments, rules, and regulations or other operative provisions.

J. Unless required to be disclosed by 18VAC48-30-270 E, any power of the declarant or of the unit owners' association or its representatives or agents to enter units shall be discussed. To the extent each is applicable, the following facts shall be stated (i) a unit may be entered without notice to the unit owner, (ii) the declarant or the unit owners' association or its representatives or agents are empowered to take actions or perform work in a unit without the consent of the unit owner, and (iii) the unit owner may be required to bear the costs of actions so taken or work so performed.

K. The section shall state whether the condominium is part of a master or other association and briefly describe such relationship and the responsibilities of and obligations to the master association, including any charges for which the unit owner or the unit owners' association may be responsible. The disclosures required by this subsection may be contained in this narrative section or another narrative section. The section shall also describe any other obligation of the association or unit owners arising out of any agreements, easements, deed restrictions, or proffers, including the obligation to pay fees or other charges.

**18VAC48-30-300. Narrative sections; display of flag.**

The public offering statement shall include a section captioned "Display of Flag." This section shall describe any restrictions, limitations, or prohibitions on the right of a unit owner to display the flag of the United States in accordance with § 55-79.75:2 of the Code of Virginia.

**18VAC48-30-310. Narrative sections; surrounding area.**

The public offering statement shall contain a section captioned "Surrounding Area." The section shall briefly describe the zoning of the immediate neighborhood of the condominium and the current uses.

**18VAC48-30-320. Narrative sections; financial matters.**

A. The public offering statement shall contain a section captioned "Financial Matters." The section shall discuss the expenses incident to the ownership of a condominium unit, excluding certain taxes, in the manner provided in subsections B through I of this section.

B. The section shall distinguish, in general terms, the following categories of costs of operation, maintenance,

repair, and replacement of various portions of the condominium: (i) common expenses apportioned among and assessed to all of the condominium units pursuant to subsection C of § 55-79.83 of the Code of Virginia or similar law or condominium instrument provision; (ii) common expenses, if any, apportioned among and assessed to less than all of the condominium units pursuant to subsections A and B of § 55-79.83 of the Code of Virginia or similar law or condominium instrument provisions; and (iii) costs borne directly by individual unit owners. The section need not discuss taxes assessed against individual condominium units and payable directly by the unit owners.

C. A budget shall show projected common expenses for the first year of the condominium's operation or, if different, the latest year for which a budget is available. The projected budget shall be attached to the public offering statement as an exhibit and the section shall direct the purchaser's attention to such exhibit. The section shall describe the manner in which the projected budget is established. If the condominium is phased, the budget shall project future years until all phases are projected to be developed and all common elements that must be built have been completed. The budget shall include an initial working capital budget showing sources and uses of initial working capital and a reserve table showing amounts to be collected to fund those reserves. The budget shall show regular individual assessments by unit type. The budget shall note that the figures are not guaranteed and may vary.

D. The section shall describe the manner in which regular common expenses are apportioned among and assessed to the condominium units. The section shall include the substance of the following statement, if applicable:

"A unit owner cannot obtain a reduction of the regular common expenses assessed against the unit by refraining from use of any of the common elements."

E. The section shall describe budget provisions for reserves for capital expenditures in accordance with § 55-79.83:1 of the Code of Virginia and for contingencies, if any. If there are no reserves, the section shall so state.

F. The section shall describe provisions for additional assessments to be levied in accordance with subsection E of § 55-79.83 of the Code of Virginia in the event that budgeted assessments provide insufficient funds for operation of the unit owners' association. The section shall also describe the provisions for an assessment against an individual unit owner.

G. The section shall discuss any common expenses actually planned to be specially assessed pursuant to subsections A and B of § 55-79.83 of the Code of Virginia or similar law or condominium instrument provisions.

H. The section shall indicate any fee, rent, or other charge to be payable by unit owners other than through common expense assessments to any party for use of the common elements or for use of recreational or parking facilities in the vicinity of the condominium. As an exception to the provisions of this subsection, the section need not discuss any fees provided for in subsection H of § 55-79.84 and § 55-79.85 of the Code of Virginia, or similar laws or condominium instrument provisions or any costs for certificates for resale.

I. The section shall discuss the effect of failure of a unit owner to pay the assessments levied against the condominium unit. Such discussion shall indicate provisions for charges or other remedies that may be imposed to be applied in the case of overdue assessments and for acceleration of unpaid assessments. The section shall indicate the existence of a lien for unpaid assessments and where applicable the bond or letter of credit conditioned on the payment of assessments filed with the board in accordance with § 55-79.84:1 of the Code of Virginia. The section shall include, to the extent applicable, the substance of the following statement:

"The unit owners' association may obtain payment of overdue assessments by bringing legal action against the unit owner or by foreclosure of the lien resulting in a forced sale of the condominium unit."

**18VAC48-30-330. Narrative sections; insurance.**

A. The public offering statement shall contain a section captioned "Insurance." The section shall describe generally the insurance on the condominium to be maintained by the unit owners' association. The section shall state, with respect to such insurance, each of the following circumstances, to the extent applicable: (i) property damage coverage will not insure personal property belonging to unit owners; (ii) property damage coverage will not insure improvements to a unit that increase its value beyond the limits of coverage provided in the unit owners' association's policy, and (iii) liability coverage will not insure against liability arising from an accident or injury occurring within a unit or as a result of the act or negligence of a unit owner. The section shall include a statement whether the unit owner is obligated to obtain coverage for any or all of the coverages described. The section shall also include a statement that the unit owner should consult with an insurance professional to determine the appropriate coverage.

B. The section shall indicate any conditions imposed by the condominium instruments or the rules and regulations to which insurance obtained directly by unit owners will be subject. Such indication may be made by reference to pertinent provisions of the condominium instruments or the rules and regulations.

C. The section shall explain that the association is the only party that can make a claim under the master policy and is the sole decision-maker as to whether to make a claim, including a statement as to the circumstances under which a unit owner could be responsible for payment of the deductible.

D. The section shall state that the unit owners' association is required to obtain and maintain a blanket fidelity bond or employee dishonesty insurance policy in accordance with subsection B of § 55-79.81 of the Code of Virginia.

**18VAC48-30-340. Narrative sections; taxes.**

A. The public offering statement shall contain a section captioned "Taxes." The section shall describe all existing or proposed taxes to be levied against condominium units individually including, without limitation, real property taxes, sewer connection charges, and other special assessments.

B. With respect to real property taxes, the section shall state the current tax rate or provide information for obtaining the current tax rate. The section shall also state a procedure or formula by means of which the taxes may be estimated.

C. With respect to other taxes, the section shall describe each tax in sufficient detail as to indicate the time at which the tax will be levied and the actual or estimated amount to be levied, or a procedure or formula by means of which the taxes may be estimated.

**18VAC48-30-350. Narrative sections; governmental reviews.**

The public offering statement shall contain a section captioned "Governmental Reviews." The section shall discuss governmental reviews applicable to the condominium property and the status of any governmental approvals required for the development of the condominium. In addition, the section shall discuss approval of the zoning application and site plan and issuance of building permits by appropriate governmental authorities. The section shall state the current zoning classification for the condominium property. The section shall also include a statement regarding any zoning, subdivision, or land use obligations or proffers that would be imposed on the unit owner or the association, but need not disclose any zoning, subdivision, or land use obligations or proffers that do not impose any obligation on the association.

**18VAC48-30-360. Narrative sections; warranties.**

The public offering statement shall contain a section captioned "Warranties." The section shall describe any warranties provided by or through the declarant on the units or the common elements and a summary of the process for commencement of an action for breach of warranty in accordance with subsection C of § 55-79.79 of the Code of Virginia. The section shall describe the structural defect warranty required by and described in subsection B of § 55-79.79 of the Code of Virginia. The section shall also include the substance of the following statement:

"Nothing contained in the warranty provided by the declarant shall limit the protection afforded by the statutory warranty."

**18VAC48-30-370. Documents from other jurisdictions.**

A. A substituted public offering statement shall only be permitted for a condominium located outside of Virginia.

B. The substituted public offering statement shall be prepared by deleting from the original disclosure document (i) references to any governmental agency of another jurisdiction to which application has been made or will be made for registration or related action; (ii) references to the action of such governmental agency relative to the condominium; (iii) statements of the legal effect in another jurisdiction of delivery, failure to deliver, acknowledgement of receipt, or related events involving the disclosure document; (iv) the effective date or dates in another jurisdiction of the disclosure document; and (v) all other information that is untrue, inaccurate, or misleading with respect to marketing, offers, or disposition of condominium units in Virginia.

C. The substituted public offering statement shall incorporate all information not otherwise included that is necessary to effect fully and accurately the disclosures required by subsection A of § 55-79.90 of the Code of Virginia and, if applicable, subsection A of § 55-79.94 of the Code of Virginia. The substituted disclosure document shall clearly explain any nomenclature that is different from the definitions provided in § 55-79.41 of the Code of Virginia.

D. The substituted public offering statement shall include as the first item of the summary of important considerations a statement that includes the following information: (i) the designation by which the original disclosure document is identified in the original jurisdiction, (ii) the governmental agency of such other jurisdiction where the original disclosure document is or will be filed, and (iii) the jurisdiction of such filing.

E. The provisions of subdivision 2 of § 55-79.88, § 55-79.90, and subsection A of § 55-79.94 of the Code of Virginia and 18VAC48-30-160, 18VAC48-30-170, and 18VAC48-30-180 shall apply to substituted public offering statements in the same manner and to the same extent that they apply to public offering statements.

**18VAC48-30-380. Condominium securities.**

A prospectus filed in compliance with the securities laws of a state or federal agency used in lieu of a public offering statement shall contain or have attached thereto copies of documents, other than the projected budget required to be attached to a public offering statement by subsection E of 18VAC48-30-180. Such prospectus shall be deemed to satisfy all of the disclosure requirements of subsections C and D of 18VAC48-30-180 and 18VAC48-30-190 through 18VAC48-30-360. In the case of a conversion condominium, the prospectus shall have attached thereto, in suitable form, the information required by 18VAC48-30-420, subsections C and D of 18VAC48-30-430, and 18VAC48-30-440 to be disclosed in public offering statements for conversion condominiums. The provisions of subdivision 2 of § 55-79.88 of the Code of Virginia shall apply to the delivery of the prospectus in the same manner and to the same extent that they apply to the delivery of a public offering statement.

**18VAC48-30-390. Board oversight of public offering statement.**

The board at any time may require a declarant to alter or amend the public offering statement to assure full and fair

disclosure to prospective purchasers and to ensure compliance with the Condominium Act and this chapter.

In accordance with subsection B of § 55-79.90 of the Code of Virginia, the board does not approve or recommend the condominium or disposition thereof. The board's issuance of an effective date for a public offering statement shall not be construed to (i) constitute approval of the condominium, (ii) represent that the board asserts that either all facts or material changes or both concerning the condominium have been fully or adequately disclosed, or (iii) indicate that the board has made judgment on the value or merits of the condominium.

Part V
Conversion Condominiums

**18VAC48-30-400. Public offering statement for conversion condominium; general instructions.**

The public offering statement for a conversion condominium shall conform in all respects to the requirements of 18VAC48-30-160 through 18VAC48-30-380. In addition, the public offering statement for a conversion condominium shall (i) contain special disclosures in the narrative sections captioned "Description of the Condominium," "Terms of the Offering," and "Financial Matters"; and (ii) incorporate narrative sections captioned "Present Condition of the Condominium" and "Replacement Requirements." Provisions for such additional disclosure are set forth in 18VAC48-30-410 through 18VAC48-30-440.

**18VAC48-30-410. Description of conversion condominium.**

In addition to the information required by 18VAC48-30-210, the section captioned "Description of the Condominium" shall indicate that the condominium is a conversion condominium. The term conversion condominium shall be defined and the particular circumstances that bring the condominium within the definition shall be stated. The nature and inception date of prior occupancy of the property being converted shall be stated.

**18VAC48-30-420. Financial matters, conversion condominium.**

A. The provisions for capital reserves described in the section captioned "Financial Matters" shall conform with 18VAC48-30-320 and shall be supplemented by the information set forth in subsections B and C of this section.

B. The section shall state the aggregate replacement cost of all physical assets whose replacement costs will constitute regular common expenses and whose expected useful lives are 10 years or less. For the purposes of this subsection, an expected useful life that is stated as being within a range of years pursuant to subsection E of 18VAC48-30-440 shall be deemed to be 10 years or less, if the lower limit of such range is 10 years or less. The total common expense assessments per unit that would be necessary in order to accumulate an amount of capital reserves equal to such aggregate replacement cost shall be stated.

C. The section shall state the amount of capital reserves that will be accumulated by the unit owners' association during the period of declarant control together with any provisions of the condominium instruments specifying the rate at which reserves are to be accumulated thereafter. If any part of the capital reserves will or may be obtained other than through regular common expense and limited common expense assessments, such fact shall be stated.

D. The actual expenditures made over a three-year period on operation, maintenance, repair, or other upkeep of the property prior to its conversion to condominium shall be set forth in tabular form as an exhibit immediately preceding or following the budget attached to the public offering statement pursuant to subsection C of 18VAC48-30-320, and shall be presented in a manner that is not misleading. Distinction shall be made between expenditures that would have constituted regular common expenses and limited common expenses, and expenditures that would have been borne by unit owners individually if the property had been converted to a condominium prior to the commencement of the three-year period. To the extent that it is impossible or impracticable to so distinguish the expenditures it shall be assumed that they would have constituted regular common expenses or limited common expenses.

Both types of expenditures shall be cumulatively broken down on a per unit basis in the same proportion that common expenses are or will actually be assessed against the condominium units. The three-year period to which this subsection refers shall be the most recent three-year period prior to application for registration during which the property was occupied and for which expenditure information is available. The expenditure information shall indicate the years for which expenditures are stated. If any portion of the property being converted to condominium was not occupied for the full three-year period, expenditure information shall be set forth only for the entire time period that portion of the property was occupied. The "Financial Matters" section shall direct the purchaser's attention to the expenditure information.

**18VAC48-30-430. Present condition of conversion condominium.**

A. The section captioned "Present Condition of the Condominium" shall contain a statement of the approximate dates of original construction or installation of all physical assets in the condominium. A single construction or installation date may be stated for all of the physical assets (i) in the condominium, (ii) within a distinctly identifiable portion of the condominium, or (iii) within a distinctly identifiable category of physical assets. A statement made pursuant to the preceding sentence shall include a separate reference to the construction or installation date of any physical asset within a stated group of physical assets that was constructed or installed significantly earlier than the construction or installation date indicated for the group generally. No statement shall be made that a physical asset or

portion thereof has been repaired, altered, improved, or replaced subsequent to its construction or installation unless the approximate date, nature, and extent of such repair, alteration, improvement, or replacement is also stated.

B. Subject to the exceptions provided in subsections D, E, and F of this section, the section captioned "Present Condition of the Condominium" shall contain a description of the present condition of all physical assets within the condominium. The description of present condition shall disclose all structural defects and incapacities of major utility installations to perform their intended functions as would be observable, detectable, or deducible by means of standard inspection and investigative techniques employed by architects or professional engineers, as the case may be.

C. The section shall indicate the dates of inspection by means of which the described present condition was determined; provided, however, that such inspections shall have been conducted not more than one year prior to the date of filing the application for registration. The section shall identify the party or parties by whom present condition was ascertained and shall indicate the relationship of such party or parties to the declarant.

D. A single statement of the present condition of a class of physical assets shall suffice to disclose the present condition of each physical asset within the class; provided, however, that, unless subsection F of this section applies, such statement shall include a separate reference to the present condition of any physical asset within the class that is significantly different from the present condition indicated for the class generally.

E. The description of present condition may include a statement that all structural components in the condominium or in a distinctly identifiable portion thereof are in sound condition except those for which structural defects are noted.

F. In a case in which there are numerous physical assets within a class of physical assets and inspection of each such physical asset is impracticable, the description of present condition of all the physical assets within the class may be based upon an inspection of a number of them selected at random, provided that the number selected is large enough to yield a reasonably reliable sample and that the total number of physical assets within the class and the number selected are disclosed.

G. The section shall include statements disclosing any environmental issues pertaining to the building and the surrounding area, to include but not be limited to:

1. The presence of any asbestos-containing material following an inspection of each building completed prior to July 1, 1978, as well as whether any response actions have been or will need to be taken as required by § 55-79.94 A 5 of the Code of Virginia;

2. Any known information on lead-based paint and lead-based paint hazards in each building constructed prior to 1978 pursuant to the Residential Lead-Based Paint Hazard Reduction Act of 1992 - Title X; and

3. Any obligations related to the declarant's participation in voluntary or nonvoluntary remediation activities.

**18VAC48-30-440. Replacement requirements in conversion condominium.**

A. Subject to the exceptions provided in subsections B and H of this section, the section captioned "Replacement Requirements" shall state the expected useful lives of all physical assets in the condominium. The section shall state that expected useful lives run from the date of the inspection by means of which the expected useful lives were determined. Such inspection date shall be stated.

B. A single statement of the expected useful life of a class of physical assets shall suffice to disclose the expected useful life of each physical asset within the class; provided, however, that such statement shall include a separate reference to the expected useful life of any physical asset within such class that is significantly shorter than the expected useful life indicated for the class generally.

C. An expected useful life may be qualified. A qualified expected useful life is an expected useful life expressly conditioned upon a given use or level of maintenance or other factor affecting longevity. No use, level of maintenance, or other factor affecting longevity shall be stated as a qualification unless such use, level of maintenance, or factor affecting longevity is normal or reasonably anticipated for the physical asset involved. If appropriate, an expected useful life may be stated as being indefinite, subject to the stated qualification that the physical asset involved must be properly used and maintained. An expected useful life may be stated as being within a range of years, provided that the range is not so broad as to render the statement meaningless. In no event shall the number of years constituting the lower limit of such range be less than two-thirds of the number of years constituting the upper limit.

D. Subject to the exceptions provided in subsections E and H of this section, the section captioned "Replacement Requirements" shall state the replacement costs of all physical assets in the condominium including those whose expected useful lives are stated as being indefinite.

E. A statement of the replacement cost of a representative member of a class of physical assets shall suffice to disclose the replacement cost of each physical asset within the class; provided, however, that such statement shall include a separate reference to the replacement cost of any physical asset within the class that is significantly greater than the replacement cost indicated for the representative member of the class.

F. Distinction shall be made between replacement costs that will be common expenses and replacement costs that will be borne by unit owners individually. The latter type of replacement costs shall be broken down on a per unit basis.

The purchaser's attention shall be directed to the "Financial Matters" section for an indication of the amount of the former type of replacement costs.

G. In any case in which the replacement cost of a physical asset may vary depending upon the circumstances surrounding its replacement, the stated replacement cost shall reflect the circumstances under which replacement will most probably be undertaken.

H. A single expected useful life and an aggregate replacement cost may be stated for all of the structural components of a building or structure that have both (i) the same expected useful lives and (ii) replacement costs that will constitute regular common expenses. A statement made pursuant to the preceding sentence shall be accompanied by statements of the expected useful lives and replacement costs, stated on a per unit basis, of all of the structural components of the building or structure whose expected useful lives differ from the general expected useful life or whose replacement costs will be borne by unit owners individually.

**18VAC48-30-450. Notice to tenants.**

No notice to terminate tenancy of a unit provided for by subsection B of § 55-79.94 of the Code of Virginia shall be given prior to the registration of the condominium including such unit as to which the tenancy is to be terminated.

Part VI
Post-Registration Provisions

**18VAC48-30-460. Minimum post-registration reporting requirements.**

A. Subsequent to the issuance of a registration for a condominium by the board, the declarant of a condominium shall:

1. File an annual report in accordance with § 55-79.93 of the Code of Virginia and this chapter.

2. File a copy of the formal notice to the tenants of a conversion condominium upon delivery or no later than 15 days after delivery to such tenants in accordance with subsection B of § 55-79.94.

3. Upon the occurrence of a material or nonmaterial change, file an amended public offering statement or substituted public offering statement in accordance with the provisions of 18VAC48-30-480 or 18VAC48-30-490, as applicable.

4. Notify the board of a change in the bond or letter of credit, as applicable, required by §§ 55-79.58:1, 55-79.84:1, and 55-79.95 of the Code of Virginia.

