VIRGINIA REGISTER OF REGULATIONS

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TABLE OF CONTENTS

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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).

October 2016 through November 2017

Volume: Issue	Material Submitted By Noon*	Will Be Published On
33:5	October 12, 2016	October 31, 2016
33:6	October 26, 2016	November 14, 2016
33:7	November 9, 2016	November 28, 2016
33:8	November 22, 2016 **(Tuesday)**	December 12, 2016
33:9	December 7, 2016	December 26, 2016
33:10	December 19, 2016 **(Monday)**	January 9, 2017
33:11	January 4, 2017	January 23, 2017
33:12	January 18, 2017	February 6, 2017
33:13	February 1, 2017	February 20, 2017
33:14	February 15, 2017	March 6, 2017
33:15	March 1, 2017	March 20, 2017
33:16	March 15, 2017	April 3, 2017
33:17	March 29, 2017	April 17, 2017
33:18	April 12, 2017	May 1, 2017
33:19	April 26, 2017	May 15, 2017
33:20	May 10, 2017	May 29, 2017
33:21	May 24, 2017	June 12, 2017
33:22	June 7, 2017	June 26, 2017
33:23	June 21, 2017	July 10, 2017
33:24	July 5, 2017	July 24, 2017
33:25	July 19, 2017	August 7, 2014
33:26	August 2, 2017	August 21, 2017
34:1	August 16, 2017	September 4, 2017
34:2	August 30, 2017	September 18, 2017
34:3	September 13. 2017	October 2, 2017
34:4	September 27, 2017	October 16, 2017
34:5	October 11, 2017	October 30, 2017
34:6	October 25. 2017	November 13, 2017
34:7	November 8, 2017	November 27, 2017

*Filing deadlines are Wednesdays unless otherwise specified.

TITLE 18. PROFESSIONAL AND OCCUPATIONAL LICENSING

BOARD OF PSYCHOLOGY

Agency Decision

Title of Regulation: **18VAC125-20. Regulations Governing the Practice of Psychology.**

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

Name of Petitioner: Dr. John Wieriman.

Nature of Petitioner's Request: To require psychologists to perform standardized pre-testing and post-testing on clients and offer evaluation of counseling sessions at their termination.

Agency Decision: Request denied.

Statement of Reason for Decision: At its meeting on September 30, 2016, the first held since the close of comment, the board decided not to initiate rulemaking. While the board agrees with the principles of screening and assessment in client care, members believe that psychologists should use professional judgment in the use of testing. Research does not support the use of standardized testing as offering greater protection for the public. Members were also concerned that benefits for such testing do not appear to outweigh costs, and they were concerned about the potential for security breaches with online assessments.

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

VA.R. Doc. No. R16-21; Filed September 30, 2016, 5:17 p.m.

TITLE 6. CRIMINAL JUSTICE AND CORRECTIONS

BOARD OF JUVENILE JUSTICE

Notice of Intended Regulatory Action

Notice is hereby given in accordance with § 2.2-4007.01 of the Code of Virginia that the Board of Juvenile Justice intends to consider amending **6VAC35-41, Regulation Governing Juvenile Group Homes and Halfway Houses**. The purpose of the proposed action is to amend the regulation to reflect changes to the continuum of services available for court-involved youth, including group homes, halfway houses, and shelter-care facilities; update the definitions section and terms used for clarity and consistency with other regulations; and incorporate appropriate cross references to statutes, regulations, and guidance documents that have been amended, enacted, or promulgated since the last review. The proposed regulatory action will involve a comprehensive overhaul of the regulation.

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

Statutory Authority: §§ 16.1-309.9 and 66-24 of the Code of Virginia.

Public Comment Deadline: November 30, 2016.

Agency Contact: Kristen Peterson, Regulatory Coordinator, Department of Juvenile Justice, P.O. Box 1110, Richmond, VA 23219, telephone (804) 598-3902, FAX (804) 371-6497, or email kristen.peterson@djj.virginia.gov.

VA.R. Doc. No. R17-4879; Filed October 11, 2016, 8:25 a.m.

TITLE 18. PROFESSIONAL AND OCCUPATIONAL LICENSING

BOARD OF MEDICINE

Notice of Intended Regulatory Action

Notice is hereby given in accordance with § 2.2-4007.01 of the Code of Virginia that the Board of Medicine intends to consider amending **18VAC85-50, Regulations Governing the Practice of Physician Assistants**. The purpose of the proposed action is to implement Chapter 450 of the 2016 Acts of Assembly. Certain amendments identified by the Advisory Board of Physician Assistants were not necessary to conform the regulation to changes in the Code of Virginia enacted by Chapter 450, so those changes could not be included in an exempt action. Therefore, this Notice of Intended Regulatory Action identifies amendments that will eliminate requirements for submission to the Board of Medicine of a physician's certification that his physician assistant is competent to perform specific invasive procedures and of the arrangements he has made for coverage by an alternative physician in his absence.

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

Statutory Authority: §§ 54.1-2400 and 54.1-2952.1 of the Code of Virginia.

Public Comment Deadline: November 30, 2016.

Agency Contact: William L. Harp, M.D., Executive Director, Board of Medicine, 9960 Mayland Drive, Suite 300, Richmond, VA 23233, telephone (804) 367-4558, FAX (804) 527-4429, or email william.harp@dhp.virginia.gov.

VA.R. Doc. No. R17-4861; Filed October 7, 2016, 8:38 p.m.

TITLE 2. AGRICULTURE

BOARD OF AGRICULTURE AND CONSUMER SERVICES

Proposed Regulation

Title of Regulation: **2VAC5-670. Rules and Regulations for Enforcement of the Virginia Pesticide Law (amending 2VAC5-670-10, 2VAC5-670-30 through 2VAC5-670-80, 2VAC5-670-130 through 2VAC5-670-160, 2VAC5-670-180, 2VAC5-670-220).**

Statutory Authority: § 3.2-3906 of the Code of Virginia.

Public Hearing Information:

December 8, 2016 - 10:30 a.m. - The Capitol, House Room 3, 1000 Bank Street, Richmond, VA 23219

Public Comment Deadline: December 30, 2016.

Agency Contact: Laura Hare, Policy Analyst, Department of Agriculture and Consumer Services, P.O. Box 1163, Richmond, VA 23218, telephone (804) 786-1908, FAX (804) 255-2666, or email laura.hare@vdacs.virginia.gov.

Basis: Section 3.2-109 of the Code of Virginia establishes the Board of Agriculture and Consumer Services as a policy board with the authority to adopt regulations in accordance with the provisions of Title 3.2 of the Code of Virginia. Section 3.2-3906 of the Code of Virginia authorizes the board to adopt regulations governing the enforcement of the Virginia Pesticide Control Act, including the registration of pesticides for manufacture, distribution, sale, storage, or use.

Purpose: The content of 2VAC5-670, Rules and Regulations for Enforcement of the Virginia Pesticide Law, was transferred from the now repealed 2VAC20-20 in October 2012, when the former Pesticide Control Board was abolished and its duties were transferred to the Board of Agriculture and Consumer Services. The content of the current regulation has not been substantively amended since approximately 1991. Because of the inherent safety considerations associated with pesticides, it is imperative that the requirements for pesticide registration, distribution, sale, storage, and use are clear and unambiguous. The proposed amendments are intended to improve the clarity of the regulations and further promote compliance.

The pesticide industry in the United States is highly regulated and is aware that regulations undergo regular reviews and are updated as necessary to align the regulations with current federal pesticide laws, agency policies and procedures, and industry standards. The agency does not expect industry to have concerns with the proposed amendments.

Substance: Substantive amendments to the regulations that the agency is considering are as follows:

1. Change the title and format to be consistent with the other regulations authorized by the Virginia Pesticide Control Act. This regulation includes requirements for product registration as well as handling and storage, pesticide disposal, application and equipment, and container labeling. The current name of the regulation is not descriptive of what is actually contained in the regulation.

2. Add the requirement for submission of the final pesticide label, including the material safety data sheet (MSDS) or the safety data sheet (SDS), along with the application for pesticide regulation. This is Department of Agriculture and Consumer Services current policy, and pesticide product registrations are not issued in the absence of these two documents.

3. Amend 2VAC5-670-220 B to include custom pesticide-animal feed and animal remedy mixtures.

4. Add specific requirements in 2VAC5-670-30 for directions for use. The current requirements state "Directions for use are required for the protection of the public. The public includes not only users of pesticides, but also those who handle them or may be affected by their use, handling, or storage"; however, this section does not include any specific requirements.

Issues: The proposed regulatory action is advantageous to private citizens and businesses, as the amendments clarify and streamline the requirements for pesticide product registration while ensuring continued compliance. The pesticide industry in the United States is highly regulated and is aware that regulations undergo regular reviews and are updated as necessary to align the regulations with current federal pesticide laws, agency policies and procedures, and industry standards. These actions do not add any additional requirements more restrictive than federal requirements to individuals or businesses seeking pesticide product registration. There are no known disadvantages to individuals, businesses, or the Commonwealth. The proposed regulatory action will clarify and streamline requirements and will lead to an increase in compliance through better understanding of applicable requirements.

Department of Planning and Budget's Economic Impact Analysis:

Summary of the Proposed Amendments to Regulation. As the result of a periodic review of the above titled regulation,[1] the Board of Agriculture and Consumer Services (Board)

proposes amendments to add several definitions and make other clarifying changes.

Result of Analysis. Benefits outweigh costs for all proposed changes.

Estimated Economic Impact. The Board proposes to add several definitions to its regulation for enforcing Virginia's pesticide law. The Board also proposes making several changes to regulatory language, such as amending "caution statement" to read "precautionary statement," which will not change what is required of businesses but will make requirements clearer. None of these proposed regulatory changes are likely to increase costs for any regulated entity because they do not change any actual requirements. Both affected businesses and other interested parties, however, will likely benefit from the additional clarity these changes bring to the regulation.

Businesses and Entities Affected. Board staff reports that approximately 3,000 pesticide businesses are licensed in the Commonwealth and that approximately 600 entities have pesticide products that are registered for use in Virginia. All of these entities, as well as other interested parties, will be affected by these proposed changes.

Localities Particularly Affected. No locality will be particularly affected by these proposed regulatory changes.

Projected Impact on Employment. These proposed regulatory changes are unlikely to affect employment in the Commonwealth.

Effects on the Use and Value of Private Property. These proposed changes will likely not affect the use or value of private property in the Commonwealth.

Real Estate Development Costs. These proposed regulatory changes are unlikely to affect real estate development costs in the Commonwealth.

Small Businesses:

Definition. Pursuant to § 2.2-4007.04 of the Code of Virginia, small business is defined as "a business entity, including its affiliates, that (i) is independently owned and operated and (ii) employs fewer than 500 full-time employees or has gross annual sales of less than $6 million."

Costs and Other Effects. No small businesses are likely to incur any additional costs on account of these clarifying changes.

Alternative Method that Minimizes Adverse Impact. No small businesses are likely to incur any additional costs on account of these clarifying changes.

Adverse Impacts:

Businesses. No businesses are likely to incur any additional costs on account of these clarifying changes.

Localities. Localities in the Commonwealth are unlikely to see any adverse impacts on account of these proposed regulatory changes.

Other Entities. No other entities are likely to be adversely affected by these proposed changes.

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[1] http://townhall.virginia.gov/l/ViewPReview.cfm?PRid=1332

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

Summary:

The proposed amendments update the regulation and align it with current agency practices and federal requirements by (i) changing the title and format to be consistent with other pesticide-related regulations; (ii) amending the language of the regulation to reflect the current agency policy regarding requirements for submission of pesticide labels; (iii) clarifying the registration requirements involving mixtures of pesticides and fertilizers, animal feed, animal remedies, or other pesticides; (iv) amending language to more closely align the regulation with the Virginia Pesticide Control Act; (v) removing duplicative registration requirements; (vi) amending and clarifying regulatory label requirements to more closely align with federal requirements; (vii) amending ingredient statement requirements for consistency throughout the regulation; and (viii) clarifying warning or caution statements to more closely align with federal requirements.

CHAPTER 670

~~RULES AND~~ REGULATIONS ~~FOR ENFORCEMENT~~ GOVERNING PESTICIDE PRODUCT REGISTRATION, HANDLING, STORAGE, AND DISPOSAL UNDER AUTHORITY OF THE VIRGINIA PESTICIDE ~~LAW~~ CONTROL ACT

2VAC5-670-10. Definitions.

The following words and terms when used in this chapter shall have the following meanings unless the context clearly indicates otherwise. ~~Words used in singular form in this chapter include the plural, and vise versa, as appropriate.~~

"Active ingredient" means an ingredient ~~which~~ that:

1. Is independently capable of:

a. Preventing, destroying, repelling, or mitigating insects, fungi, rodents, weeds, nematodes, or other pests; or

b. Altering through physiological action the behavior of ornamental or crop plants or their produce; or

c. Causing leaves or foliage to drop from a plant; or

d. Artificially accelerating the drying of plant tissue.

2. Is present in the product in an amount sufficient to be effective; and

3. Is not antagonistic to the activity of the principal active ingredients. The commissioner may require an ingredient to be designated as an active ingredient if, in his opinion, it sufficiently increases the effectiveness of the pesticide to warrant such action.

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

"Custom mixture" means a pesticide containing product that has been blended or mixed to a customer's specifications, usually a pesticide-fertilizer, pesticide-pesticide, pesticide-animal feed, or pesticide-animal remedy mixture, when:

1. The blend is prepared to the order of the customer and is not held in inventory by the blender;

2. The blend is to be used on the customer's property, including leased or rented property;

3. The pesticides used in the blend bear end-use labeling directions that do not prohibit use of the product in such a blend;

4. The blend is prepared from registered pesticides; and

5. The blend is delivered to the end-user along with a copy of the end-use labeling of each pesticide used in the blend and a statement specifying the composition of the mixture.

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

"Distributor" means a person or business, also referred to as a supplemental distributor or sub-registrant, that contracts with a basic federal registrant to produce a product that will be distributed and sold with labels bearing the distributor's own name and address instead of the name and address of the basic federal registrant.

"EPA" means the U.S. Environmental Protection Agency or any program thereof.

"FIFRA" means the Federal Insecticide, Fungicide, and Rodenticide Act (7 USC § 136 et seq.).

"Herbicide" means any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any weed, including any algae or other aquatic weed.

"Law" means Chapter 39 (§ 3.2-3900 et seq.) of Title 3.2 of the Code of Virginia, known as the Virginia Pesticide Control Act.

"Minimum risk pesticide" means pesticides that are described in 40 CFR 152.25(f), which addresses the exemptions for pesticides of a character not requiring FIFRA regulation, revised as of July 1, 2015. Minimum risk pesticides are exempted from federal registration requirements under 7 USC § 136 w(b).

"Producer" means a person who manufactures, prepares, compounds, propagates, or processes any pesticide, device, or active ingredient used in producing a pesticide. The dilution by an individual of formulated pesticides for his own use in accordance with the directions on registered labels shall not alone result in the department considering the individual a producer for the purposes of this chapter.

"Rodent" means any animal of the order Rodentia including, but not limited to, rats, mice, rabbits, gophers, prairie dogs, and squirrels.

"Temporary storage" means the storage of a pesticide in a container other than the original container in which it was purchased.

2VAC5-670-30. Label.

A. The name and address of the ~~manufacturer~~ producer, registrant, or person for whom the product was produced shall appear on the label. If the registrant's name appears on the label and the registrant is not the manufacturer, or if the name of the person for whom the pesticide was manufactured appears on the label, it must be qualified by appropriate wording such as "Packed for . . .," "Distributed by.. .," or "Sold by...," to show that the name is not that of the manufacturer.

B. The name, brand, or trademark of the pesticide appearing on the label shall be that under which the pesticide is registered.

C. The net content declaration shall comply with the Weights and Measures Act of Virginia, Chapter 56 (§ 3.2-5600 et seq.) of Title 3.2 of the Code of Virginia and its regulations.

D. Directions for use are required for the protection of the public. ~~The public includes not only users of pesticides, but also those who handle them or may be affected by their use, handling, or storage.~~ Pesticides restricted by this chapter shall be registered only for their permitted uses, and the label shall have a prominent statement to the effect that the product is to be used only as directed. Directions for use are considered necessary in the case of most retail containers~~, with the following exceptions.~~ and must include:

1. The statement of use classification.

2. The statement, "It is a violation of federal law to use this product in a manner inconsistent with its labeling." if the product requires federal registration.

3. The site of application, for example the crops, animals, areas, or objects to be treated.

4. The target pest associated with each site.

5. The dosage rate associated with each site and pest.

6. The method of application, including instructions for dilution, if required, and type of application apparatus or equipment required.

7. The frequency and timing of applications necessary to obtain effective results without causing unreasonable adverse effects on the environment.

8. Specific directions concerning the storage, residue removal, and disposal of the pesticide and its container.

9. Any limitations or restrictions on use required to prevent unreasonable adverse effects.

E. Directions may be omitted:

1. If the pesticide is to be used by manufacturers in their regular manufacturing processes, provided that the label clearly shows that the product is intended for use only in

manufacturing processes, and bears an ingredient statement giving the name and percentage of each of the active ingredients.

2. If (i) the pesticide is sold to ~~distributors~~ a producer for dilution or mixing with carriers to prepare pesticides for sale to the public, provided that the label bears an ingredient statement giving the name and percentage of each of the active ingredients; ~~and~~ (ii) the pesticide is a well-known substance or mixture of substances; and (iii) there is readily available general knowledge of the composition, methods of use, and effectiveness of the product for pesticide purposes.

2VAC5-670-40. Ingredient statement.

A. Location of ingredient statement. The ingredient statement shall appear on the front of the label or that part of the label displayed under customary conditions of purchase~~;~~, except in cases where the commissioner determines that, due to the size or form of the container, a statement on that portion of the label is impractical~~,~~ and permits the statement to appear on another side or panel of the label. When so permitted, the ingredient statement shall be in larger ~~type~~ font and be more prominent than would otherwise be required. The ingredient statement shall run parallel with other printed matter on the panel of the label on which it appears~~,~~ and shall be on a clear contrasting background.

B. Names of ingredients. The well-known common name of the ingredient shall be given or, if the ingredient has no common name, the correct chemical name. If there is no common name and the chemical composition is unknown or complex, the commissioner may permit the use of a new or coined name which he finds to be appropriate for the information and protection of the user. If the use of a new or coined name is permitted, the commissioner may prescribe the terms under which it may be used. A trademark or trade name may not be used as the name of an ingredient, except when it has become a common name.

C. Percentages of ingredients. Percentages of ingredients shall be determined by weight, and the sum of the percentages of the ingredients shall be 100. Sliding scale forms of ingredient statements shall not be used. Plant incorporated protectant products bearing an ingredient statement approved by the EPA are permitted to have ingredient statements where the sum of the percentages of the ingredients do not equal 100.

D. Designation of ingredients. Active ingredients and inert ingredients shall be so designated, and the term "inert ingredient" shall appear in the same size ~~type~~ font and be as prominent as the term "active ingredient."

2VAC5-670-50. Pesticides highly toxic to humans.

A. Pesticides ~~which~~ that fall within any of the following categories when tested on laboratory animals as specified in ~~subdivisions~~ subdivision 1, 2, or 3 of this subsection are highly toxic to humans or contain substances or quantities of substances highly toxic to humans within the meaning of the law. Such pesticides shall be referred to as pesticides highly toxic to humans. Upon application and after an opportunity for a hearing, the commissioner may exempt any pesticide from these requirements ~~which~~ that is not highly toxic to humans:

1. Oral toxicity. A pesticide ~~which~~ that has single dose LD50 of 50 milligrams or less per kilogram of body weight~~,~~ when administered orally to both male and female rats ~~which~~ that have been fasted for a period of 24 hours (or to other rodent or nonrodent species specified by the commissioner); ~~or~~

2. Toxicity on inhalation. A pesticide ~~which~~ that has an LC50 of 2,000 micrograms or less of dust or mist per liter of air or 200 parts per million or less by volume of a gas or vapor, when administered by continuous inhalation for one hour to both male and female rodent or nonrodent species specified by the commissioner, if he finds that it is reasonably foreseeable that such concentration will be encountered by humans; or

3. Toxicity by skin absorption. A pesticide ~~which~~ that has an LD50 of 200 milligrams or less per kilogram of body weight~~,~~ when administered by continuous contact for 24 hours with the bare skin of rabbits (or other rodent or nonrodent species specified by the commissioner).

B. Test on other species. Tests on other specified rodent or nonrodent species may be required by the commissioner whenever he finds that tests on other species are necessary to determine whether a pesticide is highly toxic to humans.

C. Terms LD50 and LC50. An LD50, as used in connection with oral toxicity and skin absorption toxicity tests, is the dose~~,~~ that is expected to cause death within 14 days in 50% of the test animals so treated, and LC50, as used in connection with inhalation tests, is also the concentration~~, which~~ that is expected to cause death within 14 days in 50% of the test animals so treated.

D. Toxicity based on human experience. If the commissioner finds, after an opportunity for hearing, that available data on human experience with any pesticide indicates a greater toxicity than found in the tests on animals, the human data shall take precedence~~;~~, and if he finds that the protection of the public so requires, the commissioner shall declare such a pesticide to be highly toxic to humans for the purposes of this law and its regulations.

2VAC5-670-60. Warning or ~~caution~~ statement precautionary statements.

A. Warning or ~~caution~~ precautionary statements ~~which~~ that are necessary and~~,~~ adequate to prevent injury to humans, useful vertebrate~~,~~ and invertebrate animals, and useful vegetation, must appear on the label in a place sufficiently prominent to warn the user. They shall state clearly and in nontechnical language the particular hazard involved in the use of the pesticide (e.g., ingestion, skin absorption,

inhalation, flammability, or explosion), and the precautions to be taken to avoid accident, injury, or damage.

B. The label of every pesticide shall bear warnings or ~~cautions which~~ precautionary statements that are necessary for the protection of the public, including the statement, "Keep out of reach of children," ~~and a signal word such as "DANGER," "WARNING," or "CAUTION," which the commissioner may prescribe,~~ on the front panel or that part of the label displayed under customary conditions of purchase. However, the commissioner may permit reasonable variations in the placement of that part of the required warnings and ~~cautions~~ precautionary statements other than the statement "Keep out of reach of children" ~~and the required signal word,~~ if in his opinion such variations would not be injurious to the public. If a pesticide is marketed in channels of trade where the likelihood of contact with children is extremely remote, or if the nature of the product is such that it is likely to be used on infants or small children without causing injury under any reasonably foreseeable conditions, the commissioner may waive the requirements of the statement "Keep out of reach of children." The commissioner may permit a statement such as "Keep away from infants and small children" instead of the statement "Keep out of reach of children," if he determines that such a variation would not be injurious to the public.

~~C. The label of every pesticide which is highly toxic to humans shall bear the words "DANGER" and "POISON" in red on a contrasting background next to the skull and crossbones, and an antidote statement including directions to call a physician immediately, on the front panel or that part of the label displayed under customary conditions of purchase. However, the commissioner may permit reasonable variations in the placement of the antidote statement if some reference such as "See antidote statement on back panel" appears on the front panel near the word "POISON" and the skull and crossbones.~~

~~D. Warning or caution statements which comply with the requirements of the regulations for the enforcement of the Federal Insecticide, Fungicide and Rodenticide Act shall be considered in compliance with the requirements of this chapter.~~

2VAC5-670-70. Registration.

A. Eligibility. Any manufacturer, packer, seller, distributor, or shipper of a pesticide is eligible as a registrant and may register the pesticide.

B. Pesticides requiring registration. All products that require registration under FIFRA, as well as "minimum risk pesticides," are required to be registered annually with the department. All products requiring federal registration must have and maintain a valid federal registration to be registered in the Commonwealth.

~~B.~~ C. Procedure for registration. Application for registration should be made on ~~the~~ a form provided by the department. Application forms will be furnished upon request to the Virginia Department of Agriculture and Consumer Services, Office of Pesticide Services, Post Office Box 1163, Richmond, Virginia 23218. ~~Application~~ A completed application form should be submitted as far in advance as possible~~,~~ before the time registration is desired to take effect and must be accompanied by:

1. The final container label and all associated labeling;

2. The material safety data sheet or safety data sheet; and

3. The fees required under 2VAC5-675-20.

~~C.~~ D. Effective date of registration. Registration of a pesticide shall become effective on the date the certificate of registration is issued.

~~D.~~ E. Responsibility of a registrant. The registrant is responsible for the accuracy and completeness of all information submitted in connection with his application for registration of a pesticide.

~~E.~~ F. Changes in labeling or formula.

1. Changes in the labeling, or formula of a registered pesticide, shall be submitted in advance to the Office of Pesticide Services. The registrant shall describe the exact changes desired and the proposed effective date; and upon request, shall submit a description of tests which justify such changes.

2. After the effective date of a change in labeling or formula, the product shall be marketed only under the new label or formula, except that a reasonable time may be permitted by the commissioner to dispose of properly labeled stocks of old products.

~~F.~~ G. Claims shall conform to registration. Claims made for a pesticide shall not differ in substance from representations made in connection with registration, including representations with respect to effectiveness, ingredients, directions for use, or pests against which the product is recommended.

2VAC5-670-80. Coloration and discoloration.

A. Unless exempted by 2VAC5-670-130 ~~of this chapter~~, the white pesticides ~~hereinafter named~~ listed in subsections C and D of this section shall be colored or discolored in compliance with this section. The hues, values, and chromas specified are those contained in the Munsell Book of Color, Munsell Color Company, Baltimore, Maryland.

B. Coloring agent. The coloring agent shall produce a uniformly colored product not subject to change in color beyond the minimum requirements specified in this chapter during ordinary conditions of marketing or storage. They must not cause the product to become ineffective, or cause damage when used as directed.

C. Arsenicals and barium fluosilicate. Standard lead arsenate, basic lead arsenate, calcium arsenate, magnesium arsenate, zinc arsenate, zinc arsenite, and barium fluosilicate shall be colored any hue except the yellow-reds and yellows, having a value of not more than eight and a chroma of not

less than four, or shall be discolored to a neutral lightness value not over seven.

D. Sodium fluoride and sodium fluosilicate. Sodium fluoride and sodium fluosilicate shall be colored blue or green having a value of not more than eight and a chroma of not less than four, or shall be discolored to a neutral lightness value not over seven.

E. Exceptions. The commissioner, after the opportunity for a hearing, may permit other hues to be used for any particular purpose, if the prescribed hues are not feasible for the purpose, and if this action will not be injurious to the public.

2VAC5-670-130. Exemption.

A. Any pesticide specified in 2VAC5-670-80 ~~of this chapter which~~ that is intended solely for use by a textile manufacturer or commercial laundry, cleaner, or dyer as a mothproofing agent, or used in the manufacture or processing ~~or~~ of rubber, glue, or leather goods~~, which~~ that would not be suitable for such use if colored and ~~which~~ that will not come into the hands of the public except when incorporated into a fabric and will not be present in these finished goods in sufficient quantities to cause injury to any person, shall be exempt from the requirements of 2VAC5-670-80.

B. The following products are exempt from the requirements of this chapter:

1. Substances described in 40 CFR 152.6, revised as of July 1, 2015, that are excluded from regulation by FIFRA.

2. Products described in 40 CFR 152.8, revised as of July 1, 2015, that are not pesticides because they are not for use against "pests."

3. Products described in 40 CFR 152.10, revised as of July 1, 2015, that are not pesticides because they are not intended for a pesticidal purpose.

4. Pesticides or classes of pesticides described in 40 CFR 152.20, revised as of July 1, 2015, that are regulated by a federal agency other than the EPA.

5. Treated articles or substances as described in 40 CFR 152.25(a), revised as of July 1, 2015. An article or substance treated with or containing a pesticide to protect the article or substance itself if the pesticide is registered with the EPA for such use.

6. Pheromones and pheromone traps as described in 40 CFR 152.25(b), revised as of July 1, 2015.

7. Preservatives and embalming fluids as described in 40 CFR 152.25(c), revised as of July 1, 2015.

8. Foods as described in 40 CFR 152.25(d), revised as of July 1, 2015.

9. Natural cedar as described in 40 CFR 152.25(e), revised as of July 1, 2015.

2VAC5-670-140. Declaration of pests.

In addition to those pests defined in Article 1 of the law, the commissioner hereby declares as pests the following forms of plant and animal life and viruses:

1. Mammals, including but not limited to dogs, cats, moles, bats, wild carnivores, armadillos, and deer;

2. Birds, including but not limited to starlings, English sparrows, crows, and blackbirds;

3. Fishes, including but not limited to the jawless fishes such as the sea lamprey, the cartilaginous fishes such as the sharks, and the bony fishes such as the carp;

4. Amphibians and reptiles, including but not limited to poisonous snakes;

5. Aquatic and terrestrial invertebrates, including but not limited to slugs, snails, and crayfish;

6. Roots and other plant parts growing where not wanted; and

7. Viruses, other than those on or in humans or animals.

2VAC5-670-150. Handling and storage.

No person shall handle, transport, store, display, or distribute pesticides in a manner ~~which~~ that may endanger humans and the environment, or food, feed, or any other products that may be transported, stored, displayed, or distributed with the pesticides.

2VAC5-670-160. Disposal.

No person shall dispose of, discard, or store any pesticides or pesticide containers in a manner ~~which~~ that may cause injury to humans, vegetation, crops, livestock, wildlife, or pollinating insects~~,~~ or pollute any water supply or waterway. Pesticides or pesticide containers must be disposed of in accordance with all local, state, and federal solid waste and hazardous waste laws and regulations.

2VAC5-670-180. Cancellation authority.

All pesticides ~~which~~ that have been ~~cancelled~~ canceled or suspended by the United States Government are subject to cancellation in Virginia. No registration shall be revoked or refused until the registrant has been given an opportunity for a hearing by the commissioner. Any appeal of cancellation at the federal level shall not affect cancellation proceedings with this Commonwealth.

2VAC5-670-220. Mixtures.

A. General sale.

~~Regardless of type container mixtures of pesticides with fertilizers or with other pesticides, when offered for general sale to the public shall be registered prior to sale, distribution, or use. In addition, any pesticide/fertilizer mixture shall be registered or labeled as required by the Virginia Fertilizer Law.~~ 1. All pesticide-fertilizer, pesticide-pesticide, pesticide-animal feed, and pesticide-animal remedy mixtures shall be registered under the requirements of the Virginia Pesticide Control Act (§ 3.2-

3900 et seq. of the Code of Virginia) and this chapter prior to sale or distribution to or use by the public. All bulk containers shall bear the registered pesticide product label and a copy of the label shall accompany each shipment or delivery.