5. File a complete application for registration of unregistered additional units upon the expansion of the condominium or the formation of units out of additional land. Notwithstanding the preceding, nonresidential units created out of convertible space need not be registered. Documents on file with the board and not changed with the creation of additional units need not be refiled provided that the application indicates that such documents are unchanged.

6. Notify the board of transition of control of the unit owners' association.

7. Notify the board upon the transfer of special declarant rights to a successor declarant.

8. Submit appropriate documentation to the board once the registration is eligible for termination.

9. Submit to the board any other document or information that may include information or documents that have been amended or may not have existed previously that affects the accuracy, completeness, or representation of any information or document filed with the application for registration.

10. Submit to the board any document or information to make the registration file accurate and complete.

B. Notwithstanding the requirements of subsection A of this section, the board at any time may require a declarant to provide information or documents, or amendments thereof, to assure full and fair disclosure to prospective purchasers and to ensure compliance with the Condominium Act and this chapter.

**18VAC48-30-470. Amendment of public offering statement.**

Any amendment of the public offering statement or substituted public offering statement shall comply with this chapter.

**18VAC48-30-480. Nonmaterial changes to the public offering statement.**

A. Changes to the public offering statement that are not material shall be filed with the board but shall not be deemed an amendment of the public offering statement for the purposes of this chapter and shall not give rise to a renewed right of recission in any purchase. Nonmaterial changes to the public offering statement include, but may not be limited to, the following:

1. Correction of spelling, grammar, omission, or other similar errors not affecting the substance of the public offering statement;

2. Changes in presentation or format;

3. Substitution of an executed, filed, or recorded copy of a document for the otherwise substantially identical unexecuted, unfiled, or unrecorded copy of the document that was previously submitted;

4. Inclusion of updated information such as identification or description of the current officers and directors of the declarant;

5. Disclosure of completion of improvements for improvements that were previously proposed or not complete;

6. Changes in real estate tax assessment or rate or modifications related to those changes;

7. Changes in utility charges or rates or modifications related to those changes;

8. Adoption of a new budget that does not result in a significant change in the common expense assessment or significantly impact the rights or obligations of the prospective purchasers;

9. Modifications related to changes in insurance company or financial institution, policy, or amount for bonds or letters of credit required pursuant to §§ 55-79.58:1, 55-79.84:1, and 55-79.95 of the Code of Virginia;

10. Changes in management agent or common interest community manager; and

11. Any change that is the result of orderly development of the condominium in accordance with the condominium instruments as described in the public offering statement.

B. Nonmaterial changes to the public offering statement shall be submitted with the effective date of the changes detailed. All changes shall be clearly represented in the documentation presented. The additions and deletions of text in the public offering statement and exhibits shall be identified by underlining and striking through text to be added and deleted, and any documents being added to or deleted from the contents of the public offering statement shall be clearly and accurately reflected in the table of contents utilizing underlines and strikethroughs for additions and deletions. In addition to the copies showing edits to the text, a clean copy of all new and amended documents shall be provided. In addition, the declarant shall include a statement with the submission of the declarant's plans, if any, to deliver the public offering statement to purchasers pursuant to subdivision 2 of § 55-79.88 of the Code of Virginia.

C. The board has the sole discretion for determining whether a change is nonmaterial. The declarant will be notified in writing within 15 days of receipt by the board if the submitted changes are determined to be material. Should a change be submitted as nonmaterial but determined to be a material change during review, the requirements contained in 18VAC48-30-470 and 18VAC48-30-490 shall be applicable.

**18VAC48-30-490. Filing of amended public offering statement.**

A. The declarant shall promptly file with the board for review a copy of the amended public offering statement or substituted public offering statement together with a copy of a summary of proposed amendments that shall be distributed to purchasers during the board review period. The summary of proposed amendments shall enumerate the amendments to the public offering statement submitted for board review and include a statement that the amendments to the public offering statement have been filed with the board but have not yet been accepted. The form of the submission is at the discretion of the declarant provided, however, that (i) all amendments are clearly represented in the documentation presented, (ii) the additions and deletions of text in the public offering statement and exhibits shall be identified by underlining and striking through text to be added and deleted, and (iii) any documents being added to or deleted from the contents of the public offering statement shall be clearly and accurately reflected in the table of contents utilizing underlines and strike-throughs for additions and deletions. In addition to the copies showing edits to the text, a clean copy of all new and amended documents shall be provided.

B. The amended public offering statement submitted to the board for review shall include the effective date of the amendments.

C. The board shall issue a notice of filing within five business days following receipt of the amended public offering statement.

D. Within 30 days of the issuance of the notice of filing required by subsection C of this section, the board shall review the amended public offering statement and supporting materials to determine whether the amendment complies with this chapter. If the board's review determines that the amended public offering statement complies with this chapter, it shall notify the declarant in writing and confirm the new effective date of the public offering statement.

E. If the board's review determines that the amended public offering statement does not comply with this chapter, it shall immediately notify the declarant in writing that the review has determined the amended public offering statement is not in compliance and shall specify the particulars of such noncompliance. The declarant shall then have 20 days in which to correct the particulars of noncompliance identified by the board. The declarant may, prior to the completion of the 20-day correction period, request an extension in writing of the 20-day correction period. Upon expiration of the 20-day correction period, if requested corrections have not been made or a request for extension properly received, the board may issue a temporary cease and desist order in accordance with § 55-79.100 (b) of the Code of Virginia to require the cessation of sales until such time as affirmative action as directed by the board is taken. Use of the noncompliant public offering statement may result in further action by the board pursuant to §§ 55-79.100, 55-79.101, and 55-79.103 of the Code of Virginia.

F. Notwithstanding an extension of the 30-day period for review agreed to in writing by the board and declarant, if the board does not perform the required review of the public offering statement in accordance with subsection D of this section, the amendment shall be deemed to comply with 18VAC48-30-160 through 18VAC48-30-380, and the new effective date shall be the effective date of the amendment provided pursuant to subsection B of this section.

G. In each case in which an amended document is filed pursuant to this section and the manner of its amendment is not apparent on the face of the document, the declarant shall

provide an indication of the manner and extent of amendment.

**18VAC48-30-500. Current public offering statement.**

A. Upon issuance of an effective date by the board, any purchasers who received a public offering statement and summary of proposed amendments during the board review period pursuant to subsection A of 18VAC48-30-490 shall be provided with the public offering statement as accepted by the board. A public offering statement remains current until such time as the occurrence of a material change requires amendment of the public offering statement pursuant to this chapter and a new effective date is issued by the board.

B. Upon issuance of an effective date by the board, a public offering statement remains current until such time as a new effective date is established pursuant to this chapter.

C. Notwithstanding the board's authority to issue a cease and desist order pursuant to § 55-79.100 of the Code of Virginia, the filing of an amended public offering statement shall not require the declarant to cease sales provided that the declarant provides to purchasers the summary of proposed amendments pursuant to subsection A of 18VAC48-30-490 pending the issuance of a new effective date by the board.

**18VAC48-30-510. Public offering statement not current; notification of purchasers.**

A. A purchaser who has been delivered a public offering statement that is not current due to a material change and was not provided with the summary of proposed amendments containing the proposed changes to the amended public offering statement pursuant to subsection A of 18VAC48-30-490 pending the issuance of a new effective date by the board shall be notified of such fact by the declarant.

B. A purchaser who has been delivered a public offering statement and summary of proposed amendments pursuant to subsection A of 18VAC48-30-490, but the amended public offering statement is determined to be noncompliant in accordance with subsection E of 18VAC48-30-490 shall be notified of such fact by the declarant.

1. The notification shall indicate that any contract for disposition of a condominium unit may be cancelled by the purchaser pursuant to subdivision 2 of § 55-79.88 of the Code of Virginia.

2. The declarant shall file a copy of the notification with the board and provide proof that such notification has been delivered to all purchasers under contract.

**18VAC48-30-520. Provisions applicable to substituted public offering statement and prospectus.**

A. The provisions of 18VAC48-30-470 through 18VAC48-30-510 shall apply to a substituted public offering statement in the same manner and to the same extent that they apply to public offering statements.

B. The provisions of 18VAC48-30-470 through 18VAC48-30-510 shall apply to a prospectus only to the extent that amendment of the information or documents attached to the prospectus pursuant to 18VAC48-30-380 is required or permitted. The body of the prospectus shall be amended only as provided in applicable securities law. The declarant shall immediately file with the board any amendments to the body of the prospectus and, upon receipt thereof, the board shall notify the declarant in writing and confirm the new effective date for use of the prospectus. A prospectus is current so long as it is effective under applicable securities law and the information and attached documents are current under the provisions of 18VAC48-30-490. The declarant shall immediately notify the board if the prospectus ceases being effective. If no prospectus is effective and the declarant proposes to continue offering condominium units, the declarant shall file a public offering statement with the board pursuant to 18VAC48-30-490.

C. The provisions of 18VAC48-30-510 shall apply to a prospectus in the same manner and to the same extent that they apply to a public offering statement.

D. In an annual report involving a prospectus, the declarant shall comply with all of the provisions of 18VAC48-30-540 applicable to public offering statements and, in addition, shall certify that an effective prospectus is available for delivery to purchasers and shall indicate the declarant's plans or expectations regarding the continuing effectiveness of the prospectus.

**18VAC48-30-530. Filing of phase amendment application.**

A. A phase amendment application shall be filed when adding land to or converting land in the condominium, provided that no such application need be filed for units previously registered. Such phase amendment application shall be accompanied by the fee provided for in 18VAC48-30-100 and shall be subject to all of the provisions of 18VAC48-30-90 through 18VAC48-30-150. Documents on file with the board that have not changed in connection with the additional units need not be refiled, provided that the phase amendment application indicates that such documents are unchanged.

B. The application shall include a new or amended bond or letter of credit required pursuant to § 55-79.84:1 of the Code of Virginia for the additional units.

C. The board shall review the phase amendment application and supporting materials to determine whether the amendment complies with this chapter. If the board's review determines the phase amendment application complies with this chapter, it shall issue an amended order of registration for the condominium and shall provide that any previous orders and designations of the form, content, and effective date of the public offering statement, substituted public offering statement, or prospectus to be used are superseded. If the board's review determines that the phase amendment application is not complete, the board shall correspond with the declarant to specify the particulars that must be completed to obtain compliance with this chapter.

**18VAC48-30-540. Annual report by declarant.**

A. A declarant shall file an annual report to update the material contained in the registration file at least 30 days prior to the anniversary date of the order registering the condominium. Prior to filing the annual report required by § 55-79.93 of the Code of Virginia, the declarant shall review the public offering statement then being delivered to purchasers. If such public offering statement is current, the declarant shall so certify in the annual report. If such public offering statement is not current, the declarant shall amend the public offering statement, and the annual report shall, in that event, include a filing in accordance with 18VAC48-30-490.

B. The annual report shall contain, but may not be limited to, the following:

1. Current contact information for the declarant;

2. Current contact information for the declarant's attorney, if applicable;

3. Date of the public offering statement currently being delivered to purchasers;

4. Date the condominium instruments were recorded and locality wherein recorded;

5. Number of phases registered with the board, if applicable;

6. Number of phases recorded, if applicable;

7. Number of units recorded;

8. Number of units conveyed;

9. Status of completion of all common elements within the condominium;

10. Status of declarant control;

11. Whether the declarant is current in the payment of assessments; and

12. Current evidence from the surety or financial institution of any bond or letters of credit, or submittal of replacement bonds or letters of credit, required pursuant to §§ 55-79.58:1, 55-79.84:1, and 55-79.95 of the Code of Virginia. Such verification shall provide the following:

a. Principal of bond or letter of credit;

b. Beneficiary of bond or letter of credit;

c. Name of the surety or financial institution that issued the bond or letter of credit;

d. Bond or letter of credit number as assigned by the issuer;

e. The dollar amount; and

f. The expiration date or, if self-renewing, the date by which the bond or letter of credit shall be renewed.

**18VAC48-30-550. Board review of annual report.**

A. During review of the annual report, the board may make inquiries or request additional documentation to amplify or clarify the information provided.

B. If the board does not accept the annual report and the annual report filing is not completed within 60 days of a request by the board for additional information, the board may take further action pursuant to § 55-79.100, 55-79.101, or 55-79.103 of the Code of Virginia for failing to file an annual report as required by § 55-79.93 of the Code of Virginia.

C. If the board does not perform the required review of the annual report within 30 days of receipt by the board, the annual report shall be deemed to comply with § 55-79.93 of the Code of Virginia.

**18VAC48-30-560. Transition of control of unit owners' association.**

Upon transition of control of the association to the unit owners following the period of declarant control, the declarant shall, in addition to the requirements contained in subsection G of § 55-79.74 of the Code of Virginia, notify the board in writing of the date of such transition and provide the name and contact information for members of the board of directors of the unit owners' association or the association's common interest community manager.

**18VAC48-30-570. Return of assessment bond or letter of credit to declarant.**

A. The declarant of a condominium required to post a bond or letter of credit pursuant to § 55-79.84:1 of the Code of Virginia shall maintain such bond or letter of credit for all units registered with the board until the declarant owns less than 10% of the units in the condominium and is current in the payment of assessments. For condominiums containing less than 10 units, the bond or letter of credit shall be maintained until the declarant owns only one unit.

B. The declarant shall submit a written request to the board for the return of the bond or letter of credit. The written request shall attest that the declarant (i) owns less than 10% of the units or for condominiums containing less than 10 units, that the declarant owns only one unit and (ii) is current in the payment of assessments. The written request shall provide contact information for the unit owners' association.

C. Upon receipt of the written request from the declarant, the board shall send a request to the unit owners' association to confirm the information supplied by the declarant. The person certifying the information on behalf of the unit owners' association must not be affiliated with the declarant. The managing agent may confirm the information supplied by the declarant.

D. The board shall return the bond or letter of credit to the declarant if (i) the unit owners' association confirms that the declarant is current in the payment of assessments and owns less than 10% of the units in the condominium or (ii) no response is received from the unit owners' association within 90 days. The 90-day time frame in clause (ii) of this subsection may be extended at the discretion of the board.

E. If the unit owners' association attests the declarant is not current in the payment of assessments, the board shall retain the bond or letter of credit until evidence is received satisfactory to the board that the declarant is current in the payment of assessments.

F. The board may ask for additional information from the unit owners' association or the declarant as needed to confirm compliance with § 55-79.84:1 of the Code of Virginia.

**18VAC48-30-580. Return of completion bond or letter of credit to declarant.**

A bond on file with the board pursuant to § 55-79.58:1 of the Code of Virginia may be returned to the declarant upon written request. Such request shall include a copy of the recorded plat or plan showing completion or documentation acceptable to the board that the improvements to the common elements for which the bond was submitted is completed to the extent of the declarant's obligation.

**18VAC48-30-590. Return of bond or letter of credit upon termination of registration.**

Upon issuance of an order of termination of the condominium registration pursuant to 18VAC48-30-610 and if the bond or letter of credit on file with the board has not been returned to the declarant or the declarant's agent previously, it will be considered for return in accordance with 18VAC48-30-570 or 18VAC48-30-580.

**18VAC48-30-600. Maintenance of bond or letter of credit.**

A. The declarant shall report the extension, cancellation, amendment, expiration, termination, or any other change of any bond or letter of credit submitted in accordance with §§ 55-79.58:1, 55-79.84:1, and 55-79.95 of the Code of Virginia within five days of the change.

B. The board at any time may request verification from the declarant of the status of a bond or letter of credit on file with the board. Such verification shall comply with the provisions of subdivision B 12 of 18VAC48-30-540.

C. Failure to report a change in the bond or letter of credit in accordance with this section shall result in further action by the board pursuant to Chapter 4.2 (§ 55-79.39 et seq.) of Title 55 of the Code of Virginia.

**18VAC48-30-610. Termination of condominium registration.**

A. The condominium registration shall be terminated upon receipt of documentation of one of the following:

1. In accordance with § 55-79.93 of the Code of Virginia, an annual report filed pursuant to 18VAC48-30-540 indicates that all units in the condominium have been disposed of and all periods for conversion or expansion have expired.

2. Written notification is received from the declarant attesting that all units have been disposed of and that all periods for conversion or expansion have expired and all common elements have been completed.

3. Written notification is received from the declarant requesting termination pursuant to § 55-79.72:1 of the Code of Virginia. Should the declarant later choose to offer condominium units in a condominium for which the registration has been terminated in accordance with this subsection, prior to offering a condominium unit, the declarant must submit a new application for registration of the condominium, meet all requirements in effect at the time of application, and be issued an order of registration for the condominium by the board.

B. Upon receipt and review of documentation pursuant to subsection A of this section, the board shall issue an order of termination for the condominium registration. The board may request additional information as necessary during the review of the submitted documentation to ensure that the condominium registration is eligible for termination.

C. The board shall send a copy of the order of termination for the condominium registration to the association.

**18VAC48-30-620. Administrative termination of condominium registration.**

In accordance with subsection B of § 55-79.93:2 of the Code of Virginia, the board may administratively terminate the registration of a condominium. Prior to the administrative termination of the registration, the board shall send written notice of its intent to terminate the registration to all known parties associated with the condominium, including, but not limited to, the registered agent, officer or officers of the unit owners' association, declarant's and association's attorneys, and principal or principals of the declarant. Such written notice shall be given to the parties by mail or otherwise if acknowledged by them in writing.

The board shall issue an order of termination for the condominium registration if (i) a response is not received within 30 days after sending the written notice or (ii) the response received does not indicate termination of the registration is inappropriate in accordance with Chapter 4.2 (§ 55-79.39 et seq.) of Title 55 of the Code of Virginia and this chapter.

Nothing contained in this section shall prevent the board from taking further action as allowed by law including issuance of a temporary cease and desist order, issuance of a cease and desist order, revocation of registration, and bringing action in the appropriate circuit court to enjoin the acts or practices and to enforce compliance.

**18VAC48-30-630. Notification of successor declarant and transfer of special declarant rights.**

A. In the event the special declarant rights of a condominium are transferred to a successor in accordance with § 55-79.74:3 of the Code of Virginia, the successor declarant shall notify the board within 30 days. Before units may be offered for sale, the successor declarant shall submit the following to the board:

1. Completed application for the successor declarant;

2. Copy of the recorded document evidencing the transfer;

3. Copies of all condominium instruments that were amended to reflect the successor or transfer of special declarant rights;

4. A public offering statement amended in accordance with this chapter;

5. All bonds or letters of credit required pursuant to §§ 55-79.58:1, 55-79.84:1, and 55-79.95 of the Code of Virginia; and

6. Other documents that may be required to ensure compliance with Chapter 4.2 (§ 55-79.39 et seq.) of Title 55 of the Code of Virginia and this chapter.

B. Documents on file with the board that have not changed in connection with the transfer need not be refiled, provided that the application for successor declarant indicates that such documents are unchanged.

**18VAC48-30-640. Reporting of other changes to the condominium project.**

Any other change made or known by the declarant that may affect the accuracy or completeness of the condominium registration file shall be promptly reported to the board. Such change may include but is not limited to the name of the declarant, name of the condominium project, or any other changes in information submitted in accordance with § 55-79.89 of the Code of Virginia. The board may request additional information as necessary to ensure compliance with Chapter 4.2 (§ 55-79.39 et seq.) of Title 55 of the Code of Virginia and this chapter.

Part VII
Board Authority and Standards of Conduct

**18VAC48-30-650. Grounds for disciplinary action.**

The board may revoke a registration that is not in compliance with, or of a person who has been found to have violated, any provision of the regulations of the board or Chapter 4.2 (§ 55-79.39 et seq.) of Title 55 of the Code of Virginia. Additional action may include issuance of a temporary cease and desist order, issuance of a cease and desist order, revocation of registration, and bringing action in the appropriate circuit court to enjoin the acts or practices and to enforce compliance.

**18VAC48-30-660. Registration of condominium required.**

No declarant or individual or entity acting on behalf of the declarant shall offer a condominium unit prior to the registration of the condominium including such unit.

**18VAC48-30-670. Condominium advertising standards.**

A. No promise, assertion, representation, or statement of fact or opinion in connection with a condominium marketing activity shall be made that is false, inaccurate, or misleading by reason of inclusion of an untrue statement of a material fact or omission of a statement of a material fact relative to the actual or intended characteristics, circumstances, or features of the condominium or a condominium unit.