2. Any pesticide-fertilizer mixture shall be registered as required by the Virginia Fertilizer Law (§ 3.2-3600 et seq. of the Code of Virginia). Labeling must meet the requirements of the Virginia Pesticide Control Act, this chapter, and the Virginia Fertilizer Law.

3. Any pesticide-animal feed or pesticide-animal remedy mixtures shall be registered as required by the Virginia Commercial Feed Law (§ 3.2-4800 et seq. of the Code of Virginia) and the Animal Remedies Law (§ 3.2-4900 et seq. of the Code of Virginia). Labeling must meet the requirements of the Virginia Pesticide Control Act, this chapter, the Virginia Commercial Feed Law, and the Animal Remedies Law.

B. Custom mixtures. Pesticides may be mixed with fertilizers ~~or with,~~ other pesticides, or animal feed without ~~label~~ registration when the pesticide product is duly registered~~,~~ and when such mixtures are not prohibited by the registered pesticide label.

C. When these mixtures are intended for the production of agricultural commodities, the person making the mixtures shall provide the following written or printed information to the applicator or customer:

1. Brand ~~name(s)~~ name and EPA registration ~~no.(s)~~ number of pesticide ~~product(s);~~ product;

2. ~~Percentage(s)~~ Percentage by weight of active ~~ingredient(s)~~ ingredients;

3. Directions for application, use, harvest limitations, and cropping restrictions; and

4. Precautionary and warning statements sufficient to ensure proper~~,~~ and safe use~~,~~ and disposal of the mixture.

D. The registered pesticide product ~~label(s)~~ label will suffice. All such labeling shall be subject to approval by the commissioner.

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 (2VAC5-670)

~~Application for New Pesticide Product Registration Form, VDACS 07208 (rev. 7/12).~~

Application for New Pesticide Product Registration, VDACS 07208 (rev. 9/2014)

VA.R. Doc. No. R16-4505; Filed October 11, 2016, 10:51 a.m.

TITLE 4. CONSERVATION AND NATURAL RESOURCES

BOARD OF GAME AND INLAND FISHERIES

Final Regulation

REGISTRAR'S NOTICE: The Board of Game and Inland Fisheries is claiming an exemption from the Administrative Process Act pursuant to § 2.2-4002 A 3 of the Code of Virginia when promulgating regulations regarding the management of wildlife.

Title of Regulation: **4VAC15-20. Definitions and Miscellaneous: In General (amending 4VAC15-20-130).**

Statutory Authority: §§ 29.1-103, 29.1-501, and 29.1-502 of the Code of Virginia.

Effective Date: October 10, 2016.

Agency Contact: Phil Smith, Regulatory Coordinator, Department of Game and Inland Fisheries, 7870 Villa Park Drive, Suite 400, Henrico, VA 23228, telephone (804) 367-8341, or email phil.smith@dgif.virginia.gov.

Summary:

The amendments (i) update the date reference to the federal list of endangered and threatened wildlife species and (ii) remove the Big Sandy crayfish from the Virginia List of Endangered and Threatened Species to reflect its status in Virginia more accurately.

4VAC15-20-130. Endangered and threatened species; adoption of federal list; additional species enumerated.

A. The board hereby adopts the Federal Endangered and Threatened Species List, Endangered Species Act of December 28, 1973 (16 USC §§ 1531-1543), as amended as of ~~December 23, 2015~~ [~~June 7, 2016~~ August 4, 2016], and declares all species listed thereon to be endangered or threatened species in the Commonwealth. Pursuant to subdivision 12 of § 29.1-103 of the Code of Virginia, the director of the department is hereby delegated authority to propose adoption of modifications and amendments to the Federal Endangered and Threatened Species List in accordance with the procedures of §§ 29.1-501 and 29.1-502 of the Code of Virginia.

B. In addition to the provisions of subsection A of this section, the following species are declared endangered or threatened in this Commonwealth, and are afforded the protection provided by Article 6 (§ 29.1-563 et seq.) of Chapter 5 of Title 29.1 of the Code of Virginia:

1. Fish:

Endangered

Dace, Tennessee	Phoxinus tennesseensis
Darter, sharphead	Etheostoma acuticeps
Darter, variegate	Etheostoma variatum
Sunfish, blackbanded	Enneacanthus chaetodon

Threatened:

Darter, Carolina	Etheostoma collis
Darter, golden	Etheostoma denoncourti
Darter, greenfin	Etheostoma chlorobranchium
Darter, sickle	Percina willliamsi
Darter, western sand	Ammocrypta clara
Madtom, orangefin	Noturus gilberti
Paddlefish	Polyodon spathula
Shiner, emerald	Notropis atherinoides
Shiner, steelcolor	Cyprinella whipplei
Shiner, whitemouth	Notropis alborus

2. Amphibians:

Endangered:

Salamander, eastern tiger	Ambystoma tigrinum

Threatened:

Salamander, Mabee's	Ambystoma mabeei
Treefrog, barking	Hyla gratiosa

3. Reptiles:

Endangered:

Rattlesnake, canebrake (Coastal Plain population of timber rattlesnake)	Crotalus horridus
Turtle, bog	Glyptemys muhlenbergii
Turtle, eastern chicken	Deirochelys reticularia reticularia

Threatened:

Lizard, eastern glass	Ophisaurus ventralis
Turtle, wood	Glyptemys insculpta

4. Birds:

Endangered:

Plover, Wilson's	Charadrius wilsonia
Rail, black	Laterallus jamaicensis
Wren, Bewick's	Thryomanes bewickii bewickii

Threatened:

Falcon, peregrine	Falco peregrinus
Shrike, loggerhead	Lanius ludovicianus
Sparrow, Bachman's	Aimophila aestivalis
Sparrow, Henslow's	Ammodramus henslowii
Tern, gull-billed	Sterna nilotica

5. Mammals:

Endangered:

Bat, Rafinesque's eastern big-eared	Corynorhinus rafinesquii macrotis
Bat, little brown	Myotis lucifugus
Bat, tri-colored	Perimyotis subflavus
Hare, snowshoe	Lepus americanus
Shrew, American water	Sorex palustris
Vole, rock	Microtus chrotorrhinus

6. Mollusks:

Endangered:

Coil, rubble	Helicodiscus lirellus
Coil, shaggy	Helicodiscus diadema
Deertoe	Truncilla truncata
Elephantear	Elliptio crassidens
Elimia, spider	Elimia arachnoidea
Floater, brook	Alasmidonta varicosa
Ghostsnail, thankless	Holsingeria unthanksensis

Heelsplitter, Tennessee	Lasmigona holstonia
Lilliput, purple	Toxolasma lividus
Mussel, slippershell	Alasmidonta viridis
Pigtoe, Ohio	Pleurobema cordatum
Pigtoe, pyramid	Pleurobema rubrum
Springsnail, Appalachian	Fontigens bottimeri
Springsnail (no common name)	Fontigens morrisoni
Supercoil, spirit	Paravitrea hera

Threatened:

Floater, green	Lasmigona subviridis
Papershell, fragile	Leptodea fragilis
Pigtoe, Atlantic	Fusconaiamasoni
Pimpleback	Quadrula pustulosa pustulosa
Pistolgrip	Tritogonia verrucosa
Riversnail, spiny	Iofluvialis
Sandshell, black	Ligumia recta
Supercoil, brown	Paravitrea septadens

7. Arthropods:

Threatened:

Amphipod, Madison Cave	Stygobromus stegerorum
Pseudotremia, Ellett Valley	Pseudotremia cavernarum
Xystodesmid, Laurel Creek	Sigmoria whiteheadi

~~8. Crustaceans:~~

~~Endangered:~~

~~Crayfish, Big Sandy~~	~~Cambarus veteranus~~

C. It shall be unlawful to take, transport, process, sell, or offer for sale within the Commonwealth any threatened or endangered species of fish or wildlife except as authorized by law.

D. The incidental take of certain species may occur in certain circumstances and with the implementation of certain conservation practices as described in this subsection:

Species	Location	Allowable Circumstances	Required Conservation Measures	Expected Incidental Take
Little brown bat Tri-colored bat	Statewide	Human health risk – need for removal of individual animals from human-habited structures.	Between May 15 and August 31, no exclusion of bats from maternity colonies, except for human health concerns. DGIF-permitted nuisance wildlife control operator with DGIF-recognized certification in techniques associated with removal of bats. Use of exclusion devices that allow individual animals to escape. Manual collection of individual animals incapable of sustaining themselves; transport to a willing and appropriately permitted wildlife rehabilitator.	Little to no direct lethal taking expected.
		Public safety or property damage risk – need for tree removal, application of prescribed fire, or other land management actions affecting	Hibernacula: no tree removal, use of prescribed fire, or other land management action within a 250-foot radius buffer area from December 1 through April 30. Between September 1 and November 30, increase the buffer to a 1/4-mile radius with the following conditions: for timber harvests greater than 20 acres, retain snags and wolf	Little to no direct lethal taking expected.

		known roosts; removal of animals from known roosts.	trees (if not presenting public safety or property risk) and small tree groups up to 15 trees of 3-inch diameter at breast height (dbh) or greater, one tree group per 20 acres. Otherwise, document the need (public safety, property damage risk) for tree removal during this period and verify that no known roost trees exist in the buffer area. Tree removal and prescribed fire are permitted outside of these dates. Known roost trees: no tree removal, use of prescribed fire, or other land management action within a 150-foot radius buffer area from June 1 through July 31, if possible. Otherwise, document public safety or property damage risk. DGIF-permitted nuisance wildlife control operator with DGIF-recognized certification in techniques associated with removal of bats. Use of exclusion devices that allow individual animals to escape. Manual collection of individual animals incapable of sustaining themselves; transport to a willing and appropriately permitted wildlife rehabilitator.	
		Facility or project operations when conducted in accordance with a DGIF-approved plan associated with these species.	Development and implementation of a plan that avoids, minimizes, and mitigates incidental take associated with an otherwise lawful activity. The plan shall include, but not be limited to, documenting the specific condition or action, the specific mitigation to be taken, and the expected incidental take.	Little to no direct lethal taking expected.

DOCUMENTS INCORPORATED BY REFERENCE (4VAC15-20)

List of Native and Naturalized Fauna of Virginia, March 2012, Virginia Department of Game and Inland Fisheries

~~Federal Endangered and Threatened Species List, amended as of December 23, 2015, U.S. Fish & Wildlife Service~~

[~~Federal Endangered and Threatened Species List, amended as of June 7, 2016, U.S. Fish & Wildlife Service~~

Federal Endangered and Threatened Animal Species as of August 4, 2016]

VA.R. Doc. No. R16-4802; Filed October 4, 2016, 11:45 p.m.

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TITLE 6. CRIMINAL JUSTICE AND CORRECTIONS

BOARD OF JUVENILE JUSTICE

Final Regulation

Title of Regulation: **6VAC35-170. Minimum Standards for Research Involving Human Subjects or Records of the Department of Juvenile Justice (amending 6VAC35-170-10, 6VAC35-170-30, 6VAC35-170-40, 6VAC35-170-50, 6VAC35-170-80, 6VAC35-170-100, 6VAC35-170-140, 6VAC35-170-170, 6VAC35-170-190, 6VAC35-170-200, 6VAC35-170-220; adding 6VAC35-170-62, 6VAC35-170-65, 6VAC35-170-185; repealing 6VAC35-170-120).**

Statutory Authority: §§ 66-10 and 66-10.1 of the Code of Virginia.

Effective Date: December 1, 2016.

Agency Contact: Janet P. Van Cuyk, Legislative and Research Manager, Department of Juvenile Justice, 600 East Main Street, 20th Floor, P.O. Box 1110, Richmond, VA 23218, telephone (804) 588-3879, FAX (804) 371-6490, or email janet.vancuyk@djj.virginia.gov.

Summary:

The action addresses how all external data requests and research proposals within the Commonwealth's juvenile justice system will be coordinated, reviewed, and approved or denied. The amendments provide the process for the review and approval of (i) external aggregate data requests, (ii) external case specific data requests, and (iii) human research proposals. The amendments also require researchers to report noncompliance with the conditions of the signed research agreements and authorize the Department of Juvenile Justice and the Human Research Review Committee to prohibit further research or restrict the publication and use of the data research results.

Summary of Public Comments and Agency's Response: No public comments were received by the promulgating agency.

CHAPTER 170
REGULATION GOVERNING MINIMUM STANDARDS FOR JUVENILE INFORMATION REQUESTS FROM AND RESEARCH INVOLVING HUMAN SUBJECTS ~~OR RECORDS OF~~ WITHIN THE DEPARTMENT OF JUVENILE JUSTICE

6VAC35-170-10. Definitions.

Unless the context clearly indicates otherwise, the following words and terms when used in this ~~regulation~~ chapter shall have the following meanings, consistent with the definitions offered in § 32.1-162.16 of the Code of Virginia:

"Aggregate data" means statistics that relate to broad classes, groups, or categories so that it is not possible to distinguish the properties of individuals within those classes, groups, or categories.

"Case-specific data" means nonaggregated data that provides information about individuals within a group.

"Coordinator of external research" is the department employee designated by the director to receive research proposals from external entities and ensure that the proposals are reviewed in accordance with this ~~regulation~~ chapter and related department procedures.

"De-identified data" means data with common identifiers, such as names, phone numbers, social security numbers, addresses, etc., removed in order to eliminate the ability of an individual viewing the data to determine the identity of an individual.

"Department" means the Department of Juvenile Justice.

"Director" means the Director of the Department of Juvenile Justice~~, or his designee~~.

"Encrypted" means the transformation of data through the use of an algorithmic process into a form in which there is a low probability of assigning meaning without the use of a confidential process or key or the securing of the information by another method that renders the data elements unreadable or unusable.

"External research" means research conducted at or using the resources of a facility, program, or organization that is owned, operated, or regulated by the department or the Board of Juvenile Justice by researchers who are not part of the department or under contract to the department, or who are not employees of another state agency conducting a study at the direction of the General Assembly.

~~"Human subject" means any individual who is under the department's care, custody or supervision, or a member of the family of such an individual, who is or who is proposed to be a subject of human research.~~

"Human research" means any systematic investigation ~~using human subjects, that may expose those subjects to physical or psychological injury, and that departs from the application of established and accepted therapeutic methods appropriate to meet the subject's needs~~ including research development, testing and evaluation, utilizing human subjects that is designed to develop or contribute to generalized knowledge. Human research shall not be deemed to include research exempt from federal research regulation pursuant to 45 CFR 46.101(b).

"Human Research Review Committee" means the committee established by the department to oversee human research proposals and activities in accordance with 6VAC35-170-130 and § 32.1-162.19 of the Code of Virginia.

"Human subject" means any individual who is under the department's care, custody, or supervision, or a member of the family of such an individual, who is, or who is proposed to be, a subject of human research.

"Informed consent" means the knowing and voluntary agreement without undue inducement or any element of force, fraud, deceit, duress, or other form of constraint or coercion of a person who is capable of exercising free choice. The basic elements necessary for informed consent regarding human research include:

1. A reasonable and comprehensible explanation to the person of the proposed procedures and protocols to be followed, their purposes, including descriptions of ~~any~~ attendant discomforts, and risks and benefits reasonably to be expected;

2. A disclosure of ~~any~~ alternative procedures or therapies that might be helpful to the person;

3. An instruction that the person may withdraw his consent and stop participating in the human research at any time without prejudice to him;

4. An explanation of ~~any~~ costs or compensation that may accrue to the person and whether third party reimbursement is available for the proposed procedures or protocols; and

5. An offer to answer, and answers to, ~~any~~ questions by the person about the procedures and protocols.

"Legally authorized representative" means the parent or parents having custody of a prospective subject; the legal guardian of a prospective subject; or any person or judicial or other body authorized by law to consent on behalf of a prospective subject to such subject's participation in the particular human research, including an attorney in fact appointed under a durable power of attorney, provided the power grants the authority to make such a decision and the attorney in fact is not employed by the person, institution, or agency conducting the human research. No official or employee of the institution or agency conducting or authorizing the research shall act as a legally authorized representative.

"Minimal risk" means that the risks of harm anticipated in the proposed research are not greater, considering probability and magnitude, than those ordinarily encountered in daily life or during the performance of routine physical or psychological examinations or tests.

"Nontherapeutic research" means human research in which there is no reasonable expectation of direct benefit to the physical or mental condition of the human subject.

"Organizational unit head" means the person in charge of a juvenile correctional center, ~~halfway house,~~ court service unit, ~~regional office~~ or other organizational unit of the department.

"Principal researcher" means the individual who is responsible for the research design, the conduct of research, supervision of ~~any~~ research staff, and the research findings.

"Research" means the systematic development of knowledge essential to effective planning and rational decision-making. It involves the assessment of current knowledge on conceptual problems selected, statement of those problems in researchable format, design of methodologies appropriate to the problems, and the application of statistical techniques to organize and analyze data. Research findings should provide valuable information to management for policy options.

"Researcher" means an individual conducting research.

"Research project" means the systematic collection of information, analysis of the data, and the preparation of a report of findings.

"Written" means the required information is communicated in writing. Such writing may be available in either hard copy or electronic form.

6VAC35-170-30. Professional ethics.

~~The~~ All research shall conform to the standards of ethics of professional societies such as the American Correctional Association, the American Psychological Association, the American Sociological Association, the National Association of Social Workers, the American Evaluation Association, or their equivalent.

6VAC35-170-40. Confidentiality requirements of all research.

A. Research findings shall not identify individual subjects.

B. All records and all information given by research subjects or employees of the department shall be kept confidential in accordance with § 16.1-300 of the Code of Virginia~~,~~ and applicable rules and regulations regarding confidentiality of juvenile records.

C. Persons who breach confidentiality shall be subject to sanctions in accordance with applicable laws, regulations, policies, and procedures.

D. Confidentiality does not preclude reporting results ~~in a consolidated form that protects the identity of individuals,~~ utilizing de-identified data or giving raw data to the department for possible further analysis.

6VAC35-170-50. Conditions for department approval of external research.

The department ~~will~~ may approve research projects only when it determines, in its sole discretion, that the following conditions have been met:

1. The department has sufficient financial resources and staff to support the research project, and that on balance the benefits of the research justify the department's involvement;

2. The proposed research will not interfere significantly with department programs or operations, particularly those of the operating units that would participate in the proposed research; ~~and~~

3. The proposed research is compatible with the purposes and goals of the juvenile justice system and with the department's organization, operations, and resources; and

4. The proposed research requests for aggregate data or de-identified data, and the human research proposals, comply with all department procedures, which shall be posted on the department's website.

6VAC35-170-62. Review and approval of aggregate data requests.

A. Aggregate data requests shall be submitted to the department in accordance with procedures posted on the department's website.

B. The [~~coordinator of external research~~ department] shall determine the following prior to approving the request:

1. The request meets the conditions for department approval of research identified in 6VAC35-170-30 and 6VAC35-170-50;

2. The data requested is accessible;

3. An estimate of the time required to process the data request; and

4. Based on staff workload, if staff resources are available to process the data request.

C. The [~~coordinator of external research~~ department] may approve and coordinate the provision of data.

D. The principal researcher shall be notified in writing of the approval or denial of the data request within 20 business days of the department receiving the proposal.

1. The department shall provide the principal researcher with documentation of the rationale for the denial of the request when applicable.

2. The department shall provide the principal researcher with a written estimated timeline for receipt of the data when applicable.

6VAC35-170-65. External case-specific data requests.

A. External case-specific data requests shall be submitted to the department via the Research Proposal Form, the Research Agreement Form, and any attachment required by department procedures.

B. The Research Agreement Form shall be signed by the principal researcher and the student researcher, if applicable, at the time of submission.

C. The coordinator of external research shall determine the following within 10 business days of receiving the research proposal:

1. The request meets the conditions for department approval of research identified in 6VAC35-170-30 and 6VAC35-170-50;

2. The proposal is not a human research proposal and is not required to be reviewed by the Human Research Review Committee;

3. The principal researcher has appropriate academic or professional standing or job-related experience in the area to be studied;

4. The proposal is in the required format and includes all required information;

5. The proposal complies with basic research standards and applicable laws;

6. The data requested is accessible;

7. Department staff and resources are available to process the data request; and

8. An estimate of the time required to compile the data request.

D. The following identifiers shall be removed from the data provided to researchers:

1. Names;

2. Dates (date of birth, date of admission, date of release, etc.);

3. Postal address information, other than town or city, state, and zip code;

4. Telephone numbers;

5. Social security numbers;

6. Medical record numbers;

7. Account numbers (Juvenile Tracking System, Direct Care, etc.);

8. Biometric identifiers, including finger and voice prints; and

9. Full face photographic images and any comparable image.

E. The director or his designee may on a case-by-case basis approve the dissemination of data containing a limited number of the identifiers listed in subsection D of this section for research benefiting the department.

F. The human research review process shall be followed when the data requested by a researcher are such that a reasonable person could identify the research participants.

G. Industry standard levels of encryption shall be required to protect all juvenile record information provided to researchers.

H. Upon determining the requirements in subsection C of this section are met, the director or his designee shall designate a committee to meet within 20 business days of receiving the proposal. The committee shall:

1. Review the data requested and determine if it is necessary to restrict the scope of the information provided. The scope of information may be restricted for any reason.

2. Determine the research is beneficial to the department.

3. Ensure juvenile confidential information will be adequately protected.

4. Make a recommendation to the director or his designee to approve or disapprove the request.

I. The director shall approve or deny the proposal within 10 business days of receiving the recommendation.

J. The department shall notify the researcher of the director's decision within five business days of the director making the decision.

K. Notification of the denial of a proposal shall include a written rationale.

L. Notification of the approval of a proposal shall include the research agreement. The research agreement shall outline the respective responsibilities of the parties and will specify:

1. When progress reports shall be required. If the external research also involves human research, this schedule of progress reports shall be developed in consultation with the Human Research Review Committee;

2. The department shall have unrestricted permission to use the research findings in accordance with professional standards of research;

3. A final report shall be submitted electronically to the department;

4. Unless waived by the director or designee, all external articles, reports, and presentations made from the data collected shall be submitted electronically to the department and shall include the statement, "The findings of this study are the responsibility of the researchers, and cooperation by the Virginia Department of Juvenile Justice in facilitating this research should not be construed as an endorsement of the conclusions drawn by the researchers."; and

5. The research agreement is not effective until signed by both the principal researcher and the director or his designee.

M. The department shall provide a final signed copy of the research agreement to the principal researcher by first class mail, electronic mail, or facsimile.

6VAC35-170-80. Informed consent required for human research ~~(see~~ (§ 32.1-162.18 of the Code of Virginia).

A. If a human subject is competent, informed consent shall be given in writing by the subject and witnessed.

B. If a human subject is not competent, informed consent shall be given in writing by the subject's legally authorized representative and witnessed.

C. If a human subject is a minor who is otherwise capable of giving informed consent, informed consent shall be given in writing by both the minor and his legally authorized representative.

D. If two or more persons who qualify as legally authorized representatives with decision-making authority inform the researcher that they disagree as to participation of the prospective subject in human research, the subject shall not be enrolled in the human research that is the subject of the consent.

~~D.~~ E. Notwithstanding consent by a legally authorized representative, no person who is otherwise capable of giving informed consent shall be forced to participate in any human research.

~~E.~~ F. A legally authorized representative may not consent to nontherapeutic research unless the Human Research Review Committee determines that such nontherapeutic research will present no more than a minimal risk to the human subject.

~~F.~~ G. No informed consent form shall include any language through which the human subject waives or appears to waive any legal ~~rights~~ right, including any release of any individual, institution, or agency or any ~~agents~~ agent thereof from liability for negligence (see § 32.1-162.18 of the Code of Virginia).

6VAC35-170-100. Proposal for external research.

A. If the research is proposed to take place in a particular organizational unit, the principal researcher shall present a preliminary research proposal to the head of that organizational unit and get the organizational unit head's endorsement of the proposal, in accordance with procedures established by the department.

B. The principal researcher shall submit to the coordinator of external research a complete research proposal describing the research project, and containing:

1. Name, address, telephone numbers, title and affiliation of the principal researcher;

2. Name of the person who will immediately supervise the project, if different from the principal researcher;

3. Funding source, if any;

4. Date of the proposal's submission to the department;

5. Title or descriptive name of the proposed research project;

6. Statement of the specific purpose or purposes of the proposed research project with anticipated results, including benefit to the department;

7. A concise description of the research design and techniques for data collection and analysis, and of the likely effects of the research methodology on existing programs and institutional operations;

8. ~~Time frames~~ Timeframes indicating proposed beginning and ending dates for (i) data collection, (ii) analysis, (iii) preliminary report, and (iv) final report;

9. A listing of ~~any~~ resources the researcher will require from the department or its units, such as staff, supplies, materials, equipment, work spaces, or access to clients and files;

10. ~~Endorsement~~ A written endorsement from the head of the organizational unit where the research will be conducted, if applicable;

11. For student research, endorsement from the researcher's academic advisor or other appropriate persons;

12. For research involving records of juveniles at state and local court service units, a written endorsement from the appropriate juvenile and domestic relations judge or judges;

13. For human research, a written endorsement from the institutional review board of the institution or organization with which the researcher is affiliated; and

14. For all research projects, a signed and dated statement that the principal researcher and research staff have read, understand, and agree to abide by these regulations.

6VAC35-170-120. ~~Research proposals not involving human research.~~ (Repealed.)

~~Designated department staff shall review research proposals that do not involve human research and make a recommendation to the director within 20 days of receiving the proposal. The director shall approve or deny proposals within 10 days of receiving the staff recommendation.~~

6VAC35-170-140. Timeline for review of human research proposals.

A. The ~~human research review committee~~ Human Research Review Committee will review proposals involving human research within 30 business days of receiving a complete research proposal.

B. At the request of the researcher, the ~~committee~~ Human Research Review Committee may conduct an expedited review when the proposed research involves no more than minimal risk to the human subjects and:

1. The proposal has been reviewed and approved by another agency's human research review committee; or

2. The review involves only minor changes to a research project that was previously approved.

6VAC35-170-170. Recommendation to director and final action.

A. The ~~committee~~ Human Research Review Committee shall make a recommendation to the director to deny, approve, or conditionally approve the proposed human research.

B. The director shall approve or deny the proposal within 10 business days of receiving the committee's recommendation.

C. The research agreement shall become effective only after all reviews required by this regulation and department procedures are completed and the director signs the agreement on behalf of the department. The coordinator of external research must send a copy of the signed ~~Research Agreement~~ research agreement to the researcher before the project may begin.

6VAC35-170-185. Researcher noncompliance.

A. The researcher shall report noncompliance with the approved research proposal to the Human Research Review Committee and the institutional review board.

B. Research activities identified by the department or the Human Research Review Committee as failing to comply with the approved proposal or in violation of the Code of Virginia or the Virginia Administrative Code may result in the department restricting or terminating further research and the department may prohibit the researcher from presenting or publishing the research results.

6VAC35-170-190. Committee reports required.

A. In accordance with § 66-10.1 of the Code of Virginia, the ~~committee~~ Human Research Review Committee shall submit to the Governor, the General Assembly, and the director at least annually a report on human research projects approved by the committee~~,~~ and the status of such research, including any significant ~~deviations~~ deviation from the proposals as approved.

B. The ~~committee~~ Human Research Review Committee shall also annually submit to the Board of Juvenile Justice the same report as required by subsection A of this section. ~~The report to the board shall also include a summary of human research proposals that were not approved.~~

6VAC35-170-200. Progress reports.

A. The department may require periodic reports on the progress of any research project. The principal researcher shall be responsible for providing such reports, and any supplementary information requested by the department, in a timely manner.

B. The researcher shall submit an annual progress report to [the] coordinator of external research when the research is not completed within one year of approval.

6VAC35-170-220. Final report.

A. The department shall require that a formal final report be submitted to the coordinator of external research~~,~~ and may require up to 10 copies of the report.

B. The report shall, unless waived by the director or designee, contain the following statement:

"The findings of this study are the responsibility of the researchers, and cooperation by the Virginia Department of Juvenile Justice in facilitating this research should not be construed as an endorsement of the conclusions drawn by the researchers."

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 (6VAC35-170)

[~~Research Proposal Summary (undated; filed 12/2015)~~

~~Research Agreement (undated; filed 12/2015)~~

Research Agreement (rev. 1/2016)

Research Proposal Summary (rev. 1/2016)]

VA.R. Doc. No. R14-3973; Filed October 6, 2016, 8:37 a.m.

TITLE 8. EDUCATION

STATE BOARD OF EDUCATION

Final Regulation

Title of Regulation: **8VAC20-90. Procedure for Adjusting Grievances (amending 8VAC20-90-10 through 8VAC20-90-40, 8VAC20-90-60, 8VAC20-90-70).**

Statutory Authority: §§ 22.1-16 and 22.1-308 of the Code of Virginia.

Effective Date: November 30, 2016.

Agency Contact: Patty Pitts, Department of Education, P.O. Box 2120, Richmond, VA 23218, telephone (804) 371-2522, or email patty.pitts@doe.virginia.gov.

Summary:

The amendments conform to changes in the Code of Virginia enacted by Chapters 588 and 650 of the 2013 Acts of Assembly and Chapters 13 and 103 of the 2014 Acts of Assembly and make other technical and clarifying changes. The amendments (i) remove a teacher's option to have a grievance heard before a fact-finding panel, (ii) permit a local school board to designate an impartial hearing officer from outside the school division to hear a teacher's grievance, (iii) eliminate probation as a form of discipline, and (iv) reduce the time in which a teacher who received a notice of dismissal has to request a hearing to 10 days.

Summary of Public Comments and Agency's Response: No public comments were received by the promulgating agency.

Part I
Definitions

8VAC20-90-10. Definitions.

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

"Business day" means~~, in accordance with § 22.1-312 of the Code of Virginia,~~ any day that the relevant school board office is open.

"Days" means calendar days unless a different meaning is clearly expressed in this procedure. Whenever ~~any period of time fixed by this procedure shall expire~~ the last day for performing an act required by this procedure falls on a Saturday, Sunday, or legal holiday, the ~~period of time for taking action under this procedure shall be extended to the~~ act may be performed on the next day ~~if it~~ that is not a Saturday, Sunday, or legal holiday.

"Dismissal" means the dismissal of any teacher within the term of such teacher's contract ~~and the nonrenewal of a contract of a teacher on a continuing contract~~.

"Grievance" means, for the purpose of Part II (8VAC20-90-20 et seq.), a complaint or a dispute by a teacher relating to his employment, including but not necessarily limited to the application or interpretation of personnel policies, rules and regulations, ordinances, and statutes; acts of reprisal ~~as a result~~ against a teacher for filing or processing a grievance, or participating as a witness in any step, meeting, or hearing related to a grievance; or complaints of discrimination on the basis of race, color, creed, political affiliation, handicap, age, national origin, or sex. "Grievance" means, for the purposes of Part III (8VAC20-90-60 et seq.), a complaint or a dispute involving a teacher relating to his employment involving dismissal ~~or placing on probation~~. The term "grievance" shall not include a complaint or dispute by a teacher relating to the establishment and revision of wages or salaries, position classifications or general benefits; suspension of a teacher or nonrenewal of the contract of a teacher who has not achieved continuing contract status; the establishment or contents of ordinances, statutes or personnel policies, procedures, rules and regulations; failure to promote; ~~or~~ discharge, layoff, or suspension from duties because of decrease in enrollment, decrease in ~~a particular subject,~~ enrollment in or abolition of a particular subject, or insufficient funding; hiring, transfer, assignment and retention of teachers within the school division; suspension from duties ~~in emergencies~~; ~~or~~ the methods, means and personnel by which the school division's operations are to be carried on; or coaching or extracurricular activity sponsorship. While these management rights are reserved to the school board, failure to apply, where applicable, these rules, regulations, policies, or procedures as written or established by the school board is grievable.

"Hearing officer" means an impartial hearing officer from outside the school division who possesses some knowledge and expertise in public education and education law and who is capable of presiding over an administrative hearing.

"Personnel file" means, for the purposes of Part III (8VAC20-90-60 et seq.), any and all memoranda, entries or other documents included in the teacher's file as maintained in the central school administration office or in any file regarding the teacher maintained within a school in which the teacher serves.

~~"Probation" means a period not to exceed one year during which time it shall be the duty of the teacher to remedy those deficiencies which give rise to the probationary status.~~

"Teacher" or "teachers" means, for the purposes of Part II (8VAC20-90-20 et seq.), all employees of the school division involved in classroom instruction and all other full-time employees of the school division except those employees classified as supervising employees. "Teacher" means, for the purposes of Part III (8VAC20-90-60 et seq.), all regularly ~~certified~~ licensed professional public school personnel employed by any school division under a written contract as provided by § 22.1-302 of the Code of Virginia~~, by any school division~~ as a teacher or as an assistant principal, principal, or supervisor ~~of classroom teachers but excluding all superintendents~~ as provided by § 22.1-294 of the Code of Virginia.

"Shall file," "shall respond in writing," or "shall serve written notice" means the document is either delivered personally ~~to the grievant or office of the proper school board representative~~ or is mailed by registered or certified mail, return receipt requested, and postmarked within the time limits prescribed by this procedure to the grievant or office of the proper school board representative.

"Supervisory employee" means any person having authority in the interest of the board (i) to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees; and (ii) to direct other employees; or (iii) to adjust the grievance of other employees; or (iv) to recommend any action set forth in clause (i), (ii), or (iii)

above; provided that the authority to act as set forth in clause (i), (ii), (iii), or (iv) requires the exercise of independent judgment and is not merely routine and clerical in nature.

"Written grievance appeal" means a written or typed statement describing the event or action complained of, ~~or~~ the date of the event or action complained of, and a concise description of those policies, ~~procedures~~ rules, regulations, ~~ordinances~~ or statutes upon which the teacher bases his claim. The grievant shall specify what he expects to obtain through use of the grievance procedure. A ~~statement~~ written grievance appeal shall be ~~written upon~~ on forms prescribed by the Board of Education and supplied by the local school board.

Part II

Grievance Procedure

8VAC20-90-20. Purpose of Part II of this grievance procedure.

The purpose of Part II of the Procedure for Adjusting Grievances is to provide an orderly procedure for resolving disputes concerning the application, interpretation, or violation of any of the provisions of local school board policies, rules and regulations as they affect the work of teachers, other than dismissals ~~or probation~~. An equitable solution of grievances should be secured at the most immediate administrative level. The procedure should not be construed as limiting the right of any teacher to discuss any matter of concern with any member of the school administration, nor should the procedure be construed to restrict any teacher's right to seek, or the school division administration's right to provide, review of complaints that are not included within the definition of a grievance. Nothing in this procedure shall be interpreted to limit a school board's exclusive final authority over the management and operation of the school division.

8VAC20-90-30. Grievance procedure.

Recognizing that grievances should ~~be begun~~ begin and should be settled promptly, a grievance must be initiated within 15 business days following either the event giving rise to the grievance, or within 15 business days following the time when the employee knew or reasonably should have known of its occurrence. Grievances shall be processed as follows:

1. Step 1 -- Informal. The first step shall be an informal conference between the teacher and his immediate supervisor (which may be the principal). The teacher shall state the nature of the grievance, and the immediate supervisor shall attempt to adjust the grievance. It is mandatory that the teacher present the grievance informally prior to proceeding to Step 2.

2. Step 2 -- Principal. If for any reason the grievance is not resolved informally in Step 1 to the satisfaction of the teacher, the teacher must perfect his grievance by filing ~~said grievance in writing~~ a written grievance appeal on the required form within 15 business days following the event giving rise to the grievance, or within 15 business days following the time when the employee knew or reasonably should have known of its occurrence, specifying on the form the specific relief expected. Regardless of the outcome of Step 1, if a written grievance appeal is not, without just cause, filed within the specified time, the grievance will be barred.

A meeting shall be held between the principal (or his designee or both) and the teacher (or his designee or both) within five business days of the receipt by the principal of the written grievance. At such meeting the teacher or other party involved, or both, shall be entitled to present appropriate witnesses and to be accompanied by a representative other than an attorney. The principal (or his designee or both) shall respond in writing within five business days following such meeting.

The principal may forward to the teacher within five days from the receipt of the written grievance a written request for more specific information regarding the grievance. The teacher shall file an answer thereto within 10 business days, and the meeting must then be held within five business days thereafter.

3. Step 3 -- Superintendent. If the grievance is not settled to the teacher's satisfaction in Step 2, the teacher can proceed to Step 3 by filing a written notice of appeal with the superintendent, accompanied by the original written grievance appeal form within five business days after receipt of the Step 2 answer (or the due date of such answer). A meeting shall then be held between the superintendent (or his designee or both) and the teacher (or his designee or both) at a mutually agreeable time within five business days. The superintendent or designee may make a written request for more specific information from the teacher, but only if such information was not requested in Step 2. The teacher shall file an answer to such request within 10 business days, and the meeting shall be held within five business days of the date on which the answer was received. At such meeting both the superintendent and the teacher shall be entitled to present witnesses and to be accompanied by a representative who may be an attorney. A representative may examine, cross-examine, question, and present evidence on behalf of a grievant or the superintendent without violating the provisions of § 54.1-3904 of the Code of Virginia. If no settlement can be reached in said meeting, the superintendent (or his designee) shall respond in writing within five business days following such meeting. ~~The superintendent or designee may make a written request for more specific information from the teacher, but only if such was not requested in Step 2. Such request shall be answered within 10 business days, and the meeting shall be held within five business days of the date on which the answer was received.~~ If the grievance is not resolved to the satisfaction of the teacher in Step 3, the teacher may ~~elect to have a hearing by a fact-finding panel, as provided in Step 4, or~~

~~after giving proper notice may~~ request a decision by the school board pursuant to Step ~~5~~ 4.

~~4. Step 4 - Fact finding panel. In the event the grievance is not settled upon completion of Step 3, either the teacher or the school board may elect to have a hearing by a fact finding panel prior to a decision by the school board, as provided in Step 4. If the teacher elects to proceed to Step 4, he must notify the superintendent in writing of the intention to request a fact finding panel and enclose a copy of the original grievance form within five business days after receipt of a Step 3 answer (or the due date of such answer). If the school board elects to proceed to a fact finding panel, the superintendent must serve written notice of the board's intention upon the grievant within 15 business days after the answer provided by Step 3.~~

~~a. Panel. Within five business days after the receipt by the division superintendent of the request for a fact finding panel, the teacher and the division superintendent shall each select one panel member from among the employees of the school division other than an individual involved in any previous phase of the grievance procedure as a supervisor, witness, or representative. The two panel members so selected shall within five business days of their selection select a third impartial panel member.~~

~~b. Selection of impartial third member. In the event that both panel members are unable to agree upon a third panel member within five business days, both members of the panel shall request the chief judge of the circuit court having jurisdiction of the school division to furnish a list of five qualified and impartial individuals from which one individual shall be selected by the two members of the panel to serve as the third member. The individuals named by the chief judge may reside either within or outside the jurisdiction of the circuit court, be residents of the Commonwealth of Virginia, and in all cases shall possess some knowledge and expertise in public education and education law and shall be deemed by the judge capable of presiding over an administrative hearing. Within five business days after receipt by the two panel members of the list of fact finders nominated by the chief judge, the panel members shall meet to select the third panel member. Selection shall be made by alternately deleting names from the list until only one remains. The panel member selected by the teacher shall make the first deletion. The third impartial panel member shall chair the panel. No elected official shall serve as a panel member. Panel members shall not be parties to, or witnesses to, the matter grieved. With the agreement of the teacher's and division superintendent's panel members, the impartial panel member shall have the authority to conduct the hearing and make recommendations as set forth herein while acting as a hearing officer.~~

~~The Attorney General shall represent personally or through one of his assistants any third impartial panel member who shall be made a defendant in any civil action arising out of any matter connected with his duties as a panel member. If, in the opinion of the Attorney General, it is impracticable or uneconomical for such legal representation to be rendered by him or one of his assistants, he may employ special counsel for this purpose, whose compensation shall be fixed by the Attorney General and be paid out of the funds appropriated for the administration of the Department of Education.~~

~~c. Holding of hearing. The hearing shall be held by the panel within 30 business days from the date of the selection of the final panel member. The panel shall set the date, place, and time for the hearing and shall so notify the division superintendent and the teacher. The teacher and the division superintendent each may have present at the hearing and be represented at all stages by a representative or legal counsel.~~

~~d. Procedure for fact finding panel.~~

~~(1) The panel shall determine the propriety of attendance at the hearing of persons not having a direct interest in the hearing, provided that, at the request of the teacher, the hearing shall be private.~~

~~(2) The panel may ask, at the beginning of the hearing, for statements from the division superintendent and the teacher clarifying the issues involved.~~

~~(3) The parties shall then present their claims and evidence. Witnesses may be questioned by the panel members, the teacher and the division superintendent. The panel may, at its discretion, vary this procedure, but shall afford full and equal opportunity to all parties to present any material or relevant evidence and shall afford the parties the right of cross-examination.~~

~~(4) The parties shall produce such additional evidence as the panel may deem necessary to an understanding and determination of the dispute. The panel shall be the judge of the relevancy and materiality of the evidence offered. All evidence shall be taken in the presence of the panel and of the parties.~~

~~(5) Exhibits offered by the teacher of the division superintendent may be received in evidence by the panel and, when so received, shall be marked and made a part of the record.~~

~~(6) The facts found and recommendations made by the panel shall be arrived at by a majority vote of the panel members.~~

~~(7) The hearing may be reopened by the panel, on its own motion or upon application of the teacher or the division superintendent, for good cause shown, to hear after-discovered evidence at any time before the panel's report is made.~~

~~(8) The panel shall make a written report which shall include its findings of fact and recommendations, and shall file it with the members of the school board, the division superintendent, and the teacher, not later than 30 business days after the completion of the hearing.~~

~~(9) A stenographic record or tape recording of the proceedings shall be taken. However, in proceedings concerning grievances not related to dismissal or probation, the recording may be dispensed with entirely by mutual consent of the parties. In such proceedings, if the recording is not dispensed with the two parties shall share equally the cost of the recording. If either party requests a transcript, that party shall bear the expense of its preparation.~~

~~In cases of dismissal or probation, a record or recording of the proceedings shall be made and preserved for a period of six months. If either the teacher or the school board requests that a transcript of the record or recording be made at any time prior to expiration of the six month period, it shall be made and copies shall be furnished to both parties. The school board shall bear the expense of the recording and the transcription.~~

~~(10) The recommendations and findings of fact of the panel submitted to the school board shall be based exclusively upon the evidence presented to the panel at the hearing. No panel member shall conduct an independent investigation involving the matter grieved.~~

~~e. Expenses.~~

~~(1) The teacher shall bear his own expenses. The school board shall bear the expenses of the division superintendent. The expenses of the panel shall be borne one half by the school board and one half by the teacher.~~

~~(2) The parties shall set the per diem rate of the panel. If the parties are unable to agree on the per diem, it shall be fixed by the chief judge of the circuit court. No employee of the school division shall receive such per diem for service on a panel during his normal business hours if he receives his normal salary for the period of such service.~~

~~(3) Witnesses who are employees of the school board shall be granted release time if the hearing is held during the school day. The hearing shall be held at the school in which most witnesses work, if feasible.~~

~~f. Right to further hearings. Following a hearing by a fact finding panel, the teacher shall not have the right to a further hearing by the school board as provided in subdivision 5 c of this section. The school board shall have the right to require a further hearing in any grievance proceeding as provided in subdivision 5 c of this section.~~

~~5.~~ 4. Step ~~5~~ 4 -- Decision by the school board.

a. If a teacher elects to ~~proceed directly to a determination before~~ request a decision by the school board as provided for in Step ~~5~~ 3, he must notify the superintendent in writing of the intention to ~~appeal directly to~~ make the request of the board~~, of the grievance alleged, and the relief sought~~ within five business days after receipt of the answer as required in Step 3 or the due date thereof. Upon receipt of such notice, ~~the school board may elect to have a hearing before a fact finding panel, as indicated in Step 4, by filing a written notice of such intention with the teacher within 10 business days of the deadline for the teacher's request for a determination by the school board~~ the board may hold a hearing on the grievance, may elect to have the hearing conducted by a hearing officer appointed by the school board consistent with the procedures in § 22.1-311 of the Code of Virginia, or may make its determination on the basis of the written evidence presented by the teacher and the recommendation of the superintendent.

~~b. In the case of a hearing before a fact finding panel, the school board shall give the grievant its written decision within 30 days after the school board receives both the transcript of such hearing, if any, and the panel's finding of fact and recommendations unless the school board proceeds to a hearing under subdivision 5 c of this section. The decision of the school board shall be reached after considering the transcript, if any; the findings of fact and recommendations of the panel; and such further evidence as the school board may receive at any further hearing which the school board elects to conduct.~~

~~c. In any case in which a hearing before a fact finding panel is held in accordance with Step 4, the local school board may conduct a further hearing before such school board.~~

~~(1) The local school board shall initiate such hearing by sending written notice of its intention to the teacher and the division superintendent within 10 days after receipt by the board of the findings of fact and recommendations of the fact-finding panel and any transcript of the panel hearing. Such notice shall be provided upon forms to be prescribed by the Board of Education and shall specify each matter to be inquired into by the school board.~~

~~(2) In any case where such further hearing is held by a school board after a hearing before the fact finding panel, the school board shall consider at such further hearing the transcript, if any; the findings and recommendations of the fact finding panel; and such further evidence including, but not limited to, the testimony of those witnesses who have previously testified before the fact-finding panel as the school board deems may be appropriate or as may be offered on behalf of the grievant or the administration.~~

~~(3) The further hearing before the school board shall be set within 30 days of the initiation of such hearing, and the teacher must be given at least 15 days written notice of the date, place, and time of the hearing.~~

b. In any case in which the school board elects to hold a hearing or elects to have a hearing officer conduct the hearing, the hearing shall be set within 30 days of the school board's receipt of the notice required by subdivision 4 a of this section (Step 4a), and the teacher must be given at least 15 days' written notice of the date, time, and place of the hearing.

The teacher and the division superintendent may be represented by legal counsel or other representatives. The hearing ~~before the school board~~ shall be private, unless the teacher requests a public hearing. The school board or the hearing officer, as the case may be, shall establish the rules for the conduct of ~~any~~ the hearing ~~before it~~. Such rules shall include the opportunity for the teacher and the division superintendent to make an opening statement and to present all material or relevant evidence, including the testimony of witnesses and the right of all parties or their representatives to cross-examine the witnesses. Witnesses may be questioned by the school board or the hearing officer.

~~The~~ In the case of a hearing conducted by the school board, the school board's attorney, assistants, or representative, if he~~,~~ or they~~,~~ represented a participant in the prior proceedings, the grievant, the grievant's attorney~~,~~ or representative and, notwithstanding the provisions of § 22.1-69 of the Code of Virginia, the superintendent shall be excluded from any executive session of the school board ~~which~~ that has as its purpose reaching a decision on the grievance. However, immediately after a decision has been made and publicly announced, as in favor of or not in favor of the grievant, the school board's attorney or representative, and the superintendent, may join the school board in executive session to assist in the writing of the decision.

A stenographic record or tape recording of the ~~proceedings~~ hearing shall be taken. However, ~~in proceedings concerning grievances not related to dismissal or probation,~~ the recording may be dispensed with entirely by mutual consent of the parties. ~~In such proceedings, if~~ If the recording is not dispensed with, the two parties shall share the cost of the recording equally, and if either party requests a transcript, that party shall bear the expense of its preparation.

~~In the case of dismissal or probation, a record or recording of the proceedings shall be made and preserved for a period of six months. If either the teacher or the school board requests that a transcript of the record or recording be made at any time prior to the expiration of the six-month period, it shall be made and copies shall be furnished to both parties. The school board shall bear the expense of the recording and the transcription.~~

c. In the event of a hearing conducted by a hearing officer, the recommendation of the hearing officer shall be based exclusively upon the evidence presented at the hearing. Upon the hearing officer's own motion or upon application by either party to the grievance, the hearing officer may reopen the hearing for the purpose of hearing after-discovered evidence upon a finding of good cause by the hearing officer at any time before his recommendation is due. The hearing officer shall transmit his written recommendation and a record or recording of the hearing to the school board as soon as practicable and no more than 10 business days after the hearing.

d. In the event of a hearing by a hearing officer, the school board may make its decision upon the record or recording of such hearing or the school board may elect to conduct a further hearing to receive additional evidence. The school board must hold such further hearing as soon as practicable and must give written notice of the time and place of such further hearing to the division superintendent and the teacher within 10 business days after the board received the record or recording of the initial hearing. The notice must specify each matter to be inquired into by the school board. The school board shall determine the procedure to be followed at such further hearing.

e. In the event of a hearing before the school board, the school board shall give the teacher its written decision as soon as practicable and no more than 30 days after the hearing. The decision of the school board shall be reached after considering the evidence and information presented at the school board hearing.

f. In the event of a hearing before a hearing officer followed by a further hearing by the school board, the school board shall give the teacher its written decision as soon as practicable and no more than 30 days after such further hearing. The decision of the school board shall be reached after considering the record or recording of the initial hearing, the recommendations of the hearing officer, and the evidence and information presented at the further hearing before the school board.

g. In the event of a hearing before a hearing officer in cases in which no further hearing is conducted by the school board, the school board shall give the teacher its written decision as soon as practicable and no more than 30 days after receiving the record or recording of the hearing. The decision of the school board shall be reached after considering the record or recording of the hearing and the recommendations of the hearing officer.

~~(4) The decision of the school board shall be based solely on the transcript, if any; the findings of fact and recommendations of the fact-finding panel; and any evidence relevant to the issues of the original grievance procedure at the school board hearing in the presence of each party. The school board shall give the grievant its written decision within 30 days after the completion of the hearing before the school board. In the event the~~

~~school board's decision is at variance with the recommendations of the fact-finding panel, the school board's written decision shall include the rationale for the decision.~~

~~d. In any case where a hearing before a fact-finding panel is not held, the board may hold a separate hearing or may make its determination on the basis of the written evidence presented by the teacher and the recommendation of the superintendent.~~

~~e.~~ h. The school board shall retain its exclusive final authority over matters concerning employment and the supervision of its personnel.

8VAC20-90-40. Grievability.

A. Initial determination of grievability. Decisions regarding whether a matter is grievable shall be made by the school board at the request of the division ~~superintendent~~ administration or grievant and such decision shall be made within 10 business days of such request. The school board shall reach its decision only after allowing the division ~~superintendent~~ administration and the grievant opportunity to present written or oral arguments regarding grievability. The decision as to whether the arguments shall be written or oral shall be at the discretion of the school board. ~~Decisions shall be made within 10 business days of such request.~~ Such determination of grievability shall be made subsequent to the reduction of the grievance to writing but prior to any ~~panel or board~~ hearing by the board or a hearing officer, or the right to such determination shall be deemed to have been waived. Failure of the school board to make such a determination within such a prescribed 10-business-day period shall entitle the grievant to advance to the next step as if the matter were grievable.

B. Appeal of determination on grievability.

1. Decisions of the school board may be appealed to the circuit court having jurisdiction in the school division for a hearing on the issue of grievability.

a. Proceedings for a review of the decision of the school board shall be instituted by filing a notice of appeal with the school board within 10 business days after the date of the decision and giving a copy thereof to all other parties.

b. Within 10 business days thereafter, the school board shall transmit to the clerk of the court to which the appeal is taken, a copy of its decision, a copy of the notice of appeal, and the exhibits. The failure of the school board to transmit the record within the time allowed shall not prejudice the rights of the grievant. The court may, on motion of the grievant, issue a writ of certiorari requiring the school board to transmit the records on or before a certain date.

c. Within 10 business days of receipt by the clerk of such record, the court, sitting without a jury, shall hear the appeal on the record transmitted by the school board and such additional evidence as may be necessary to resolve any controversy as to the correctness of the record. The court may, in its discretion, receive such other evidence as the ends of justice require.

d. The court may affirm the decision of the school board or may reverse or modify the decision. The decision of the court shall be rendered not later than 15 days from the date of the conclusion of the court's hearing.

Part III

Procedure for Dismissals ~~or Placing on Probation~~

8VAC20-90-60. Dispute resolution.

This Part III of the Procedure for Adjusting Grievances adopted by the Board of Education in accordance with the statutory mandate of Article 3 (§ 22.1-306 et seq.) of Chapter 15 of Title 22.1 of the Code of Virginia and the Standards of Quality for school divisions, Chapter 13.1 (§ 22.1-253.13:1 et seq.) of Title 22.1 of the Code of Virginia, is to provide an orderly procedure for the expeditious resolution of disputes involving the dismissal ~~or placing on probation~~ of any teacher.

8VAC20-90-70. Procedure for dismissals ~~or placing on probation~~.

A. Notice to teacher of recommendation for dismissal ~~or placing on probation~~.

1. In the event a division superintendent determines to recommend dismissal of any teacher, ~~or the placing on probation of a teacher on continuing contract,~~ written notice shall be sent to the teacher on forms ~~to be~~ prescribed by the Board of Education notifying him of the proposed dismissal [~~,~~] ~~or placing on probation,~~ and informing the teacher that within ~~15~~ 10 business days after receiving the notice, the teacher may request a hearing before the school board~~, or before a fact-finding panel as hereinafter set forth~~ or, at the option of the school board, a hearing officer appointed by the school board, as provided in § 22.1-311 of the Code of Virginia.

2. During such ~~15-day~~ 10-business-day period and thereafter until a hearing is held in accordance with the provisions herein, if one is requested by the teacher, the merits of the recommendation of the division superintendent shall not be considered, discussed, or acted upon by the school board except as provided for herein.

3. At the request of the teacher, the superintendent shall provide the reasons for the recommendation in writing or, if the teacher prefers, in a personal interview. In the event a teacher requests a hearing pursuant to § 22.1-311 or ~~§~~ 22.1-312 of the Code of Virginia, the division superintendent shall provide, within 10 days of the request, the teacher, or his representative, with the opportunity to inspect and copy his personnel file and all other documents relied upon in reaching the decision to recommend dismissal ~~or probation~~. Within 10 days of the request of the division superintendent, the teacher, or his representative, shall provide the division superintendent with the opportunity to

inspect and copy the documents to be offered in rebuttal to the decision to recommend dismissal ~~or probation~~. The division superintendent and the teacher or his representative shall be under a continuing duty to disclose and produce any additional documents identified later that may be used in the respective parties' cases-in-chief. The cost of copying such documents shall be paid by the requesting party.

4. Upon a timely request for a hearing, the school board or, at the school board's option, a hearing officer appointed by the school board shall set a hearing within 15 days of the request and the teacher shall be given at least five days' written notice of the time and the place of the hearing.

~~B. Fact-finding panel. Within 15 days after the teacher receives the notice referred to in subdivision A 1 of this section, either the teacher, or the school board, by written notice to the other party upon a form to be prescribed by the Board of Education, may elect to have a hearing before a fact-finding panel prior to any decision by the school board.~~

~~1. Panel. Within five business days after the receipt by the division superintendent of the request for a fact-finding panel, the teacher and the division superintendent shall each select one panel member from among the employees of the school division other than an individual involved in the recommendation of dismissal or placing on probation as a supervisor, witness, or representative. The two panel members so selected shall within five business days of their selection select a third impartial panel member.~~

~~2. Selection of impartial third member. In the event that both panel members are unable to agree upon a third panel member within five business days, both members of the panel shall request the chief judge of the circuit court having jurisdiction of the school division to furnish a list of five qualified and impartial individuals from which list one individual shall be selected by the two members of the panel as the third member. The individuals named by the chief judge may reside either within or without the jurisdiction of the circuit court, be residents of the Commonwealth of Virginia, and in all cases shall possess some knowledge and expertise in public education and education law, and shall be deemed by the judge capable of presiding over an administrative hearing. Within five business days after receipt by the two panel members of the list of fact finders nominated by the chief judge, the panel members shall meet to select the third panel member. Selection shall be made by the panel members alternately deleting names from the list until only one remains with the panel member selected by the teacher to make the first deletion. The third impartial panel member shall chair the panel. No elected official shall serve as a panel member. Panel members shall not be parties to, or witnesses to, the matter grieved. With the agreement of the teacher's and division superintendent's panel members, the impartial panel member shall have the authority to conduct the hearing and make recommendations as set forth herein while acting as a hearing officer.~~

~~The Attorney General shall represent personally or through one of his assistants any third impartial panel member who shall be made a defendant in any civil action arising out of any matter connected with his duties as a panel member. If, in the opinion of the Attorney General, it is impracticable or uneconomical for such legal representation to be rendered by him or one of his assistants, he may employ special counsel for this purpose, whose compensation shall be fixed by the Attorney General and be paid out of the funds appropriated for the administration of the Department of Education.~~

~~3. Holding of hearing. The hearing shall be held by the panel within 30 calendar days from the date of the selection of the final panel member. The panel shall set the date, place, and time for the hearing and shall so notify the division superintendent and the teacher. The teacher and the division superintendent each may have present at the hearing and be represented at all stages by legal counsel or another representative.~~

~~4. Procedure for fact-finding panel.~~

~~a. The panel shall determine the propriety of attendance at the hearing of persons not having a direct interest in the hearing, provided that, at the request of the teacher, the hearing shall be private.~~

~~b. The panel may ask, at the beginning of the hearing, for statements from the division superintendent and the teacher (or their representative) clarifying the issues involved.~~

~~c. The parties shall then present their claims and evidence. Witnesses may be questioned by the panel members, the teacher and the division superintendent,. However, the panel may, at its discretion, vary this procedure but shall afford full and equal opportunity to all parties for presentation of any material or relevant evidence and shall afford the parties the right of cross-examination.~~

B. Procedure for hearing.

1. The hearing shall be conducted by the school board or, at the school board's option, a hearing officer appointed by the school board. The teacher and the division superintendent may be represented by legal counsel or other representatives. The hearing shall be private, unless the teacher requests a public hearing. The school board or hearing officer, as the case may be, shall establish the rules for the conduct of the hearing, and such rules shall include the opportunity for the teacher and the division superintendent to make an opening statement and to present all material or relevant evidence, including the testimony of witnesses, and the right of all parties to cross-examine the witnesses. Witnesses may be questioned by the school board or hearing officer.

~~d.~~ 2. The parties shall produce such additional evidence as the ~~panel~~ school board or hearing officer may deem necessary to an understanding and determination of the dispute. The ~~panel~~ school board or hearing officer shall ~~be~~ determine the ~~judge of~~ relevancy and materiality of the evidence offered. All evidence shall be taken in the presence of the ~~panel~~ school board or hearing officer and of the parties.

~~e.~~ 3. Exhibits offered by the teacher or the division superintendent may be received in evidence by the ~~panel~~ school board or hearing officer and, when so received, shall be marked and made a part of the record.