B. No promise, assertion, representation, or statement of fact or opinion made in connection with a condominium marketing activity shall indicate that an improvement will be built or placed on the condominium unless the improvement is a proposed improvement within the meaning of subsection C of 18VAC48-30-120.

C. No promise, assertion, representation, or statement of fact or opinion made in connection with a condominium marketing activity and relating to a condominium unit not registered shall, by its express terms, induce, solicit, or encourage a prospective purchaser to leave Virginia for the purpose of executing a contract for sale or lease of the condominium unit or performing some other act that would create or purport to create a legal or equitable interest in the condominium unit other than a security interest in or a nonbinding reservation of the condominium unit.

**18VAC48-30-680. Response to inquiry and provision of records.**

A. The declarant must respond within 15 days to a request by the board or any of its agents regarding any complaint filed with the department. The board may extend such time frame upon a showing of extenuating circumstances prohibiting delivery within such 15-day period.

B. Unless otherwise specified by the board, the declarant shall produce to the board or any of its agents within 15 days of the request any document, book, or record concerning any transaction in which the declarant was involved, or for which the declarant is required to maintain records for inspection and copying by the board or its agents. The board may extend such time frame upon a showing of extenuating circumstances prohibiting delivery within such 15-day period.

C. A declarant shall not provide a false, misleading, or incomplete response to the board or any of its agents seeking information in the investigation of a complaint filed with the board.

D. With the exception of the requirements of subsections A and B of this section, a declarant must respond to an inquiry by the board or its agent within 21 days.

**18VAC48-30-690. Prohibited acts.**

The following acts are prohibited and any violation may result in action by the board, including but not limited to issuance of a temporary cease and desist order in accordance with § 55-79.100 (b) of the Code of Virginia:

1. Violating, inducing another to violate, or cooperating with others in violating any of the provisions of any of the regulations of the board, Chapter 23.3 (§ 54.1-2345 et seq.) of Title 54.1 of the Code of Virginia, or Chapter 4.1 (§ 55-79.1 et seq.) or Chapter 4.2 (§ 55-79.39 et seq.) of Title 55 of the Code of Virginia.

2. Obtaining or attempting to obtain a registration by false or fraudulent representation, or maintaining a registration by false or fraudulent representation.

3. Failing to comply with 18VAC48-30-80 in offering literature.

4. Failing to alter or amend the public offering statement as directed in accordance with 18VAC48-30-390 or 18VAC48-30-490.

5. Providing information to purchasers in a manner that willfully and intentionally fails to promote full and fair disclosure.

6. Failing to provide information or documents, or amendments thereof, in accordance with subsection B of 18VAC48-30-460.

7. Failing to comply with the post-registration requirements of 18VAC48-30-470, 18VAC48-30-480, 18VAC48-30-490, 18VAC48-30-520, 18VAC48-30-530, and 18VAC48-30-540.

8. Failing to give notice to a purchaser in accordance with 18VAC48-30-560.

9. Failing to give notice to the board of transition of control of unit owners' association in accordance with 18VAC48-30-560.

10. Failing to transition control of the unit owners' association in accordance with § 55-79.74 of the Code of Virginia.

11. Failing to turn over books and records in accordance with subsection H of § 55-79.74 of the Code of Virginia.

12. Providing false information or misrepresenting an affiliation with an association in seeking return of a bond or letter of credit in accordance with 18VAC48-30-570 or 18VAC48-30-580.

13. Filing false or misleading information in the course of terminating a registration in accordance with 18VAC48-30-610 or 18VAC48-30-620.

14. Failing to comply with 18VAC48-30-630 and 18VAC48-30-640.

15. Failing to comply with the advertising standards contained in 18VAC48-30-670.

NOTICE: The following forms used in administering the regulation were filed by the agency. The forms are not being published; however, online users of this issue of the Virginia Register of Regulations may click on the name of a form with a hyperlink to access it. The forms are also available from the agency contact or may be viewed at the Office of the Registrar of Regulations, General Assembly Building, 2nd Floor, Richmond, Virginia 23219.

FORMS (18VAC48-30)

Condominium Registration Application, A492-0517REG-v1 (eff. 9/13)

Declarant Annual Report - Condominium, A492-0517ANRPT-v1 (eff. 9/13)

VA.R. Doc. No. R12-2805; Filed November 20, 2013, 1:32 p.m.

## BOARD OF NURSING

### Proposed Regulation

Title of Regulation: **18VAC90-20. Regulations Governing the Practice of Nursing (amending 18VAC90-20-10, 18VAC90-20-35, 18VAC90-20-40, 18VAC90-20-70, 18VAC90-20-80, 18VAC90-20-90, 18VAC90-20-100 through 18VAC90-20-170; adding 18VAC90-20-121, 18VAC90-20-122, 18VAC90-20-131, 18VAC90-20-132, 18VAC90-20-133, 18VAC90-20-134, 18VAC90-20-135, 18VAC90-20-136, 18VAC90-20-137, 18VAC90-20-161; repealing 18VAC90-20-50, 18VAC90-20-60, 18VAC90-20-95, 18VAC90-20-96).**

Statutory Authority: §§ 54.1-2400 and 54.1-3005 of the Code of Virginia.

Public Hearing Information:

January 28, 2014 - 10:30 a.m. - Department of Health Professions, Perimeter Center, 9960 Mayland Drive, Suite 201, Richmond, VA 23233

Public Comment Deadline: February 14, 2014.

Agency Contact: Jay P. Douglas, R.N., Executive Director, Board of Nursing, 9960 Mayland Drive, Suite 300, Richmond, VA 23233-1463, telephone (804) 367-4515, FAX (804) 527-4455, or email jay.douglas@dhp.virginia.gov.

Basis: Regulations are promulgated under the general authority of Chapter 24 (§ 54.1-2400 et seq.) of Title 54.1 of the Code of Virginia. Section 54.1-2400 provides the Board of Nursing the authority to promulgate regulations to administer the regulatory system, and § 54.1-3005 of the Code of Virginia specifies the powers and duties of the board, which include: (i) prescribing minimum standards and approving curricula for educational programs preparing persons for licensure or certification under this chapter; (ii) approving programs that meet the requirements of this chapter and of the board; (iii) providing consultation service for educational programs as requested; (iv) providing for periodic surveys of educational programs; (v) denying or withdrawing approval from educational programs for failure to meet prescribed standards; and (vi) approving programs that entitle professional nurses to be registered as clinical nurse specialists and to prescribe minimum standards for such programs.

Purpose: The Board of Nursing has identified several problems with the quality and effectiveness of some nursing education programs and applications for approval of such programs. The intent of the proposed regulatory action is to address problems and inadequacies that exist in some programs by requiring more accountability in reporting on clinical sites for training, in the enrollment and progression of students through the program, in oversight of programs through required site visits and surveys, and in the quality of the curriculum. By specifying certain outcome measures, the board will be better assured that programs will graduate a

minimally competent entry-level nurse who practices with skill and integrity.

There is a problem in Virginia with the quality of some nursing education programs. Virginia ranks below the national average in nursing students passing the National Council Licensure Examination (NCLEX), especially graduates of the practical nursing programs. The national passage rate for practical nursing programs in 2010 was 87.06%; in Virginia the average was 77.55%. Neighboring states far exceed Virginia in the passage of NCLEX for practical nurses: North Carolina was 95.50%, Maryland was 91.58%, Kentucky was 93.03%, Tennessee was 94.14%, and West Virginia was 88.82%. The low NCLEX pass rates negatively impact any attempt to increase the nursing workforce and leave students with loans to pay back and no ability to practice.

In the 2010 report of NCLEX passage (from 1/1/10 to 12/31/10), 24 of the 77 practical nursing programs in Virginia fell below the 80% benchmark set by the board in current regulations; another 14 fell below the national average for passage of the licensing examination. Of the 24 programs that fell below 80% passage, 10 are proprietary (for-profit) schools. Applications for new programs are primarily from for-profit entities from areas of Virginia near bordering states. As a result, a majority of these students reside outside of Virginia. Maryland does not approve proprietary nursing education programs; North Carolina has approved one proprietary program.

These indicators and the increase in the number of proceedings for noncompliance with Board of Nursing regulations by nursing education programs are evidence that the Board of Nursing needs to revise its regulations to add specificity and rigor to its requirements and approval process. By assuring more accountability in the academic and clinical programs, the board intends to address the issues of inadequacy in clinical sites and experiences, problems with the majority of clinical sites located outside Virginia, lack of integrity in the information provided on an application, transfer of unsuccessful students from one program to another, high failure rates in examinations, and exploitation of students for profit. By addressing these issues and strengthening regulations for program approval, the board intends to assist nursing education programs in graduating nurses who will be successful on the NCLEX and able to practice with clinical skills and nursing knowledge adequate to protect the health and safety of patients in Virginia.

Substance: In order to set more specific standards to address some of the issues and problems the board has encountered in recent years, the following amendments are proposed:

1. Prohibit acceptance of transfer students until a program has attained full approval to prevent a program from building a new class by accepting failing or problem students from other programs.

2. Require more specificity about the clinical training sites in the application to ensure oversight and adequacy, including a percentage of the clinical experience that must be completed in a facility licensed in Virginia and more specificity about the number of students and amount of time the facility allows for training.

3. Require disclosure of actions or adverse decisions against a program in another jurisdiction and add adverse action in another jurisdiction as grounds for denial of approval.

4. Add a 12-month limitation of the length of the application process to ensure currency in the information initially provided with an expectation that the program admit students within that time frame.

5. Require an analysis that describes the geographic area and population the program intends to serve, the number of nursing programs currently in the area, the number of clinical sites available for training, and the potential impact on existing schools of nursing in order to demonstrate a need for a new nursing program.

6. Clarify that advertisement of a program or enrollment of students is not acceptable until full approval is given; such advertisement could be grounds for denial.

7. Clarify that the board has the authority to monitor and take action at any stage in the approval process for a program that is not showing progress toward meeting the requirements for approval.

8. Specify that the approval by an "appropriate state agency" is approval from the Virginia Department of Education or from the State Council of Higher Education in Virginia.

9. Rather than submission of the philosophy and objectives, add specific requirements and detail about the development of a written, systematic plan of evaluation that will be used by the program for program review and be available to the board to review program progress.

10. Add provisions (definition and ratio) on simulation for clinical training currently contained in a guidance document.

11. Specify that the information about the nursing education program must be published and provided to applicants and students and must include a grievance policy, accreditation status, and a record of complaints and their resolution.

12. Specify that the curriculum content is applicable to all programs, regardless of the method of delivery (online or in person) and include definition and language about "direct client care" from the guidance document.

13. Add prevention and response to disaster planning and intimate partner violence to the curriculum.

14. Clarify that the board must be notified about a change in location for an educational program or about the

addition of another location, and make arrangements for a site visit to be conducted by board staff and approval granted by the board before classes can be conducted at the new location. The board must also be notified if there are other changes that may significantly impact the program's approval status.

15. Examine frequency of survey visits for approved programs to ensure that certain requirements of Virginia regulations are examined consistently for all programs.

Specify that the requirements for closing of a nursing education program are applicable at any stage of the process and that failure to comply with such requirements may be grounds for withdrawal of approval.

Issues: The most significant benefit of the proposed amendments is to the patients or nursing clients in Virginia who are dependent on quality nursing care. Better oversight and quality control in nursing education programs, especially in the clinical experiences, may result in better trained graduates who have sufficient knowledge and skills to pass the national licensing exam and then to be employed in the provision of safe, effective nursing care. There are definitely advantages to students and potential students, who will not experience poor quality, inadequate education that does not prepare them for licensure or practice. Many of these students are saddled with significant debt and no means by which to be employed and practice in the profession.

There are also advantages to entities or persons who want to initiate a program or to improve the quality of an existing program. Clearer standards and processes will provide a better road map to board approval. Programs will be required to engage in a systematic valuation that guides them to address their weaknesses and provides clearer standards by which to measure progress.

There are no disadvantages to the public or to programs that intend to adequately prepare nurses. The board works diligently with such programs on addressing any deficiencies and on plans of correction.

The primary advantage to the board (the agency) and the Commonwealth is that clearer, more explicit requirements may result in fewer problematic programs that necessitate the expenditure of a great amount of time and resources. Persons or entities that consider opening a nursing education program will have a clearer set of regulations to follow and will be more knowledgeable about board expectations before they engage in the process of seeking approval. There are no disadvantages.

Department of Planning and Budget's Economic Impact Analysis:

Summary of the Proposed Amendments to Regulation. The Board of Nursing (Board) proposes to reorganize and amend the portions of its regulations that govern approval of nursing education programs. The Board proposes numerous clarifying changes as well as several substantive changes for these regulations. In addition to clarifying changes, the Board specifically proposes to 1) require entities that are applying for approval as nursing schools to submit the results of a community assessment or market analysis, 2) require that all nursing students undergo a criminal background check as a requirement for admission to nursing school and 3) require 80% of clinical hours to be conducted in Virginia.

Result of Analysis. Benefits likely outweigh costs for most of these proposed regulatory changes. There is insufficient information to determine whether benefits will outweigh costs for several of the proposed changes.

Estimated Economic Impact. Most of the proposed changes to these regulations are not substantive. Portions of the regulations are being moved around so that they more closely follow the chronological order of the approval process for nursing schools, and some requirements that are already in guidance are being moved into the regulatory text; the Board is, for instance, moving the requirement that school "faculty shall provide evidence of education and/or experience in the specialty area in which they supervise students' clinical experience" from guidance documents into regulation. Changes such as these will likely not subject regulated entities to any additional costs as those entities already have to follow all regulations and Board guidance to gain approval of nursing education programs now. These changes will likely benefit anyone who has to read and understand the rules under which nursing education programs are approved as they bring added clarity to those rules.

The Board also proposes three new requirements in the proposed regulations.

First, the Board proposes to require entities that are seeking approval of new nursing education programs to submit the results of a community assessment or market analysis along with other, already required, paperwork. Board staff reports that this requirement is being added because some education programs have been approved in the past when those programs did not have access to enough clinical sites to meet the needs of their student populations. Board staff reports that the Board seeks to eliminate this problem by requiring entities to verify that there are sufficient clinical resources in any community where they might open an educational facility. Both proprietors of nursing education programs and their future students will benefit from this requirement if it better ensures that nursing programs actually have the resources to provide the education that is promised. Since market analyses have not been required before, Board staff is unsure of what expenses will be incurred statewide in generating them. Some entities may already be conducting market analyses as part of their private decision to open an education program. For these entities, extra costs would be minimal and would likely be limited to costs for copying and mailing documents that already exist. Entities that do not already plan on conducting a market analysis may incur, according to Board estimates, costs of between $1,000 and

$5,000. There is insufficient information to ascertain whether benefits will outweigh costs for this proposed change.

The Board also proposes to newly require all potential nursing students to undergo a criminal background check as a condition of admittance to an approved nursing education program. Board staff reports that there have been issues with current nursing students who have been accepted into nursing schools, but who could not complete their required clinical hours because they had been convicted of barrier crimes that precluded them being allowed to work at the nursing homes or hospitals with whom their education program had contracted. The Board also requires applicants for nursing licensure to self report any criminal convictions so, in theory, students could get completely through their education program and then be denied licensure because they have a criminal history. In order to forestall these problems, the Board now proposes to require a criminal background check. Either potential students or educational facilities will have to pay the approximately $35 per person that the State Police charges for this check. Board staff reports that 12,080 nursing students were admitted to various education programs across the state during the 2009-2010 academic year. If this requirement had been in place then, and all entering students would later have had to undergo a second criminal background check when starting their clinical work, affected entities statewide would have incurred extra costs of $422,800. Information gathered from talking to various nursing schools and clinical sites would indicate, if this proposed change is promulgated, some but not all incoming nursing students would have to undergo a criminal background check upon admittance to a nursing program in addition to the one they currently undergo when they start their clinical experience. Given this, the costs of compliance for this change will likely be somewhat less than $422,800 per year. Whether benefits will outweigh costs statewide will depend on whether tuition and time costs incurred by students with criminal records outweigh the costs of all students submitting to a criminal background check. The Board could likely lower costs, but accomplish the same goal, by requiring schools to inform potential students (who are likely aware of their own criminal backgrounds) of which past or future criminal convictions are likely to keep them from successfully completing a nursing education program or gaining licensure. Schools could also err on the side of caution by also informing potential students of how they might get their own criminal background check run if they are unsure of their criminal history.

Finally, the Board proposes to require that at least 80% of student nurses' clinical experiences occur within Virginia. Current regulations are silent on where students complete their required clinical hours. The Board has, however, had a number of complaints from students who have had to travel some distance and to bordering states in order to work at clinical sites that have contracts with Virginia-based nursing schools. Board staff reports that this has been a particular problem with nursing education programs in Northern Virginia. To minimize the adverse impact that this issue can have on nursing students, the Board proposes to require that 80% of clinical experience for any student be completed within Virginia. Board staff reports that this requirement would not affect schools' current clinical contracts but that any newly contracted clinical sites would have to meet the new requirements. To the extent that currently contracted clinical sites are outside of Virginia and also represent the most efficient and cost-saving choice for obtaining educational services for their students, some educational institutions are likely to see costs increase because of this proposed regulatory change. There is insufficient information to measure these costs against the savings that will accrue to students who will not have to travel as far to complete clinical hours.

Businesses and Entities Affected. The Department of Health Professions (DHP) reports that there are currently 83 full nursing education programs and 77 LPN nursing education programs approved by the Board and that the Board receives approximately 15 new applications for new nursing programs each year. Board staff reports that some of these programs are likely small businesses but does not know how many would so qualify.

Localities Particularly Affected. No localities will be particularly affected by these proposed regulatory changes.

Projected Impact on Employment. This regulatory action will likely have little impact on employment in the Commonwealth.

Effects on the Use and Value of Private Property. This regulatory action will likely have little effect on the use or value of private property in the Commonwealth.

Small Businesses: Costs and Other Effects. Affected small businesses will likely incur costs for conducting criminal background checks and may also incur costs associated with conducting market analyses and/or contracting with in-state clinical sites.

Small Businesses: Alternative Method that Minimizes Adverse Impact. The Board could likely lower costs for these proposed regulations by requiring schools to inform potential students (who are likely aware of their own criminal background) of which past or future criminal convictions are likely to keep them from successfully completing a nursing education program or gaining licensure instead of requiring that all potential students undergo a criminal background check. Schools could also err on the side of caution by also informing potential students of how they might get their own criminal background check run if they are unsure of their criminal history.

Real Estate Development Costs. This regulatory action will likely have no effect on real estate development costs in the Commonwealth.

Legal Mandate. The Department of Planning and Budget (DPB) has analyzed the economic impact of this proposed regulation in accordance with § 2.2-4007.04 of the Administrative Process Act and Executive Order Number 14 (10). Section 2.2-4007.04 requires that such economic impact analyses include, but need not be limited to, the projected number of businesses or other entities to whom the regulation would apply, the identity of any localities and types of businesses or other entities particularly affected, the projected number of persons and employment positions to be affected, the projected costs to affected businesses or entities to implement or comply with the regulation, and the impact on the use and value of private property. Further, if the proposed regulation has adverse effect on small businesses, § 2.2-4007.04 requires that such economic impact analyses include (i) an identification and estimate of the number of small businesses subject to the regulation; (ii) the projected reporting, recordkeeping, and other administrative costs required for small businesses to comply with the regulation, including the type of professional skills necessary for preparing required reports and other documents; (iii) a statement of the probable effect of the regulation on affected small businesses; and (iv) a description of any less intrusive or less costly alternative methods of achieving the purpose of the regulation. The analysis presented above represents DPB's best estimate of these economic impacts.

Agency's Response to Economic Impact Analysis: The Board of Nursing makes the following comment on the economic impact analysis (EIA) of the Department of Planning and Budget on proposed amendments to 18VAC90-20, Regulations Governing the Practice of Nursing, relating to rules for nursing education programs.