~~f. The facts found and recommendations made by the panel shall be arrived at by a majority vote of the panel members.~~

~~g. The recommendations and findings of fact of the panel shall be based exclusively upon the evidence presented to the panel at the hearing. No panel member shall conduct an independent investigation involving the matter grieved.~~

~~h. The hearing may be reopened by the panel at any time before the panel's report is made upon its own motion or upon application of the teacher or the division superintendent for good cause shown to hear after-discovered evidence.~~

~~i. The panel shall make a written report which shall include its findings of fact and recommendations and shall file it with the members of the school board, the division superintendent and the teacher, not later than 30 days after the completion of the hearing.~~

~~j. A stenographic record or tape recording of the proceedings shall be taken. However, in proceedings concerning grievances not related to dismissal or probation, the recording may be dispensed with entirely by mutual consent of the parties. In such proceedings, if the recording is not dispensed with, the two parties shall share the cost of the recording equally; if either party requests a transcript, that party shall bear the expense of its preparation.~~

~~In cases of dismissal or probation, a record or recording of the proceedings shall be made and preserved for a period of six months. If either the teacher or the school board requests that a transcript of the record or recording be made at any time prior to expiration of the six month period, it shall be made and copies shall be furnished to both parties. The school board shall bear the expense of the recording and the transcription.~~

~~5. Expenses.~~

~~a. The teacher shall bear his own expenses. The school board shall bear the expenses of the division superintendent. The expenses of the panel shall be borne one half by the school board and one half by the teacher.~~

~~b. The parties shall set the per diem rate of the panel. If the parties are unable to agree on the per diem, it shall be fixed by the chief judge of the circuit court. No employee of the school division shall receive such per diem for service on a panel during his normal business hours if he receives his normal salary for the period of such service.~~

~~6. Right to further hearing. If the school board elects to have a hearing by a fact finding panel on the dismissal or placing on probation of a teacher, the teacher shall have the right to a further hearing by the school board as provided in subsection C of this section. The school board shall have the right to require a further hearing as provided in subsection C also.~~

~~7. Witnesses. Witnesses who are employees of the school board shall be granted release time if the hearing is held during the school day. The hearing shall be held at the school in which most witnesses work, if feasible.~~

~~C. Hearing by school board.~~

~~1. After receipt of the notice of pending dismissal or placing on probation described in subdivision A 1 of this section, the teacher may request a hearing before the school board by delivering written notice to the division superintendent within 15 days from the receipt of notice from the superintendent. Subsequent to the hearing by a fact finding panel under subsection B of this section, the teacher, as permitted by subdivision B 6 of this section, or the school board may request a school board hearing by written notice to the opposing party and the division superintendent within 10 business days after the receipt by the party initiating such hearing of the findings of fact and recommendations made by the fact finding panel and the transcript of the panel hearing. Such notice shall be provided upon a form to be prescribed by the Board of Education and shall specify each matter to be inquired into by the school board.~~

~~2. In any case in which a further hearing is held by a school board after a hearing before the fact-finding panel, the school board shall consider at such further hearing the record, or transcript, if any, the findings of fact and recommendations made by the fact finding panel and such further evidence, including, but not limited to, the testimony of those witnesses who have previously testified before the fact-finding panel as the school board deems may be appropriate or as may be offered on behalf of the teacher or the superintendent.~~

~~3. The school board hearing shall be set and conducted within 30 days of the receipt of the teacher's notice or the giving by the school board of its notice. The teacher shall be given at least 15 days written notice of the date, place, and time of the hearing and such notice shall also be provided to the division superintendent.~~

~~4. The teacher and the division superintendent may be represented by legal counsel or other representatives. The hearing before the school board shall be private, unless the~~

~~teacher requests a public hearing. The school board shall establish the rules for the conduct of any hearing before it, and such rules shall include the opportunity for the teacher and the division superintendent to make an opening statement and to present all material or relevant evidence including the testimony of witnesses and the right of all parties to cross-examine the witnesses. Witnesses may be questioned by the school board. The school board may hear a recommendation for dismissal and make a determination whether to make a recommendation to the Board of Education regarding the teacher's license at the same hearing or hold a separate hearing for each action.~~

~~5. A record or recording of the proceedings shall be made and preserved for a period of six months. If either the teacher or the school board requests that a transcript of the record or recording be made at any time prior to expiration of the six-month period, it shall be made and copies shall be furnished to both parties. The board shall bear the expense of the recording and the transcription.~~

~~6. The school board shall give the teacher its written decision within 30 days after the completion of the hearing before the school board.~~

~~7. The decision by the school board shall be based on the transcript, the findings of the fact and recommendations made by the fact-finding panel, and any evidence relevant to the issues of the original grievance produced at the school board hearing in the presence of each party.~~

~~The school board's attorney, assistants, or representative, if he or they represented a participant in the prior proceedings, the grievant, the grievant's attorney, or representative and, notwithstanding the provisions of § 22.1-69 of the Code of Virginia, the superintendent shall be excluded from any executive session of the school board which has as its purpose reaching a decision on a grievance. However, immediately after a decision has been made and publicly announced, as in favor of or not in favor of the grievant, the school board's attorney or representative and the superintendent may join the school board in executive session to assist in the writing of the decision.~~

4. A stenographic record or tape recording of the proceedings shall be taken. The two parties shall share the cost of the recording equally. The record or recording of the proceedings shall be preserved for a period of six months. If the school board requests that a transcript of the record or recording be made at any time prior to expiration of the six-month period, it shall be made and copies shall be furnished to both parties. The school board shall bear the expense of the transcription.

5. The teacher shall bear his own expenses. The school board shall bear the expenses of the division superintendent and the hearing officer.

6. Witnesses who are employees of the school board shall be granted release time if the hearing is held during the school day. The hearing shall be held at the school in which most witnesses work, if feasible.

7. In the event of a hearing conducted by a hearing officer, the recommendation of the hearing officer shall be based exclusively upon the evidence presented at the hearing. Upon the hearing officer's own motion or upon application by the teacher or the division superintendent, the hearing officer may reopen the hearing for the purpose of hearing after-discovered evidence upon a finding of good cause by the hearing officer at any time before his recommendation is due. The hearing officer shall transmit his written recommendation and a record or recording of the hearing to the school board as soon as practicable and no more than 10 business days after the hearing.

8. In the event of a hearing by a hearing officer, the school board may make its decision upon the record or recording of such hearing or the school board may elect to conduct a further hearing to receive additional evidence. The school board must hold such further hearing as soon as practicable and must give written notice of the time and place of such further hearing to the division superintendent and the teacher within 10 business days after the board received the record or recording of the initial hearing. The notice must specify each matter to be inquired into by the school board. The school board shall determine the procedure to be followed at such further hearing.

~~D.~~ C. School board determination.

1. ~~In any case in which a hearing is held before a fact-finding panel but no further hearing before the school board is requested by either party, the school board shall give the teacher its written decision within 30 days after the school board receives both the transcript of such hearing and the panel's findings of the fact and recommendation. The decision of the school board shall be reached after considering the transcript, the findings of fact, and the recommendations made by the panel.~~ In the event of a hearing before the school board, the school board shall give the teacher its written decision as soon as practicable and no more than 30 days after the hearing. The decision of the school board shall be reached after considering the evidence and information presented at the school board hearing.

2. In the event of a hearing before a hearing officer followed by a further hearing by the school board pursuant to subdivision B 8 of this section, the school board shall give the teacher its written decision as soon as practicable and no more than 30 days after such further hearing. The decision of the school board shall be reached after considering the record or recording of the initial hearing, the recommendations of the hearing officer, and the evidence and information presented at the further hearing before the school board.

3. In the event of a hearing before a hearing officer in cases in which no further hearing is conducted by the school

board, the school board shall give the teacher its written decision as soon as practicable and no more than 30 days after receiving the record or recording of the hearing. The decision of the school board shall be reached after considering the record or recording of the hearing and the recommendations of the hearing officer.

~~2.~~ 4. The school board may dismiss~~,~~ or suspend~~, or place on probation~~ a teacher upon a majority vote of a quorum of the school board. ~~In the event the school board's decision is at variance with the recommendation of the fact finding panel, the school board shall be required to conduct an additional hearing, which shall be public unless the teacher requests a private one. However, if the fact finding hearing was held in private, the additional hearing shall be held in private. The hearing shall be conducted by the school board pursuant to subdivisions C 1 and 2 of this section, except that the grievant and the division superintendent shall be allowed to appear, to be represented, and to give testimony. However, the additional hearing shall not include examination and cross-examination of any other witnesses. The school board's written decision shall include the rationale for the decision.~~ The school board's attorney, assistants, or representative, if he or they represented a participant in the prior proceedings; the grievant; the grievant's attorney or representative; and, notwithstanding the provisions of § 22.1-69 of the Code of Virginia, the superintendent shall be excluded from any executive session of the school board that has as its purpose reaching a decision on a grievance. However, immediately after a decision has been made and publicly announced, as in favor of or not in favor of the grievant, the school board's attorney or representative and the superintendent may join the school board in executive session to assist in the writing of the decision.

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 (8VAC20-90)

~~Statement of Grievance, eff. 2/05~~

~~Principal's Decision, eff. 2/05~~

~~Superintendent's Level, eff. 2/05~~

~~Request for Hearing (Decision to be Presented to Grievant), eff. 2/05~~

~~Notice of Proposed Dismissal or Proposed Placing on Probation, eff. 2/05~~

~~Request for Hearing (to be submitted to Superintendent), eff. 2/05.~~

[~~Statement of Grievance (undated, filed 11/2015)~~

~~Principal's Decision (undated, filed 11/2015)~~

~~Superintendent's Decision (undated, filed 11/2015)~~

~~Request for Hearing (undated, filed 11/2015)~~

~~Notice of Proposed Dismissal (undated, filed 11/2015)~~

Statement of Grievance (rev. 4/2016)

Principal's Decision (rev. 4/2016)

Superintendent's Decision (rev. 4/2016)

Request for Hearing (rev. 4/2016)

Notice of Proposed Dismissal (rev. 4/2016)]

VA.R. Doc. No. R13-3790; Filed October 12, 2016, 10:50 a.m.

Final Regulation

Title of Regulation: **8VAC20-730. Regulations Governing the Collection and Reporting of Truancy-Related Data and Student Attendance Policies (adding 8VAC20-730-10, 8VAC20-730-20, 8VAC20-730-30).**

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

Effective Date: November 30, 2016.

Agency Contact: Dr. Cynthia Cave, Director of Student Services, Department of Education, P.O. Box 2120, Richmond, VA 23218, telephone (804) 225-2818, FAX (804) 225-2524, or email cynthia.cave@doe.virginia.gov.

Summary:

The regulations establish criteria for truancy data collection and a procedure for intervening with a student who has unexcused absences. The regulations provide definitions to promote consistent data collection and reporting among school divisions and to the Virginia Department of Education, recommend options for satisfying the required procedures for intervening with students who have unexcused absences, and direct a referral to court services when a student is noncompliant with compulsory attendance law.

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.

CHAPTER 730
REGULATIONS GOVERNING THE COLLECTION AND REPORTING OF TRUANCY-RELATED DATA AND STUDENT ATTENDANCE POLICIES

8VAC20-730-10. Definitions.

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

"Attendance conference" means a face-to-face meeting, [or an interaction that is conducted through the use of communication technology], at a minimum, after the sixth unexcused absence among school staff, parents, and student ~~(if appropriate)~~. The conference may include~~, if necessary,~~ community representatives to ~~discuss the current attendance~~

~~plan and make modifications to support regular school attendance~~ participate in resolving issues related to nonattendance and revisions to the current attendance plan if necessary.

"Attendance plan" means ~~action steps~~ a plan developed jointly by a school representative, such as a school principal or his designee or attendance officer; parent~~,~~; and student ~~(if appropriate)~~ to resolve the student's nonattendance and engage the student in regular school attendance. The plan shall identify reasons for nonattendance and academic, social, emotional, and familial barriers that impede daily attendance along with positive strategies to address such reasons and impedances and support regular attendance. This plan may include school-based activities or suggested referrals to community supports, or both.

"Court referral" means ~~referral~~ filing a complaint to the Juvenile and Domestic Relations Court ~~intake worker~~ after the student's seventh unexcused absence. ~~Copies~~ Documentation of interventions regarding the student's unexcused absences, such as copies of the attendance plan and documentation of conference meetings, and compliance with § 22.1-258 of the Code of Virginia will be provided to the intake worker.

"Excused absence" means an absence of an entire assigned instructional school day with ~~an excuse~~ a reason acceptable to the school administration that is provided by the parent. If circumstances permit, the parent should provide the school ~~authority~~ administration with the reason for the nonattendance prior to the absence. Examples of an excused absence may include, but are not limited to, the following reasons: funeral, illness (including mental health and substance abuse illnesses), injury, legal obligations, medical procedures, suspensions, religious observances, and military obligation. Expelled and suspended students continue to remain under the provisions of compulsory school attendance as described in § 22.1-254 of the Code of Virginia. An absence from school attendance resulting from a suspension or expulsion may be considered excused for the period of the suspension or expulsion.

"Instructional school day" means the length of a regularly scheduled school day for an individual student.

"Multi-disciplinary team" means a school-based team that ~~convenes on a regular basis~~ may be convened to review student records and to ~~identify an integrated system of care for the student in need, including (i)~~ participate in prevention, early intervention, and provision of support services ~~and (ii)~~ to address unexcused absences, including school-based case management. These services should address academic, social, emotional, and familial issues in order to improve regular school attendance. ~~Members of the team meet confidentially with the parent and the student (if appropriate) to develop, evaluate, and update action steps and supports.~~ Team members may include, but are not limited to, the following: an administrator, school counselor, social worker or psychologist, student assistance specialist, special education and regular education teacher, and attendance officer.

"Parent" means the parent or parents, guardian or guardians, legal custodian or legal custodians, or other person or persons having legal control or charge of the student.

"Truancy" means the act of accruing one or more unexcused absences.

"Unexcused absence" means an absence where (i) ~~either~~ the student misses his scheduled instructional school day in its entirety ~~or misses part of the scheduled instructional school day without permission from an administrator~~ and (ii) no indication has been received by school personnel within three days of the absence that the student's parent is aware and supports the absence, or the parent provides ~~an excuse~~ a reason for the absence that is unacceptable to the school administration. ~~An administrator~~ The school administration may change an unexcused absence to an excused absence when it determines that the parent has provided an acceptable ~~excuse~~ reason meeting criteria for the student's absence or there are extenuating circumstances. ~~Absences resulting from suspensions shall not be considered unexcused.~~

8VAC20-730-20. Unexcused absences intervention process and responsibilities.

A. Each local school board shall provide guidance regarding what would constitute an excused absence in order to address when the explanation provided by the parent will be determined to be reasonable and acceptable.

B. Each local school board shall develop procedures to ensure that appropriate interventions will be implemented when a student engages in a pattern of absences less than a full day, the explanation for which, if it were a full-day absence, would not be deemed an excused absence.

C. The following intervention steps shall be implemented to respond to unexcused absences from school and to engage students in regular school attendance.

1. Whenever a student fails to report to school on a regularly scheduled school day and no information has been received by school personnel that the student's parent is aware of and supports the absence, the school principal or designee, attendance officer, or other school personnel or volunteer will notify the parent by phone or email or any other electronic means to obtain an explanation. The school staff shall record the student's absence for each day as "excused" or "unexcused." Early intervention with the student and parent or parents shall take place for repeated unexcused absences.

2. When a student has received five unexcused absences, the school principal or designee or the attendance officer shall make a reasonable effort to ensure that direct contact is made with the parent. The parent shall be contacted [~~either~~] in a face-to-face conference [, ~~or~~] by telephone [, or through the use of other communication devices]. During the direct contact with the parent and the student (if

appropriate), reasons for nonattendance shall be documented and the consequences of nonattendance explained. An attendance plan shall be made with the student and parent or parents to resolve the nonattendance issues. The student and parent may be referred to a school-based multi-disciplinary team for assistance implementing the attendance plan and case management.

3. The school principal or designee or the attendance officer shall schedule a face-to-face attendance conference [, or an interaction that is conducted through the use of communication technology,] within 10 school days from the date of the student's sixth unexcused absence for the school year. The attendance conference must be held within 15 school days from the date of the sixth unexcused absence. The conference shall include the parent, student ~~(when applicable)~~, and school personnel (which may be a representative or representatives from the multi-disciplinary team) and may include community service providers.

4. The school principal or designee shall notify the attendance officer or division superintendent of the student's seventh unexcused absence for the school year. The division superintendent or designee shall contact the Juvenile and Domestic Relations Court intake to file a ~~Child In Need of Supervision (CHINSup) petition or begin~~ complaint alleging the student is a child in need of supervision (CHINSup) or to institute proceedings against the parent. In addition to documentation of compliance with the notice provisions of § 22.1-258 of the Code of Virginia, all records of intervention regarding the student's unexcused absences, such as copies of the conference meeting notes, attendance plan, and supports ~~provided prior to filing the petition~~ shall be presented to the intake worker. ~~The decision shall be made by the intake worker either to divert the case or to file the petition for presentation before the court.~~

~~B.~~ D. A record shall be maintained of each meeting that includes the attendance plan, the name of individuals in attendance at each conference meeting (including via telephone or electronic devices), the location and date of the conference, a summary of what occurred, and follow-up steps. ~~This record does not become a part of the student's permanent scholastic record.~~

8VAC20-730-30. Data collection and reporting.

Data collection shall begin on the first day students attend for the school year. Each school division shall provide student level attendance data for each student that includes the number of unexcused absences ~~as~~ in a manner prescribed by the Virginia Department of Education. A student's attendance is cumulative and begins on the first official day of the school year or the first day the student is officially enrolled. All nonattendance days are cumulative and begin with the first absence. For purposes of this data collection, truancy shall start with the first unexcused absence and will be cumulative.

Excused and unexcused absences shall be counted for each individual student and shall be reported to the Virginia Department of Education as follows:

1. All excused and unexcused absences as defined in this chapter for each individual student shall be collected.

2. For each student with five unexcused absences, whether an attendance plan was developed, and if not, the reason.

3. For each student with six unexcused absences, whether an attendance conference was scheduled, and if not, the reason.

4. For each student with six unexcused absences, whether an attendance conference was actually held, and if not, the reason.

5. For each student with seven unexcused absences, whether a court referral [~~or a petition was filed~~ was made] or if proceedings against the parent or parents were initiated and, if not, the reason.

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TITLE 9. ENVIRONMENT

STATE AIR POLLUTION CONTROL BOARD

Fast-Track Regulation

Title of Regulation: **9VAC5-10. General Definitions (Rev. C16) (amending 9VAC5-10-20).**

Statutory Authority: § 10.1-1308 of the Code of Virginia.

Public Hearing Information: No public hearings are scheduled.

Public Comment Deadline: November 30, 2016.

Effective Date: December 15, 2016.

Agency Contact: Karen G. Sabasteanski, Department of Environmental Quality, 629 East Main Street, P.O. Box 1105, Richmond, VA 23218, telephone (804) 698-4426, FAX (804) 698-4510, TTY (804) 698-4021, or email karen.sabasteanski@deq.virginia.gov.

Basis: Section 10.1-1308 of the Code of Virginia authorizes the State Air Pollution Control Board to promulgate regulations abating, controlling, and prohibiting air pollution in order to protect public health and welfare.

Federal requirements: Section 109(a) of the federal Clean Air Act requires the U.S. Environmental Protection Agency (EPA) to prescribe national ambient air quality standards (NAAQS) to protect public health. Section 110 mandates that each state adopt and submit to EPA a state implementation plan (SIP) that provides for the implementation, maintenance, and enforcement of the NAAQS. Ozone, one of the pollutants for which there is a NAAQS, is in part created by emissions of VOCs. Therefore, in order to control ozone, volatile

organic compounds (VOCs) must be addressed in Virginia's SIP.

40 CFR Part 51 sets out requirements for the preparation, adoption, and submittal of SIPs. Subpart F of Part 51, Procedural Requirements, includes § 51.100, which consists of a list of definitions. 40 CFR 51.100 contains a definition of VOC. This definition is revised by EPA to add or remove VOCs as necessary. If it can be demonstrated that a particular VOC is "negligibly reactive"--that is, if it can be shown that a VOC is not as reactive and therefore does not have a significant effect on ground-level or upper-level ozone--then EPA may remove that substance from the definition of VOC.

On November 29, 2004 (69 FR 69298), EPA delisted t-butyl acetate, or tertiary butyl acetate, (TBAC) as a VOC because it was negligibly reactive. However, because of concerns about the potential widespread use of TBAC and potential cumulative effects, EPA also required that TBAC continue to be treated as a VOC for recordkeeping and reporting to monitor for such effects. Subsequently, EPA received a petition to remove these additional requirements. EPA concluded that TBAC is not being used at levels that would cause concern for ozone formation. Additionally, EPA concluded that these requirements are of limited utility because they do not provide sufficient information to judge the cumulative impacts of exempted compounds and because the data have not been consistently collected and reported.

Therefore, on February 25, 2016 (80 FR 9339), EPA removed the recordkeeping and reporting requirements for TBAC. This change became effective on April 25, 2016.

State requirements: This specific amendment is not required by state mandate. Rather, Virginia's Air Pollution Control Law gives the State Air Pollution Control Board the discretionary authority to promulgate regulations "abating, controlling and prohibiting air pollution throughout or in any part of the Commonwealth" in § 10.1-1308 A. The law defines such air pollution as "the presence in the outdoor atmosphere of one or more substances which are or may be harmful or injurious to human health, welfare or safety, to animal or plant life, or to property, or which unreasonably interfere with the enjoyment by the people or life or property" (§ 10.1-1300 of the Code of Virginia).

Purpose: The purpose of the general definitions chapter is not to impose any regulatory requirements in and of itself, but to provide a basis for and support to other provisions of the Regulations for the Control and Abatement of Air Pollution, which are in place in order to protect public health and welfare. The proposed amendment is being made to ensure that the definition of VOC, which is crucial to most of the regulations, is up-to-date and scientifically accurate, as well as consistent with the overall EPA requirements under which the regulations operate.

Rationale for Using Fast-Track Rulemaking Process: The definition of VOC is being revised to remove the recordkeeping, emissions reporting, photochemical dispersion modeling, and inventory requirements related to the use of TBAC. As discussed elsewhere, this amendment is not expected to affect a significant number of sources or have a significant impact on air quality overall other than potential improvement. Additionally, removal of these requirements at the federal level was accompanied by detailed scientific review and public comment. Therefore, no additional information on the pollution potential of this substance or the appropriateness of removing reporting requirements is anticipated.

Substance: The general definitions impose no regulatory requirements in and of themselves but provide support to other provisions of the Regulations for the Control and Abatement of Air Pollution. The list of substances not considered to be VOCs in Virginia has been revised to remove the recordkeeping and reporting requirements for TBAC.

Issues: The general public health and welfare may benefit because the revision may encourage the use of the delisted substance in place of products containing more reactive and thereby more polluting substances. Removing unnecessary recordkeeping and reporting requirements associated with this substance will make it easier and less expensive for industry to use it. Companies that use this substance in place of more reactive substances may also benefit by reducing their VOC emissions and concomitant reductions in permitting and other regulatory requirements. As explained, EPA has made its decision to delist TBAC as a VOC because the data that had been reported in accordance to the previous regulation had been incomplete and inconsistent. Although there are no studies which indicate TBAC is harmful to human health, EPA is currently conducting its own assessment on health risks through its Integrated Risk Information System program. If it becomes clear that TBAC or its metabolites are harmful and that action is warranted, EPA may consider additional action to mitigate health risks. This assessment does not rely on any of the data collected through the recordkeeping and reporting requirements at issue in this rule.

The amendment will not have any direct impact on the department.

Department of Planning and Budget's Economic Impact Analysis:

Summary of the Proposed Amendments to Regulation. The State Air Pollution Control Board (Board) proposes to revise the definition of volatile organic compound (VOC) to remove the recordkeeping, emissions reporting, photochemical dispersion modeling and inventory requirements related to the use of t-butyl acetate (also known as tertiary butyl acetate or TBAC) as a VOC.

Result of Analysis. The benefits likely exceed the costs for all proposed changes.

Estimated Economic Impact. The general definitions of 9VAC5-10 impose no regulatory requirements in and of themselves, but provide support for other Board regulations.

On February 25, 2016 (81 FR 9339), the U.S. Environmental Protection Agency (EPA) revised the definition of volatile organic compound (VOC) to remove the recordkeeping, emissions reporting, photochemical dispersion modeling and inventory requirements related to the use of t-butyl acetate (also known as tertiary butyl acetate or TBAC) as a VOC. The state definition must now be revised accordingly.

TBAC is a solvent. The manufacturer of TBAC (LyondellBasell[1]) states that TBAC can be used alone or in solvent blends in applications including coatings, inks, adhesives, industrial cleaners and degreasers, and can be used to clean dirt, grease, soot, paint debris, and burned-on carbon from vehicles and equipment before painting operations.

There are 3 facilities located in Virginia known to use this substance: Axalta Coating Systems (Front Royal[2]), Huber Engineered Woods (Crystal Hill[3]), and O'Sullivan Films (Winchester). None of these companies is a small business.[4] There may be other facilities that may someday eventually wish to use this substance; however, the Department of Environmental Quality (Department) has not identified any specific facilities that plan to do so.

The three facilities in the state using this substance may recognize some cost savings associated with the removal of the recordkeeping, emissions reporting, photochemical dispersion modeling and inventory requirements. A facility that is not currently using this substance but at some point does choose to do so may realize a cost savings. Removing the requirements may be an incentive for some facilities to switch their current solvent use to TBAC.

The general public health and welfare will likely benefit because the revision may encourage the use of the affected substance in place of products containing more reactive and thereby more polluting substances. Due to its low photochemical reactivity, this substance is considered to be negligibly reactive in the formation of ground level ozone. Therefore, this substance does not have a negative effect on human health or the environment.

Removing the above-mentioned requirements for this substance will make it easier and less expensive for industry to use it. Companies that use this substance in place of more reactive substances may also benefit by reducing their VOC emissions and concomitant reductions in permitting and other regulatory requirements. Also the amendment will allow the Department to focus VOC reduction strategies on substances that have a negative impact on human health and the environment.

Businesses and Entities Affected. The proposed revision of the VOC definition concerning TBAC directly affects its manufacturer LyondellBasell and the three Virginia-located firms/facilities known to use it: Axalta Coating Systems (Front Royal), Huber Engineered Woods (Crystal Hill), and O'Sullivan Films (Winchester).[5]

Localities Particularly Affected. The three known facilities that currently use TBAC and are thus affected by the proposed amendment are located in Halifax County, Warren County, and the City of Winchester.

Projected Impact on Employment. The proposed amendment is unlikely to directly affect employment in the Commonwealth. The demand for TBAC would likely increase, but the solvent is not produced in Virginia.

Effects on the Use and Value of Private Property. The proposed amendment may encourage some Virginia firms to switch to using TBAC as a solvent.

Real Estate Development Costs. The proposed amendment is unlikely to significantly affect real estate development costs.

Small Businesses:

Definition. Pursuant to § 2.2-4007.04 of the Code of Virginia, small business is defined as "a business entity, including its affiliates, that (i) is independently owned and operated and (ii) employs fewer than 500 full-time employees or has gross annual sales of less than $6 million."

Costs and Other Effects. The proposed amendment may reduce costs for some small businesses that use solvents if they choose to use TBAC.

Alternative Method that Minimizes Adverse Impact. The proposed amendment does not adversely affect small businesses.

Adverse Impacts.

Businesses. The proposed amendment does not adversely affect businesses.

Localities. The proposed amendment does not adversely affect localities.

Other Entities. The proposed amendment does not adversely affect other entities.

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[1] See https://www.lyondellbasell.com/

[2] Warren County

[3] Halifax County

[4] Source: Department of Environmental Quality

[5] Ibid

Agency's Response to Economic Impact Analysis: The department has reviewed the economic impact analysis prepared by the Department of Planning and Budget and has no comment.

Summary:

The amendment revises the definition of volatile organic compound (VOC) to remove the recordkeeping, emissions reporting, photochemical dispersion modeling, and inventory requirements related to the use of t-butyl acetate, also known as tertiary butyl acetate or TBAC, as a VOC.

9VAC5-10-20. Terms defined.

"Actual emissions rate" means the actual rate of emissions of a pollutant from an emissions unit. In general actual emissions shall equal the average rate, in tons per year, at which the unit actually emitted the pollutant during the most

recent two-year period or some other two-year period which is representative of normal source operation. If the board determines that no two-year period is representative of normal source operation, the board shall allow the use of an alternative period of time upon a determination by the board that it is more representative of normal source operation. Actual emissions shall be calculated using the unit's actual operating hours, production rates, and types of materials processed, stored, or combusted during the selected time period.

"Administrator" means the administrator of the U.S. Environmental Protection Agency (EPA) or his authorized representative.

"Affected facility" means, with reference to a stationary source, any part, equipment, facility, installation, apparatus, process or operation to which an emission standard is applicable or any other facility so designated. The term "affected facility" includes any affected source as defined in 40 CFR 63.2.

"Air pollution" means the presence in the outdoor atmosphere of one or more substances which are or may be harmful or injurious to human health, welfare or safety; to animal or plant life; or to property; or which unreasonably interfere with the enjoyment by the people of life or property.

"Air quality" means the specific measurement in the ambient air of a particular air pollutant at any given time.

"Air quality control region" means any area designated as such in 9VAC5-20-200.

"Alternative method" means any method of sampling and analyzing for an air pollutant which is not a reference or equivalent method, but which has been demonstrated to the satisfaction of the board, in specific cases, to produce results adequate for its determination of compliance.

"Ambient air" means that portion of the atmosphere, external to buildings, to which the general public has access.

"Ambient air quality standard" means any primary or secondary standard designated as such in 9VAC5-30 (Ambient Air Quality Standards).

"Board" means the State Air Pollution Control Board or its designated representative.

"Certified mail" means electronically certified or postal certified mail, except that this definition shall only apply to the mailing of plan approvals, permits, or certificates issued under the provisions of these regulations and only where the recipient has notified the department of the recipient's consent to receive plan approvals, permits, or certificates by electronic mail. Any provision of these regulations requiring the use of certified mail to transmit special orders or administrative orders pursuant to enforcement proceedings shall mean postal certified mail.

"Class I area" means any prevention of significant deterioration area (i) in which virtually any deterioration of existing air quality is considered significant and (ii) designated as such in 9VAC5-20-205.

"Class II area" means any prevention of significant deterioration area (i) in which any deterioration of existing air quality beyond that normally accompanying well-controlled growth is considered significant and (ii) designated as such in 9VAC5-20-205.

"Class III area" means any prevention of significant deterioration area (i) in which deterioration of existing air quality to the levels of the ambient air quality standards is permitted and (ii) designated as such in 9VAC5-20-205.

"Continuous monitoring system" means the total equipment used to sample and condition (if applicable), to analyze, and to provide a permanent continuous record of emissions or process parameters.

"Control program" means a plan formulated by the owner of a stationary source to establish pollution abatement goals, including a compliance schedule to achieve such goals. The plan may be submitted voluntarily, or upon request or by order of the board, to ensure compliance by the owner with standards, policies and regulations adopted by the board. The plan shall include system and equipment information and operating performance projections as required by the board for evaluating the probability of achievement. A control program shall contain the following increments of progress:

1. The date by which contracts for emission control system or process modifications are to be awarded, or the date by which orders are to be issued for the purchase of component parts to accomplish emission control or process modification.

2. The date by which the on-site construction or installation of emission control equipment or process change is to be initiated.

3. The date by which the on-site construction or installation of emission control equipment or process modification is to be completed.

4. The date by which final compliance is to be achieved.

"Criteria pollutant" means any pollutant for which an ambient air quality standard is established under 9VAC5-30 (Ambient Air Quality Standards).

"Day" means a 24-hour period beginning at midnight.

"Delayed compliance order" means any order of the board issued after an appropriate hearing to an owner which postpones the date by which a stationary source is required to comply with any requirement contained in the applicable implementation plan.

"Department" means any employee or other representative of the Virginia Department of Environmental Quality, as designated by the director.

"Director" or "executive director" means the director of the Virginia Department of Environmental Quality or a designated representative.