The EIA refers to the cost for conducting market analyses as part of a program's application for board approval of a new nursing education program. It was acknowledged that many programs already conduct such an analysis to assess the viability of and need for an educational program in the area from which the program intends to draw students. In the EIA, there is a statement that a program conducting a market analysis may incur costs of "many thousands of dollars." In fact, programs that have conducted an analysis report to board staff that the costs ranged from $1,000 to $5,000, depending on the extensiveness of the analysis and the geographic location of the school. Therefore, the board takes exception to the assumption that an analysis would cost many thousands of dollars and would recommend that the range of actual cost be stated. (The Department of Planning and Budget subsequently revised its EIA accordingly.)

Additionally, the EIA states that the requirement for potential nursing students to have a criminal background check would cost affected entities $422,800. In fact, a criminal background check is already a requirement before any student can be engaged in a clinical setting. The Joint Commission on Accreditation of Healthcare Organizations (JCAHO) has such a requirement, and all hospitals and long-term care facilities require the criminal background check for employees and students working in their facilities. Therefore, there would be no additional cost for the background check since it is already required for persons enrolled in nursing education programs.

Summary:

*The proposed amendments reorganize provisions for approval of nursing education programs to clarify all criteria that must be met to obtain initial approval, full approval, and continued full approval. The proposed amendments (i) incorporate current guidance on observational experiences and simulation into the regulation; (ii) provide processes and procedures for granting initial or full approval, for placing a program on conditional approval, and for denial or withdrawal of approval of a program; (iii) require entities that are applying for approval as nursing schools to submit the results of a community assessment or market analysis; and (iv) require 80% of clinical hours to be conducted in Virginia.*

Part I
General Provisions

**18VAC90-20-10. Definitions.**

In addition to words and terms defined in § 54.1-3030 of the Code of Virginia, the following words and terms when used in this chapter shall have the following meanings unless the context clearly indicates otherwise:

"Accreditation" means having been accredited by the Accreditation Commission for Education in Nursing (ACEN) or by the Commission on Collegiate Nursing Education (CCNE).

"Active practice" means activities performed, whether or not for compensation, for which an active license to practice nursing is required.

"Advisory committee" means a group of persons from a nursing education program and the health care community who meet regularly to advise the nursing education program on the quality of its graduates and the needs of the community.

"Approval" means the process by which the board or a governmental agency in another state or foreign country evaluates and grants official recognition to nursing education programs that meet established standards not inconsistent with Virginia law.

"Associate degree nursing program" means a nursing education program preparing for registered nurse licensure, offered by a Virginia college or other institution and designed to lead to an associate degree in nursing, provided that the institution is authorized to confer such degree by the State Council of Higher Education for Virginia.

"Baccalaureate degree nursing program" or "prelicensure graduate degree program" means a nursing education program preparing for registered nurse licensure, offered by a Virginia college or university and designed to lead to a

baccalaureate or a graduate degree with a major in nursing, provided that the institution is authorized to confer such degree by the State Council of Higher Education for Virginia.

"Board" means the Board of Nursing.

"CGFNS" means the Commission on Graduates of Foreign Nursing Schools.

"Clinical setting" means any location in which the clinical practice of nursing occurs as specified in an agreement between the cooperating agency and the school of nursing.

"Conditional approval" means a time-limited status ~~which~~ that results when an approved nursing education program has failed to maintain requirements as set forth in ~~Article 2 (18VAC90-20-70 et seq.) of Part II of~~ this chapter.

"Contact hour" means 50 minutes of continuing education coursework or activity.

"Cooperating agency" means an agency or institution that enters into a written agreement to provide ~~learning~~ clinical or observational experiences for a nursing education program.

"Diploma nursing program" means a nursing education program preparing for registered nurse licensure, offered by a hospital and designed to lead to a diploma in nursing, provided the hospital is licensed in this state.

"FERPA" means the Family Educational Rights and Privacy Act (20 USC § 1232g).

"Initial approval" means the status granted to a nursing education program that allows the admission of students.

"NCLEX" means the National Council Licensure Examination.

"NCSBN" means the National Council of State Boards of Nursing.

"National certifying organization" means an organization that has as one of its purposes the certification of a specialty in nursing based on an examination attesting to the knowledge of the nurse for practice in the specialty area.

"Nursing education program" means an entity offering a basic course of study preparing persons for licensure as registered nurses or as licensed practical nurses. A basic course of study shall include all courses required for the degree, diploma or certificate.

"Nursing faculty" means registered nurses who teach the practice of nursing in nursing education programs.

"Practical nursing program" means a nursing education program preparing for practical nurse licensure that leads to a diploma or certificate in practical nursing, provided the school is authorized by the Virginia ~~State Board~~ Department of Education or ~~the appropriate governmental credentialing agency~~ by an accrediting agency recognized by the U.S. Department of Education.

"Preceptor" means a licensed ~~health care provider~~ nurse who is employed in the clinical setting, serves as a resource person and role model, and is present with the nursing student in that setting providing clinical supervision.

"Primary state of residence" means the state of a person's declared fixed permanent and principal home or domicile for legal purposes.

"Program director" means a registered nurse who holds a current, unrestricted license in Virginia or a multistate licensure privilege and who has been designated by the controlling authority to administer the nursing education program.

~~"Provisional approval" means the initial status granted to a nursing education program which shall continue until the first class has graduated and the board has taken final action on the application for approval.~~

"Recommendation" means a guide to actions that will assist an institution to improve and develop its nursing education program.

"Requirement" means a mandatory condition that a nursing education program must meet to be approved or maintain approval.

"Site visit" means a focused on-site review of the nursing program by board staff, usually completed within one day for the purpose of evaluating program components such as the physical location (skills lab, classrooms, learning resources) for obtaining initial program approval, in response to a complaint, compliance with NCLEX plan of correction, change of location, or verification of noncompliance with this chapter.

"Survey visit" means a comprehensive on-site review of the nursing program by board staff, usually completed within two days (depending on the number of programs or campuses being reviewed) for the purpose of obtaining and maintaining full program approval. The survey visit includes the program's completion of a self-evaluation report prior to the visit, as well as a board staff review of all program resources (including skills lab, classrooms, learning resources, and clinical facilities) and other components to ensure compliance with this chapter. Meetings with faculty, administration, students, and clinical facility staff will occur.

**18VAC90-20-35. Identification; accuracy of records.**

A. Any person regulated by this chapter who provides direct ~~patient~~ client care shall, while on duty, wear identification that is clearly visible and indicates the person's first and last name and the appropriate title for the license, ~~certification, or~~ registration ~~issued to such person by the board~~, or student status under which he is practicing in that setting. Any person practicing in hospital emergency departments, psychiatric and mental health units and programs, or in health care facilities units offering treatment for ~~patients~~ clients in custody of state or local law-enforcement agencies may use identification badges of first name and first letter only of last name and appropriate title.

B. A licensee who has changed his name shall submit as legal proof to the board a copy of the marriage certificate or court order evidencing the change. A duplicate license shall be issued by the board upon receipt of such evidence and the required fee.

C. Each licensee shall maintain an address of record with the board. Any change in the address of record or in the public address, if different from the address of record, shall be submitted by a licensee in writing to the board within 30 days of such change. All notices required by law and by this chapter to be mailed by the board to any licensee shall be validly given when mailed to the latest address of record on file with the board.

Part II
Nursing Education Programs

Article 1
~~Establishing~~ Initial Approval of a Nursing Education Program

**18VAC90-20-40. Application for initial approval.**

~~A.~~ An institution wishing to establish a nursing education program shall:

1. Provide documentation of attendance by the program director at a board orientation on establishment of a nursing education program prior to submission of an application and fee.

2. Submit to the board~~, at least 12 months in advance of expected opening date, a statement of intent~~ an application to establish a nursing education program along with ~~an~~ a nonrefundable application fee as prescribed in 18VAC90-20-30.

a. The application shall be effective for 12 months from the date the application was received by the board.

b. If the program does not meet the board's requirements for approval within 12 months, it shall file a new application and fee.

3. Submit the following information on the organization and operation of a nursing education program:

a. A copy of a business license and zoning permit to operate a school in a Virginia location, a certificate of operation from the State Corporation Commission, evidence of approval from the Virginia Department of Education, and documentation of accreditation, if applicable;

b. The organizational structure of the institution and its relationship to the nursing education program therein;

c. The type of nursing program, as defined in 18VAC90-20-10;

d. An enrollment plan specifying the beginning dates and number of students for each class for a two-year period from the date of initial approval including (i) the planned number of students in the first class and in all subsequent classes and (ii) the planned frequency of admissions. Any increase in admissions that is not stated in the enrollment plan must be approved by the board. Also, transfer students are not authorized until full approval has been granted to the nursing education program; and

e. A tentative time schedule for planning and initiating the program through graduation of the first class and the program's receipt of results of the NCLEX examination.

~~2.~~ 4. Submit to the board evidence documenting adequate resources for the projected number of students and the ability to provide a program that can meet the requirements of ~~Article 2 (18VAC90-20-70 et seq.) of~~ this part to include the following information:

a. ~~Organizational structure of the institution and relationship of nursing program therein~~ The results of a community assessment or market analysis that demonstrates the need for the nursing education program in the geographic area for the proposed school. The assessment or analysis shall include employment opportunities of nurses in the community, the number of clinical facilities or employers available for the size of the community to support the number of graduates, and the number and types of other nursing education programs in the area;

~~b. Purpose and type of program;~~

~~c. Availability~~ b. A projection of the availability of qualified faculty sufficient to provide classroom instruction and clinical supervision for the number of students specified by the program;

~~d.~~ c. Budgeted faculty positions sufficient in number to provide classroom instruction and clinical supervision;

~~e.~~ d. Availability of clinical training facilities for the program as evidenced by copies of contracts or letters of agreement specifying the responsibilities of the respective parties and indicating sufficient availability of clinical experiences for the number of students in the program, the number of students, and clinical hours permitted at each clinical site and on each nursing unit;

e. Documentation that at least 80% of all clinical experiences are to be conducted in Virginia, unless an exception is granted by the board. There shall be documentation of written approval for any clinical experience conducted outside of Virginia by the agency that has authority to approve clinical placement of students in that state. The use of any clinical site in Virginia located 50 miles or more from the school shall require board approval;

f. ~~Availability~~ A diagram or blueprint showing the availability of academic facilities for the program, including classrooms, skills laboratory, and ~~library~~ learning resource center. This information shall include the number of restrooms for the student and faculty population, classroom and skills laboratory space large enough to accommodate the number of the student body,

and sufficient faculty office space that meets FERPA requirements; and

g. Evidence of financial resources for the planning, implementation, and continuation of the program with line-item budget projections for the first three years; of operations beginning with the admission of students.

h. Tentative time schedule for planning and initiating the program; and

i. An enrollment plan specifying the beginning dates and number of students for each class for a two-year period from the date of initial approval.

3. 5. Respond to the board's request for additional information within a time frame established by the board.

B. A site visit may be conducted by a representative of the board.

C. The Education Special Conference Committee (the "committee"), composed of not less than two members of the board, shall, in accordance with § 2.2-4019 of the Code of Virginia, receive and review applications and the report of the site visit and shall make recommendations to the board regarding the granting or denial of approval of the program application.

1. If the board accepts the recommendation to approve the program application, the institution may apply for provisional approval of the nursing education program as set forth in this chapter.

2. If the committee recommendation is to deny approval of the program application, no further action will be required of the board unless the program requests a hearing before the board or a panel thereof in accordance with § 2.2-4020 and subdivision 9 of § 54.1-2400 of the Code of Virginia.

**18VAC90-20-50. Provisional approval. (Repealed.)**

A. The application for provisional approval shall be complete when the following conditions are met:

1. A program director has been appointed, and there are sufficient faculty to initiate the program as required in 18VAC90-20-90; and

2. A written curriculum plan developed in accordance with 18VAC90-20-120 has been submitted.

B. The committee shall, in accordance with § 2.2-4019 of the Code of Virginia, make recommendations to the board to grant or deny provisional approval.

1. If provisional approval is granted:

a. The admission of students is authorized; and

b. The program director shall submit quarterly progress reports to the board which shall include evidence of progress toward program approval and other information as required by the board.

2. If the committee recommendation is to deny provisional approval, no further action will be required of the board unless the program requests a hearing before the board or a panel thereof in accordance with § 2.2-4020 and subdivision 9 of § 54.1-2400 of the Code of Virginia.

**18VAC90-20-60. Program approval. (Repealed.)**

A. The application for approval shall be complete when:

1. A self-evaluation report of compliance with Article 2 (18VAC90-20-70 et seq.) of this part has been submitted along with the fee for a survey visit as required by 18VAC90-20-30;

2. The first graduating class has taken the licensure examination, and the cumulative passing rate for the program's first-time test takers taking the NCLEX over the first four quarters following graduation of the first class is not less than 80%; and

3. A satisfactory survey visit and report has been made by a representative of the board verifying that the program is in compliance with all requirements for program approval.

B. The committee shall, in accordance with § 2.2-4019 of the Code of Virginia, receive and review the self-evaluation, the NCLEX results and survey reports and shall make a recommendation to the board for the granting or denial of approval or for continuance of provisional approval.

C. If the committee's recommendation is to deny approval, no further action will be required of the board unless the program requests a hearing before the board or a panel thereof in accordance with § 2.2-4020 of the Code of Virginia.

Article 2
Requirements for Initial and Continued Approval

**18VAC90-20-70. Organization and administration.**

A. The governing or parent institution offering Virginia nursing education programs shall be approved or accredited by the appropriate state agencies by the Virginia Department of Education or accredited by an accrediting agency recognized by the United States U.S. Department of Education.

B. Any agency or institution used for clinical experience by a nursing education program shall be in good standing with its licensing body.

C. The program director of the nursing education program shall hold an unencumbered:

1. Hold a current license or multistate licensure privilege to practice as a registered nurse or a multistate licensure privilege to practice nursing in the Commonwealth, with the without any disciplinary action that currently restricts practice;

2. Have additional education and experience necessary to administer, plan, implement, and evaluate the nursing education program.;

3. Ensure that faculty are qualified by education and experience to teach in the program or to supervise the clinical practice of students in the program;

4. Maintain a current faculty roster, a current clinical agency form, and current clinical contracts available for board review and subject to an audit; and

5. Only serve as program director at one location or campus for the program.

D. The program shall provide evidence that the director has authority to:

1. Implement the program and curriculum;

2. Oversee the admission, academic progression and graduation of students;

3. Hire and evaluate faculty; and

4. Recommend and administer the program budget, consistent with established policies of the controlling agency.

~~D.~~ E. An organizational plan shall indicate the lines of authority and communication of the nursing education program to the controlling body; to other departments within the controlling institution; to the cooperating agencies; and to the advisory committee~~, if one exists~~ for the nursing education program.

~~E.~~ F. There shall be evidence of financial support and resources sufficient to meet the goals of the nursing education program as evidenced by a copy of the current annual budget or a signed statement from administration specifically detailing its financial support and resources.

**18VAC90-20-80. Philosophy and objectives.**

Written statements of philosophy and objectives shall be the foundation of the curriculum and shall be:

1. Formulated and accepted by the faculty and the program director;

2. Descriptive of the practitioner to be prepared; and

3. The basis for planning, implementing, and evaluating the total program through the implementation of a systematic plan of evaluation that is documented in faculty or committee meeting minutes.

**18VAC90-20-90. Faculty.**

A. Qualifications for all faculty.

1. Every member of the nursing faculty, including the program director, shall hold a current~~, unencumbered~~ license ~~as a registered nurse~~ or a multistate licensure privilege to practice nursing in Virginia as a registered nurse without any disciplinary action that currently restricts practice and have had at least two years of direct client care experience as a registered nurse prior to employment by the program. Persons providing instruction in topics other than nursing shall not be required to hold a license as a registered nurse.

2. Every member of a nursing faculty supervising the clinical practice of students shall meet the licensure requirements of the jurisdiction in which that practice occurs. Faculty shall provide evidence of education or experience in the specialty area in which they supervise students' clinical experience for quality and safety. Prior to supervision of students, the faculty providing supervision shall have completed a clinical orientation to the unit in which supervision is being provided.

3. The program director and each member of the nursing faculty shall maintain documentation of professional competence through such activities as nursing practice, continuing education programs, conferences, workshops, seminars, academic courses, research projects and professional writing. Documentation of annual professional development shall be maintained in employee files for the director and each faculty member until the next survey visit and shall be available for board review.

4. For baccalaureate degree and prelicensure graduate degree programs:

a. The program director shall hold a doctoral degree with a graduate degree in nursing.

b. Every member of the nursing faculty shall hold a graduate degree; the majority of the faculty shall have a graduate degree in nursing. Faculty members with a graduate degree with a major other than in nursing shall have a baccalaureate degree with a major in nursing.

5. For associate degree and diploma programs:

a. The program director shall hold a graduate degree~~, preferably~~ with a major in nursing.

b. The majority of the members of the nursing faculty shall hold a graduate degree, preferably with a major in nursing.

c. ~~Other~~ All members of the nursing faculty shall hold a baccalaureate or graduate degree~~, preferably~~ with a major in nursing.

6. For practical nursing programs:

a. The program director shall hold a baccalaureate degree~~, preferably~~ with a major in nursing.

b. The majority of the members of the nursing faculty shall hold a baccalaureate degree, preferably with a major in nursing.

~~7. Exceptions to provisions of subdivisions 4, 5, and 6 of this subsection shall be by board approval.~~

~~a. Initial request for exception.~~

~~(1) The program director shall submit a request for initial exception in writing for consideration prior to the academic year during which the nursing faculty member is scheduled to teach or whenever an unexpected vacancy has occurred.~~

~~(2) A description of teaching assignment, a curriculum vitae, and a statement of intent from the prospective faculty member to pursue the required degree shall accompany each request.~~

~~b. Request for continuing exception.~~

~~(1) Continuing exception will be based on the progress of the nursing faculty member toward meeting the degree required by this chapter during each year for which the exception is requested.~~

~~(2) The program director shall submit the request for continuing exception in writing prior to the next academic year during which the nursing faculty member is scheduled to teach.~~

~~(3) A list of courses required for the degree being pursued and college transcripts showing successful completion of a minimum of two of the courses during the past academic year shall accompany each request.~~

~~(4) Any request for continuing exception shall be considered by the committee, which shall make a recommendation to the board.~~

~~c. The executive director of the board shall be authorized to make the initial decision on requests for exceptions. Any appeal of that decision shall be in accordance with the provisions of the Administrative Process Act (§ 2.2-4000 et seq. of the Code of Virginia)~~

B. Number of faculty.

1. The number of faculty shall be sufficient to prepare the students to achieve the objectives of the educational program and to ensure safety for ~~patients~~ clients to whom students provide care.

2. When students are giving direct care to ~~patients~~ clients, the ratio of students to faculty shall not exceed 10 students to one faculty member, and the faculty shall be on site solely to supervise students.

3. When preceptors are utilized for specified learning experiences in clinical settings, the faculty member may supervise up to 15 students.

C. Functions. The principal functions of the faculty shall be to:

1. Develop, implement and evaluate the philosophy and objectives of the nursing education program;

2. Design, implement, teach, evaluate and revise the curriculum. Faculty shall provide evidence of education and experience necessary to indicate that they are competent to teach a given course;

3. Develop and evaluate student admission, progression, retention and graduation policies within the framework of the controlling institution;

4. Participate in academic advisement and counseling of students in accordance with FERPA requirements;

5. Provide opportunities for and evidence of student and graduate evaluation of curriculum and teaching and program effectiveness; and

6. Document actions taken in faculty and committee meetings using a systematic plan of evaluation for total program review.

**18VAC90-20-95. ~~Preceptorships.~~ (Repealed.)**

~~A. Clinical preceptors may be used to augment the faculty and enhance the clinical learning experience. The clinical preceptor shall be licensed at or above the level for which the student is preparing.~~

~~B. When giving direct care to patients, students shall be supervised by faculty or preceptors as designated by faculty. In utilizing preceptors to supervise students, the ratio shall not exceed two students to one preceptor at any given time.~~

~~C. Faculty shall be responsible for the designation of a preceptor for each student and shall communicate such assignment with the preceptor. A preceptor may not further delegate the duties of the preceptorship.~~

~~D. Preceptorships shall include:~~

~~1. Written objectives, methodology, and evaluation procedures for a specified period of time;~~

~~2. An orientation program for faculty, preceptors, and students;~~

~~3. The performance of skills for which the student has had faculty supervised clinical and didactic preparation; and~~

~~4. The overall coordination by faculty who assume ultimate responsibility for implementation, periodic monitoring, and evaluation.~~

**18VAC90-20-96. ~~Clinical practice of students.~~ (Repealed.)**

~~A. In accordance with § 54.1-3001 of the Code of Virginia, a nursing student, while enrolled in an approved nursing program, may perform tasks that would constitute the practice of nursing. The student shall be responsible and accountable for the safe performance of those direct patient care tasks to which he has been assigned.~~

~~B. Faculty members or preceptors providing supervision in the clinical care of patients shall be responsible and accountable for the assignment of patients and tasks based on their assessment and evaluation of the student's clinical knowledge and skills. Supervisors shall also monitor clinical performance and intervene if necessary for the safety and protection of the patients.~~

**18VAC90-20-100. Admission~~, promotion and graduation~~ of students.**

A. Requirements for admission to ~~the~~ a registered nursing education program shall not be less than the requirements of § 54.1-3017 A 1 of the Code of Virginia that will permit the graduate to be admitted to the appropriate licensing examination. The equivalent of a four-year high school course of study as required pursuant to § 54.1-3017 shall be considered to be:

1. A General Educational Development (GED) certificate for high school equivalence; or

2. Satisfactory completion of the college courses required by the nursing education program.

~~B. The equivalent of a four-year high school course of study is considered to be:~~

~~1. A General Educational Development (GED) certificate for high school equivalence; or~~

~~2. Satisfactory completion of the college courses required by the nursing education program.~~

B. Requirements for admission to a practical nursing education program shall not be less than the requirements of subdivision 1 of § 54.1-3020 of the Code of Virginia that will permit the graduate to be admitted to the appropriate licensing examination.

C. Requirements for admission, readmission, advanced standing, progression, retention, dismissal and graduation shall be available to the students in written form.

D. A criminal background check shall be required for admission to a nursing education program.

E. Transfer students may not be admitted until a nursing education program has received full approval from the board.

**18VAC90-20-110. ~~School records; student records; school bulletin or catalogue~~ Resources, facilities, publications, and services.**

~~A. A system of records shall be maintained and be made available to the board representative and shall include:~~

~~1. Data relating to accreditation by any agency or body.~~

~~2. Course outlines.~~

~~3. Minutes of faculty and committee meetings.~~

~~B. A file shall be maintained for each student. Each file shall be available to the board representative and shall include the student's:~~

~~1. Application;~~

~~2. High school transcript or copy of high school equivalence certificate; and~~

~~3. Current record of achievement.~~

~~A final transcript shall be retained in the permanent file of the institution.~~

~~Provision shall be made for the protection of student and graduate records against loss, destruction and unauthorized use.~~

~~C. Current information about the nursing education program shall be published periodically and distributed to students, applicants for admission and the board. Such information shall include:~~

~~1. Description of the program.~~

~~2. Philosophy and objectives of the controlling institution and of the nursing program.~~

~~3. Admission and graduation requirements.~~

~~4. Fees.~~

~~5. Expenses.~~

~~6. Financial aid.~~

~~7. Tuition refund policy.~~

~~8. Education facilities.~~

~~9. Student activities and services.~~

~~10. Curriculum plan.~~

~~11. Course descriptions.~~

~~12. Faculty-staff roster.~~

~~13. School calendar.~~

~~14. Annual passage rates on NCLEX for the past five years.~~

A. Classrooms, conference rooms, laboratories, clinical facilities, and offices shall be sufficient to meet the objectives of the nursing education program and the needs of the students, faculty, administration, and staff and shall include private areas for faculty-student conferences. The nursing education program shall provide facilities that meet federal and state requirements including:

1. Comfortable temperatures;

2. Clean and safe conditions;

3. Adequate lighting;

4. Adequate space to accommodate all students; and

5. Instructional technology and equipment needed for simulating client care.

B. The program shall have learning resources and technology that are current, pertinent, and accessible to students and faculty, and sufficient to meet the needs of the students and faculty.

C. Current information about the nursing education program shall be published and distributed to applicants for admission and shall be made available to the board. Such information shall include:

1. Description of the program;

2. Philosophy and objectives of the controlling institution and of the nursing program;

3. Admission and graduation requirements, including the policy on the use of a final comprehensive exam;

4. Fees and expenses;

5. Availability of financial aid;

6. Tuition refund policy;

7. Education facilities;

8. Availability of student activities and services;

9. Curriculum plan to include course progression from admission to graduation, the name of each course, theory hours, skills lab hours, simulation hours (if used in lieu of direct client care hours), and clinical hours;

10. Course descriptions to include a complete overview of what is taught in each course;

11. Faculty-staff roster;

12. School calendar;

13. Student grievance policy; and

14. Information about implication of criminal convictions.

D. Administrative support services shall be provided.

E. There shall be written agreements with cooperating agencies that:

1. Ensure full control of student education by the faculty of the nursing education program, including the selection and supervision of learning experiences to include the dismissal of students from the clinical site if client safety is or may be compromised by the acts of the student;

2. Provide that faculty members or preceptors are present in the clinical setting when students are providing direct client care;

3. Provide for cooperative planning with designated agency personnel to ensure safe client care;

4. Provide that faculty be readily available to students and preceptors while students are involved in preceptorship experiences; and

5. State the number of students allowed on each nursing unit from the nursing education program.

F. Cooperating agencies shall be approved by the appropriate accreditation, evaluation, or licensing bodies, if such exist.

**18VAC90-20-120. Curriculum.**

A. ~~Curriculum~~ Both classroom and online curricula shall reflect the philosophy and objectives of the nursing education program and shall be consistent with the law governing the practice of nursing.

B. Nursing education programs preparing for ~~nursing~~ licensure as a registered or practical nurse shall include:

1. ~~Didactic~~ Evidence-based didactic content and supervised clinical experience in nursing encompassing the attainment and maintenance of physical and mental health and the prevention of illness for individuals and groups throughout the life cycle and in a variety of acute, nonacute, and long-term care clinical settings and experiences to include adult medical/surgical nursing, geriatric nursing, maternal/infant (obstetrics, gynecology, neonatal) nursing, mental health/psychiatric nursing, nursing fundamentals, and pediatric nursing;

2. Concepts of the nursing process that include conducting a focused nursing assessment of the client status that includes decision making about who and when to inform, identifying client needs, planning for episodic nursing care, implementing appropriate aspects of client care, ~~and~~ contributing to data collection and the evaluation of client outcomes, and the appropriate reporting and documentation of collected data and care rendered;

3. Concepts of anatomy, physiology, chemistry, microbiology, and the behavioral sciences;

4. Concepts of communication, growth and development, nurse-client interpersonal relations, and ~~patient~~ client education, including:

a. Development of professional socialization that includes working in interdisciplinary teams; and

b. Conflict resolution;

5. Concepts of ethics and the vocational and legal aspects of nursing, including:

a. Regulations and sections of the Code of Virginia related to nursing;

b. ~~Patient~~ Client rights, privacy, and confidentiality;

c. Prevention of ~~patient~~ client abuse, neglect, and abandonment throughout the life cycle, including instruction in the recognition, intervention, and reporting by the nurse of evidence of child or elder abuse;

d. Professional responsibility to include the role of the practical and professional nurse; ~~and~~

e. Professional boundaries to include appropriate use of social media and electronic technology; and

~~e.~~ f. History and trends in nursing and health care;

6. Concepts of pharmacology, dosage calculation, medication administration, nutrition, and diet therapy;

7. Concepts of client-centered care, including:

a. Respect for cultural differences, values, and preferences ~~and expressed needs~~;

b. Promotion of healthy life styles for clients and populations;

c. Promotion of a safe client environment; ~~and~~

d. Prevention and appropriate response to situations of bioterrorism, natural and man-made disasters, and ~~domestic~~ intimate partner and family violence; ~~and~~

e. Use of critical thinking and clinical judgment in the implementation of safe client care; and

f. Care of clients with multiple, chronic conditions; and

8. Development of management and supervisory skills~~.~~, including:

a. The use of technology in medication administration and documentation of client care;

b. Participation in quality improvement processes and systems to measure client outcomes and identify hazards and errors; and

c. Supervision of certified nurse aides, registered medication aides and unlicensed assistive personnel.

C. In addition to meeting curriculum requirements set forth in subsection B of this section, registered nursing education programs preparing for registered nurse licensure shall also include:

1. ~~Didactic~~ Evidence-based didactic content and supervised clinical experiences in conducting a comprehensive nursing assessment that includes:

a. Extensive data collection, both initial and ongoing, for individuals, families, groups, and communities addressing anticipated changes in client conditions as well as emerging changes in a client's health status;

b. Recognition of alterations to previous client conditions;

c. Synthesizing the biological, psychological and social aspects of the client's condition;

d. Evaluation of the effectiveness and impact of nursing care;

e. Planning for nursing interventions and evaluating the need for different interventions for individuals, groups and communities;

f. Evaluation and implementation of the need to communicate and consult with other health team members; and

g. Use of a broad and complete analysis to make independent decisions and nursing diagnoses;

2. ~~Didactic~~ Evidence-based didactic content and supervised experiences in:

a. Development of clinical judgment;

b. Development of leadership skills and ~~knowledge~~ unit management;

c. Knowledge of the rules and principles for delegation of nursing tasks to unlicensed persons;

d. Supervision of licensed practical nurses;

~~c.~~ e. Involvement of clients in decision making and a plan of care; and

~~d. Participation in quality improvement processes to measure client outcomes and identify hazards and errors;~~

~~3.~~ f. Concepts of pathophysiology~~; and~~.

~~4. Principles of delegation of nursing tasks to unlicensed persons~~.

~~D. On and after July 1, 2007, all nursing education programs shall provide instruction in child abuse recognition and intervention.~~

~~E. A nursing education program preparing for licensure as a practical nurse shall provide a minimum of 400 hours of direct client care supervised by qualified faculty. A nursing education program preparing for licensure as a registered nurse shall provide a minimum of 500 hours of direct client care supervised by qualified faculty.~~

**18VAC90-20-121. Curriculum for direct client care.**

A. A nursing education program preparing a student for licensure as a registered nurse shall provide a minimum of 500 hours of direct client care supervised by qualified faculty. A nursing education program preparing a student for licensure as a practical nurse shall provide a minimum of 400 hours of direct client care supervised by qualified faculty. Direct client care hours shall include experiences and settings as set forth in 18VAC90-20-120 B 1.

B. Licensed practical nurses transitioning into prelicensure registered nursing programs may be awarded no more than 150 clinical hours of the 400 clinical hours received in a practical nursing program. In a practical nursing to registered nursing transitional program, the remainder of the clinical hours shall include registered nursing clinical experience across the life cycle in adult medical/surgical nursing, maternal/infant (obstetrics, gynecology, neonatal) nursing, mental health/psychiatric nursing, and pediatric nursing.

C. Any observational experiences shall be planned in cooperation with the agency involved to meet stated course objectives. Observational experiences shall not be accepted toward the 400 or 500 minimum clinical hours required. Observational objectives shall be available to students, the clinical unit, and the board.

D. Simulation for direct client clinical hours.

1. No more than 20% of direct client contact hours may be simulation. For prelicensure registered nursing programs, the total of simulated client care hours cannot exceed 100 hours (20% of the required 500 hours). For prelicensure practical nursing programs, the total of simulated client care hours cannot exceed 80 hours (20% of the required 400 hours).

2. No more than 50% of the total clinical hours for any course may be used as simulation.

3. Skills acquisition and task training alone, as in the traditional use of a skills laboratory, do not qualify as simulated client care and therefore do not meet the requirements for direct client care hours.

4. Clinical simulation must be led by faculty who meet the qualifications specified in 18VAC90-20-90.

5. Documentation of the following shall be available for all simulated experiences:

a. Course description and objectives;

b. Type of simulation and location of simulated experience;

c. Number of simulated hours;

d. Faculty qualifications; and

e. Methods of debriefing.

**18VAC90-20-122. Clinical practice of students.**

A. In accordance with § 54.1-3001 of the Code of Virginia, a nursing student, while enrolled in an approved nursing program, may perform tasks that would constitute the practice of nursing. The student shall be responsible and accountable for the safe performance of those direct client care tasks to which he has been assigned.

B. Faculty shall be responsible for ensuring that students perform only skills or services in direct client care for which they have received instruction and have been found proficient by the instructor. Skills checklists shall be maintained for each student.

C. Faculty members or preceptors providing on-site supervision in the clinical care of clients shall be responsible and accountable for the assignment of clients and tasks based on their assessment and evaluation of the student's clinical knowledge and skills. Supervisors shall also monitor clinical performance and intervene if necessary for the safety and protection of the clients.

D. Clinical preceptors may be used to augment the faculty and enhance the clinical learning experience. Faculty shall be responsible for the designation of a preceptor for each student and shall communicate such assignment with the preceptor. A preceptor may not further delegate the duties of the preceptorship.

E. Preceptors shall provide to the nursing education program evidence of competence to supervise students' clinical experience for quality and safety in each specialty area where they supervise students. The clinical preceptor shall be licensed as a nurse at or above the level for which the student is preparing.

F. Supervision of students.

1. When faculty are supervising direct client care by students, the ratio of students to faculty shall not exceed 10 students to one faculty member. The faculty member shall be on site in the clinical setting solely to supervise students.

2. When preceptors are utilized for specified learning experiences in clinical settings, the faculty member may supervise up to 15 students. In utilizing preceptors to supervise students in the clinical setting, the ratio shall not exceed two students to one preceptor at any given time. During the period in which students are in the clinical setting with a preceptor, the faculty member shall be available for communication and consultation with the preceptor.

G. Prior to beginning any preceptorship, the following shall be required:

1. Written objectives, methodology, and evaluation procedures for a specified period of time to include the dates of each experience;

2. An orientation program for faculty, preceptors, and students;

3. A skills checklist detailing the performance of skills for which the student has had faculty-supervised clinical and didactic preparation; and

4. The overall coordination by faculty who assume ultimate responsibility for implementation, periodic monitoring, and evaluation.

**18VAC90-20-130. ~~Resources, facilities and services.~~ Granting of initial program approval.**

~~A. Periodic evaluations of resources, facilities and services shall be conducted by the administration, faculty, students and graduates of the nursing education program.~~

~~B. Secretarial and other support services shall be provided.~~

~~C. Classrooms, conference rooms, laboratories, clinical facilities and offices shall be sufficient to meet the objectives of the nursing education program and the needs of the students, faculty, administration and staff.~~

~~D. The program shall have learning resources that are current, pertinent and accessible to students and faculty, and sufficient to meet the needs of the students and faculty.~~

~~E. Written agreements with cooperating agencies shall be developed, maintained and periodically reviewed. The agreement shall:~~

~~1. Ensure full control of student education by the faculty of the nursing education program, including the selection and supervision of learning experiences.~~

~~2. Provide that faculty members or preceptors be present in the clinical setting when students are assigned for direct patient care.~~

~~3. Provide for cooperative planning with designated agency personnel to ensure safe patient care.~~

~~4. Provide that faculty be available to students and preceptors while students are involved in preceptorship experiences.~~

~~F. Any observational experiences shall be planned in cooperation with the agency involved to meet stated course objectives.~~

~~G. Cooperating agencies shall be approved by the appropriate accreditation, evaluation or licensing bodies, if such exist.~~

A. Initial approval may be granted when all documentation required in 18VAC90-20-40 has been submitted and is deemed satisfactory to the board and when the following conditions are met:

1. There is evidence that the requirements for organization and administration and the philosophy and objectives of the program, as set forth in 18VAC90-20-70 and 18VAC90-20-80, have been met;

2. A program director who meets board requirements has been appointed, and there are sufficient faculty to initiate the program as required in 18VAC90-20-90;

3. A written curriculum plan developed in accordance with 18VAC90-20-120 has been submitted and approved by the board;

4. A written systematic plan of evaluation has been developed and approved by the board; and

5. The program is in compliance with requirements of 18VAC90-20-110 for resources, facilities, publications, and services as verified by a satisfactory site visit conducted by a representative of the board.

B. If initial approval is granted:

1. The advertisement of the nursing program is authorized.

2. The admission of students is authorized, except that transfer students are not authorized to be admitted until the program has received full program approval.

3. The program director shall submit quarterly progress reports to the board that shall include evidence of progress toward full program approval and other information as required by the board.

**18VAC90-20-131. Denying or withdrawing initial program approval.**

A. Denial of initial program approval.

1. Initial approval may be denied for causes enumerated in 18VAC90-20-132.

2. If the initial approval is denied:

a. The program shall be given an option of correcting the deficiencies cited by the board during the time remaining in its initial 12-month period following receipt of the application.

b. No further action regarding the application shall be required of the board unless the program requests, within 30 days of the mailing of the decision, an informal conference pursuant to §§ 2.2-4019 and 54.1-109 of the Code of Virginia.

3. If denial is recommended following the informal conference, the recommendation shall be presented to the board or a panel thereof for review and action.

4. If the recommendation of the informal conference committee to deny initial approval is accepted by the board or a panel thereof, the decision shall be reflected in a board order and no further action by the board is required. The program may request a formal hearing within 30 days from entry of the order, in accordance with § 2.2-4020 of the Code of Virginia.

5. If the decision of the board or a panel thereof, following a formal hearing, is to deny initial approval, the program shall be advised of the right to appeal the decision to the appropriate circuit court in accordance with § 2.2-4026 and Part 2A of the Rules of the Supreme Court of Virginia.

B. Withdrawal of initial program approval.

1. Initial approval shall be withdrawn and the program closed if:

a. The program has not admitted students within six months of approval of its application;

b. The program fails to submit evidence of progression toward full program approval; or

c. For any of the causes enumerated in 18VAC90-20-132.

2. If a decision is made to withdraw initial approval, no further action shall be required by the board unless the program, within 30 days of the mailing of the decision, requests an informal conference pursuant to §§ 2.2-4019 and 54.1-109 of the Code of Virginia.

3. If withdrawal of initial approval is recommended following the informal conference, the recommendation shall be presented to the board or a panel thereof for review and action.

4. If the recommendation of the informal conference committee to withdraw initial approval is accepted by the board or a panel thereof, the decision shall be reflected in a board order and no further action by the board is required unless the program requests a formal hearing within 30 days from entry of the order, in accordance with § 2.2-4020 of the Code of Virginia.

5. If the decision of the board or a panel thereof following a formal hearing is to withdraw initial approval, the program shall be advised of the right to appeal the decision to the appropriate circuit court in accordance with § 2.2-4026 of the Code of Virginia and Part 2A of the Rules of the Supreme Court of Virginia.

**18VAC90-20-132. Causes for denial or withdrawal of nursing education program approval.**

A. Denial or withdrawal of program approval may be based upon the following:

1. Failing to demonstrate compliance with program requirements in Article 1 (18VAC90-20-40 et seq.), Article 2 (18VAC90-20-133 et seq.), or Article 3 (18VAC90-20-151 et seq.) of this part.

2. Failing to comply with terms and conditions placed on a program by the board.

3. Advertising for or admitting students without authority, board approval, or contrary to a board restriction.

4. Failing to progress students through the program in accordance with an approved time frame.

5. Failing to provide evidence of progression toward initial program approval within a time frame established by the board.

6. Failing to provide evidence of progression toward full program approval within a time frame established by the board.

7. Failing to respond to requests for information required from board representatives.

8. Fraudulent submission of documents or statements to the board or its representatives.

9. Having had past actions taken by the board, other states, or accrediting entities regarding the same nursing education program operating in another jurisdiction.

10. Failing to maintain a pass rate of 80% on the NCLEX for graduates of the program as required by 18VAC90-20-151.

11. Failing to comply with an order of the board or with any terms and conditions placed upon it by the board for continued approval.

12. Having the program director, owner, or operator of the program convicted of a felony or a misdemeanor involving moral turpitude or his professional license disciplined by a licensing body or regulatory authority.

13. Failing to pay the required fee for a survey or site visit.

B. Withdrawal of nursing education program approval may occur at any stage in the application or approval process pursuant to procedures enumerated in 18VAC90-20-131, 18VAC90-20-134, and 18VAC90-20-161.