"Dispersion technique"

1. Means any technique which attempts to affect the concentration of a pollutant in the ambient air by:

a. Using that portion of a stack which exceeds good engineering practice stack height;

b. Varying the rate of emission of a pollutant according to atmospheric conditions or ambient concentrations of that pollutant; or

c. Increasing final exhaust gas plume rise by manipulating source process parameters, exhaust gas parameters, stack parameters, or combining exhaust gases from several existing stacks into one stack; or other selective handling of exhaust gas streams so as to increase the exhaust gas plume rise.

2. Subdivision 1 of this definition does not include:

a. The reheating of a gas stream, following use of a pollution control system, for the purpose of returning the gas to the temperature at which it was originally discharged from the facility generating the gas stream;

b. The merging of exhaust gas streams where:

(1) The owner demonstrates that the facility was originally designed and constructed with such merged gas streams;

(2) After July 8, 1985, such merging is part of a change in operation at the facility that includes the installation of pollution controls and is accompanied by a net reduction in the allowable emissions of a pollutant. This exclusion from the definition of "dispersion techniques" shall apply only to the emissions limitation for the pollutant affected by such change in operation; or

(3) Before July 8, 1985, such merging was part of a change in operation at the facility that included the installation of emissions control equipment or was carried out for sound economic or engineering reasons. Where there was an increase in the emissions limitation or, in the event that no emissions limitation was in existence prior to the merging, an increase in the quantity of pollutants actually emitted prior to the merging, the board shall presume that merging was significantly motivated by an intent to gain emissions credit for greater dispersion. Absent a demonstration by the owner that merging was not significantly motivated by such intent, the board shall deny credit for the effects of such merging in calculating the allowable emissions for the source;

c. Smoke management in agricultural or silvicultural prescribed burning programs;

d. Episodic restrictions on residential woodburning and open burning; or

e. Techniques under subdivision 1 c of this definition which increase final exhaust gas plume rise where the resulting allowable emissions of sulfur dioxide from the facility do not exceed 5,000 tons per year.

"Emergency" means a situation that immediately and unreasonably affects, or has the potential to immediately and unreasonably affect, public health, safety or welfare; the health of animal or plant life; or property, whether used for recreational, commercial, industrial, agricultural or other reasonable use.

"Emissions limitation" means any requirement established by the board which limits the quantity, rate, or concentration of continuous emissions of air pollutants, including any requirements which limit the level of opacity, prescribe equipment, set fuel specifications, or prescribe operation or maintenance procedures to assure continuous emission reduction.

"Emission standard" means any provision of 9VAC5-40 (Existing Stationary Sources), 9VAC5-50 (New and Modified Stationary Sources), or 9VAC5-60 (Hazardous Air Pollutant Sources) that prescribes an emissions limitation, or other requirements that control air pollution emissions.

"Emissions unit" means any part of a stationary source which emits or would have the potential to emit any air pollutant.

"Equivalent method" means any method of sampling and analyzing for an air pollutant which has been demonstrated to the satisfaction of the board to have a consistent and quantitative relationship to the reference method under specified conditions.

"EPA" means the U.S. Environmental Protection Agency or an authorized representative.

"Excess emissions" means emissions of air pollutant in excess of an emission standard.

"Excessive concentration" is defined for the purpose of determining good engineering practice (GEP) stack height under subdivision 3 of the GEP definition and means:

1. For sources seeking credit for stack height exceeding that established under subdivision 2 of the GEP definition, a maximum ground-level concentration due to emissions from a stack due in whole or part to downwash, wakes, and eddy effects produced by nearby structures or nearby terrain features which individually is at least 40% in excess of the maximum concentration experienced in the absence of such downwash, wakes, or eddy effects and which contributes to a total concentration due to emissions from all sources that is greater than an ambient air quality standard. For sources subject to the provisions of Article 8 (9VAC5-80-1605 et seq.) of Part II of 9VAC5-80 (Permits for Stationary Sources), an excessive concentration alternatively means a maximum ground-level concentration due to emissions from a stack due in whole or part to downwash, wakes, or eddy effects produced by nearby structures or nearby terrain features which individually is at least 40% in excess of the maximum

concentration experienced in the absence of the maximum concentration experienced in the absence of such downwash, wakes, or eddy effects and greater than a prevention of significant deterioration increment. The allowable emission rate to be used in making demonstrations under this provision shall be prescribed by the new source performance standard that is applicable to the source category unless the owner demonstrates that this emission rate is infeasible. Where such demonstrations are approved by the board, an alternative emission rate shall be established in consultation with the owner;

2. For sources seeking credit after October 11, 1983, for increases in existing stack heights up to the heights established under subdivision 2 of the GEP definition, either (i) a maximum ground-level concentration due in whole or part to downwash, wakes or eddy effects as provided in subdivision 1 of this definition, except that the emission rate specified by any applicable implementation plan (or, in the absence of such a limit, the actual emission rate) shall be used, or (ii) the actual presence of a local nuisance caused by the existing stack, as determined by the board; and

3. For sources seeking credit after January 12, 1979, for a stack height determined under subdivision 2 of the GEP definition where the board requires the use of a field study or fluid model to verify GEP stack height, for sources seeking stack height credit after November 9, 1984, based on the aerodynamic influence of cooling towers, and for sources seeking stack height credit after December 31, 1970, based on the aerodynamic influence of structures not adequately represented by the equations in subdivision 2 of the GEP definition, a maximum ground-level concentration due in whole or part to downwash, wakes or eddy effects that is at least 40% in excess of the maximum concentration experienced in the absence of such downwash, wakes, or eddy effects.

"Existing source" means any stationary source other than a new source or modified source.

"Facility" means something that is built, installed or established to serve a particular purpose~~;~~ and includes, but is not limited to, buildings, installations, public works, businesses, commercial and industrial plants, shops and stores, heating and power plants, apparatus, processes, operations, structures, and equipment of all types.

"Federal Clean Air Act" means Chapter 85 (§ 7401 et seq.) of Title 42 of the United States Code.

"Federally enforceable" means all limitations and conditions which are enforceable by the administrator and citizens under the federal Clean Air Act or that are enforceable under other statutes administered by the administrator. Federally enforceable limitations and conditions include, but are not limited to, the following:

1. Emission standards, alternative emission standards, alternative emissions limitations, and equivalent emissions limitations established pursuant to § 112 of the federal Clean Air Act as amended in 1990.

2. New source performance standards established pursuant to § 111 of the federal Clean Air Act, and emission standards established pursuant to § 112 of the federal Clean Air Act before it was amended in 1990.

3. All terms and conditions in a federal operating permit, including any provisions that limit a source's potential to emit, unless expressly designated as not federally enforceable.

4. Limitations and conditions that are part of an implementation plan.

5. Limitations and conditions that are part of a § 111(d) or 111(d)/129 plan.

6. Limitations and conditions that are part of a federal construction permit issued under 40 CFR 52.21 or any construction permit issued under regulations approved by EPA in accordance with 40 CFR Part 51.

7. Limitations and conditions that are part of an operating permit issued pursuant to a program approved by EPA into an implementation plan as meeting EPA's minimum criteria for federal enforceability, including adequate notice and opportunity for EPA and public comment prior to issuance of the final permit and practicable enforceability.

8. Limitations and conditions in a Virginia regulation or program that has been approved by EPA under subpart E of 40 CFR Part 63 for the purposes of implementing and enforcing § 112 of the federal Clean Air Act.

9. Individual consent agreements issued pursuant to the legal authority of EPA.

"Good engineering practice" or "GEP," with reference to the height of the stack, means the greater of:

1. 65 meters, measured from the ground-level elevation at the base of the stack;

2. a. For stacks in existence on January 12, 1979, and for which the owner had obtained all applicable permits or approvals required under 9VAC5-80 (Permits for Stationary Sources),

Hg = 2.5H,

provided the owner produces evidence that this equation was actually relied on in establishing an emissions limitation;

b. For all other stacks,

Hg = H + 1.5L,

where:

Hg = good engineering practice stack height, measured from the ground-level elevation at the base of the stack,

H = height of nearby structure(s) measured from the ground-level elevation at the base of the stack,

L = lesser dimension, height or projected width, of nearby structure(s) provided that the board may require the use of a field study or fluid model to verify GEP stack height for the source; or

3. The height demonstrated by a fluid model or a field study approved by the board, which ensures that the emissions from a stack do not result in excessive concentrations of any air pollutant as a result of atmospheric downwash, wakes, or eddy effects created by the source itself, nearby structures or nearby terrain features.

"Hazardous air pollutant" means an air pollutant to which no ambient air quality standard is applicable and which in the judgment of the administrator causes, or contributes to, air pollution which may reasonably be anticipated to result in an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness.

"Implementation plan" means the portion or portions of the state implementation plan, or the most recent revision thereof, which has been approved under § 110 of the federal Clean Air Act, or promulgated under § 110(c) of the federal Clean Air Act, or promulgated or approved pursuant to regulations promulgated under § 301(d) of the federal Clean Air Act and which implements the relevant requirements of the federal Clean Air Act.

"Initial emission test" means the test required by any regulation, permit issued pursuant to 9VAC5-80 (Permits for Stationary Sources), control program, compliance schedule or other enforceable mechanism for determining compliance with new or more stringent emission standards or permit limitations or other emissions limitations requiring the installation or modification of air pollution control equipment or implementation of a control method. Initial emission tests shall be conducted in accordance with 9VAC5-40-30.

"Initial performance test" means the test required by (i) 40 CFR Part 60 for determining compliance with standards of performance, or (ii) a permit issued pursuant to 9VAC5-80 (Permits for Stationary Sources) for determining initial compliance with permit limitations. Initial performance tests shall be conducted in accordance with 9VAC5-50-30 and 9VAC5-60-30.

"Isokinetic sampling" means sampling in which the linear velocity of the gas entering the sampling nozzle is equal to that of the undisturbed gas stream at the sample point.

"Locality" means a city, town, county or other public body created by or pursuant to state law.

"Mail" means electronic or postal delivery.

"Maintenance area" means any geographic region of the United States previously designated as a nonattainment area and subsequently redesignated to attainment subject to the requirement to develop a maintenance plan and designated as such in 9VAC5-20-203.

"Malfunction" means any sudden failure of air pollution control equipment, of process equipment, or of a process to operate in a normal or usual manner, which failure is not due to intentional misconduct or negligent conduct on the part of the owner or other person. Failures that are caused in part by poor maintenance or careless operation are not malfunctions.

"Monitoring device" means the total equipment used to measure and record (if applicable) process parameters.

"Nearby" as used in the definition of good engineering practice (GEP) is defined for a specific structure or terrain feature and:

1. For purposes of applying the formulae provided in subdivision 2 of the GEP definition means that distance up to five times the lesser of the height or the width dimension of a structure, but not greater than 0.8 km (1/2 mile); and

2. For conducting demonstrations under subdivision 3 of the GEP definition means not greater than 0.8 km (1/2 mile), except that the portion of a terrain feature may be considered to be nearby which falls within a distance of up to 10 times the maximum height (Ht) of the feature, not to exceed two miles if such feature achieves a height (Ht) 0.8 km from the stack that is at least 40% of the GEP stack height determined by the formulae provided in subdivision 2 b of the GEP definition or 26 meters, whichever is greater, as measured from the ground-level elevation at the base of the stack. The height of the structure or terrain feature is measured from the ground-level elevation at the base of the stack.

"Nitrogen oxides" means all oxides of nitrogen except nitrous oxide, as measured by test methods set forth in 40 CFR Part 60.

"Nonattainment area" means any area which is shown by air quality monitoring data or, where such data are not available, which is calculated by air quality modeling (or other methods determined by the board to be reliable) to exceed the levels allowed by the ambient air quality standard for a given pollutant including, but not limited to, areas designated as such in 9VAC5-20-204.

"One hour" means any period of 60 consecutive minutes.

"One-hour period" means any period of 60 consecutive minutes commencing on the hour.

"Organic compound" means any chemical compound of carbon excluding carbon monoxide, carbon dioxide, carbonic disulfide, carbonic acid, metallic carbides, metallic carbonates and ammonium carbonate.

"Owner" means any person, including bodies politic and corporate, associations, partnerships, personal representatives, trustees and committees, as well as individuals, who owns, leases, operates, controls or supervises a source.

"Particulate matter" means any airborne finely divided solid or liquid material with an aerodynamic diameter smaller than 100 micrometers.

"Particulate matter emissions" means all finely divided solid or liquid material, other than uncombined water, emitted to the ambient air as measured by the applicable reference method, or an equivalent or alternative method.

"PM_{10}" means particulate matter with an aerodynamic diameter less than or equal to a nominal 10 micrometers as measured by the applicable reference method or an equivalent method.

"PM_{10} emissions" means finely divided solid or liquid material, with an aerodynamic diameter less than or equal to a nominal 10 micrometers emitted to the ambient air as measured by the applicable reference method, or an equivalent or alternative method.

"Performance test" means a test for determining emissions from new or modified sources.

"Person" means an individual, corporation, partnership, association, a governmental body, a municipal corporation, or any other legal entity.

"Pollutant" means any substance the presence of which in the outdoor atmosphere is or may be harmful or injurious to human health, welfare or safety, to animal or plant life, or to property, or which unreasonably interferes with the enjoyment by the people of life or property.

"Potential to emit" means the maximum capacity of a stationary source to emit a pollutant under its physical and operational design. Any physical or operational limitation on the capacity of the source to emit a pollutant, including air pollution control equipment, and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, shall be treated as part of its design only if the limitation or its effect on emissions is state and federally enforceable.

"Prevention of significant deterioration area" means any area not designated as a nonattainment area in 9VAC5-20-204 for a particular pollutant and designated as such in 9VAC5-20-205.

"Proportional sampling" means sampling at a rate that produces a constant ratio of sampling rate to stack gas flow rate.

"Public hearing" means, unless indicated otherwise, an informal proceeding, similar to that provided for in § 2.2-4007.02 of the Administrative Process Act, held to afford persons an opportunity to submit views and data relative to a matter on which a decision of the board is pending.

"Reference method" means any method of sampling and analyzing for an air pollutant as described in the following EPA regulations:

1. For ambient air quality standards in 9VAC5-30 (Ambient Air Quality Standards): The applicable appendix of 40 CFR Part 50 or any method that has been designated as a reference method in accordance with 40 CFR Part 53, except that it does not include a method for which a reference designation has been canceled in accordance with 40 CFR 53.11 or 40 CFR 53.16.

2. For emission standards in 9VAC5-40 (Existing Stationary Sources) and 9VAC5-50 (New and Modified Stationary Sources): Appendix M of 40 CFR Part 51 or Appendix A of 40 CFR Part 60.

3. For emission standards in 9VAC5-60 (Hazardous Air Pollutant Sources): Appendix B of 40 CFR Part 61 or Appendix A of 40 CFR Part 63.

"Regional director" means the regional director of an administrative region of the Department of Environmental Quality or a designated representative.

"Regulation of the board" means any regulation adopted by the State Air Pollution Control Board under any provision of the Code of Virginia.

"Regulations for the Control and Abatement of Air Pollution" means 9VAC5-10 (General Definitions) through 9VAC5-80 (Permits for Stationary Sources).

"Reid vapor pressure" means the absolute vapor pressure of volatile crude oil and volatile nonviscous petroleum liquids except liquefied petroleum gases as determined by American Society for Testing and Materials publication, "Standard Test Method for Vapor Pressure of Petroleum Products (Reid Method)" (see 9VAC5-20-21).

"Run" means the net period of time during which an emission sample is collected. Unless otherwise specified, a run may be either intermittent or continuous within the limits of good engineering practice.

"Section 111(d) plan" means the portion or portions of the plan, or the most recent revision thereof, which has been approved under 40 CFR 60.27(b) in accordance with § 111(d)(1) of the federal Clean Air Act, or promulgated under 40 CFR 60.27(d) in accordance with § 111(d)(2) of the federal Clean Air Act, and which implements the relevant requirements of the federal Clean Air Act.

"Section 111(d)/129 plan" means the portion or portions of the plan, or the most recent revision thereof, which has been approved under 40 CFR 60.27(b) in accordance with §§ 111(d)(1) and 129(b)(2) of the federal Clean Air Act, or promulgated under 40 CFR 60.27(d) in accordance with §§ 111(d)(2) and 129(b)(3) of the federal Clean Air Act, and which implements the relevant requirements of the federal Clean Air Act.

"Shutdown" means the cessation of operation of an affected facility for any purpose.

"Source" means any one or combination of the following: buildings, structures, facilities, installations, articles, machines, equipment, landcraft, watercraft, aircraft or other contrivances which contribute, or may contribute, either directly or indirectly to air pollution. Any activity by any person that contributes, or may contribute, either directly or indirectly to air pollution, including, but not limited to, open

burning, generation of fugitive dust or emissions, and cleaning with abrasives or chemicals.

"Stack" means any point in a source designed to emit solids, liquids or gases into the air, including a pipe or duct, but not including flares.

"Stack in existence" means that the owner had:

1. Begun, or caused to begin, a continuous program of physical on-site construction of the stack; or

2. Entered into binding agreements or contractual obligations, which could not be canceled or modified without substantial loss to the owner, to undertake a program of construction of the stack to be completed in a reasonable time.

"Standard conditions" means a temperature of 20°C (68°F) and a pressure of 760 mm of Hg (29.92 inches of Hg).

"Standard of performance" means any provision of 9VAC5-50 (New and Modified Stationary Sources) which prescribes an emissions limitation or other requirements that control air pollution emissions.

"Startup" means the setting in operation of an affected facility for any purpose.

"State enforceable" means all limitations and conditions which are enforceable by the board or department, including, but not limited to, those requirements developed pursuant to 9VAC5-170-160; requirements within any applicable regulation, order, consent agreement or variance; and any permit requirements established pursuant to 9VAC5-80 (Permits for Stationary Sources).

"State Implementation Plan" means the plan, including the most recent revision thereof, which has been approved or promulgated by the administrator, U.S. Environmental Protection Agency, under § 110 of the federal Clean Air Act, and which implements the requirements of § 110.

"Stationary source" means any building, structure, facility or installation which emits or may emit any air pollutant. A stationary source shall include all of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control) except the activities of any vessel. Pollutant-emitting activities shall be considered as part of the same industrial grouping if they belong to the same "Major Group" (i.e., which have the same two-digit code) as described in the Standard Industrial Classification Manual (see 9VAC5-20-21).

"These regulations" means 9VAC5-10 (General Definitions) through 9VAC5-80 (Permits for Stationary Sources).

"Total suspended particulate" or "TSP" means particulate matter as measured by the reference method described in Appendix B of 40 CFR Part 50.

"True vapor pressure" means the equilibrium partial pressure exerted by a petroleum liquid as determined in accordance with methods described in American Petroleum Institute (API) publication, "Evaporative Loss from External Floating-Roof Tanks" (see 9VAC5-20-21). The API procedure may not be applicable to some high viscosity or high pour crudes. Available estimates of true vapor pressure may be used in special cases such as these.

"Urban area" means any area consisting of a core city with a population of 50,000 or more plus any surrounding localities with a population density of 80 persons per square mile and designated as such in 9VAC5-20-201.

"Vapor pressure," except where specific test methods are specified, means true vapor pressure, whether measured directly, or determined from Reid vapor pressure by use of the applicable nomograph in American Petroleum Institute publication, "Evaporative Loss from Floating-Roof Tanks" (see 9VAC5-20-21).

"Virginia Air Pollution Control Law" means Chapter 13 (§ 10.1-1300 et seq.) of Title 10.1 of the Code of Virginia.

"Volatile organic compound" means any compound of carbon, excluding carbon monoxide, carbon dioxide, carbonic acid, metallic carbides or carbonates, and ammonium carbonate, which participates in atmospheric photochemical reactions.

1. This includes any such organic compounds which have been determined to have negligible photochemical reactivity other than the following:

a. Methane;

b. Ethane;

c. Methylene chloride (dichloromethane);

d. 1,1,1-trichloroethane (methyl chloroform);

e. 1,1,2-trichloro-1,2,2-trifluoroethane (CFC-113);

f. Trichlorofluoromethane (CFC-11);

g. Dichlorodifluoromethane (CFC-12);

h. Chlorodifluoromethane (H CFC-22);

i. Trifluoromethane (H FC-23);

j. 1,2-dichloro 1,1,2,2,-tetrafluoroethane (CFC-114);

k. Chloropentafluoroethane (CFC-115);

l. 1,1,1-trifluoro 2,2-dichloroethane (HCFC-123);

m. 1,1,1,2-tetrafluoroethane (HFC-134a);

n. 1,1-dichloro 1-fluoroethane (HCFC-141b);

o. 1-chloro 1,1-difluoroethane (HCFC-142b);

p. 2-chloro-1,1,1,2-tetrafluoroethane (HCFC-124);

q. Pentafluoroethane (HFC-125);

r. 1,1,2,2-tetrafluoroethane (HFC-134);

s. 1,1,1-trifluoroethane (HFC-143a);

t. 1,1-difluoroethane (HFC-152a);

u. Parachlorobenzotrifluoride (PCBTF);

v. Cyclic, branched, or linear completely methylated siloxanes;

w. Acetone;

x. Perchloroethylene (tetrachloroethylene);

y. 3,3-dichloro-1,1,1,2,2-pentafluoropropane (HCFC-225ca);

z. 1,3-dichloro-1,1,2,2,3-pentafluoropropane (HCFC-225cb);

aa. 1,1,1,2,3,4,4,5,5,5-decafluoropentane (HFC 43-10mee);

bb. Difluoromethane (HFC-32);

cc. Ethylfluoride (HFC-161);

dd. 1,1,1,3,3,3-hexafluoropropane (HFC-236fa);

ee. 1,1,2,2,3-pentafluoropropane (HFC-245ca);

ff. 1,1,2,3,3-pentafluoropropane (HFC-245ea);

gg. 1,1,1,2,3-pentafluoropropane (HFC-245eb);

hh. 1,1,1,3,3-pentafluoropropane (HFC-245fa);

ii. 1,1,1,2,3,3-hexafluoropropane (HFC-236ea);

jj. 1,1,1,3,3-pentafluorobutane (HFC-365mfc);

kk. Chlorofluoromethane (HCFC-31);

ll. 1 chloro-1-fluoroethane (HCFC-151a);

mm. 1,2-dichloro-1,1,2-trifluoroethane (HCFC-123a);

nn. 1,1,1,2,2,3,3,4,4-nonafluoro-4-methoxy-butane ($C_4F_9OCH_3$ or HFE-7100);

oo. 2-(difluoromethoxymethyl)-1,1,1,2,3,3,3-heptafluoropropane ($(CF_3)_2CFCF_2OCH_3$);

pp. 1-ethoxy-1,1,2,2,3,3,4,4,4-nonafluorobutane ($C_4F_9OC_2H_5$ or HFE-7200);

qq. 2-(ethoxydifluoromethyl)-1,1,1,2,3,3,3-heptafluoropropane ($(CF_3)_2CFCF_2OC_2H_5$);

rr. Methyl acetate;

ss. 1,1,1,2,2,3,3-heptafluoro-3-methoxy-propane (n-$C_3F_7OCH_3$) (HFE-7000);

tt. 3-ethoxy-1,1,1,2,3,4,4,5,5,6,6,6-dodecafluoro-2-(trifluoromethyl) hexane (HFE-7500);

uu. 1,1,1,2,3,3,3-heptafluoropropane (HFC 227ea);

vv. methyl formate ($HCOOCH_3$);

ww. 1,1,1,2,2,3,4,5,5,5-decafluoro-3-methoxy-4-trifluoromethyl-pentane (HFE-7300);

xx. propylene carbonate;

yy. dimethyl carbonate;

zz. trans-1,3,3,3-tetrafluoropropene;

aaa. HCF_2OCF_2H (HFE-134);

bbb. $HCF_2OCF_2OCF_2H$ (HFE-236cal2);

ccc. $HCF_2OCF_2CF_2OCF_2H$ (HFE-338pcc13);

ddd. $HCF_2OCF_2OCF_2CF_2OCF_2H$ (H-Galden 1040x or H-Galden ZT 130 (or 150 or 180));

eee. trans 1-chloro-3,3,3-trifluoroprop-1-ene;

fff. 2,3,3,3-tetrafluoropropene;

ggg. 2-amino-2-methyl-1-propanol; ~~and~~

hhh. t-butyl acetate; and

iii. Perfluorocarbon compounds ~~which~~ that fall into these classes:

(1) Cyclic, branched, or linear, completely fluorinated alkanes;

(2) Cyclic, branched, or linear, completely fluorinated ethers with no unsaturations;

(3) Cyclic, branched, or linear, completely fluorinated tertiary amines with no unsaturations; and

(4) Sulfur containing perfluorocarbons with no unsaturations and with sulfur bonds only to carbon and fluorine.

2. For purposes of determining compliance with emissions standards, volatile organic compounds shall be measured by the appropriate reference method in accordance with the provisions of 9VAC5-40-30 or 9VAC5-50-30, as applicable. Where such a method also measures compounds with negligible photochemical reactivity, these negligibly reactive compounds may be excluded as a volatile organic compound if the amount of such compounds is accurately quantified, and such exclusion is approved by the board.

3. As a precondition to excluding these compounds as volatile organic compounds or at any time thereafter, the board may require an owner to provide monitoring or testing methods and results demonstrating, to the satisfaction of the board, the amount of negligibly reactive compounds in the emissions of the source.

4. Exclusion of the ~~above~~ compounds listed in subdivision 1 of this definition in effect exempts such compounds from the provisions of emission standards for volatile organic compounds. The compounds are exempted on the basis of being so inactive that they will not contribute significantly to the formation of ozone in the troposphere. However, this exemption does not extend to other properties of the exempted compounds which, at some future date, may require regulation and limitation of their use in accordance with requirements of the federal Clean Air Act.

5. ~~The following compound is a VOC for purposes of all recordkeeping, emissions reporting, photochemical dispersion modeling and inventory requirements that apply to VOCs and shall be uniquely identified in emission reports, but is not a VOC for purposes of VOC emission standards, VOC emissions limitations, or VOC content requirements: t butyl acetate~~ Reserved.

"Welfare" means that language referring to effects on welfare includes, but is not limited to, effects on soils, water, crops, vegetation, man-made materials, animals, wildlife, weather, visibility and climate, damage to and deterioration of

property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being.

VA.R. Doc. No. R17-4642; Filed October 12, 2016, 7:53 a.m.

VIRGINIA WASTE MANAGEMENT BOARD

Final Regulation

Title of Regulation: **9VAC20-60. Virginia Hazardous Waste Management Regulations (amending 9VAC20-60-261, 9VAC20-60-264, 9VAC20-60-265, 9VAC20-60-273, 9VAC20-60-1505).**

Statutory Authority: § 10.1-1402 of the Code of Virginia; 42 USC § 6921 et seq.; 40 CFR Parts 260 through 272.

Effective Date: January 1, 2017.

Agency Contact: Debra Harris, Policy and Planning Specialist, Department of Environmental Quality, 629 East Main Street, P.O. Box 1105, Richmond, VA 23218, telephone (804) 698-4209, FAX (804) 698-4346, TTY (804) 698-4021, or email debra.harris@deq.virginia.gov.

Summary:

The amendments address the management of mercury-containing lamps by recycling facilities or universal waste handlers, including (i) testing, operational, closure, and recordkeeping requirements, and if applicable, financial assurance requirements and (ii) requirements for small and large quantity handlers and destination facilities that manage mercury-containing lamps. The amendments qualify the Virginia mercury-containing lamp universal waste program as a state-equivalent program that permits the crushing of mercury-containing lamps.

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.

9VAC20-60-261. Adoption of 40 CFR Part 261 by reference.

A. Except as otherwise provided, the regulations of the United States Environmental Protection Agency set forth in 40 CFR Part 261 are hereby incorporated as part of the Virginia Hazardous Waste Management Regulations. Except as otherwise provided, all material definitions, reference materials, and other ancillaries that are a part of 40 CFR Part 261 are also hereby incorporated as part of the Virginia Hazardous Waste Management Regulations.

B. In all locations in these regulations where 40 CFR Part 261 is incorporated by reference, the following additions, modifications, and exceptions shall amend the incorporated text for the purpose of its incorporation into these regulations:

1. Any agreements required by 40 CFR 261.4(b)(11)(ii) shall be sent to the United States Environmental Protection Agency at the address shown and to the Department of Environmental Quality, P.O. Box 1105, Richmond, Virginia 23218.

2. In 40 CFR 261.4(e)(3)(iii), the text "in the Region where the sample is collected" shall be deleted.

3. In 40 CFR 261.4(f)(1), the term "Regional Administrator" shall mean the regional administrator of Region III of the United States Environmental Protection Agency or his designee.

4. In 40 CFR 261.6(a)(2), recyclable materials shall be subject to the requirements of 9VAC20-60-270 and Part XII (9VAC20-60-1260 et seq.) of this chapter.

5. No hazardous waste from a conditionally exempt small quantity generator shall be managed as described in 40 CFR 261.5(g)(3)(iv) or 40 CFR 261.5(g)(3)(v) unless such waste management is in full compliance with all requirements of the Solid Waste Management Regulations (9VAC20-81).

6. In 40 CFR 261.9 and wherever elsewhere in Title 40 of the Code of Federal Regulations there is a listing of universal wastes or a listing of hazardous wastes that are the subject of provisions set out in 40 CFR Part 273 as universal wastes, it shall be amended by addition of the following sentence: "In addition to the hazardous wastes listed ~~herein~~ here, the term "universal waste" and all lists of universal waste or waste subject to provisions of 40 CFR Part 273 shall include those hazardous wastes listed in Part XVI (9VAC20-60-1495 et seq.) of the Virginia Hazardous Waste Management Regulations as universal wastes, ~~under such~~ in accordance with the terms and requirements ~~as shall therein be ascribed~~ described."

7. In Subparts B and D of 40 CFR Part 261, the term "Administrator" shall mean the administrator of the United States Environmental Protection Agency, and the term "Director" shall not supplant "Administrator" throughout Subparts B and D.

8. For the purpose of this chapter, any solid waste is a hazardous waste if it is defined to be hazardous waste under the laws or regulations of the state in which it first became a solid waste.

9. In 40 CFR 261.6(c)(1) and 40 CFR 261.6(c)(2) mercury-containing lamp recycling facilities must also comply with all applicable requirements of 9VAC20-60-264 B 34 and 9VAC20-60-265 B 21.