C. Programs with approval denied or withdrawn may not accept or admit additional students into the program effective upon the date of entry of the board's final order to deny or withdraw approval. Further, the program shall submit quarterly reports until the program is closed, and the program shall comply with board requirements regarding closure of a program as stated in 18VAC90-20-170.

Article 2
Full Approval for a Nursing Education Program

**18VAC90-20-133. Granting full program approval.**

A. Full approval may be granted when:

1. A self-evaluation report of compliance with Articles 1 (18VAC90-20-40 et seq.) and 2 (18VAC90-20-133 et seq.) of this part and a survey visit fee as specified in 18VAC90-20-30 have been submitted and received by the board;

2. The program has achieved a passage rate of not less than 80% for the program's first-time test takers taking the NCLEX based on at least 20 graduates within a two-year period; and

3. A satisfactory survey visit and report have been made by a representative of the board verifying that the program is in compliance with all requirements for program approval.

B. If full approval is granted, the program shall continue to comply with all requirements in Articles 1, 2, and 3 (18VAC90-20-151 et seq.) of this part, and admission of transfer students is authorized.

**18VAC90-20-134. Denying full program approval.**

A. Denial of full program approval may occur for causes enumerated in 18VAC90-20-132.

B. If full program approval is denied, the board shall also be authorized to do one of the following:

1. The board may continue the program on initial program approval with terms and conditions to be met within the time frame specified by the board; or

2. The board may withdraw initial program approval.

C. If the board takes one of the actions specified in subsection B of this section, the following shall apply:

1. No further action will be required of the board unless the program, within 30 days of the mailing of the decision, requests an informal conference pursuant to §§ 2.2-4019 and 54.1-109 of the Code of Virginia.

2. If continued initial program approval with terms and conditions or withdrawal of initial approval is recommended following the informal conference, the recommendation shall be presented to the board or a panel thereof for review and action.

3. If the recommendation of the informal conference committee is accepted by the board or a panel thereof, the decision shall be reflected in a board order and no further action by the board regarding the application is required. The program may request a formal hearing within 30 days from entry of the order, in accordance with § 2.2-4020 and subdivision 11 of § 54.1-2400 of the Code of Virginia.

4. If the decision of the board or a panel thereof following a formal hearing is to deny full and/or withdraw or continue on initial approval with terms or conditions, the program shall be advised of the right to appeal the decision to the appropriate circuit court in accordance with § 2.2-4026 of the Code of Virginia and Part 2A of the Rules of the Supreme Court of Virginia.

D. If a program is denied full approval and initial approval withdrawn, no additional students may be accepted into the program, effective upon the date of entry of the board's final order to deny or withdraw approval. Further, the program shall submit quarterly reports until the program is closed, and the program shall comply with board requirements regarding closure of a program as stated in 18VAC90-20-170.

**18VAC90-20-135. Requests for exceptions or requirements for faculty.**

After full approval has been granted, a program may request board approval for exceptions to requirements of 18VAC90-20-90 for faculty as follows:

1. Initial request for exception.

a. The program director shall submit a request for initial exception in writing to the board for consideration prior to the academic year during which the nursing faculty member is scheduled to teach or whenever an unexpected vacancy has occurred.

b. A description of teaching assignment, a curriculum vitae, and a statement of intent from the prospective faculty member to pursue the required degree shall accompany each request.

c. The executive director of the board shall be authorized to make the initial decision on requests for exceptions. Any appeal of that decision shall be in accordance with the provisions of the Administrative Process Act (§ 2.2-4000 et seq. of the Code of Virginia).

2. Request for continuing exception.

a. Continuing exception will be based on the progress of the nursing faculty member toward meeting the degree required by this chapter during each year for which the exception is requested.

b. The program director shall submit the request for continuing exception in writing prior to the next academic year during which the nursing faculty member is scheduled to teach.

c. A list of courses required for the degree being pursued and college transcripts showing successful completion of a minimum of two of the courses during the past academic year shall accompany each request.

d. Any request for continuing exception shall be considered by the committee, which shall make a recommendation to the board.

**18VAC90-20-136. Records and provision of information.**

A. Requirements for admission, readmission, advanced standing, progression, retention, dismissal, and graduation shall be readily available to the students in written form.

B. A system of records shall be maintained and be made available to the board representative and shall include:

1. Data relating to accreditation by any agency or body.

2. Course outlines.

3. Minutes of faculty and committee meetings including documentation of the use of a systematic plan of evaluation for total program review and including those faculty members in attendance.

4. Record of and disposition of complaints.

C. A file shall be maintained for each student. Provision shall be made for the protection of student and graduate files against loss, destruction, and unauthorized use. Each file shall be available to the board representative and shall include the student's:

1. Application, including the date of its submission and the date of admission into the program;

2. High school transcript or copy of high school equivalence certificate, and if the student is a foreign graduate, a transcript translated into English and the results of passage of an examination of English proficiency as determined by the board;

3. Current record of achievement to include classroom grades, skills checklists, and clinical hours for each course; and

4. A final transcript retained in the permanent file of the institution to include dates of admission and completion of coursework, graduation date, name and address of graduate, the dates of each semester or term, number of clinical hours for each clinical course, course grades, and authorized signature.

D. Current information about the nursing education program shall be published and distributed to students and applicants for admission and shall be made available to the board. In addition to information specified in 18VAC90-20-110 C, the following information shall be included:

1. Annual passage rates on NCLEX for the past five years; and

2. Accreditation status.

**18VAC90-20-137. Evaluation of resources; written agreements with cooperating agencies.**

A. Periodic evaluations of resources, facilities, and services shall be conducted by the administration, faculty, students, and graduates of the nursing education program including an employer evaluation for graduates of the nursing education program. Such evaluation shall include assurance that at least 80% of all clinical experiences are conducted in Virginia unless an exception has been granted by the board.

B. Current written agreements with cooperating agencies shall be maintained and reviewed annually and shall be in accordance with of 18VAC90-20-110 E.

C. Upon request, a program shall provide a clinical agency summary on a form provided by the board.

D. Upon request and if applicable, the program shall provide (i) documentation of board approval for use of clinical sites located 50 or more miles from the school; and (ii) for use of clinical experiences conducted outside of Virginia, documented approval from the agency that has authority to approve clinical placement of students in that state.

**18VAC90-20-140. Program changes.**

A. The following shall be reported to the board within 10 days of the change or receipt of a report from an accrediting body:

1. Change in the program director, governing body, or parent institution;

2. Adverse action taken by a licensing authority against the program director, governing body, or parent institution;

3. Conviction of a felony or misdemeanor involving moral turpitude against the program director, owner, or operator of the program;

~~2.~~ 4. Change in ~~accreditation status~~ the physical location of the program;

~~3.~~ 5. Change in ~~content of curriculum, faculty or method of delivery that affects 25% or more of the hours of instruction~~ the availability of clinical sites;

~~4.~~ 6. Change in financial resources that could substantively affect the nursing education program;

7. Change in content of curriculum, faculty, or method of delivery that affects 25% or more of the hours of instruction;

~~5.~~ 8. Change in ~~the physical location of the program~~ accreditation status; and

~~6.~~ 9. A final report with findings and recommendations from the accrediting body.

B. Other curriculum or faculty changes shall be reported to the board with the annual report required in 18VAC90-20-160 A.

Article 3
Continued Approval of Nursing Education Programs

**18VAC90-20-151. Passage rate on national examination.**

A. For the purpose of continued approval by the board, a nursing education program shall maintain a passage rate for first-time test takers on the NCLEX that is not less than 80%, calculated on the cumulative results of the past four quarters of all graduates in each calendar year regardless of where the graduate is seeking licensure.

B. If an approved program falls below 80% for one year, it shall submit a plan of correction to the board. If ~~a~~ an approved program falls below 80% for two consecutive years, the board shall place the program on conditional approval with terms and conditions, require the program to submit a plan of correction, and conduct a site visit ~~and place the program on conditional approval~~. Prior to the conduct of such a visit, the program shall submit the fee for a site visit pursuant to the NCLEX passage rate as required by 18VAC90-20-30. If a program falls below 80% for three consecutive years, the board may withdraw program approval.

C. For the purpose of program evaluation, the board may provide to the program the NCLEX examination results of its graduates. However, further release of such information by the program shall not be authorized without written authorization from the candidate.

~~Article 3~~
~~Maintaining or Closing an Approved Nursing Education Program~~

**18VAC90-20-160. Maintaining an approved nursing education program.**

A. The program director of each nursing education program shall submit an annual report to the board.

B. Each nursing education program shall be reevaluated as follows:

1. ~~A~~ Every nursing education program that has not achieved accreditation as defined in 18VAC90-20-10 shall be reevaluated at least every ~~eight~~ five years ~~for a practical nursing program and every six years for a registered nursing program~~ by submission of a comprehensive self-evaluation report based on ~~Article~~ Articles 1 (18VAC90-20-40 et seq.) and 2 ~~(18VAC90-20-70~~ (18VAC90-20-133 et seq.) of this part, and a survey visit by a ~~representative(s)~~ representative or representatives of the board on dates mutually acceptable to the institution and the board.

2. A program that has maintained accreditation as defined in 18VAC90-20-10 shall be reevaluated at least every 10 years by submission of a comprehensive self-evaluation report as provided by the board. As evidence of compliance with specific requirements of this chapter, the board may accept the most recent study report, site visit report, and final decision letter from the accrediting body. The board may require additional information or a site visit to ensure compliance with requirements of this chapter. If accreditation has been withdrawn or a program has been placed on probation by the accrediting body, the board ~~shall conduct an on-site~~ may require a survey visit ~~within one year of such action~~. If a program fails to submit the documentation required in this subdivision, the requirements of subdivision 1 of this subsection shall apply.

~~C. The Education Special Conference Committee (the "committee"), composed of not less than two members of the board, shall, in accordance with § 2.2-4019 of the Code of Virginia, receive and review the self-evaluation and survey reports and shall make a recommendation to the board to grant continued approval, place the program on conditional approval or withdraw approval.~~

~~1. A nursing education program shall continue to be approved provided the requirements set forth in Article 2 of this part are attained and maintained.~~

~~2. If the committee determines that a nursing education program is not maintaining the requirements of Article 2 of this part, the committee shall recommend to the board that the program be placed on conditional approval and the governing institution shall be given a reasonable period of time to correct the identified deficiencies.~~

~~a. The committee shall receive and review reports of progress toward correcting identified deficiencies and, when a final report is received at the end of the specified time showing correction of deficiencies, make a recommendation to the board to grant continued approval, continue the program on conditional approval or withdraw approval.~~

~~b. If the nursing education program fails to correct the identified deficiencies within the time specified by an order of the board, the board may withdraw the approval following a formal hearing.~~

~~c. The governing institution may request a formal hearing before the board or a panel thereof pursuant to § 2.2-4020 and subdivision 9 of § 54.1-2400 of the Code of Virginia if it objects to any action of the board relating to conditional approval.~~

~~D.~~ C. Interim site or survey visits shall be made to the institution by board representatives at any time within the initial approval period or full approval period ~~either by request or~~ as deemed necessary by the board. Prior to the conduct of such a visit, the program shall submit the fee for a survey visit as required by 18VAC90-20-30.

~~E.~~ D. Failure to submit the required fee for a survey or site visit may subject an education program to board action or withdrawal of board approval.

**18VAC90-20-161. Continuing and withdrawing full approval.**

A. The board shall receive and review the self-evaluation and survey reports pursuant to 18VAC90-20-160 B or complaints relating to program compliance. Following review, the board may continue the program on full approval so long as it remains in compliance with all requirements in Articles 1 (18VAC90-20-40 et seq.), 2 (18VAC90-20-133 et seq.) and 3 (18VAC90-20-151 et seq.) of this part.

B. If the board determines that a program is not maintaining the requirements of Articles 1, 2, and 3, or for causes enumerated in 18VAC90-20-132, it may:

1. Place the program on conditional approval with terms and conditions to be met within the time frame specified by the board; or

2. Withdraw program approval.

C. If the board either places a program on conditional approval with terms and conditions to be met within a time frame specified by the board or withdraws approval, the following shall apply:

1. No further action will be required of the board unless the program requests an informal conference pursuant to §§ 2.2-4019 and 54.1-109 of the Code of Virginia.

2. If withdrawal or continued program approval with terms and conditions is recommended following the informal conference, the recommendation shall be presented to the board or a panel thereof for review and action.

3. If the recommendation of the informal conference committee is accepted by the board or a panel thereof, the decision shall be reflected in a board order and no further action by the board is required unless the program requests a formal hearing within 30 days from entry of the order in accordance with § 2.2-4020 of the Code of Virginia.

4. If the decision of the board or a panel thereof following a formal hearing is to withdraw approval or continue on conditional approval with terms or conditions, the program shall be advised of the right to appeal the decision to the appropriate circuit court in accordance with § 2.2-4026 of the Code of Virginia and Part 2A of the Rules of the Supreme Court of Virginia.

D. If a program approval is withdrawn, no additional students may be admitted into the program effective upon the date of entry of the board's final order to withdraw approval. Further, the program shall submit quarterly reports until the program is closed, and the program must comply with board requirements regarding closure of a program as stated in 18VAC90-20-170.

**18VAC90-20-170. Closing of an approved nursing education program; custody of records.**

A. When the governing institution anticipates the closing of a nursing education program, it shall notify the board in writing, stating the reason, plan, and date of intended closing.

The governing institution shall assist in the transfer of students to other approved programs with the following conditions:

1. The program shall continue to meet the standards required for approval until all students are transferred and shall submit a quarterly report to the board regarding progress toward closure.

2. ~~A~~ The program shall provide to the board a list of the names of students who have been transferred to approved programs, and the date on which the last student was transferred ~~shall be submitted to the board by the governing institution~~.

3. The date on which the last student was transferred shall be the closing date of the program.

B. When the board denies or withdraws approval of a program, the governing institution shall comply with the following procedures:

1. The program shall be closed according to a time frame established by the board.

2. ~~A~~ The program shall provide to the board a list of the names of students who have transferred to approved programs and the date on which the last student was transferred shall be submitted to the board by the governing institution.

3. The program shall provide quarterly reports to the board regarding progress toward closure.

C. Provision shall be made for custody of records as follows:

1. If the governing institution continues to function, it shall assume responsibility for the records of the students and the graduates. The institution shall inform the board of the arrangements made to safeguard the records.

2. If the governing institution ceases to exist, the academic transcript of each student and graduate shall be transferred by the institution to the board for safekeeping.

VA.R. Doc. No. R10-2513; Filed November 20, 2013, 1:48 p.m.

## BOARD FOR WATERWORKS AND WASTEWATER WORKS OPERATORS AND ONSITE SEWAGE SYSTEM PROFESSIONALS

### Proposed Regulation

Title of Regulation: **18VAC160-20. Board for Waterworks and Wastewater Works Operators and Onsite Sewage System Professionals Regulations (amending 18VAC160-20-10, 18VAC160-20-97).**

Statutory Authority: §§ 54.1-201 and 54.1-2301 of the Code of Virginia.

Public Hearing Information:

December 18, 2013 - 10:30 a.m. - Department of Professional and Occupational Regulation, Perimeter

Center, 9960 Mayland Drive, Suite 200, Board Room 2, Richmond, VA 23233

Public Comment Deadline: February 14, 2014.

Agency Contact: Trisha Henshaw, Executive Director, Board for Waterworks and Wastewater Works Operators and Onsite Sewage System Professionals, 9960 Mayland Drive, Suite 400, Richmond, VA 23233, telephone (804) 367-8595, FAX (866) 350-5354, or email waterwasteoper@dpor.virginia.gov.

Basis: Subdivision 5 of § 54.1-201 of the Code of Virginia states that the Board for Waterworks and Wastewater Works Operators and Onsite Sewage System Professionals has the power and duty "To promulgate regulations in accordance with the Administrative Process Act (§ 2.2-4000 et seq. of the Code of Virginia) necessary to assure continued competency, to prevent deceptive or misleading practices by practitioners and to effectively administer the regulatory system administered by the regulatory board." Section 54.1-2301 D of the Code of Virginia states that, "The Board, in consultation with the Board of Health, shall adopt regulations for the licensure of (i) onsite soil evaluators; (ii) installers of alternative onsite sewage systems, as defined in § 32.1-163; and (iii) operators of alternative onsite sewage systems, as defined in § 32.1-163."

Purpose: The proposed amendments reflect current procedures consistent with the Virginia Department of Health (VDH) that pertain to the issuance of permits obtained by contractors for the installation of sewage systems, completion statements submitted to VDH by the contractor after the installation, and inspection report and completion statements submitted to VDH by a licensed soil evaluator or a Virginia-licensed professional engineer. The requirement to provide these documents for an installer license will sufficiently demonstrate the individual's installation experience without overburdening him with unnecessary documents such as a system operation permit.

The changes to the regulations are necessary to allow individuals currently working in the water, wastewater, soil evaluation, sewage installation, or sewage operation industry to continue to work if under the direct supervision of a licensed individual. Licensees will supervise both individuals who are seeking experience for licensure as well as individuals who work in the industry but are not seeking licensure. Evaluation, installation, and operation duties will continue to be controlled by a properly licensed person in order to continue to safeguard the public, but persons who are unlicensed and work under the direct supervision of a licensee are not mandated to apply for licensure should they choose not to apply.

One goal of the proposed amendments is to amend current requirements for documenting installation experience so as to make them more consistent with the actual procedures in the onsite sewage system industry. Currently, a contractor completion statement and a separate authorized onsite soil evaluator or a professional engineer (AOSE/PE) inspection report and completion statement is required by VDH after a system installation is complete.

The amendments require a sewage system installer license applicant to submit copies of the contractor completion statements, corresponding inspection report and completion statements, and a signed statement from a supervisor within the company that performed the installation. This process is a standard that applies to all installer applicants seeking to prove their qualifications for sewage system installation licensure. The applicant needs to provide copies of documents that are already required by VDH and kept as public records after the installation of a system.

Another goal of the proposed amendments is to allow technically qualified persons to obtain the installer license by proving their experience of installing systems without limiting them to the time period during which the contractor may or may not have had the sewage disposal system (SDS) specialty on the contractor license. The current requirements preclude individuals from licensure who might otherwise be qualified, but whose firm may not have had the SDS endorsement on the firm's contractor license during the time period of the employee's experience. The proposed language resolves this issue by separating the experience of the employee from the SDS endorsement on the firm's contractor license. The applicant must have certification of his experience and proof that the firm, of which he is either an employee or a member of responsible management, has a proper Virginia contractor license with the SDS specialty at the time of his individual installer application. This accomplishes two things: it allows minimally qualified individuals to meet the requirements for licensure while simultaneously ensuring continued compliance of existing sewage system installation contractors in Virginia.

Substance: Proposed amendments include (i) removing language from the definitions of "direct supervisor" and "direct supervision," which indicates that such supervision requires that the supervisee must intend to apply for a license, (ii) less restrictive entry requirements for installers, (iii) changes to the documentation requirements for installers to prove experience so that they are consistent with VDH procedures involved in the installation of a sewage system. The proposed amendments, although substantive in nature, are less restrictive than current requirements.

Issues: The primary advantages to the public are less restrictive licensure requirements that still ensure minimum competency within the soil evaluation, septic installation, and septic operation fields. The primary advantage to the Commonwealth is the continuance of a successful licensure program that meets the needs of protecting the public by ensuring minimum competency within the onsite sewage system industry. Simultaneously, the regulated community is not overly burdened in obtaining the licensure required to continue to perform its business in the Commonwealth. No

disadvantages to the public or Commonwealth have been identified.

Department of Planning and Budget's Economic Impact Analysis:

Summary of the Proposed Amendments to Regulation. The Board for Waterworks and Wastewater Works Operators and Onsite Sewage System Professionals (Board) proposes to amend its regulations so that: 1) licensees may supervise the work of unlicensed individuals who are not seeking licensure, 2) the experience requirement for licensure as a sewage system installer can be fulfilled with proof of installation jobs performed whether or not they were performed under a contractor's license with a SDS specialty attached and 3) the experience requirements for licensure as an alternate onsite sewage installer require, as proof of experience, paperwork that is already required by the Virginia Department of Health (VDH) after a system installation is complete.

Result of Analysis. The benefits likely exceed the costs for all proposed changes.

Estimated Economic Impact. Under current regulations, the definitions of direct supervision and direct supervisor only allow licensees to supervise non-licensed individuals who are working to qualify for licensure. The Board proposes to modify these definitions so that licensees can supervise unlicensed individuals whether or not they ever plan on becoming licensed. Since the licensee supervisors are now, and will continue to be, responsible for the work of any individuals that they supervise, it is likely that no entity will incur extra costs on account of this regulatory change. Regulated entities will benefit from the removal of this restriction because it will open up a wider pool of possible employees for their businesses. Individuals who might be interested in this type of employment, but who do not want to work toward licensure, will also benefit as this regulatory change will allow them to work under the supervision of a licensee.

Current regulations require that applicants for licensure as onsite sewage system installers have experience installing onsite sewage systems either under the supervision of a contractor with a sewage disposal system (SDS) specialty or actually working as a contractor with an SDS specialty. Because the Board has had contractor applicants who have a proven record of successfully installing onsite sewage systems during a time when they did not have an SDS specialty attached to their license, the Board proposes to change licensure requirements. Under the proposed regulations, applicants for licensure only have to either have a contractor’s license with an SDS specialty, or be working for a contractor with an SDS specialty, at the time they apply for licensure rather than when all experience requirements were met. Contractors who meet the requirements for an SDS specialty can obtain it by checking the correct box on their application for initial licensure or, when they are adding the specialty after initial licensure, by filling out a form and paying a $110 fee. Since all onsite sewage systems are inspected after they are completed, there is likely no public health consequence to allowing less restrictive provisions for gaining experience. Applicants will likely benefit from this proposed change as it will allow them to use all of their experience without having to discount jobs that were not done under a contractor's SDS specialty.

Current regulations that govern licensure for alternate onsite sewage system installers require, in some paths to licensure, proving successful completion of a certain number of onsite or alternate onsite sewage systems installations. The Board currently requires, as proof of completed jobs, paperwork that might be difficult or impossible for applicants to obtain. To solve this problem, the Board proposes to require only the same paperwork that is also required by the Virginia Department of Health (VDH) to prove successful completion of sewage systems jobs. This change will benefit applicants who will no longer be required to provide papers that they don't have or can't get.

Businesses and Entities Affected. The Department of Professional and Occupational Regulation (DPOR) reports that there are currently 1,023 licensed sewage systems installers, 958 interim onsite sewage system installers and 1,459 contractors with SDS specialties in the Commonwealth. All of these individuals, as well as any individuals who may wish to be licensed by the Board in the future, will be affected by these proposed regulations.

Localities Particularly Affected. No locality will be particularly affected by this proposed regulatory action.

Projected Impact on Employment. This regulatory action will likely have no impact on employment in the Commonwealth.

Effects on the Use and Value of Private Property. This regulatory action will likely have no effect on the use or value of private property in the Commonwealth.

Small Businesses: Costs and Other Effects. Small businesses in the Commonwealth are unlikely to incur any costs on account of this regulatory action.

Small Businesses: Alternative Method that Minimizes Adverse Impact. Small businesses in the Commonwealth are unlikely to incur any costs on account of this regulatory action.

Real Estate Development Costs. This regulatory action will likely have no effect on real estate development costs in the Commonwealth.

Legal Mandate. The Department of Planning and Budget (DPB) has analyzed the economic impact of this proposed regulation in accordance with § 2.2-4007.04 of the Administrative Process Act and Executive Order Number 14 (10). Section 2.2-4007.04 requires that such economic impact analyses include, but need not be limited to, the projected number of businesses or other entities to whom the regulation would apply, the identity of any localities and types of businesses or other entities particularly affected, the projected

number of persons and employment positions to be affected, the projected costs to affected businesses or entities to implement or comply with the regulation, and the impact on the use and value of private property. Further, if the proposed regulation has adverse effect on small businesses, § 2.2-4007.04 requires that such economic impact analyses include (i) an identification and estimate of the number of small businesses subject to the regulation; (ii) the projected reporting, recordkeeping, and other administrative costs required for small businesses to comply with the regulation, including the type of professional skills necessary for preparing required reports and other documents; (iii) a statement of the probable effect of the regulation on affected small businesses; and (iv) a description of any less intrusive or less costly alternative methods of achieving the purpose of the regulation. The analysis presented above represents DPB's best estimate of these economic impacts.

Agency's Response to Economic Impact Analysis: The Board for Waterworks and Wastewater Works Operators and Onsite Sewage System Professionals concurs with the economic impact analysis prepared by the Department of Planning and Budget.

Summary:

*The proposed amendments change the definitions of "direct supervisor" and "direct supervision," allowing licensees to supervise the work of unlicensed individuals who are not seeking licensure. Also, the requirements for applicants for an individual sewage system installer license are modified to reflect current industry procedures consistent with the Virginia Department of Health. The proposed amendments also change the experience requirement for the individual sewage system installer license to allow an individual's installation experience to fulfill the requirement for licensure as long as the applicant's firm is properly licensed as a Virginia contractor with the specialty of sewage disposal systems at the time he applies for the installer license.*

Part I
Definitions

**18VAC160-20-10. Definitions.**

The following words and terms when used in this chapter shall have the following meanings unless the context clearly indicates otherwise:

"Alternative onsite sewage system" means a treatment works that is not a conventional onsite sewage system and does not result in a point source discharge.

"Alternative onsite sewage system installer" means an individual licensed by the board to construct, install, and repair conventional and alternative onsite sewage systems.

"Alternative onsite sewage system operator" means an individual licensed by the board to operate and maintain conventional and alternative onsite sewage systems.

"Alternative onsite soil evaluator" means an individual licensed by the board to evaluate soils and soil properties in relationship to the effect of these properties on the use and management of these soils as the locations for conventional and alternative onsite sewage systems, to certify in accordance with applicable state regulations and local ordinances that sites are suitable for conventional and alternative onsite sewage systems, and to design conventional and alternative onsite sewage systems suitable for the soils.

"Authorized onsite soil evaluator" or "AOSE" means an individual holding an authorized onsite soil evaluator certification issued by the Virginia Department of Health that was valid on June 30, 2009.

"Board" means the Board for Waterworks and Wastewater Works Operators and Onsite Sewage System Professionals or any successor agency.

"Category" means waterworks operator, wastewater works operator, onsite soil evaluator, onsite sewage system installer, and onsite sewage system operator.

"Classification" means the divisions within each category of waterworks and wastewater works operators' licenses into classes where Class "1" represents the highest classification.

"Classified facility" means a waterworks that has been granted a classification by the Virginia Department of Health or a wastewater works that has been granted a classification by the Virginia Department of Environmental Quality.

"Contact hour" means 50 minutes of participation in a structured training activity.

"Continuing Professional Education (CPE)" means participation in a structured training activity that enables a licensee to maintain and increase the competence required to assure the public's protection.

"Conventional onsite sewage system" means a treatment works consisting of one or more septic tanks with gravity, pumped, or siphoned conveyance to a gravity distributed subsurface drain field.

"Conventional onsite sewage system installer" means an individual licensed to construct, install, and repair conventional onsite sewage systems.

"Conventional onsite sewage system operator" means an individual licensed by the board to operate and maintain a conventional onsite sewage system.

"Conventional onsite soil evaluator" means an individual licensed by the board to evaluate soils and soil properties in relationship to the effects of these properties on the use and management of these soils as the locations for conventional and alternative onsite sewage systems, to certify in accordance with applicable state regulations and local ordinances that sites are suitable for conventional and alternative onsite sewage systems, and to design conventional onsite sewage systems suitable for the soils.

"Department" means the Virginia Department of Professional and Occupational Regulation.

"Direct supervision" means being responsible for the compliance with this chapter by any unlicensed individual who~~, for the purpose of obtaining the necessary competence to qualify for licensure,~~ is engaged in activities requiring an operator, installer, or evaluator license.

"Direct supervisor" means a licensed operator, installer, or evaluator who undertakes the supervision of an unlicensed individual engaged in activities requiring a license ~~for the purpose of obtaining the competence necessary to qualify for licensure and who~~. The direct supervisor shall be responsible for the unlicensed individual's full compliance with this chapter.

"Distance learning" means participation in a training activity, with or without interaction with an instructor, that utilizes DVD's, videos, or other audio/visual materials, or is computer-based. Documentation of distance learning must meet the requirements of 18VAC160-20-109 D.

"Experience" means time spent learning how to physically and theoretically operate the waterworks, wastewater works, or onsite sewage system as an operator-in-training or time spent operating a waterworks or wastewater works for which the operator is currently licensed for the purpose of obtaining the necessary competence to qualify for a specific license. Experience also means the time spent under the direct supervision of an authorized onsite soil evaluator, onsite soil evaluator licensee, onsite sewage system installer licensee or onsite site sewage system operator licensee for the purpose of obtaining the necessary competence to qualify for a specific license.

"Interim license" means a method of regulation whereby the board authorizes an unlicensed individual to engage in activities requiring a specific license provided for in this chapter for a limited time to obtain the necessary competence to qualify for that specific license.

"Interim licensee" means an individual holding a valid interim license.

"Licensed operator" means an operator with a license in the category of onsite sewage systems operator, waterworks operator, or wastewater works operator. For waterworks operators and wastewater works operators, the license classification must be equal to or higher than the classification of the waterworks or wastewater works being operated.

"Licensee" means an individual holding a valid license issued by the board.

"Licensure" means a method of regulation whereby the Commonwealth, through the issuance of a license, authorizes a person possessing the character and minimum skills to engage in the practice of a profession or occupation that is unlawful to practice without a license.

"Maintenance" or "maintain" means performing adjustments to equipment and controls and in-kind replacement of normal wear and tear parts such as light bulbs, fuses, filters, pumps, motors, or other like components. Maintenance includes pumping the tanks or cleaning the building sewer on a periodic basis. Maintenance shall not include replacement of tanks, drain field piping, distribution boxes, or work requiring a construction permit and a licensed onsite sewage system installer.

"Nonclassified facility" means a facility located in Virginia that has not been classified by the Virginia Department of Health or a facility that has not been classified by the Virginia Department of Environmental Quality.

"Onsite sewage system" means a conventional onsite sewage system or an alternative onsite sewage system.

"Operate" means any act of an individual that may impact on the finished water quality at a waterworks, the plant effluent at a wastewater works, or the effluent at an onsite sewage system.

"Operating staff" means individuals employed or appointed by an owner to work at a waterworks or wastewater works.

"Operator" means any individual employed or appointed by any owner, and who is designated by such owner to be the person in responsible charge, such as a supervisor, a shift operator, or a substitute in charge, and whose duties include testing or evaluation to control waterworks, wastewater works operations, or to operate onsite sewage systems. Not included in this definition are superintendents or directors of public works, city engineers, or other municipal or industrial officials whose duties do not include the actual operation or direct supervision of waterworks or wastewater works.

"Operator-in-training" means an individual employed by an owner to work under the direct supervision and direction of an operator holding a valid license in the proper category and classification for the purpose of gaining experience and knowledge in the duties and responsibilities of an operator of a waterworks, wastewater works, or onsite sewage system. An operator-in-training is not an operator.

"Owner" means the Commonwealth of Virginia, or any political subdivision thereof, any public or private institution, corporation, association, or any other entity organized or existing under the laws of this Commonwealth or of any other state or nation, or any person or group of persons acting individually or as a group, who own, propose to own, manage, or maintain waterworks, wastewater works, or onsite sewage systems.

"Provisional licensee" means an individual holding a valid provisional license issued by the board.

"Provisional licensure" or "provisional license" means a method of regulation whereby the Commonwealth recognizes an individual as having met specific standards but who is not authorized to operate a classified facility until he has met the

remaining requirements for licensure and has been issued a license.

"Renewal" means continuing the effectiveness of a license for another period of time.

"Responsible charge" means the designation by the owner of any individual to have the duty and the authority to operate a waterworks, wastewater works, or onsite sewage system.

"Sewage" means water-carried and nonwater-carried human excrement, kitchen, laundry, shower, bath or lavatory wastes separately or together with such underground, surface, storm or other water and liquid industrial wastes as may be present from residences, buildings, vehicles, industrial establishments or other places.

"Sewage handler" means any person who removes or contracts to remove and transports by vehicle the contents of any septic tank, sewage treatment plant, privy, holding tank, portable toilet, or other treatment or holding device, or any sewage, septage or sewage sludges and who is permitted under the Sewage Handling and Disposal Regulations (12VAC5-610) or successor regulation.

"Sewerage system" means pipelines or conduits, pumping stations and force mains, and all other construction, devices and appliances appurtenant thereto, used for the collection and conveyance of sewage to a treatment works or point of ultimate disposal, as defined in the Sewage Handling and Disposal Regulations (12VAC5-610).

"Structured training activity" means a formal educational process designed to permit a participant to learn a given subject or subjects through interaction with an instructor in a course, seminar, conference, or other performance-oriented format, or distance learning.

"Training credit or education credit" means a unit of board-approved training or formal education completed by an individual that may be used to substitute for experience when applying for a license. Formal education used to meet a specific education requirement for license entry cannot also be used as a training credit for experience substitution.

"Transportation" means the vehicular conveyance of sewage, as defined in § 32.1-163 of the Code of Virginia.

"Treatment works" means any device or system used in the storage, treatment, disposal or reclamation of sewage or combinations of sewage and industrial wastes including, but not limited to, pumping, power and other equipment and appurtenances, septic tanks and any works, including land, that are or will be (i) an integral part of the treatment process or (ii) used for ultimate disposal of residues or effluent resulting from such treatment.

"VDH" means Virginia Department of Health.

"Wastewater works" means a system of (i) sewerage systems or sewage treatment works serving more than 400 persons, as set forth in § 62.1-44.18 of the Code of Virginia; (ii) sewerage systems or sewage treatment works serving fewer than 400 persons, as set forth in § 62.1-44.18 of the Code of Virginia, if so certified by the State Water Control Board; and (iii) facilities for discharge into state waters of industrial wastes or other wastes, if certified by the State Water Control Board.

"Wastewater works operator" means any individual employed or appointed by any owner, who is designated by such owner to be the person in responsible charge, such as a supervisor, a shift operator, or a substitute in charge, and whose duties include testing or evaluation to control wastewater works operations. Superintendents or directors of public works, city engineers, or other municipal or industrial officials whose duties do not include the actual operation or direct supervision of wastewater works are not included in this definition.

"Waterworks" means a system that serves piped water for drinking or domestic use to (i) at least 15 connections or (ii) at least 25 of the same individuals for more than six months out of the year. The term waterworks shall include all structures, equipment, and appurtenances used in the storage, collection, purification, treatment and distribution of pure water, except the piping and fixtures inside the building where such water is delivered.

"Waterworks operator" means any individual employed or appointed by any owner, who is designated by such owner to be the person in responsible charge, such as a supervisor, a shift operator, or a substitute in charge, and whose duties include testing or evaluation to control waterworks operations. Superintendents or directors of public works, city engineers, or other municipal or industrial officials whose duties do not include the actual operation or direct supervision of waterworks are not included in this definition.

**18VAC160-20-97. Qualifications for licensure - onsite sewage system installers.**

A. Each applicant shall make application in accordance with 18VAC160-20-76 and shall meet the specific entry requirements provided for in this section for the license desired.

B. Each applicant holding a valid interim onsite sewage system installer license shall submit documentation of compliance with the continuing professional education requirements of this chapter at the time of application.

C. Specific entry requirements.

1. Conventional onsite sewage system installer. Each individual applying for an initial conventional onsite sewage system installer license shall pass a board-approved examination and shall meet one of the following requirements:

a. Have two years of full-time experience successfully installing alternative or conventional onsite sewage systems during the last four years ~~under the direct supervision of a properly licensed contractor holding a sewage disposal system (SDS) specialty issued by the Virginia Board for Contractors~~ and be currently

employed by a firm holding a current and valid Virginia contractor license with the sewage disposal system (SDS) specialty; ~~or~~

b. Have two years of full-time experience successfully installing alternative or conventional onsite sewage systems during the last four years ~~as a properly licensed contractor holding a sewage disposal system (SDS) specialty issued by the Virginia Board for Contractors~~ and be a member of responsible management in a firm holding a current and valid Virginia contractor license with the sewage disposal system (SDS) specialty; ~~or~~

c. Have two years of full-time experience successfully installing alternative or conventional onsite sewage systems during the last four years working under the direct supervision of, or working as, a properly licensed Virginia contractor with the sewage disposal system (SDS) specialty; or

d. Have documentation certifying that the applicant is competent to install conventional onsite sewage systems. Certification must be provided by any combination of three of the following individuals:

(1) VDH Authorized Onsite Soil Evaluators (AOSE) for work performed prior to July 1, 2009;

(2) Licensed interim onsite soil evaluators;

(3) Licensed conventional or alternative onsite soil evaluators;

(4) Licensed conventional or alternative onsite sewage system installers; or

(5) Virginia licensed professional engineers.

2. Conventional onsite sewage system installer. The examination requirement provided for in subdivision 1 of this subsection shall not apply to applicants seeking initial licensure as a conventional onsite sewage system installer provided that:

a. The applicant is able to satisfactorily demonstrate that he has been actively engaged in performing the duties of a conventional onsite sewage system installer, as defined in this chapter, for at least eight years within the 12-year period immediately preceding the date of application. Documentation of being actively engaged in performing the duties of a conventional onsite sewage system installer, as defined in this chapter, for at least eight years within the 12-year period immediately preceding the date of application shall be provided by one or more of the following:

(1) VDH Authorized Onsite Soil Evaluator (AOSE) for work performed prior to July 1, 2009;

(2) Licensed interim onsite soil evaluator;

(3) Licensed conventional or alternative onsite soil evaluator;

(4) Licensed conventional or alternative onsite sewage system installer; or

(5) Virginia licensed professional engineer; and

b. The department receives a completed application no later than June 30, 2016. An individual who fails to have his application in the department's possession by June 30, 2016, shall be required to pass the board-approved examination provided for in subdivision 1 of this subsection.

3. Alternative onsite sewage system installer. Each individual applying for an initial alternative onsite sewage system installer license shall pass a board-approved examination and shall meet one of the following requirements:

a. Provide contractor completion statements and ~~associated operation permits issued by the VDH~~ each corresponding professional engineer's or onsite soil evaluator's inspection report and completion statement for work performed after June 30, 2009. Where applicable, a VDH inspection report shall accompany the corresponding contractor completion statement in lieu of a professional engineer's or a non-VDH onsite soil evaluator's inspection report and completion statement. The contractor completion statements ~~and permits~~ must verify that the applicant had successfully installed 36 onsite sewage systems during the preceding three years, six of which must be alternative systems. All ~~contractor completion statements and associated VDH operation permits~~ professional engineer, onsite soil evaluator, and VDH inspection reports and completion statements shall be certified by either a licensed alternative onsite soil evaluator, ~~a licensed conventional or alternative onsite sewage system installer~~ an authorized VDH employee, or a Virginia licensed professional engineer, as appropriate;

b. Provide contractor completion statements and ~~associated operation permits issued by the VDH~~ each corresponding AOSE/professional engineer inspection report and completion statement for work performed on or before June 30, 2009. The contractor completion statements ~~and permits~~ must verify that the applicant successfully installed 12 alternative onsite sewage systems during the past three years. All ~~contractor completion statements and associated VDH operation permits~~ AOSE/professional engineer inspection reports and completion statements shall be certified by either an authorized onsite soil evaluator or a Virginia licensed professional engineer;

c. Have two years of full-time experience successfully installing sewage systems ~~as a properly licensed contractor holding a sewage disposal system (SDS) specialty issued by the Virginia Board for Contractors~~, be a member of responsible management in a firm holding a current and valid Virginia contractor license with the sewage disposal system (SDS) specialty, and provide certification by at least three interim or alternative onsite soil evaluator licensees, Virginia-licensed professional

engineers, or any combination thereof, that the applicant is competent to install alternative onsite sewage systems;

d. Have two years of full-time experience successfully installing sewage systems ~~under the direct supervision a properly licensed contractor holding a sewage disposal system (SDS) specialty issued by the Virginia Board for Contractors~~, be currently employed by a firm holding a current and valid Virginia contractor license with the sewage disposal system (SDS) specialty, and provide certification by at least three interim or alternative onsite soil evaluator licensees, Virginia-licensed professional engineers, or any combination thereof, that the applicant is competent to install alternative onsite sewage systems; ~~or~~

e. Have two years of full-time experience successfully installing sewage systems during the last four years working under the direct supervision of, or working as, a properly licensed Virginia contractor with the sewage disposal system (SDS) specialty and provide certification by at least three interim or alternative onsite soil evaluator licensees, Virginia-licensed professional engineers, or any combination thereof, that the applicant is competent to install alternative onsite sewage systems; or

~~e.~~ f. Have two years of full-time experience as a licensed or interim licensed conventional onsite sewage system installer and provide certification by at least three interim or alternative onsite soil evaluator licensees, Virginia-licensed professional engineers, or any combination thereof, that the applicant is competent to install alternative onsite sewage systems.