9VAC20-60-264. Adoption of 40 CFR Part 264 by reference.

A. Except as otherwise provided, the regulations of the United States Environmental Protection Agency set forth in 40 CFR Part 264 are hereby incorporated as part of the Virginia Hazardous Waste Management Regulations. Except as otherwise provided, all material definitions, reference materials and other ancillaries that are a part of 40 CFR Part 264 are also hereby incorporated as part of the Virginia Hazardous Waste Management Regulations.

B. In all locations in these regulations where 40 CFR Part 264 is incorporated by reference, the following additions,

modifications, and exceptions shall amend the incorporated text for the purpose of its incorporation into these regulations:

1. Sections 40 CFR 264.1(d), 40 CFR 264.1(f), 40 CFR 264.149, 40 CFR 264.150, 40 CFR 264.301(l), and Appendix VI are not included in the incorporation of 40 CFR Part 264 by reference and are not a part of the Virginia Hazardous Waste Management Regulations.

2. In 40 CFR 264.1(g)(11) and wherever elsewhere in Title 40 of the Code of Federal Regulations there is a listing of universal wastes or a listing of hazardous wastes that are the subject of provisions set out in 40 CFR Part 273 as universal wastes, it shall be amended by addition of the following sentence: "In addition to the hazardous wastes listed ~~herein~~ here, the term "universal waste" and all lists of universal waste or waste subject to provisions of 40 CFR Part 273 shall include those hazardous wastes listed in Part XVI (9VAC20-60-1495 et seq.) of the Virginia Hazardous Waste Management Regulations as universal wastes, ~~under such~~ in accordance with the terms and requirements ~~as shall therein be ascribed~~ described."

3. In 40 CFR 264.12(a), the term "Regional Administrator" shall mean the regional administrator of Region III of the United States Environmental Protection Agency or his designee.

4. In 40 CFR 264.33, the following sentence shall be added to the end of the paragraph: "A record of tests or inspections will be maintained on a log at that facility or other reasonably accessible and convenient location."

5. In addition to the notifications required by 40 CFR 264.56(d)(2), notification shall be made to the on-scene coordinator, the National Response Center, and the Virginia Department of Emergency Management, Emergency Operations Center. In the associated report filed under 40 CFR 264.56(j), the owner or operator shall include such other information specifically requested by the director, which is reasonably necessary and relevant to the purpose of an operating record.

6. In 40 CFR 264.93, "hazardous constituents" shall include constituents identified in 40 CFR Part 264 Appendix IX in addition to those in 40 CFR Part 261 Appendix VIII.

7. The federal text at 40 CFR 264.94(a)(2) is not incorporated by reference. The following text shall be substituted for 40 CFR 264.94(a)(2): "For any of the constituents for which the USEPA has established a Maximum Contaminant Level (MCL) under the National Primary Drinking Water Regulation, 40 CFR Part 141 (regulations under the Safe Drinking Water Act), the concentration must not exceed the value of the MCL; or if the background level of the constituent is below the MCL; or."

8. The owner or operator must submit the detailed, written closure cost estimate described in 40 CFR 264.142 upon the written request of the director.

9. In 40 CFR 264.143(b)(1), 40 CFR 264.143(c)(1), 40 CFR 264.145(b)(1), and 40 CFR 264.145(c)(1), any surety issuing surety bonds to guarantee payment or performance must be licensed pursuant to Chapter 10 (§ 38.2-1000 et seq.) of Title 38.2 of the Code of Virginia.

10. In 40 CFR 264.143(b), 40 CFR 264.143(c), 40 CFR 264.145(b) and 40 CFR 264.145(c), any owner or operator demonstrating financial assurance for closure or post-closure care using a surety bond shall submit with the surety bond a copy of the deed book page documenting that the power of attorney of the attorney-in-fact executing the bond has been recorded pursuant to § 38.2-2416 of the Code of Virginia.

11. Where in 40 CFR 264.143(c)(5) the phrase "final administrative determination pursuant to section 3008 of RCRA" appears, it shall be replaced with "final determination pursuant to Chapter 40 (§ 2.2-4000 et seq.) of Title 2.2 of the Code of Virginia."

12. The following text shall be substituted for 40 CFR 264.143(d)(8): "Following a final administrative determination pursuant to Chapter 40 (§ 2.2-4000 et seq.) of Title 2.2 of the Code of Virginia that the owner or operator has failed to perform final closure in accordance with the approved closure plan, the applicable regulations or other permit requirements when required to do so, the director may draw on the letter of credit."

13. The following text shall be substituted for 40 CFR 264.143(e)(1): "An owner or operator may satisfy the requirements of this section by obtaining closure insurance which conforms to the requirements of this paragraph and submitting a certificate of such insurance, along with a complete copy of the insurance policy, to the department. An owner or operator of a new facility must submit the certificate of insurance along with a complete copy of the insurance policy to the department at least 60 days before the date on which the hazardous waste is first received for treatment, storage or disposal. The insurance must be effective before this initial receipt of hazardous waste. At a minimum, the insurer must be licensed pursuant to Chapter 10 (§ 38.2-1000 et seq.) of Title 38.2 of the Code of Virginia."

14. The following text shall be substituted for 40 CFR 264.143(f)(3)(ii), 40 CFR 264.145(f)(3)(ii) and 40 CFR 264.147(f)(3)(ii): "A copy of the owner's or operator's audited financial statements for the latest completed fiscal year; including a copy of the independent certified public accountant's report on examination of the owner's or operator's financial statements for the latest completed fiscal year; and"

15. In addition to the other requirements in 40 CFR 264.143(f)(3), 40 CFR 264.145(f)(3) and 40 CFR

264.147(f)(3), an owner or operator must submit confirmation from the rating service that the owner or operator has a current rating for its most recent bond issuance of AAA, AA, A, or BBB as issued by Standard and Poor's or Aaa, Aa, A, or Baa as issued by Moody's if the owner or operator passes the financial test with a bond rating as provided in 40 CFR 264.143(f)(1)(ii)(A).

16. The following text shall be substituted for 40 CFR 264.143(h) and 40 CFR 264.145(h): "An owner or operator may use a financial assurance mechanism specified in this section to meet the requirements of this section for more than one facility in Virginia. Evidence of financial assurance submitted to the department must include a list showing, for each facility, the EPA Identification Number, name, address, and the amount of funds for closure or post-closure assured by the mechanism. The amount of funds available through the mechanism must be no less than the sum of funds that would be available if a separate mechanism had been established and maintained for each facility. In directing funds available through the mechanism for closure or post-closure care of any of the facilities covered by the mechanism, the director may direct only the amount of funds designated for that facility, unless the owner or operator agrees to the use of additional funds available under the mechanism."

17. In addition to the requirements of 40 CFR 264.144, "the owner or operator must submit a detailed, written post-closure cost estimate upon the written request of the director."

18. The following text shall be substituted for 40 CFR 264.144(b): "During the active life of the facility and the post-closure period, the owner or operator must adjust the post-closure cost estimate for inflation within 60 days prior to the anniversary date of the establishment of the financial instrument(s) used to comply with 40 CFR 264.145. For owners or operators using the financial test or corporate guarantee, the post-closure cost estimate must be updated for inflation within 30 days after the close of the firm's fiscal year and before the submission of updated information to the department as specified in 40 CFR 264.145(f)(5). The adjustment may be made by recalculating the post-closure cost estimate in current dollars or by using an inflation factor derived from the most recent Implicit Price Deflator for Gross National Product published by the U.S. Department of Commerce in its Survey of Current Business as specified in 40 CFR 264.142(b)(1) and (2). The inflation factor is the result of dividing the latest published annual Deflator by the Deflator for the previous year.

a. The first adjustment is made by multiplying the post-closure cost estimate by the inflation factor. The result is the adjusted post-closure cost estimate.

b. Subsequent adjustments are made by multiplying the latest adjusted post-closure cost estimate by the latest inflation factor."

19. The following text shall be substituted for 40 CFR 264.144(c): "During the active life of the facility and the post-closure period, the owner or operator must revise the post-closure cost estimate within 30 days after the director has approved the request to modify the post-closure plan, if the change in the post-closure plan increases the cost of post-closure care. The revised post-closure cost estimate must be adjusted for inflation as specified in 264.144(b)."

20. Where in 40 CFR 264.145(c)(5) the phrase "final administrative determination pursuant to section 3008 of RCRA" appears, it shall be replaced with "final determination pursuant to Chapter 40 (§ 2.2-4000 et seq.) of Title 2.2 of the Code of Virginia."

21. The following text shall be substituted for 40 CFR 264.145(d)(9): "Following a final administrative determination pursuant to Chapter 40 (§ 2.2-4000 et seq.) of Title 2.2 of the Code of Virginia that the owner or operator has failed to perform post-closure in accordance with the approved post-closure plan, the applicable regulations, or other permit requirements when required to do so, the director may draw on the letter of credit."

22. The following text shall be substituted for 40 CFR 264.145(e)(1): "An owner or operator may satisfy the requirements of this section by obtaining post-closure insurance which conforms to the requirements of this paragraph and submitting a certificate of such insurance to the department. An owner or operator of a new facility must submit the certificate of insurance along with a complete copy of the insurance policy to the department at least 60 days before the date on which the hazardous waste is first received for treatment, storage or disposal. The insurance must be effective before this initial receipt of hazardous waste. At a minimum, the insurer must be licensed pursuant to Chapter 10 (§ 38.2-1000 et seq.) of Title 38.2 of the Code of Virginia."

23. In 40 CFR 264.147(a)(1)(ii), 40 CFR 264.147(b)(1)(ii), 40 CFR 264.147(g)(2), and 40 CFR 264.147(i)(4), the term "Virginia" shall not be substituted for the term "State" or "States."

24. In 40 CFR 264.191(a), the compliance date of January 12, 1988, applies only for HSWA tanks. For non-HSWA tanks, the compliance date is November 2, 1997, instead of January 12, 1997.

25. In 40 CFR 264.191(c), the reference to July 14, 1986, applies only to HSWA tanks. For non-HSWA tanks, the applicable date is November 2, 1987, instead of July 14, 1986.

26. In 40 CFR 264.193, the federal effective dates apply only to HSWA tanks. For non-HSWA tanks, the applicable date is November 2, 1997, instead of January 12, 1997.

27. A copy of all reports made in accordance with 40 CFR 264.196(d) shall be sent to the director and to the chief administrative officer of the local government of the jurisdiction in which the event occurs. The sentence in 40 CFR 264.196(d)(1), "If the release has been reported pursuant to 40 CFR Part 302, that report will satisfy this requirement." is not incorporated by reference into these regulations and is not a part of the Virginia Hazardous Waste Management Regulations.

28. The following text shall be substituted for 40 CFR 264.570(a): "The requirements of this subpart apply to owners and operators of facilities that use new or existing drip pads to convey wood drippage, precipitation and/or surface water run-off to an associated collection system. Existing HSWA drip pads are those constructed before December 6, 1990, and those for which the owner or operator has a design and has entered into a binding financial or other agreement for construction prior to December 6, 1990. Existing non-HSWA drip pads are those constructed before January 14, 1993, and those for which the owner or operator has a design and has entered into a binding financial or other agreements for construction prior to January 14, 1993. All other drip pads are new drip pads. The requirement at 40 CFR 264.573(b)(3) to install a leak collection system applies only to those HSWA drip pads that are constructed after December 24, 1992, except for those constructed after December 24, 1992, for which the owner or operator has a design and has entered into a binding financial or other agreement for construction prior to December 24, 1992. For non-HSWA drip pads, the requirement at 40 CFR 264.573(b)(3) to install a leak collection system applies only to those non-HSWA drip pads that are constructed after September 8, 1993, except for those constructed after September 8, 1993, for which the owner or operator has a design and has entered into a binding financial or other agreement for construction prior to September 8, 1993."

29. In 40 CFR 264.1030(c), the reference to 40 CFR 124.15 shall be replaced by a reference to 40 CFR 124.5.

30. The underground injection of hazardous waste for treatment, storage or disposal shall be prohibited throughout the Commonwealth of Virginia.

31. In addition to the notices required in Subpart B and others parts of 40 CFR Part 264, the following notices are also required:

a. The owner or operator of a facility that has arranged to receive hazardous waste from a foreign source (a source located outside of the United States of America) shall notify the department and administrator in writing at least four weeks in advance of the date the waste is expected to arrive at the facility. Notice of subsequent shipments of the same waste from the same foreign source is not required.

b. The owner or operator of a facility that receives hazardous waste from an off-site source (except where the owner or operator of the facility is also the generator of this waste) shall inform the generator in writing that he has appropriate permits for, and will accept, the waste that the generator is shipping. The owner or operator shall keep a copy of this written notice as part of the operating record.

c. Before transferring ownership or operation of a facility during its operating life, or of a disposal facility during the post-closure care period, the owner or operator shall notify the new owner or operator in writing of the requirements contained in this section and 9VAC20-60-270. An owner or operator's failure to notify the new owner or operator of the above requirements in no way relieves the new owner or operator of his obligation to comply with all applicable requirements.

d. Any person responsible for the release of a hazardous substance from the facility that poses an immediate or imminent threat to public health and who is required by law to notify the National Response Center shall notify the department and the chief administrative officer of the local government of the jurisdiction in which the release occurs or their designees. In cases when the released hazardous substances are hazardous wastes or hazardous waste constituents additional requirements are prescribed by Subpart D of 40 CFR Part 264.

32. In 40 CFR 264.71, the terms "EPA" and "Environmental Protection Agency" shall mean the United States Environmental Protection Agency, and the reference to "system" means the United States Environmental Protection Agency's national electronic manifest system.

33. Regardless of the provisions of 9VAC20-60-18, the requirements of 40 CFR 264.71(j) are not incorporated into this chapter.

34. Requirements for mercury-containing lamp recycling facilities. The following requirements apply to all facilities that recover or reclaim mercury from lamps.

a. All owners and operators of mercury-containing lamp recycling facilities shall:

(1) Have established markets for the utilization of reclaimed materials and be able to identify these markets to the department;

(2) Only introduce into the processing equipment lamps or devices for which the equipment was specifically designed to process and operate and maintain processing equipment consistent with the equipment manufacturer's specifications; and

(3) Not speculatively accumulate the materials.

b. If a mercury-containing lamp recycling facility's processed materials are to be delivered to a facility other than a mercury reclamation facility, the owner or operator shall:

(1) Demonstrate proper equipment operation and efficiency by sampling and analytical testing of the processed materials. The testing shall ensure that such processed materials (i) have less than three parts per million of "average mercury" during each consecutive 12-week time period of operations ("average mercury" shall be calculated pursuant to subdivision 34 b (3) of this subsection); (ii) have less than five parts per million of total mercury as reported in the "weekly composite sample of process operations" ("weekly composite sample of process operations" shall be calculated pursuant to subdivision 34 b (3) of this subsection); (iii) are not a hazardous waste; and (iv) comply with 40 CFR Part 268, if applicable.

(2) Retest, reprocess, or deliver to a mercury reclamation facility processed materials that are in excess of the allowable levels of mercury specified in subdivision 34 b (1) of this subsection.

(3) Sample and perform analytical testing of the processed material for total mercury as follows:

(a) Facility operators shall take daily physical samples of the mercury-containing materials at the point at which they exit the processing equipment. These samples shall be representative of the materials processed during that day.

(b) At the beginning of each week, the prior week's daily samples [~~that~~] shall be consolidated into one weekly sample [,] which shall be submitted for chemical analysis of total mercury content using an approved EPA methodology. At least three separate daily samples shall be taken in order to obtain a weekly sample. When a facility is not operating at least three days during a week, that week will be dropped out of the 12-week rolling average as calculated under subdivision 34 b (3) (c) of this subsection. However, all daily samples that are in a week that has been dropped out shall be counted towards the very next weekly sample that is included in a 12-week rolling average. The result of this analysis shall be considered the "weekly composite sample of process operations."

(c) The "average mercury" value calculation shall be the rolling average of weekly composite sample results from samples taken during the most recent 12-week time period with each new weekly composite sample result replacing the oldest sample result that was used in the previous 12-week period.

c. Mercury-containing lamp recycling facilities shall ensure that the separated materials that are generated from their operations are suitable and safe for their intended end use and shall bear the burden of responsibility for the safety of these materials sold or delivered from the operations. Facilities shall notify in writing receiving sources, other than mercury reclamation facilities, of the amount and type of hazardous substances present in the processed materials as demonstrated by laboratory analysis.

d. Operating requirements. Mercury-containing lamp recycling facilities shall be operated in accordance with the following requirements:

(1) Mercury-containing lamp recycling facilities shall control mercury emissions through the use of a single air handling system with redundant mercury controls and comply with the following:

(a) The owner or operator shall operate, monitor, and maintain an air handling system with redundant air pollution control equipment in order to reduce the mercury content of the air collected during the volume reduction and mercury recovery and reclamation processes.

(b) Redundant air pollution control equipment shall incorporate at least two carbon filters or equivalent technology arranged in a series so that the air passes through both filters before being released. In the event of a single filter failure, each filter shall be designed to ensure compliance with the risk-based protectiveness standards for mercury vapor provided in subdivision 34 e of this subsection.

(c) A sample of air shall be collected after the first carbon filter (or equivalent technology) and upstream of the second once each operating day while mercury-containing lamps or devices are being processed. The mercury content of the sample shall be determined for comparison with the risk-based protectiveness standards provided in subdivision 34 e of this subsection.

(d) The owner or operator shall operate, monitor, and maintain the air pollution control equipment in such a manner as not to exceed the risk-based protectiveness standards under subdivision 34 e of this subsection for mercury vapor downstream of the first carbon filter (or equivalent technology) and upstream of the second carbon filter.

(2) The area in which the processing equipment is located shall be fully enclosed and kept under negative pressure while processing mercury-containing lamps or devices.

e. Testing for mercury releases from lamp crushing units shall be performed using a mercury vapor analyzer that has been approved for the application by the U.S. Occupational Safety and Health Administration or the Virginia Department of Labor and Industry or a comparable device that has been calibrated by the manufacturer or laboratory providing the equipment. Mercury vapor monitors used for testing must be capable of detecting mercury at the applicable concentrations provided below or lower in air and must be equipped with a data recording device to provide a record of measurements taken. Mercury monitoring data shall be

documented and available for inspection in accordance with subdivision 34 g of this subsection. The acute exposure protectiveness standard is 300 µg/m^3 for a 10-minute exposure with the understanding that the acute exposure protectiveness standard is considered a ceiling value and at no time during bulb crushing operation will the air concentrations of mercury exceed 300 µg/m^3. The following are risk-based protectiveness standards at a distance of five feet from the bulb crushing unit:

Monthly Bulb Crushing Duration (X Hours/Month)*	Chronic Exposure Air Emission Limit (µg/m^3)	Acute Exposure Air Emission Limit (µg/m^3)
X ≥ 32	1.314^{skin} µg/m^3	300 µg/m^3
8 < X < 32	6.317 ^{skin} µg/m^3	300 µg /m^3
X ≤ 8	27.375 ^{skin} µg/m^3	300 µg/m^3
*Monthly crushing duration is determined based on the maximum number of hours that bulb crushing occurred in any one month over the last 12-month period.		

f. Closure. Mercury-containing lamp recycling facilities must prepare and maintain a closure plan conforming to the requirements of 40 CFR Part 264, Subpart G as adopted by reference in this section. Financial assurance shall be provided to the department in accordance with 40 CFR Part 264, Subpart H as adopted by reference in this section.

g. Recordkeeping requirements. The owner or operator of a mercury-containing lamp recycling facility shall maintain records of monitoring information that (i) specify the date, place, and time of measurement; (ii) provide the methodology used; and (iii) list the analytical results. The records maintained shall include all calibration and maintenance records of monitoring equipment. The owner or operator shall retain records of all monitoring data and supporting information available for department inspection for a period of at least three years from the date of collection.

9VAC20-60-265. Adoption of 40 CFR Part 265 by reference.

A. Except as otherwise provided, the regulations of the United States Environmental Protection Agency set forth in 40 CFR Part 265 are hereby incorporated as part of the Virginia Hazardous Waste Management Regulations. Except as otherwise provided, all material definitions, reference materials and other ancillaries that are parts of 40 CFR Part 265 are also hereby incorporated as parts of the Virginia Hazardous Waste Management Regulations.

B. In all locations in these regulations where 40 CFR Part 265 is incorporated by reference, the following additions, modifications, and exceptions shall amend the incorporated text for the purpose of its incorporation into these regulations:

1. Sections 40 CFR 265.1(c)(4), 40 CFR 265.149 and 40 CFR 265.150 and Subpart R of 40 CFR Part 265 are not included in the incorporation of 40 CFR Part 265 by reference and are not a part of the Virginia Hazardous Waste Management Regulations.

2. In 40 CFR 265.1(c)(14) and wherever elsewhere in Title 40 of the Code of Federal Regulations there is a listing of universal wastes or a listing of hazardous wastes that are the subject of provisions set out in 40 CFR Part 273 as universal wastes, it shall be amended by addition of the following sentence: "In addition to the hazardous wastes listed ~~herein~~ here, the term "universal waste" and all lists of universal waste or waste subject to provision of 40 CFR Part 273 shall include those hazardous wastes listed in Part XVI (9VAC20-60-1495 et seq.) of the Virginia Hazardous Waste Management Regulations as universal wastes, ~~under such~~ in accordance with the terms and requirements ~~as shall therein be ascribed~~ described."

3. A copy of all reports and notices made in accordance with 40 CFR 265.12 shall be sent to the department, the administrator and the chief administrative officer of the local government of the jurisdiction in which the event occurs.

4. In 40 CFR 265.12(a), the term "Regional Administrator" shall mean the regional administrator of Region III of the United States Environmental Protection Agency or his designee.

5. In 40 CFR 265.33, the following sentence shall be added to the end of the paragraph: "A record of tests or inspections will be maintained on a log at that facility or other reasonably accessible and convenient location."

6. In addition to the notifications required by 40 CFR 265.56(d)(2), notification shall be made to the on-scene coordinator, the National Response Center, and the Virginia Department of Emergency Management, Emergency Operations Center. In the associated report filed under 40 CFR 265.56(j), the owner or operator shall include such other information specifically requested by the director, which is reasonably necessary and relevant to the purpose of an operating record.

7. In addition to the requirements of 40 CFR 265.91, a log shall be made of each ground water monitoring well describing the soils or rock encountered, the permeability of formations, and the cation exchange capacity of soils encountered. A copy of the logs with appropriate maps shall be sent to the department.

8. The following text shall be substituted for 40 CFR 265.143(g) and 40 CFR 265.145(g): "An owner or operator may use a financial assurance mechanism specified in this section to meet the requirements of this section for more than one facility in Virginia. Evidence of financial assurance submitted to the department must include a list showing, for each facility, the EPA Identification Number, name, address, and the amount of funds for closure or post-closure assured by the mechanism. The amount of funds available through the mechanism must be no less than the sum of funds that would be available if a separate mechanism had been established and maintained for each facility. In directing funds available through the mechanism for closure or post-closure care of any of the facilities covered by the mechanism, the director may direct only the amount of funds designated for that facility, unless the owner or operator agrees to the use of additional funds available under the mechanism.

9. In 40 CFR 265.147(a)(1)(ii), 40 CFR 265.147(g)(2), and 40 CFR 265.147(i)(4), the term "Virginia" shall not be substituted for the term "State" or "States."

10. In 40 CFR 265.191(a), the compliance date of January 12, 1988, applies only for HSWA tanks. For non-HSWA tanks, the compliance date is November 2, 1986.

11. In 40 CFR 265.191(c), the reference to July 14, 1986, applies only to HSWA tanks. For non-HSWA tanks, the applicable date is November 2, 1987.

12. In 40 CFR 265.193, the federal effective dates apply only to HSWA tanks. For non-HSWA tanks, the applicable date ~~is~~ of January 12, 1987, is replaced with November 2, 1997.

13. The following text shall be substituted for 40 CFR 265.440(a): "The requirements of this subpart apply to owners and operators of facilities that use new or existing drip pads to convey wood drippage, precipitation and/or surface water run-off to an associated collection system. Existing HSWA drip pads are those constructed before December 6, 1990, and those for which the owner or operator has a design and has entered into a binding financial or other agreement for construction prior to December 6, 1990. Existing non-HSWA drip pads are those constructed before January 14, 1993, and those for which the owner or operator has a design and has entered into a binding financial or other agreement for construction prior to January 14, 1993. All other drip pads are new drip pads. The requirement at 40 CFR 265.443(b)(3) to install a leak collection system applies only to those HSWA drip pads that are constructed after December 24, 1992, except for those constructed after December 24, 1992, for which the owner or operator has a design and has entered into a binding financial or other agreement for construction prior to December 24, 1992. For non-HSWA drip pads, the requirement at 40 CFR 264.573(b)(3) to install a leak collection system applies only to those non-HSWA drip pads that are constructed after September 8, 1993, except for those constructed after September 8, 1993, for which the owner or operator has a design and has entered into a binding financial or other agreement for construction prior to September 8, 1993."

14. In 40 CFR 265.1083(c)(4)(ii), the second occurrence of the term "EPA" shall mean the United States Environmental Protection Agency.

15. In addition to the requirements of 40 CFR 265.310, the owner or operator shall consider at least the following factors in addressing the closure and post-closure care objectives of this part:

a. Type and amount of hazardous waste and hazardous waste constituents in the landfill;

b. The mobility and the expected rate of migration of the hazardous waste and hazardous waste constituents;

c. Site location, topography, and surrounding land use, with respect to the potential effects of pollutant migration;

d. Climate, including amount, frequency and pH of precipitation;

e. Characteristics of the cover, including material, final surface contours, thickness, porosity and permeability, slope, length of run of slope, and type of vegetation on the cover; and

f. Geological and soil profiles and surface and subsurface hydrology of the site.

16. Additionally, during the post-closure care period, the owner or operator of a hazardous waste landfill shall comply with the requirements of 40 CFR 265.116 and the following items:

a. Maintain the function and integrity of the final cover as specified in the approved closure plan;

b. Maintain and monitor the leachate collection, removal, and treatment system, if present, to prevent excess accumulation of the leachate in the system;

c. Maintain and monitor the landfill gas collection and control system, if present, to control the vertical and horizontal escape of gases;

d. Protect and maintain, if present, surveyed benchmarks; and

e. Restrict access to the landfill as appropriate for its post-closure use.

17. The underground injection of hazardous waste for treatment, storage or disposal shall be prohibited throughout the Commonwealth of Virginia.

18. Regulated units of the facility are those units used for storage treatment or disposal of hazardous waste in surface impoundments, waste piles, land treatment units, or landfills that received hazardous waste after July 26, 1982. In addition to the requirements of Subpart G of 40 CFR

Part 265, owners or operators of regulated units who manage hazardous wastes in regulated units shall comply with the closure and post-closure requirements contained in Subpart G of 40 CFR Part 264, Subpart H of 40 CFR Part 264, and Subpart K of 40 CFR Part 264 through Subpart N of 40 CFR Part 264, as applicable, and shall comply with the requirements in Subpart F of 40 CFR Part 264 during any post-closure care period and for the extended ground water monitoring period, rather than the equivalent requirements contained in 40 CFR Part 265. The following provisions shall also apply:

a. For owners or operators of surface impoundments or waste piles included above who intend to remove all hazardous wastes at closure in accordance with 40 CFR 264.228(a)(1) or 40 CFR 264.258(a), as applicable, submittal of contingent closure and contingent post-closure plans is not required. However, if the facility is subsequently required to close as a landfill in accordance with Subpart N of 40 CFR Part 264, a modified closure plan shall be submitted no more than 30 days after such determination. These plans will be processed as closure plan amendments. For such facilities, the corresponding post-closure plan shall be submitted within 90 days of the determination that the unit shall be closed as a landfill.

b. A permit application as required under 9VAC20-60-270 to address the post-closure care requirements of 40 CFR 264.117 and for ground water monitoring requirements of 40 CFR 264.98, 40 CFR 264.99, or 40 CFR 264.100, as applicable, shall be submitted for all regulated units that fail to satisfy the requirements of closure by removal or decontamination in 40 CFR 264.228(a)(1), 40 CFR 264.258(a), or 40 CFR 264.280(d) and 40 CFR 264.280(e), as applicable. The permit application shall be submitted at the same time as the closure plan for those units closing with wastes in place and six months following the determination that closure by removal or decontamination is unachievable for those units attempting such closure. The permit application shall address the post-closure care maintenance of both the final cover and the ground water monitoring wells as well as the implementation of the applicable ground water monitoring program whenever contaminated soils, subsoils, liners, etc., are left in place. When all contaminated soils, subsoils, liners, etc., have been removed yet ground water contamination remains, the permit application shall address the post-closure care maintenance of the ground water monitoring wells as well as the implementation of the applicable ground water monitoring program.

c. In addition to the requirements of 40 CFR 264.112(d)(2)(i) for requesting an extension to the one-year limit, the owner or operator shall demonstrate that he will continue to take all steps to prevent threats to human health and the environment.

d. In addition to the requirements of 40 CFR 264.119(c), the owner or operator shall also request a modification to the post-closure permit if he wishes to remove contaminated structures and equipment.

19. In 40 CFR 265.71, the terms "EPA" and "Environmental Protection Agency" shall mean the United States Environmental Protection Agency, and the reference to "system" means the United States Environmental Protection Agency's national electronic manifest system.

20. Regardless of the provisions of 9VAC20-60-18, the requirements of 40 CFR 265.71(j) are not incorporated into this chapter.

21. Requirements for mercury-containing lamp recycling facilities. The following requirements apply to all facilities that recover or reclaim mercury from lamps:

a. All owners and operators of mercury-containing lamp recycling facilities shall:

(1) Have established markets for the utilization of reclaimed materials and be able to identify these markets to the department;

(2) Only introduce into the processing equipment lamps or devices for which the equipment was specifically designed to process and operate and maintain processing equipment consistent with the equipment manufacturer's specifications; and

(3) Not speculatively accumulate the materials.

b. If a mercury-containing lamp recycling facility's processed materials are to be delivered to a facility other than a mercury reclamation facility, the owner or operator shall:

(1) Demonstrate proper equipment operation and efficiency by sampling and analytical testing of the processed materials. The testing shall ensure that such processed materials (i) have less than three parts per million of "average mercury" during each consecutive 12-week time period of operations ("average mercury" shall be calculated pursuant to subdivision 21 b (3) of this subsection); (ii) have less than five parts per million of total mercury as reported in the "weekly composite sample of process operations" ("weekly composite sample of process operations" shall be calculated pursuant to subdivision 21 b (3) of this subsection); (iii) are not a hazardous waste; and (iv) comply with 40 CFR Part 268, if applicable.

(2) Retest, reprocess, or deliver to a mercury reclamation facility processed materials that are in excess of the allowable levels of mercury specified in subdivision 21 b (1) of this subsection.

(3) Sample and perform analytical testing of the processed material for total mercury as follows:

(a) Facility operators shall take daily physical samples of the mercury-containing materials at the point at which

they exit the processing equipment. These samples shall be representative of the materials processed during that day.

(b) At the beginning of each week, the prior week's daily samples shall be consolidated into one weekly sample that shall be submitted for chemical analysis of total mercury content using an approved EPA methodology. At least three separate daily samples shall be taken in order to obtain a weekly sample. When a facility is not operating at least three days during a week, that week will be dropped out of the 12-week rolling average as calculated under subdivision 21 b (3) (c) of this subsection. However, all daily samples that are in a week that has been dropped out shall be counted towards the very next weekly sample that is included in a 12-week rolling average. The result of this analysis shall be considered the "weekly composite sample of process operations."

(c) The "average mercury" value calculation shall be the rolling average of weekly composite sample results from samples taken during the most recent 12-week time period with each new weekly composite sample result replacing the oldest sample result that was used in the previous 12-week period.

c. Mercury-containing lamp recycling facilities shall ensure that the separated materials that are generated from their operations are suitable and safe for their intended end use and shall bear the burden of responsibility for the safety of these materials sold or delivered from the operations. Facilities shall notify in writing receiving sources, other than mercury reclamation facilities, of the amount and type of any hazardous substances present in the processed materials as demonstrated by laboratory analysis.

d. Operating requirements. Mercury-containing lamp recycling facilities shall be operated in accordance with the following requirements:

(1) Mercury-containing lamp recycling facilities shall control mercury emissions through the use of a single air handling system with redundant mercury controls and comply with the following:

(a) The owner or operator shall operate, monitor, and maintain an air handling system with redundant air pollution control equipment in order to reduce the mercury content of the air collected during the volume reduction and mercury recovery and reclamation processes.

(b) Redundant air pollution control equipment shall incorporate at least two carbon filters or equivalent technology arranged in a series so that the air passes through both filters before being released. In the event of a single filter failure, each filter shall be designed to ensure compliance with the risk-based protectiveness standards for mercury vapor provided in subdivision 21 e of this subsection.

(c) A sample of air shall be collected after the first carbon filter (or equivalent technology) and upstream of the second once each operating day while mercury-containing lamps or devices are being processed. The mercury content of the sample shall be determined for comparison with the risk-based protectiveness standards provided in subdivision 21 e of this subsection.

(d) The owner or operator shall operate, monitor, and maintain the air pollution control equipment in such a manner as not to exceed the risk-based protectiveness standards under subdivision 21 e of this subsection for mercury vapor downstream of the first carbon filter (or equivalent technology) and upstream of the second carbon filter.

(2) The area in which the processing equipment is located shall be fully enclosed and kept under negative pressure while processing mercury-containing lamps or devices.

e. Testing for mercury releases from lamp crushing units shall be performed using a mercury vapor analyzer that has been approved for the application by the U.S. Occupational Safety and Health Administration or the Virginia Department of Labor and Industry or a comparable device that has been calibrated by the manufacturer or laboratory providing the equipment. Mercury vapor monitors used for testing must be capable of detecting mercury at the applicable concentrations provided below or lower in air and must be equipped with a data recording device to provide a record of measurements taken. Mercury monitoring data shall be documented and available for inspection in accordance with subdivision 21 g of this subsection. The acute exposure protectiveness standard is 300 $\mu g/m^3$ for a 10-minute exposure with the understanding that the acute exposure protectiveness standard is considered a ceiling value and at no time during bulb crushing operation will the air concentrations of mercury exceed 300 $\mu g/m^3$. The following are risk-based protectiveness standards at a distance of five feet from the bulb crushing unit:

Monthly Bulb Crushing Duration (X Hours/Month)*	Chronic Exposure Air Emission Limit ($\mu g/m^3$)	Acute Exposure Air Emission Limit ($\mu g/m^3$)
$X \geq 32$	$\frac{1.314^{skin}}{\mu g/m^3}$	300 $\mu g/m^3$
$8 < X < 32$	$\frac{6.317^{skin}}{\mu g/m^3}$	300 $\mu g /m^3$
$X \leq 8$	$\frac{27.375^{skin}}{\mu g/m^3}$	300 $\mu g/m^3$

*Monthly crushing duration is determined based on the maximum number of hours that bulb crushing occurred in any one month over the last 12-month period.

f. Closure. Mercury-containing lamp recycling facilities must prepare and maintain a closure plan conforming to the requirements of 40 CFR Part 265, Subpart G as adopted by reference in this section. Financial assurance shall be provided to the department in accordance with 40 CFR Part 265, Subpart H as adopted by reference in this section.

g. Recordkeeping requirements. The owner or operator of a mercury-containing lamp recycling facility shall maintain records of monitoring information that (i) specify the date, place, and time of measurement; (ii) provide the methodology used; and (iii) list the analytical results. The records maintained shall include all calibration and maintenance records of monitoring equipment. The owner or operator shall retain records of all monitoring data and supporting information available for department inspection for a period of at least three years from the date of collection.

9VAC20-60-273. Adoption of 40 CFR Part 273 by reference.

A. Except as otherwise provided, the regulations of the United States Environmental Protection Agency set forth in 40 CFR Part 273 are hereby incorporated as part of the Virginia Hazardous Waste Management Regulations. Except as otherwise provided, all material definitions, reference materials and other ancillaries that are a part of 40 CFR Part 273 are also hereby incorporated as part of the Virginia Hazardous Waste Management Regulations.

B. In all locations in these regulations where 40 CFR Part 273 is incorporated by reference, the following additions, modifications, and exceptions shall amend the incorporated text for the purpose of its incorporation into these regulations:

1. In 40 CFR 273.32(a)(3), the term "EPA" shall mean the United States Environmental Protection Agency ~~or his designee~~.

2. In addition to universal wastes included in 40 CFR Part 273, other wastes are defined to be universal wastes in Part XVI (9VAC20-60-1495 et seq.) of these regulations. Part XVI also contains waste specific requirements associated with the waste defined to be universal waste therein. In 40 CFR 273.1, the definitions in 40 CFR 273.9, and wherever elsewhere in Title 40 of the Code of Federal Regulations there is a listing of universal wastes or a listing of hazardous waste that are the subject of provisions set out in 40 CFR Part 273 as universal wastes, it shall be amended by addition of the following sentence: "In addition to the hazardous wastes listed ~~herein~~ here, the term "universal waste" and all lists of universal waste or waste subject to provisions of 40 CFR Part 273 shall include those hazardous wastes listed in Part XVI (9VAC20-60-1495 et seq.) of the Virginia Hazardous Waste Management Regulations as universal wastes, ~~under such~~ in accordance with the terms and requirements ~~as shall therein be ascribed~~ described." Any listing of universal wastes in 40 CFR Part 273 shall incorporate the universal wastes set out in Part XVI in a manner identical to those included in the federal text; whether, for example, as in 40 CFR 273.32(b)(4), 40 CFR 273.32(b)(5), 40 CFR 273.39(b)(2), and 40 CFR 273.62(a)(20) or as items to be included in a calculation or requirement as in the definitions of "Large Quantity Handler of Universal Waste" and "Small Quantity Handler of Universal Waste."

3. In addition to the requirements ~~for lamps~~ contained in 40 CFR 273, the following requirements shall apply:

a. A used lamp shall be considered to be discarded and a waste on the date the generator permanently removes it from its fixture. An unused lamp becomes a waste on the date the generator discards it since that is the date on which he is deemed to have decided to discard it in accordance with 40 CFR 273.5(c)(2).

~~b. Universal waste lamps may be crushed or intentionally broken on the site of generation to reduce their volume; however, breaking, crushing, handling, and storage must occur in a safe and controlled manner that minimizes the release of mercury to the workplace and the environment and must comply with 29 CFR 1910.1000. The procedure for breaking, crushing, handling and storing of the lamps must be documented and use a mechanical unit specifically designed for the process that incorporates the containment and filtration of process air flows to remove mercury-containing vapors and dusts.~~

~~c. All handlers of universal waste (large or small quantity) who crush mercury-containing lamps under these universal waste regulations shall comply with the following provisions:~~

~~(1) The handler must use a mercury-containing lamp crusher indoors with air pollution controls that capture both particulate and vapor phase mercury. At a minimum, these controls must include, or must be equivalent to the protection provided by a HEPA filter, activated charcoal, and a negative air flow (vacuum) through the crusher unit. The crusher must have documentation from the manufacturer that demonstrates that the unit:~~

~~(a) Is capable of achieving the Occupational Safety and Health Administration Permissible Exposure Limit (PEL) for mercury of 0.10 milligram per cubic meter in indoor ambient air (under individual site-specific use conditions); and~~

~~(b) Achieves a particle retention rate of 99.97% in the HEPA filter (at a particle diameter of 0.3 microns).~~

~~(2) The handler must develop and implement a written procedure specifying how to safely crush universal waste lamps. This procedure must include: type of equipment to be used to crush the lamps safely, operation and maintenance of the unit in accordance with written procedures developed by the manufacturer of the equipment, and proper waste management practices. The handler must document maintenance activities and keep records of maintenance. In addition, the unit operator must receive training in crushing procedures, waste handling and emergency procedures (training must be documented).~~

~~(3) Residues, filter media, or other solid waste generated as part of the crushing operation, which are not being reclaimed and which exhibit any characteristics of a hazardous waste, must be managed in accordance with all applicable hazardous waste management requirements.~~

~~(4) The handler must ensure that spills of the contents of the universal waste lamps that may occur during crushing operations are cleaned up in accordance with 40 CFR 273.13 (d)(2) or 40 CFR 273.33 (d) (2).~~

~~(5) The handler must store the crushed lamps in closed, nonleaking drums or containers that are in good condition. Transfer of the crushed lamps to other drums or containers is not permitted.~~

~~(6) Drums or containers used for storage of crushed lamps must be properly sealed and labeled. The label shall bear the words "Universal Waste Lamp(s)," "Waste Lamp(s)," or "Used Lamp(s)."~~

~~4. A small quantity~~ b. A handler having a waste subject to the requirements of 40 CFR 273.13(a)(3)(i) or 40 CFR 273.33(a)(3)(l) is also subject to 9VAC20-60-270 and Parts IV (9VAC20-60-305 et seq.), VII (9VAC20-60-420 et seq.), and XII (9VAC20-60-1260 et seq.) of this chapter.

c. Small and large quantity handlers of universal waste (i) may only crush mercury-containing lamps for size reduction at the site of generation or under the control of the generator as defined in 9VAC20-60-1505 B 4 and (ii) shall comply with the applicable mercury-containing lamps crushed for size reduction requirements of 9VAC20-60-1505.

d. All large quantity handlers of universal waste lamps (i.e., generators who accumulate 5000 kilograms or more of universal waste lamps) must prepare and maintain a closure plan conforming to the requirements of 40 CFR Part 264, Subpart G as adopted by reference in 9VAC20-60-264. Financial assurance shall be provided to the department in accordance with 40 CFR Part 264, Subpart H as adopted by reference in 9VAC20-60-264.

e. The owner or operator of a destination facility that recycles mercury-containing lamps with or without storing the mercury-containing lamps before they are recycled must comply with all applicable requirements of 9VAC20-60-264 B 34 and 9VAC20-60-265 B 21 [~~of this section~~] for mercury-containing lamp recycling facilities.

9VAC20-60-1505. Additional universal wastes.

~~Note: At this time, there are no universal wastes that are not also universal wastes under 40 CFR Part 273 or 9VAC20-60-273 B.~~

A. The Commonwealth of Virginia incorporates at 9VAC20-60-273 A all universal wastes adopted by the federal government at 40 CFR Part 273. In addition to the universal wastes listed in 40 CFR Part 273, the universal wastes listed in this section are also universal wastes in Virginia if the requirements as provided in this section for each particular universal waste are met.

B. Mercury-containing lamps may be crushed for size reduction provided the requirements of this subsection are met.

1. Mercury-containing lamps are crushed under the control of the generator as defined in subdivision 4 of this subsection, and the crushed lamps are sent off site for recycling.

2. The use of mobile crushing units is prohibited. Mobile crushing units include any device or equipment or combination of devices and equipment that is designed to be transported and operated at more than one site.

3. Mercury-containing lamps that are crushed for size reduction by a generator or under the control of the generator as defined in subdivision 4 of this subsection may be managed under the provisions for universal wastes, 9VAC20-60-273, if the owner or operator complies with all the requirements and qualifications of this section.

4. "Under the control of the generator" means:

a. That the mercury-containing lamps are generated and crushed at the generating facility (for purposes of this definition, generating facility means all contiguous property owned, leased, or otherwise controlled by the universal waste (UW) lamp generator); or

b. That the mercury-containing lamps are generated and crushed at different facilities if the crushing facility is controlled by the generator or if both the generating facility and the crushing facility are controlled by a person as defined in 40 CFR Part 260.10, and if the generator provides one of the following certifications: (i) "on behalf of [insert generator facility name], I certify that this facility will send the indicated UW lamps to [insert crushing facility name], which is controlled by [insert generator facility name] and that [insert the name of either facility] has acknowledged full responsibility for the safe management of the UW lamps" or (ii) "on behalf of [insert generator facility name] I certify that this facility will send the indicated UW lamps to [insert

crushing facility name], that both facilities are under common control, and that [insert name of either facility] has acknowledged full responsibility for the safe management of the UW lamps." For purposes of this certification, "control" means the power to direct the policies of the facility, whether by the ownership of stock, voting rights, or otherwise, except that contractors who operate facilities on behalf of a different person as defined in 40 CFR Part 260.10 shall not be deemed to "control" such facilities. The certification shall be submitted to the department in accordance with subdivision 7 (h) of this subsection.

5. Mercury-containing lamp crushing operations that do not meet the definition of "under the control of the generator" in subdivision 4 of this subsection are subject to all applicable requirements for destination facilities in 40 CFR Part 273, Subpart E.

6. Safety hazards to operating personnel shall be controlled through an active safety program consistent with the requirements of 29 CFR Part 1910.

7. Crushing, handling, and storing mercury-containing lamps shall occur in a safe and controlled manner that minimizes the release of mercury to the environment. Requirements for a safe and controlled manner shall include the following:

a. Mercury-containing lamps shall be crushed in a mechanical unit specifically designed to crush mercury-containing lamps. This unit shall be hermetically sealed, except for air intakes, and under negative pressure. Air intake points must be closed when the unit is not operating.

b. Crushing operations shall occur in a space with its ambient air isolated from other work areas where persons who are not involved in the crushing operation may work. The ambient air from rooms containing crushing operations shall be discharged after filtration directly to an area outside the building where persons are unlikely to be directly exposed. If a situation exists at a particular facility in which the facility determines that discharge of ambient air from a room containing a crushing operation to the outside is technically or financially impracticable, the department may approve an alternated design that allows the discharge of ambient air from a room containing a crushing operation to another internal building space or centralized air circulation system if:

(1) The ambient air is discharged to the internal building space or centralized air circulation system through filtration system capable of capturing both particulate and vapor phase mercury.

(2) The filtration system is maintained as recommended by the manufacturer to ensure that it operates at its design mercury removal efficiency.

(3) Maintenance of the filtration system shall be documented and records of maintenance shall be kept on site.

c. Mercury-containing lamps shall be crushed with a device that is equipped with air pollution controls that capture both particulate and vapor phase mercury. At a minimum, these controls shall include a HEPA filter, a sorption column of sulfur impregnated activated carbon media, and a negative air flow (vacuum) throughout the unit. The crushing unit shall have documentation from the manufacturer that demonstrates that the unit is equipped as required and:

(1) Achieves a particle retention rate of 99.97% in the HEPA filter (at a particle diameter less than 0.3 microns); and

(2) Achieves the air emission limits specified in the risk-based protectiveness standards table of subdivision 7 n (2) of this subsection.

d. Mercury-containing lamps shall be crushed indoors.

e. The transfer of crushed mercury-containing lamps in drums or containers to other drums or containers is not permitted.

f. Crushed mercury-containing lamps shall be stored in closed and hermetically sealed, nonleaking drums or containers that are in good condition (e.g., no severe rusting, no apparent structural defects, and no leaking).

g. Drums or containers used for storage of crushed mercury-containing lamps shall be properly sealed and labeled. The label shall bear the words "universal waste-lamps," "waste lamps," or "used lamps."

h. The generator or facility under the control of the generator shall make written notification to the department of the physical location of the crushing operation no later than [~~30 calendar days after (insert effective date of this section)~~ January 31, 2017,] for all existing operations or 30 calendar days prior to beginning operation of a new crushing operation. The notification shall include the name of the individual or company that owns the operation; the EPA ID number if one has been issued for the facility; the location of the crushing operation; and the names, addresses, and telephone numbers of the operator and principal contact person or persons. A written notice of changes in the notification data shall be sent to the department within 15 calendar days of the change. The notification shall include the certification required under subdivision 4 (b) of this subsection if applicable.

i. A written procedure specifying how to safely crush, handle, and store mercury-containing lamps and how to minimize the release of mercury, including during drum changes and malfunctions, shall be developed, implemented, and documented. This procedure shall include (i) the type of equipment to be used to crush

mercury-containing lamps safely, (ii) instructions for proper equipment operation and a schedule for maintenance of the unit in accordance with written procedures developed by the manufacturer of the equipment, (iii) proper waste management practices, and (iv) the use of personal protective equipment to include at a minimum safety glasses or full face shield and cut-proof gloves. The maintenance schedule shall identify all maintenance operations and the frequency with which they must be performed, including replacement of particle filters and the activated carbon media as recommended by the manufacturer of the crushing unit.

j. Maintenance activities shall be documented and records of maintenance shall be maintained and available for inspection per subdivision 8 of this subsection.

k. Each unit operator shall receive initial and annual training in crushing procedures, waste handling, safety, use of personal protective equipment, and emergency procedures, including proper procedures for cleaning up broken mercury-containing lamps. All training shall be documented and records of training shall be maintained and available for inspection per subdivision 8 of this subsection.

l. Residues, filter media, used equipment, other mercury-containing equipment, and other solid waste shall not be placed in the container with the crushed mercury-containing lamps. Any waste materials generated as part of the crushing operation that are determined to be hazardous waste shall be managed under this chapter, as hazardous waste or if not hazardous waste, as a solid waste under the Solid Waste Management Regulations, 9VAC20-81.

m. Any spills of the contents of the mercury-containing lamps that may occur shall be cleaned up in accordance with 40 CFR Part 273.13(d)(2) or 40 CFR Part 273.33(d)(2).

n. All generators or facilities under the control of the generator that crush mercury-containing lamps, except those generators or facilities that crush two hours or less and no more than 220 pounds/100 kilograms (CESQG equivalent) of bulbs per month, shall provide monitoring as follows:

(1) Ambient air within the lamp crushing room and exhaust air from the lamp crushing unit shall be tested for mercury during the first month of using the lamp crushing unit and whenever the unit is modified or replaced, and annually thereafter. In addition, all connection points for hoses circulating air from within the unit, the seal between the unit and the drum, and openings in the crushing unit (e.g., the lamp feed tube) shall also be tested for mercury release during the first month of lamp crushing operation and annually thereafter. Routine maintenance of the machine does not constitute modified or replaced for purposes of requiring ambient air testing. Ambient air shall be tested within five feet of the lamp crushing device. Exhaust air and other tests shall be performed within two inches of the designated testing points on the lamp crushing device. All mercury testing required by this section shall be performed at a time when the lamp crushing device is being used to crush mercury-containing lamps.

(2) Testing for mercury releases from lamp crushing units shall be performed using a mercury vapor analyzer that has been approved for the application by the U.S. Occupational Safety and Health Administration or the Virginia Department of Labor and Industry, or a comparable device that has been calibrated by the manufacturer or laboratory providing the equipment. Mercury vapor monitors used for testing must be capable of detecting mercury at the applicable concentrations provided below or lower in air and must be equipped with a data recording device to provide a record of measurements taken. Mercury monitoring data shall be documented and available for inspection per subdivision 8 of this subsection. The acute exposure protectiveness standard is 300 $\mu g/m^3$ for a 10-minute exposure with the understanding that the acute exposure protectiveness standard is considered a ceiling value and at no time during bulb crushing operation will the air concentrations of mercury exceed 300 $\mu g/m^3$. Alternately, compliance with the acute exposure protectiveness standard may be demonstrated by comparing the 95% upper confidence level of the mean of the individual data points to the standard. The following are risk-based protectiveness standards at a distance of five feet from the bulb crushing unit:

Monthly Bulb Crushing Duration (X Hours/Month)*	Chronic Exposure Air Emission Limit ($\mu g/m^3$)	Acute Exposure Air Emission Limit ($\mu g/m^3$)
$X \geq 32$	1.314^{skin} $\mu g/m^3$	300 $\mu g/m^3$
$8 < X < 32$	6.317^{skin} $\mu g/m^3$	300 $\mu g/m^3$
$X \leq 8$	27.375^{skin} $\mu g/m^3$	300$\mu g/m^3$
$X \leq 2$ and no more than 220 lbs/month or 100 kg/month of bulbs crushed	Monitoring not required	Monitoring not required
*Monthly crushing duration is determined based on the maximum number of hours that bulb crushing		

occurred in any one month over the last 12-month period.

(3) Any lamp crushing device that, when tested as described [~~above~~ in subdivisions 7 n (1) and 7 n (2) of this subsection], fails to meet the criteria specified in subdivision 7 n (2) of this subsection, must immediately be removed from service. Lamp crushing devices removed from service under this subdivision may not be returned to service until the device has been inspected and repaired, and in subsequent testing has been shown to meet the specified criteria. Test data and documentation of repairs shall be kept in the facility record and available for inspection per subdivision 8 of this subsection.

(4) The facility shall document the amount of time spent crushing lamps and this information shall be maintained in the facility record and available for inspection per subdivision 8 of this subsection.

8. A copy of all records, notifications, certifications, and reports required by this section shall be kept on site and be available for examination by the department for a period of at least three years.

9. All requirements of this section shall be immediately effective for all new facilities beginning operations on or after [~~(insert effective date of this section)~~ January 1, 2017]. All requirements of this section shall be effective for all existing facilities no later than [~~90 calendar days after (insert effective date of this section)~~ April 1, 2017].

VA.R. Doc. No. R12-3084; Filed October 11, 2016, 12:59 p.m.

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TITLE 12. HEALTH

DEPARTMENT OF MEDICAL ASSISTANCE SERVICES

Proposed Regulation

Title of Regulation: **12VAC30-120. Waivered Services (amending 12VAC30-120-1710 through 12VAC30-120-1740).**

Statutory Authority: § 32.1-325 of the Code of Virginia; 42 USC § 1396 et seq.

Public Hearing Information: No public hearings are scheduled.

Public Comment Deadline: December 30, 2016.

Agency Contact: Emily McClellan, Regulatory Supervisor, Policy Division, Department of Medical Assistance Services, 600 East Broad Street, Suite 1300, Richmond, VA 23219, telephone (804) 371-4300, FAX (804) 786-1680, or email emily.mcclellan@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. Section 32.1-324 of the Code of Virginia authorizes 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 1915(c) of the Social Security Act permits states to cover an array of home and community-based services that enable qualifying individuals to live in their communities thereby avoiding institutionalization. These community services are eligible for federal matching funds. The technology assisted waiver (TW) is a DMAS program operating under this federal authority.

Purpose: The technology assisted waiver serves individuals who require some form of mechanical device, such as ventilators, to sustain life. The regulations for the TW services require updating to ensure that the services reflect best health care practices. These changes are expected to provide greater access to waiver services while ensuring the health, safety, and welfare of all individuals receiving TW services.

Substance:

1. The TW currently requires all registered nurses (RNs) and licensed practical nurses (LPNs) who are reimbursed for rendering skilled private duty nursing services to TW individuals have at least six months of clinical experience that is comparable to the care needs of the assigned TW individuals. This experience must be acquired prior to providing skilled private duty nursing services or skilled private duty respite services for Medicaid reimbursement in this waiver program.

Nationally, as well as in Virginia, there is a nursing shortage. TW services providers, such as home health agencies and nursing agencies, are having difficulty finding nurses with six months of specialized clinical experience in the complex care required by TW individuals (ventilators, tracheostomies, nasogastric tubes, etc.). As more individuals with complex medical needs choose to remain in their communities, the shortage of experienced complex care nurses who can meet the service needs of these individuals is further strained.

In part, this nursing shortage has occurred as a result of advances in the care of ventilator-dependent individuals who live in their communities. Individuals are choosing to receive care in communities (rather than in institutions), which has reduced the number of nursing facilities (NF) and NF specialized care ventilator units where nurses may receive training and experience. Additionally, acute care hospitals have shifted many of the responsibilities for direct respiratory care and tracheostomy and ventilator maintenance from staff nurses to respiratory therapists thereby further reducing opportunities for nurses to acquire experience.

2. DMAS currently requires that families provide at least eight hours of care in every 24-hour day to TW individuals. In the past, there have been concerns about the waiver individual's health and safety as well as the care costs for these individuals exceeding, in the aggregate, institutional costs. Should this happen, the federal funding agency, the Centers for Medicare and Medicaid Services (CMS), will withdraw federal funding for this community waiver resulting in many of these waiver individuals being moved into institutions.

Families have stated that, while remaining within their weekly authorized number of private duty nursing hours, it should not matter when the nursing hours are used - whether the hours are consolidated over just a few days in the week (assuming that home health or nursing agencies can provide enough nursing staff) or spread out over the entire week. Families and caregivers have argued that it is difficult for them to find employment when they cannot commit to regular, consistent work schedules for their employers.

In addition, CMS is generally requiring Medicaid programs to have person-centered approaches for all service delivery. DMAS believes that keeping the expenditures for this waiver below the institutional care costs can be maintained while permitting these individuals and their families greater flexibility using authorized skilled private duty nursing services.

3. When a skilled private duty nurse cancels a scheduled work shift (due to illness or family issues) with the TW individual, it is considered to be "missed" nursing hours. DMAS currently allows TW individuals to "make up" missed authorized private duty nursing (PDN) hours within the same week (Sunday through Saturday) of the missed shift. The total number of provided PDN hours and made up hours cannot exceed 16 hours per day.

With the change in the policy allowing families greater flexibility in scheduling their authorized hours per week, a policy to make up missed hours is no longer required. If previously scheduled hours are not covered by the skilled private duty nurse, the family still has those hours available within their weekly total authorized hours to schedule on another day during that same week. This rescheduling of the "missed" coverage hours falls within their ability to "flex" their schedule and would not be considered make-up.

DMAS recommends permitting providers to employ nurses (both RNs and LPNs) who have either six months of related clinical experience or who have completed a relevant provider training program. The regulations stipulate the required elements of the training. The trainer may be either a licensed registered nurse or a licensed respiratory therapist who has at least six months hands-on experience in the area of care to be provided (such as ventilator, tracheostomy, peg tube, nasogastric tube, etc.). A satisfactory training program will include classroom time as well as direct hands-on demonstration of skills by trainees. Training must include the following subject areas related to the care to be provided: (i) human anatomy and physiology; (ii) frequently used medications for this population of individuals; (iii) emergency management; and (iv) operation of equipment. The provider must ensure competency of staff. Allowing providers to substitute a quality, relevant nurse training program in lieu of the current six months of clinical experience is expected to increase the pool of potential nurses (RNs and LPNs) eligible to provide TW services.

DMAS recommends changing the policy that families or caregivers provide at least eight hours of care in a 24-hour day to permit them to use DMAS-approved hours across a week. Such flexibility allows the TW individual's schedule to include longer work days to accommodate physician appointments, community activities, caregiver work schedules, etc. A sample schedule for a TW individual that allows caregiver coverage for work but also extended hours for community involvement may be, for example:

Week	Sun	Mon	Tues	Wed	Thurs	Fri	Sat	Week Total
Agency	8	16	20	16	20	16	16	112
Family	16	8	4	8	4	8	8	56

DMAS recommends deleting the current wording related to make up or rescheduling of missed hours as it is no longer germane.

These recommendations do not expand the existing service coverage limits for skilled private duty nursing or private duty respite services.

Other recommended text changes update language to improve readability and comprehension.

Issues: The advantages to the public include allowing the technology assisted waiver (TW) program to accommodate changes in the industry and providing additional options to agencies for staffing of skilled private duty nursing and respite services while preserving the health, safety, and welfare of individuals who receive TW services. In response to provider requests, DMAS is considering permitting the substitution of training for private duty nurses in place of clinical experience. In response to family requests, DMAS is also considering permitting families to use their authorized private duty nursing hours over the span of a week rather than limiting them to 16 hours of private duty nursing services in a 24-hour period. There are no disadvantages to the agency, the public, or the Commonwealth.

Department of Planning and Budget's Economic Impact Analysis:

Summary of the Proposed Amendments to Regulation. The Board of Medical Assistance Services proposes to 1) allow nursing providers to train their nurses in place of the currently required six months of clinical experience, 2) permit families greater flexibility to use their authorized private duty nursing hours over the span of a week rather than limiting them to 16

hours of private duty nursing services in a 24-hour period, and 3) remove the language related to making up or rescheduling missed nursing hours.

Result of Analysis. The benefits likely exceed the costs for all proposed changes.

Estimated Economic Impact. This regulation governs technology assisted waiver (TW) services provided to individuals who require some form of a mechanical device, such as a ventilator, to compensate for loss of a vital body function. One of the proposed changes will allow service providers to train private duty nurses in lieu of the required clinical experience. Under the current regulation, all nurses must have at least six months of clinical experience comparable to the care needs of the patient. This experience must be acquired prior to providing skilled private duty nursing services or skilled private duty respite services. The Department of Medical Assistance Services (DMAS) notes that provider agencies are experiencing increasing difficulty finding nurses who have the required six months of clinical experience. As more individuals with complex medical needs choose to remain in their communities, a corresponding decline has occurred in nursing facility population where nurses have traditionally gained their clinical experience. Additionally, acute care hospitals have shifted many of the responsibilities for direct respiratory care and tracheostomy/ventilator maintenance from staff nurses to respiratory therapists, further reducing opportunities for nurses to acquire experience. As a result of the experienced nursing shortage, provider agencies are unable to meet the care needs of some of their TW patients.