~~If the applicant is not listed on the completion statement but did perform the installation, then the individual named on the contractor's completion statement and associated operation permit issued by the VDH may certify the applicant's work performed on an alternative onsite sewage system that was installed prior to June 30, 2009, provided that the application is received by the department no later than June 30, 2010.~~ Each applicant applying under subdivision 3 a or b of this subsection shall provide written and signed verification from a supervisor within the company that is listed on each contractor completion statement. The verification must explicitly show that the applicant was employed by the company that performed the installation as well as show that the applicant himself performed the installation.

D. Education and training substitution. Each individual applying for a conventional or an alternative onsite sewage system installer license may receive credit for up to half of the experience required by this section for:

1. Satisfactory completion of postsecondary courses in wastewater, biology, chemistry, geology, hydraulics, hydrogeology, or soil science at the rate of one month per semester hour or two-thirds of a month per quarter hour; or

2. Satisfactory completion of board-approved onsite sewage system installer training courses at the rate of one month for each training credit earned. Up to one training credit is awarded for each 10 hours of classroom contact time or for each 20 hours of laboratory exercise and field trip contact time. No credit towards training credits is granted for breaks, meals, receptions, and time other than classroom, laboratory and field trip contact time.

VA.R. Doc. No. R13-2270; Filed November 20, 2013, 1:34 p.m.

# TITLE 22. SOCIAL SERVICES

## STATE BOARD OF SOCIAL SERVICES

### Fast-Track Regulation

Title of Regulation: **22VAC40-670. Degree Requirements for Social Work Occupational Group (amending 22VAC40-670-10, 22VAC40-670-20).**

Statutory Authority: § 63.2-217 of the Code of Virginia.

Public Hearing Information: No public hearings are scheduled.

Public Comment Deadline: January 15, 2014.

Effective Date: February 1, 2014.

Agency Contact: Linda Martin, Policy Analyst Senior, Department of Social Services, 801 East Main Street, Richmond, VA 23219, telephone (804) 726-7803, FAX (804) 726-7027, or email linda.martin@dss.virginia.gov.

Basis: Section 63.2-217 of the Code of Virginia provides the State Board of Social Services the general authority for the development of regulations to carry out the purposes of Title 63.2. Section 63.2-219 of the Code of Virginia gives the board authority to specify the requirements for local departments' personnel administration under Title 63.2.

Purpose: The amendments are necessary to make the regulation consistent with the requirements of state law and to make technical corrections. The amendments are intended to help ensure employees who provide direct services have the education and experience necessary to protect the health, safety, and welfare of clients served by local departments of social services.

Rationale for Using Fast-Track Process: Executive Order 14 (2010) allows state agencies to use a fast-track rulemaking process to expedite regulatory changes that are expected to be noncontroversial. The amendments to the regulation incorporate requirements of state law and make technical corrections. As a result, no objections are anticipated.

Substance: The amendments conform the regulation to restrictions on the use of the title "social worker" pursuant to § 54.1-3709 of the Code of Virginia and incorporate necessary technical changes.

This action is necessary due to Chapter 794 of the 2011 Acts of Assembly, which stipulates that the title of social worker cannot be used by an individual unless he has received "a baccalaureate or master's degree in social work from an accredited social work school or program approved by the Council on Social Work Education or a doctorate in social work."

Issues: The advantage of this regulatory action to the agency and to the public is that it makes the regulation consistent with state law and clarifies the requirements for local department employees. There are no disadvantages to the public or the Commonwealth.

Department of Planning and Budget's Economic Impact Analysis:

Summary of the Proposed Amendments to Regulation. To comply with title protection requirements in Chapter 794 of the 2011 Acts of Assembly, the Board of Social Services (Board) proposes to change the titles of Local Departments of Social Services (LDSS) employed Social Workers and Social Work Supervisors to Family Services Specialists and Family Services Supervisors, respectively.

Result of Analysis. There is insufficient information to ascertain whether benefits will outweigh costs for these proposed changes.

Estimated Economic Impact. In 2011, the General Assembly passed a law that reads, in part, "It shall be unlawful for any person not licensed under this chapter to use the title of 'social worker' in writing or in advertising." This law also makes it a Class I misdemeanor to violate this title protection provision. In response to this change in statute, the Board now proposes to change the titles of Social Workers I, II, III and IV as well as Social Work Supervisors so that these individuals as well as the LDSS that employ them will be in compliance with the law. The Board proposes to change the titles of these workers to Family Services Specialists I, II, III and IV and Family Services Supervisors.

This change will benefit social workers who are licensed through the Department of Health Professions as they will now have sole use of the title of social worker. LDSS will likely incur one-time costs for reprinting business cards for the 2,689 affected workers (approximate cost: $9.50 per box) and will also likely incur some one-time expense for staff time spent going through all electronic information and brochures and changing titles appropriately.

Businesses and Entities Affected. Board staff reports there are currently 2,689 employees of LDSS that will be affected by this proposed regulatory change.

Localities Particularly Affected. All LDSS will be affected by this proposed regulatory action.

Projected Impact on Employment. This regulatory action is unlikely to affect employment in the Commonwealth.

Effects on the Use and Value of Private Property. These proposed regulatory changes are unlikely to affect the use or value of private property in the Commonwealth.

Small Businesses: Costs and Other Effects. No small businesses will be affected by this regulatory action.

Small Businesses: Alternative Method that Minimizes Adverse Impact. No small businesses will be affected by this regulatory action.

Real Estate Development Costs. This regulatory action will likely have no effect on real estate development costs in the Commonwealth.

Legal Mandate. The Department of Planning and Budget (DPB) has analyzed the economic impact of this proposed regulation in accordance with § 2.2-4007.04 of the Administrative Process Act and Executive Order Number 14 (10). Section 2.2-4007.04 requires that such economic impact analyses include, but need not be limited to, a determination of the public benefit, the projected number of businesses or other entities to whom the regulation would apply, the identity of any localities and types of businesses or other entities particularly affected, the projected number of persons and employment positions to be affected, the projected costs to affected businesses or entities to implement or comply with the regulation, and the impact on the use and value of private property. Further, if the proposed regulation has an adverse effect on small businesses, § 2.2-4007.04 requires that such economic impact analyses include (i) an identification and estimate of the number of small businesses subject to the regulation; (ii) the projected reporting, recordkeeping, and other administrative costs required for small businesses to comply with the regulation, including the type of professional skills necessary for preparing required reports and other documents; (iii) a statement of the probable effect of the regulation on affected small businesses; and (iv) a description of any less intrusive or less costly alternative methods of achieving the purpose of the regulation. The analysis presented above represents DPB's best estimate of these economic impacts.

Agency's Response to Economic Impact Analysis: The Department of Social Services concurs with the economic impact analysis prepared by the Department of Planning and Budget.

Summary:

*The amendments change the occupational titles of social workers and social work supervisors employed by local departments of social services to family services specialists and family services supervisors to conform to the title restriction requirements of Chapter 794 of the 2011 Acts of Assembly.*

CHAPTER 670
DEGREE REQUIREMENTS FOR ~~SOCIAL WORK~~ FAMILY SERVICES OCCUPATIONAL GROUP

**22VAC40-670-10. Definitions.**

The following words and terms when used in this chapter shall have the following meanings unless the context clearly indicates otherwise:

"Human services field" means the field of ~~social work~~ family services and related degrees, including counseling, gerontology, guidance and counseling, family and child development, psychology, sociology, or other related degrees determined by the Division of Human ~~Resource Management~~ Resources based on the similarity of the curriculum and course content. It is the applicant's responsibility to provide information with the application if the applicant wishes the course content and curriculum to be so evaluated.

~~"Social Work~~ "Family Services Occupational Group" includes the following occupational titles:

~~Social Work~~ Family Services Supervisor;

~~Social Worker~~ Family Services Specialist IV;

~~Social Worker~~ Family Services Specialist III;

~~Social Worker~~ Family Services Specialist II; and

~~Social Worker~~ Family Services Specialist I.

For purposes of this chapter, ~~Social Work Organizational~~ Family Services Occupational Group does not include ~~Social Work~~ Family Services Manager.

**22VAC40-670-20. Policy.**

Section 63.2-219 of the Code of Virginia requires the board to establish minimum entrance and performance standards.

In order to be evaluated for vacancies in the ~~Social Work~~ Family Services Occupational Group, applicants shall:

1. Possess a minimum of a baccalaureate degree in the human services field; or

2. Possess a minimum of a baccalaureate degree in any field accompanied by a minimum of two years appropriate and related experience in a human services related area; or

3. To be considered for promotion, persons currently employed in the ~~Social Work~~ Family Services Occupational Group by a local ~~agency~~ department prior to September 1, 1990, who do not meet the requirements of subdivision 1 or 2 of this section, shall possess four years of appropriate and related experience in a human services area and must have successfully completed all available competency-based training related to the promotional area.

If an individual does not indicate possession of the requirements in subdivision 1, 2, or 3 of this section on the application, he will not be qualified for the position.

Once the applicant has noted the possession of a baccalaureate degree in the human services field on the application or resume, the evaluation process will continue using knowledge, skill, and ability criteria.

Individuals employed in the ~~Social Work~~ Family Services Occupational Group prior to September 1, 1990, who do not meet the requirements of subdivision 1, 2, or 3 of this section, will be retained in their current occupational title or any lesser occupational title without having to meet the above requirements. This includes the same occupational title in another local ~~agency~~ department. These individuals will be required to meet the requirements of subdivision 1, 2, or 3 of this section for application to any higher occupational title other than their current occupational title.

VA.R. Doc. No. R14-3367; Filed November 18, 2013, 12:34 p.m.

## STATE CORPORATION COMMISSION

### Bureau of Insurance

AT RICHMOND, NOVEMBER 25, 2013

COMMONWEALTH OF VIRGINIA, ex rel.

STATE CORPORATION COMMISSION

Ex Parte: In the matter of revising the
Rules Governing Long-term Care Insurance

CASE NO. INS-2013-00238

ORDER INITIATING PROCEEDING

The State Corporation Commission ("Commission") initiates this proceeding to consider whether the Commission's Rules Governing Long-term Care Insurance should be revised.

Long-term care insurance sold in Virginia is regulated pursuant to Chapter 52 of Title 38.2 of the Code of Virginia, as well as through rules adopted by the Commission. In 1992, the Commission adopted Chapter 200 of Title 14 of the Virginia Administrative Code, entitled Rules Governing Long-term Care Insurance, 14VAC5-200-10 et seq. ("Rules").[1] provide standards for initial filing requirements and premium rate schedule increases that, as required by § 38.2-5206 of the Code, are "similar to those set forth in the model regulation for long-term care insurance developed by the National Association of Insurance Commissioners." In 2003, the Commission adopted revisions to the Rules that were primarily intended to lessen the need for future premium rate increases for policies issued on or after October 1, 2003.

On November 26, 2012, the Commission entered an Order in which it noted an increase in the number and frequency of substantial premium rate increase requests by insurers writing long-term care insurance in this Commonwealth. The Commission therefore directed the staff of the Bureau of Insurance ("Bureau") to prepare a report studying the premium rate increases implemented by insurers writing long-term care insurance on or after January 1, 2009 ("Report").[2]

The staff of the Bureau filed its Report on October 4, 2013.[3] Among other things, the Report found that: (1) recent long-term care premium rate increases are largely the result of insurers' failure to adequately anticipate future claim costs given the lack of credible experience data that was available when they originally designed and priced the products; (2) many increases have been substantial and have resulted in a significant financial hardship to Virginia policyholders; and (3) those policyholders who are unable to afford the additional increases are faced with difficult choices such as reducing their benefits, if such option is available, or allowing their coverage to lapse.[4]

NOW THE COMMISSION, upon consideration of this matter, finds that it is appropriate to undertake a review of the Report and the Rules and consider proposing and adopting additional revisions to the Rules. Specifically, the Commission will seek and consider comments on matters regarding the Report and any suggested revisions to the Rules.

Accordingly, IT IS ORDERED THAT:

(1) This matter is docketed and assigned Case No. INS-2013-00238.

(2) All interested persons, including insurers writing long-term care insurance in Virginia, who desire to comment on the Bureau's Report or propose amendments to the Rules Governing Long-term Care Insurance, Chapter 200 of Title 14 of the Virginia Administrative Code, shall file written comments or proposals on or before February 1, 2014, with Joel H. Peck, Clerk, State Corporation Commission, c/o Document Control Center, P.O. Box 2118, Richmond, Virginia 23218. All comments shall refer to Case No. INS-2013-00238. Any person desiring to submit comments electronically may do so by following the instructions at the Commission's website: http://www.scc.virginia.gov/case.

(3) This matter is continued.

AN ATTESTED COPY hereof shall be sent by the Clerk of the Commission to Deputy Commissioner Althelia P. Battle, who forthwith shall mail a copy of this Order to all insurance companies who reported Long-Term Care Insurance Earned Premium in the 2012 Long-Term Care Experience Reporting Form as well as to all other interested persons; and C. Meade Browder, Jr., Senior Assistant Attorney General, Division of Consumer Counsel, Office of the Attorney General, 900 East Main Street, Second Floor, Richmond, Virginia 23219.

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[1] The Rules can be found at: http://lis.virginia.gov/000/reg/TOC14005.HTM#C0200.

[2] Commonwealth of Virginia, ex rel. State Corporation Commission, Ex Parte: In the matter of investigating long-term care insurance premium rates, Case No. INS-2012-00282, Doc. Cont. Cen. No. 121130186, Order Directing Report (Nov. 26, 2012).

[3] A copy of the Report can be found on the Commission's website: http://www.scc.virginia.gov/case, by selecting the "Docket Search" feature and searching for Case No. INS-2012-00282.

[4] Report at 25-26.

## DEPARTMENT OF ENVIRONMENTAL QUALITY

### Notice of Citizen Nomination of State Surface Waters for Water Quality Monitoring

In accordance with § 62.1-44.19:5 F of the Code of Virginia, the Water Quality Monitoring Information and Restoration Act, the Virginia Department of Environmental Quality (DEQ) has developed guidance for requests from the public regarding specific segments that can be nominated for consideration to be included in DEQ's annual Water Quality Monitoring Plan.

Any citizen of the Commonwealth who wishes to nominate a water body or stream segment for inclusion in DEQ's Water Quality Monitoring Plan should refer to the guidance in preparation and submittal of their requests. All nominations must be received between January 1 and April 30, 2014, to be considered for the 2015 calendar year. Copies of the guidance document and nomination form are available online at http://www.deq.virginia.gov/Programs/Water/WaterQualityInformationTMDLs/WaterQualityMonitoring/CitizenMonitoring.aspx.

Nominations can be submitted by mail, fax, email, or hand delivery to the contact person below.

Use of the nomination form available from the contact person below is preferred. All nominations with the minimum of information as outlined in the guidance document will be accepted for review.

Contact Information: Stuart Torbeck, Department of Environmental Quality, 629 East Main Street, P.O. Box 1105, Richmond, VA 23218, telephone (804) 698-4461, FAX (804) 698-4032, or email charles.torbeck@deq.virginia.gov.

## STATE LOTTERY DEPARTMENT

### Director's Orders

The following Director's Orders of the State Lottery Department were filed with the Virginia Registrar of Regulations on October 7, 2013. The orders may be viewed at the State Lottery Department, 900 East Main Street, Richmond, VA, or at the office of the Registrar of Regulations, 201 North 9th Street, 2nd Floor, Richmond, VA.

Director's Order Number One (14)

"Convenience Store Highlight Ticket Dispenser Retailer Incentive Promotion" Virginia Lottery Retailer Incentive Program Requirements (effective on March 1, 2014, and shall remain in full force and effect until 90 days after the conclusion of the incentive program, unless otherwise extended by the Director)

Director's Order Number Five (14)

Virginia's Instant Game Lottery 1464 "3,000,000 Jackpot" Final Rules for Game Operation (effective January 7, 2014)

Director's Order Number Six (14)

Virginia's Instant Game Lottery 1444 "10X The Money" Final Rules for Game Operation (effective January 7, 2014)

Director's Order Number Seven (14)

Virginia's Instant Game Lottery 1403 "Cash In A Flash" Final Rules for Game Operation (effective February 4, 2014)

Director's Order Number Eight (14)

Virginia's Instant Game Lottery 1467 "$100 Million Cash Extravaganza" Final Rules for Game Operation (effective March 18, 2014)

Director's Order Number Ten (14)

Virginia's Instant Game Lottery 1343 "Lucky Cherry Slots" Final Rules for Game Operation (effective March 18, 2014)

Director's Order Number One Hundred Ten (13)

Virginia's Instant Game Lottery 1440 "Holiday Double Match" Final Rules for Game Operation (effective October 29, 2013)

## STATE WATER CONTROL BOARD

### Proposed Consent Special Order for Honeywell Resins & Chemicals, LLC

An enforcement action has been proposed for Honeywell Resins & Chemicals, LLC for alleged violations at Honeywell Resins & Chemicals, LLC, Hopewell Site, Hopewell, Virginia. The State Water Control Board proposes to issue a consent special order to Honeywell Resins & Chemicals, LLC to address noncompliance with State Water Control Board law. A description of the proposed action is available at the Department of Environmental Quality office named below or online at www.deq.virginia.gov. Gina Pisoni will accept comments by email at gina.pisoni@deq.virginia.gov, FAX (804) 527-5106, or postal mail at Department of Environmental Quality, Piedmont Regional Office, 4949-A Cox Road, Glen Allen, VA 23060, from December 14, 2013, to January 15, 2014.

## VIRGINIA CODE COMMISSION

### Notice to State Agencies

**Contact Information:** *Mailing Address:* Virginia Code Commission, General Assembly Building, 201 North 9th Street, 2nd Floor, Richmond, VA 23219; *Telephone:* Voice (804) 786-3591; FAX (804) 692-0625; *Email:* varegs@dls.virginia.gov.

**Meeting Notices:** Section 2.2-3707 C of the Code of Virginia requires state agencies to post meeting notices on their websites and on the Commonwealth Calendar at http://www.virginia.gov/connect/commonwealth-calendar.

**Cumulative Table of Virginia Administrative Code Sections Adopted, Amended, or Repealed:** A table listing regulation sections that have been amended, added, or repealed in the *Virginia Register of Regulations* since the regulations were originally published or last supplemented in the print version of the Virginia Administrative Code is available at http://register.dls.virginia.gov/documents/cumultab.pdf.

**Filing Material for Publication in the Virginia Register of Regulations:** Agencies use the Regulation Information System (RIS) to file regulations and related items for publication in the *Virginia Register of Regulations*. The Registrar's office works closely with the Department of Planning and Budget (DPB) to coordinate the system with the Virginia Regulatory Town Hall. RIS and Town Hall complement and enhance one another by sharing pertinent regulatory information.

## ERRATA

### BOARD OF AGRICULTURE AND CONSUMER SERVICES

Title of Regulation: **2VAC5-690. Regulations for Pesticide Containers and Containment Under Authority of the Virginia Pesticide Control Act.**

Publication: 30:6 VA.R. 571-590 November 18, 2013

Correction to Fast-Track Regulation:

Page 578, 2VAC5-690-90 C, line 7, inside the parenthetical, insert "et seq." after "2VAC5-690-110"

VA.R. Doc. No. R14-3295; Filed November 26, 2013 12:04 p.m.