Under the proposed changes, provider agencies will be allowed to train their nurses. Providers, who choose to implement a training program for their nurses, must assure that the health, safety, and welfare of the TW individuals continues to be met. The trainer may be either a licensed registered nurse or a licensed respiratory therapist who has at least 6 months hands-on experience in the area of care to be provided (such as ventilator, tracheostomy, peg tube, nasogastric tube, etc.). Training programs developed by providers will be required to contain certain elements. A satisfactory training program will include classroom time as well as direct hands-on demonstration of skills by trainees. Training must include the following subject areas related to the care to be provided: (i) human anatomy and physiology, (ii) frequently used medications for this population of individuals, (iii) emergency management, and (iv) operation of equipment. While a training program may introduce additional costs for the providers, they would undertake such a program only if their anticipated benefits are greater than their costs. The main expected benefits to providers may include their increased ability to meet the demand by increasing the pool of potential nurses eligible to provide TW services and potentially lower advertising costs spent to attract the limited number of qualified nurses.

Another proposed change will allow families to use their authorized private duty nursing hours over the span of a week rather than a day. Currently, families are required to provide at least 8 hours of care in every 24-hour day to TW individuals leaving up to 16 hours of authorized private duty nursing to be publicly funded. If not all of the authorized hours are utilized in a given day, the family loses the nursing hours authorized but not used for that day. The proposed change will allow families to keep the authorized but unused nursing hours across a week. This change will provide greater flexibility to TW individuals and their families to receive the care they need. In addition, such flexibility would allow TW individuals' schedules to include longer work days to accommodate physician appointments, community activities, caregiver work schedules, etc. Even though the added flexibility will likely increase the nursing hours utilized, the hours reimbursed cannot exceed the number of authorized hours. DMAS believes the cost effectiveness of this waiver which is a necessary condition to continue to receive federal funding can be maintained while permitting these individuals and their families greater flexibility.

The proposed changes will also remove language related to making up or re-scheduling of missed hours as it would be no longer relevant. When a skilled private duty nurse cancels a scheduled work shift (due to illness or family issues) with the TW individual, it is considered to be "missed" nursing hours. Under the current regulations, TW individuals are allowed to "make up" missed authorized private duty nursing hours within the same week of the missed shift. Since one of the proposed changes allows TW individuals to keep the authorized but unused nursing hours across a week, this language is no longer needed.

Considered together, the proposed changes will increase the supply of available nursing hours by allowing provider agencies to train their nurses and increase demand for such hours by allowing TW individuals to retain their authorized but unused nursing hours over a week. The likely effect of these changes is an increase in utilization. In fiscal year 2015, approximately 1.7 million hours were authorized. Of the authorized hours, 1.1 million hours were used at a cost of $28.5 million.[1] Thus, approximately only 2/3 of the authorized hours were used. The proposed changes will likely increase utilization above 2/3 and increase the total expenditures while making it easier for providers to increase their number of trained nurses available to staff TW individuals' authorized nursing hours and improving their access to waiver services. Any increase in expenditures will be split 50% by the Commonwealth and 50% by the federal government.

Businesses and Entities Affected. Currently there are approximately 143 private duty nursing provider agencies with approximately 500 nurses on staff serving the needs of approximately 280 waiver recipients.

Localities Particularly Affected. The proposed changes apply statewide.

Projected Impact on Employment. Under the proposed changes nursing agencies would hire training personnel if they choose to train their own nurses, and potentially be able to supply additional nursing hours to their clients. Also, the additional flexibility afforded to waiver recipients and their families to retain their authorized but unused nursing hours may add to the demand for nursing services. All of these effects individually or together would have a positive impact on employment.

Effects on the Use and Value of Private Property. A nursing agency would train its nurses only if benefits exceed the costs. Thus, a positive impact on their asset values may be expected.

Real Estate Development Costs. No impact on real estate development costs is expected.

Small Businesses:

Definition. Pursuant to § 2.2-4007.04 of the Code of Virginia, small business is defined as "a business entity, including its affiliates, that (i) is independently owned and operated and (ii) employs fewer than 500 full-time employees or has gross annual sales of less than $6 million."

Costs and Other Effects. All of the 143 nursing provider agencies are believed to be small businesses. Thus, the costs and other effects discussed above apply to them.

Alternative Method that Minimizes Adverse Impact. The proposed changes do not adversely affect small businesses.

Adverse Impacts:

Businesses. The proposed changes will not adversely affect non-small businesses.

Localities. The proposed amendments will not adversely affect localities.

Other Entities. The proposed amendments will not adversely affect other entities.

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[1] The hourly reimbursement rates for nurses under this waiver are as follows: Registered Nurse, Northern Virginia -$33.08; Registered Nurse, Rest of State -$27.24; Licensed Practical Nurse, Northern Virginia -$28.67; Licensed Practical Nurse, Rest of State -$23.65.

Agency's Response to Economic Impact Analysis: The agency has reviewed the economic impact analysis prepared by the Department of Planning and Budget. The agency raises no issues with this analysis.

Summary:

The proposed amendments update the technology assisted waiver provisions to accommodate changes in the home health care industry and provide additional flexibility to families and provider agencies when attempting to staff authorized skilled private duty nursing hours. Proposed changes include (i) modifying the staff experience requirement to substitute a quality training program for nurses instead of the current six months of clinical experience, (ii) permitting families greater flexibility to use their authorized private duty nursing hours over the span of a week rather than limiting them to 16 hours of private duty nursing services in a 24-hour period, and (iii) removing the current option of making up or rescheduling missed nursing hours.

12VAC30-120-1710. Individual eligibility requirements; preadmission screening.

A. Individual eligibility requirements.

1. The Commonwealth covers these optional categorically needy groups: ADC and AFDC-related individuals; SSI and SSA-related individuals; aged, blind, or disabled Medicaid-eligible individuals under 42 CFR 435.121; and the home and community-based waiver group at 42 CFR 435.217 that includes individuals who are eligible under the State Plan if they were institutionalized.

a. The income level used for the home and community-based waiver group at 42 CFR 435.217 shall be 300% of the current Supplemental Security Income payment standard for one person.

b. Medically needy Medicaid-eligible individuals shall be eligible if they meet the medically needy financial requirements for income and resources.

2. Under this waiver, the coverage groups authorized under § 1902(a)(10)(A)(ii)(VI) of the Social Security Act shall be considered as if they were institutionalized for the purpose of applying institutional deeming rules. All individuals in the waiver must meet the financial and non-financial Medicaid eligibility criteria and meet the institutional LOC criteria. The deeming rules shall be applied to waiver eligible individuals as if they were residing in an institution or would require that level of care.

3. An applicant for technology assisted waiver shall meet specialized care nursing facility criteria, including both medical and functional needs, and also be dependent on waiver services to avoid or delay facility placement and meet all criteria for the age appropriate assessments in order to be eligible for the tech waiver. Applicants shall not be enrolled in the tech waiver unless skilled ~~PDN~~ private duty nursing (PDN) hours are ordered by the physician. The number of skilled PDN hours shall be based on the total technology and nursing score on the Technology Assisted Waiver Pediatric Referral form, DMAS-109 (when individuals are younger than 21 years of age). The number of skilled PDN hours for adults shall be based on the Technology Assisted Waiver Adult Referral form (DMAS-108).

4. Applicants who are eligible for third-party payment for skilled private duty nursing services shall not be eligible for these waiver services. If an individual or an individual's legally responsible party voluntarily drops any insurance plan that would have provided coverage of skilled private

duty nursing services in order to become eligible for these waiver services within one year prior to the date waiver services are requested, eligibility for the waiver shall be denied. From the date that such insurance plan is discontinued, such applicants shall be barred for one year from reapplying for waiver services. After the passage of the one-year time period, the applicant may reapply to DMAS for admission to the tech waiver.

5. In addition to the medical needs identified in this section, the Medicaid-eligible individual shall be determined to need substantial and ongoing skilled nursing care. The Medicaid-eligible individual shall be required to meet a minimum standard on the age appropriate referral forms to be eligible for enrollment in the tech waiver.

6. Medicaid-eligible individuals who entered the waiver prior to their 21st birthday shall, on the date of their 21st birthday, conform to the adult medical criteria and cost-effectiveness standards.

7. Every individual who applies for Medicaid-funded waiver services must have his Medicaid eligibility evaluated or re-evaluated, if already Medicaid eligible, by the local DSS in the city or county in which he resides. This determination shall be completed at the same time the ~~Pre-admission Screening~~ preadmission screening (PAS) team completes its evaluation (via the use of the Uniform Assessment Instrument (UAI)) of whether the applicant meets waiver criteria. DMAS payment of waiver services shall be contingent upon the DSS' determination that the individual is eligible for Medicaid services for the dates that waiver services are to be provided and that DMAS or the designated service authorization contractor has authorized waiver enrollment and has prior authorized the services that will be required by the individual.

8. In order for an enrolled waiver individual to retain his enrolled status, tech waiver services must be used by the individual at least once every 30 days. Individuals who do not utilize tech waiver services at least once every 30 days shall be terminated from the waiver.

9. The waiver individual shall have a trained primary caregiver, as defined in 12VAC30-120-1700, who accepts responsibility for the individual's health, safety, and welfare. This primary caregiver shall be responsible for ~~a minimum of eight hours of the individual's care in a 24-hour period as well as~~ all hours not provided by ~~an~~ the provider agency's RN or ~~an~~ LPN. The name of the trained primary caregiver shall be documented in the provider agency records. This trained primary caregiver shall also have a back up system available in emergency situations.

B. Screening and community referral for authorization for tech waiver. Tech waiver services shall be considered only for individuals who are eligible for Medicaid and for admission to a specialized care nursing facility, ICF/ID, long-stay hospital, or acute care hospital when those individuals meet all the criteria for tech waiver admission. Such individuals, with the exception of those who are transferring into this tech waiver from a long-stay hospital, shall have been screened using the Uniform Assessment Instrument (UAI).

1. The screening team shall provide the individual and family or caregiver with the choice of tech waiver services or specialized care nursing facility or long-stay hospital placement, as appropriate, as well as the provider of those services from the time an individual seeks waiver information or application and referral. Such provision of choice includes the right to appeal pursuant to 12VAC30-110 when applicable.

2. The screening team shall explore alternative care settings and services to provide the care needed by the applicant being screened when Medicaid-funded home and community-based care services are determined to be the critical service necessary to delay or avoid facility placement.

3. Individuals must be screened to determine necessity for nursing facility placement if the individual is currently financially Medicaid eligible or anticipates that he will be financially eligible within 180 days of the receipt of nursing facility care or if the individual is at risk of nursing facility placement.

a. Such covered waiver services shall be critical, as certified by the participant's physician at the time of assessment, to enable the individual to remain at home and in the community rather than being placed in an institution. In order to meet criteria for tech waiver enrollment, the applicant requesting consideration for waiver enrollment must meet the level of care criteria.

b. Individuals who are younger than 21 years of age shall have the Technology Assisted Waiver Pediatric Referral ~~Form~~ form (DMAS-109) completed and must require substantial and ongoing nursing care as indicated by a minimum score of at least 50 points to qualify for waiver enrollment. This individual shall require a medical device and ongoing skilled PDN care by meeting the categories described in subdivision (1), (2), or (3) below:

(1) Applicants depending on mechanical ventilators;

(2) Applicants requiring prolonged intravenous administration of nutritional substances or drugs or requiring ongoing peritoneal dialysis; or

(3) Applicants having daily dependence on other device-based respiratory or nutritional support, including tracheostomy tube care, oxygen support, or tube feeding.

c. Individuals who are 21 years of age or older shall have the Technology Assisted Waiver Adult Referral ~~Form~~ form (DMAS-108) completed and must be determined to be dependent on a ventilator or must meet all eight specialized care criteria (12VAC30-60-320) for complex tracheostomy care in order to qualify for waiver enrollment.

4. When an applicant has been determined to meet the financial and waiver eligibility requirements and DMAS has verified the availability of the services for that individual and that the individual has no other payment sources for skilled PDN, tech waiver enrollment and entry into home and community-based care may occur.

~~5. Preadmission screenings are considered valid for the following time frames for all LTC services. The following time frames apply to individuals who have been screened but have not received either institutional or community-based services during the periods shown below:~~

~~a. Zero to six months: screenings are valid and do not require updates;~~

~~b. Six months to 12 months: screening updates are required; however, no additional reimbursement is made by DMAS; and~~

~~c. Over 12 months: a new screening is required. Additional reimbursement shall be made by DMAS for the repeated screening.~~

5. A PAS is considered valid for the following timeframes. The validity of a PAS applies to individuals who are screened, meet the criteria for long-term care services, but have not yet begun receiving services during the periods outlined in subdivisions 5 a through 5 f of this subsection.

a. Zero to 180 days. Screenings are valid and do not require revisions or a new screening.

b. 180 days to 12 months. Screening revisions are required; revisions may also be done if there is a significant change in an individual's medical or physical condition. Revisions should be entered into the ePAS system, per the Medicaid web portal instructions, resulting in a claim being generated for the screening revision. For the purposes of this subdivision, "Electronic preadmission screening" or "ePAS" means the automated system for use by all entities contracted by DMAS to perform preadmission screenings pursuant to § 32.1-330 of the Code of Virginia. DMAS will cover the cost of the PAS.

c. Over 12 months. A new screening is required and reimbursement is made by DMAS. New screenings must be entered into ePAS according to the Medicaid web portal instructions.

d. Break in services. When an individual starts and then stops services for a period of time exceeding 30 consecutive calendar days, the PAS team will need to complete a revised screening prior to service resumption if the individual has not received any Medicaid funded long-term care services during the break in service delivery. DMAS will cover the cost of the PAS.

e. In any other circumstances, including hospitalization, that cause services to cease or to be interrupted for more than 30 consecutive calendar days, the individuals shall be referred back to the local department of social services for redetermination of his Medicaid eligibility. The provider shall be responsible for notifying the local department of social services via the DMAS-225 form when there is an interruption of services for 30 consecutive calendar days or upon discharge from the provider's services.

f. If the individual has been receiving ongoing services either through a nursing facility or a home and community-based service program, the screening timeframes do not apply.

6. When an individual was not screened prior to admission to a specialized care nursing facility, or the individual resides in the community at the time of referral initiation to DMAS, the locality in which the individual resides at the time of discharge shall complete the preadmission screening prior to enrollment into the tech waiver.

7. DMAS shall be the final determining body for enrollment in the tech waiver and the determination of the number of approved skilled PDN hours for which DMAS will pay. DMAS has the ultimate responsibility for authorization of waiver enrollment and Medicaid skilled PDN reimbursement for tech waiver services.

C. Waiver individuals' rights and responsibilities. DMAS shall ensure that:

1. Each waiver individual shall receive, and the provider and provider staff shall provide, the necessary care and services, to the extent of provider availability, to attain or maintain the highest practicable physical, mental, and psychosocial well-being, in accordance with the individual's comprehensive assessment and POC.

2. Waiver individuals shall have the right to receive services from the provider with reasonable accommodation of the individuals' needs and preferences except when DMAS makes a determination that the health, safety, or welfare of the individuals or other waiver individuals would be endangered.

3. Waiver individuals formulate their own advance directives based on information that providers must give to adult waiver individuals at the time of their admissions to services.

4. All waiver individuals shall have the right to:

a. Voice grievances to the provider or provider staff without discrimination or reprisal. Such grievances include those with respect to treatment that has been furnished or has not been furnished;

b. Prompt efforts by the provider or staff, as appropriate, to resolve any grievances the waiver individual may have;

c. Be free from verbal, sexual, physical, and mental abuse, neglect, exploitation, and misappropriation of property;

d. Be free from any physical or chemical restraints of any form that may be used as a means of coercion, discipline, convenience, or retaliation and that are not required to treat the individual's medical symptoms; and

e. Their personal privacy and confidentiality of their personal and clinical records.

5. Waiver individuals shall be provided by their health care providers, at the time of their admission to this waiver, with written information regarding their rights to participate in medical care decisions, including the right to accept or refuse medical treatment and the right to formulate advance directives.

6. The legally competent waiver individual, the waiver individual's legal guardian, or the parent (natural, adoptive or foster) of the minor child shall have the right to:

a. Choose whether the individual wishes to receive home and community-based care waiver services instead of institutionalization in accordance with the assessed needs of the individual. The PAS team shall inform the individual of all available waiver service providers in the community in which the waiver individual resides. The tech waiver individual shall have the option of selecting the provider and services of his choice. This choice must be documented in the individual's medical record;

b. Choose his own primary care physician in the community in which he lives;

c. Be fully informed in advance about the waiver POC and treatment needs as well as any changes in that care or treatment that may affect the individual's well-being; and

d. Participate in the care planning process, choice, and scheduling of providers and services.

12VAC30-120-1720. Covered services; limits; changes to or termination of services.

A. Coverage statement.

1. These waiver services shall be medically necessary, cost-effective as compared to the costs of institutionalization, and necessary to maintain the individual safely in the community and prevent institutionalization.

2. Services shall be provided only to those individuals whose service needs are consistent with the service description and for which providers are available who have adequate and appropriate staffing to meet the needs of the individuals to be served.

3. All services covered through this waiver shall be rendered according to the individuals' POCs that have been certified by physicians as medically necessary and also reviewed by DMAS to enable the waiver enrolled individuals to remain at home or in the community.

4. Providers shall be required to refund payments received to DMAS if they (i) are found during any review to have billed Medicaid contrary to policy, (ii) have failed to maintain records to support their claims for services, or (iii) have billed for medically unnecessary services.

5. DMAS shall perform service authorization for skilled PDN services, PC for adults, and transition services. DMAS or the service authorization contractor shall perform service authorization for skilled private duty respite services, AT services and EM services.

6. When a particular service requires service authorization, reimbursement shall not be made until the service authorization is secured from either DMAS or the DMAS-designated service authorization contractor.

B. Covered services. Covered services shall include: skilled PDN; skilled private duty respite care; personal care only for adults, assistive technology; environmental modifications; and transition services only for individuals needing to move from a designated institution into the community or for waiver individuals who have already moved from an institution within 30 days of their transition. Coverage shall not be provided for these services for individuals who reside in any facilities enumerated in 12VAC30-120-1705. Skilled PDN shall be a required service. If an individual has no medical necessity for skilled PDN, he shall not be admitted to this waiver. All other services provided in this waiver shall be provided in conjunction with the provision of skilled PDN.

1. Skilled PDN, for a single individual and congregate group settings, as defined in 12VAC30-120-1700, shall be provided for waiver enrolled individuals who have serious medical conditions or complex health care needs. To receive this service, the individuals must require specific skilled and continuous nursing care on a regularly scheduled or intermittent basis performed by an RN or an LPN. Upon completion of the required screening and required assessments and a determination that the individual requires substantial and ongoing skilled nursing care and waiver enrollment then the PDN hours shall be authorized by the DMAS staff.

a. PDN services shall be rendered according to a POC authorized by DMAS and shall have been certified by a physician as medically necessary to enable the individual to remain at home.

b. No reimbursement shall be provided by DMAS for either RN or LPN services without signed physician orders that specifically identify skilled nursing tasks to be performed for the individual.

c. Limits placed on the amount of PDN that will be approved for reimbursement shall be consistent with the individual's ~~total points on the~~ age-appropriate ~~Tech Waiver Referral Form~~ technology assisted waiver referral form ~~(DMAS-108)~~ (DMAS-108 or DMAS-109) and medical necessity. ~~In~~ Except for a minor individual's care during his first 15 days following initial enrollment into this waiver, in no instances shall the individual's POC or ongoing multiple POCs result in coverage of more than ~~16 hours of PDN in a 24-hour period per household or~~

~~congregate group setting except for minor individuals during the first 15 calendar days after initial waiver admission, and where 16 scheduled PDN hours are not completed within a 24 hour period, the hours may be rescheduled and worked within the following 72 hours to support the primary caregiver~~ 112 hours of skilled PDN per week (Sunday through Saturday). The maximum number of approved hours authorized per week for minor children shall be based on their total approved points documented on the Technology Assisted Waiver Pediatric Referral form (DMAS-109). The maximum skilled PDN hours authorized per week for adult individuals shall be based on their technology and medical necessity justification documented on the Technology Assisted Waiver Adult Referral form (DMAS-108).

(1) The number of skilled PDN hours for minor individuals shall be based on the total technology and nursing score on the DMAS ~~Tech Waiver Staff Assessment~~ DMAS-109 form and updated by the DMAS staff when changes occur and with annual waiver eligibility redetermination by DMAS.

(2) Once the minor individual's composite score (total score) is derived, a LOC is designated for the individual as a Level A, B, or C. This LOC designation determines the maximum number of hours per ~~day~~ week of skilled PDN that DMAS may allocate for a pediatric individual. Any hours beyond the approved maximum for such individual's LOC ~~must~~ shall be medically necessary and service authorized by DMAS. Any POC submitted without approval for hours beyond the approved maximum for any particular LOC will only be entered for the approved maximum for that LOC.

(3) The results of the scoring assessment determine the maximum amount of hours available and authorization shall occur as follows:

(a) 50 – 56 points = ~~10 hours per day~~ 70 hours per week.

(b) 57 – 79 points = ~~12 hours per day~~ 84 hours per week.

(c) 80 points or greater = ~~16 hours per day~~ 112 hours per week.

~~(3)~~ (4) For minor individuals, whether living separately or in a congregate setting, during the first 15 calendar days after such individuals' initial admission to the waiver, skilled PDN may be covered for up to 24-hours per day, if required and appropriate to assist the family in adjustment to the care associated with technology assistance. After these first 15 calendar days, skilled PDN shall be reimbursed up to ~~a~~ the maximum ~~of 16 hours per 24-hour period per household~~ allowable hours per week based on the individual's total technology and nursing scores and provided that the aggregate cost-effectiveness standard is not exceeded for the individual's care.

~~(4)~~ (5) When reimbursement is to be made for skilled PDN services to be provided in schools, the nurse shall be in the same room as the waiver individual for the hours of skilled PDN care billed. When an individual receives skilled PDN while attending school, the total skilled PDN hours shall not exceed the authorized number of hours under his nursing score category on the Technology Assisted Waiver Pediatric Referral ~~Form~~ form (DMAS-109).

~~(5) The making up or trading of any missed authorized hours of care may be done within the same week (Sunday through Saturday) of the missed scheduled shift but the total hours made up, including for any day, shall not exceed 16 hours per day for any reason.~~

(6) For adult individuals, whether living separately or in a congregate ~~group~~ setting, skilled PDN shall be reimbursed up to a maximum of ~~16 hours within a 24-hour period per~~ 112 hours per week (Sunday through Saturday) per tech waiver individual living in the household based on the individual's ~~total~~ technology and ~~nursing scores~~ medical justification and provided that the aggregate cost-effectiveness standard is not exceeded for the individual's care.

(7) The adult individual shall be determined to need a medical device and ongoing skilled nursing care when such individual meets Category A or all eight criteria in Category B:

(a) Category A. Individuals who depend on mechanical ventilators; or

(b) Category B. Individuals who have a complex tracheostomy as defined by:

(i) Tracheostomy with the potential for weaning off of it, or documentation of attempts to wean, with subsequent inability to wean;

(ii) Nebulizer treatments ordered at least four times a day or nebulizer treatments followed by chest physiotherapy provided by a nurse or respiratory therapist at least four times a day;

(iii) Pulse oximetry monitoring at least every shift due to unstable oxygen saturation levels;

(iv) Respiratory assessment and documentation every shift by a licensed respiratory therapist or nurse;

(v) Have a physician's order for oxygen therapy with documented usage;

(vi) Receives tracheostomy care at least daily;

(vii) Has a physician's order for tracheostomy suctioning; and

(viii) Deemed at risk to require subsequent mechanical ventilation.

(8) Skilled PDN services shall be available to individuals in their primary residence with some community

integration (e.g., medical appointments and school) permitted.

(9) Skilled PDN services may include consultation and training for the primary caregiver.

d. The provider shall be responsible for notifying DMAS should the primary residence of the individual be changed, should the individual be hospitalized, should the individual die, or should the individual be out of the Commonwealth for 48 hours or more.

e. Exclusions from DMAS' coverage of skilled PDN:

(1) This service shall not be authorized when intermittent skilled nursing visits could be satisfactorily utilized while protecting the health, safety, and welfare of the individual.

(2) Skilled PDN hours shall not be reimbursed while the individual is receiving emergency care or during emergency transport of the individual to such facilities. The RN or LPN shall not transport the waiver individual to such facilities.

(3) Skilled PDN services may be ordered but shall not be provided simultaneously with PDN respite care or personal care services as described in ~~12VAC30-120-1720~~ this section.

(4) Parents (natural, adoptive, legal guardians), spouses, siblings, grandparents, grandchildren, adult children, other legal guardians, or any person living under the same roof with the individual shall not provide skilled PDN services for the purpose of Medicaid reimbursement for the waiver individual.

(5) Providers shall not bill prior to receiving the physician's dated signature on the individual's POC for services provided and the DMAS staff's authorization/determination of skilled PDN hours.

(6) Time spent driving the waiver individual shall not be reimbursed by DMAS.

f. Congregate skilled PDN.

(1) If more than one waiver individual will reside in the home, the same waiver provider or providers shall be chosen to provide all skilled PDN services for all waiver individuals in the home.

(2) Only one nurse shall be authorized to care for no more than two waiver individuals in such arrangements. In instances when three waiver individuals share a home, nursing ratios shall be determined by DMAS or its designated agent based on the needs of all the individuals who are living together. These congregate skilled PDN hours shall be at the same scheduled shifts.

(3) The primary caregiver shall be shared and shall be responsible for providing ~~at least eight hours of skilled PDN care per 24 hours as well as all skilled PDN~~ all care needs ~~in the absence of the provider agency~~ when a private duty nurse is not available.

(4) DMAS shall not reimburse for skilled PDN services through the tech waiver and skilled PDN services through the EPSDT benefit for the same individual at the same time.

2. Skilled private duty respite care services. Skilled private duty respite care services may be covered for a maximum of 360 hours per calendar year ~~regardless of waiver~~ for individuals who are qualified for tech waiver services and regardless of whether the waiver individual changes waivers and ~~who have a~~ whose primary caregiver ~~who~~ requires temporary or intermittent relief from the burden of caregiving.

a. This service shall be provided by skilled nursing staff licensed to practice in the Commonwealth under the direct supervision of a licensed, certified, or accredited home health agency and with which DMAS has a provider agreement to provide skilled PDN.

b. Skilled private duty respite care services shall be comprised of both skilled and hands-on care of either a supportive or health-related nature and ~~may include, but shall not be limited to~~ includes (i) all skilled nursing care as ordered on the physician-certified POC, (ii) assistance with ~~ADLs/IADLs~~ ADLs and IADLs, (iii) administration of medications or other medical needs, and (iv) monitoring of the health status and physical condition of the individual or individuals.

c. When skilled private duty respite services are offered in conjunction with skilled PDN, the same individual record may be used with a separate section for skilled private duty respite services documentation.

d. Individuals who are living in congregate arrangements shall be permitted to share skilled private duty respite care service providers. The same limits on this service in the congregate setting ~~(360~~ (360 hours per calendar year per household) shall apply ~~regardless of the waiver~~.

e. Skilled private duty respite care services shall be provided in the individual's primary residence as is designated upon admission to the waiver.

3. Assistive technology (AT) services. Assistive technology, as defined in 12VAC30-120-1700, devices shall be portable and shall be authorized per calendar year.

a. AT services shall be available for enrolled waiver individuals who are receiving skilled PDN. AT services are the specialized medical equipment and supplies, including those devices, controls, or appliances, specified in the individual's plan of care, but that are not available under the State Plan for Medical Assistance, that enable waiver individuals to increase their abilities to perform ADLs/IADLs, or to perceive, control, or communicate with the environment in which they live. This service includes ancillary supplies and equipment necessary to the proper functioning of such items.

b. An independent, professional consultation shall be obtained from qualified professionals who are knowledgeable of that item for each AT request prior to approval by DMAS or the designated service authorization contractor. Individual professional consultants include speech/language therapists, physical therapists, occupational therapists, physicians, certified rehabilitation engineers or rehabilitation specialists. A prescription shall not meet the standard of an assessment.

c. In order to qualify for these services, the individual must have a demonstrated need for equipment for remedial or direct medical benefit primarily in the individual's primary residence or primary vehicle to specifically serve to improve the individual's personal functioning.

d. AT shall be covered in the least expensive, most cost-effective manner. The cost of AT services shall be included in the total cost of waiver services.

e. Service units and service limitations. AT equipment and supplies shall not be rented but shall be purchased through a Medicaid-enrolled durable medical equipment provider.

(1) The service unit is always one, for the total cost of all AT being requested for a specific timeframe. The maximum Medicaid-funded expenditure per individual for all AT covered procedure codes combined shall be $5,000 per individual per calendar year.

(2) The cost for AT shall not be carried over from one calendar year to the next. Each item must be service authorized by either DMAS or the DMAS designated contractor for each calendar year.

(3) Unexpended portions of the maximum amount shall not be accumulated across one or more calendar years to be expended in a later year.

(4) Shipping/freight/delivery charges are not billable to DMAS or the waiver individual, as such charges are considered noncovered items.

(5) All products must be delivered, demonstrated, installed and in working order prior to submitting any claim for them to Medicaid.

(6) The date of service on the claim shall be within the service authorization approval dates, which may be prior to the delivery date as long as the initiation of services commenced during the approved dates.

(7) The service authorization shall not be modified to accommodate delays in product deliveries. In such situations, new service authorizations must be sought by the provider.

(8) When two or more waiver individuals live in the same home or congregate living arrangement, the AT shall be shared to the extent practicable consistent with the type of AT.

f. AT exclusions.

(1) Medicaid shall not reimburse for any AT devices or services that may have been rendered prior to authorization from DMAS or the designated service authorization contractor.

(2) Providers of AT shall not be spouses, parents (natural, adoptive, or foster), or stepparents of the individual who is receiving waiver services. Providers that supply AT for the waiver individual may not perform assessments/consultation or write specifications for that individual. Any request for a change in cost (either an increase or a decrease) requires justification and supporting documentation of medical need and service authorization by DMAS or the designated service authorization contractor. The vendor shall receive a copy of the professional evaluation in order to purchase the items recommended by the professional. If a change is necessary then the vendor shall notify the assessor to ensure the changed items meet the individual's needs.

(3) All equipment or supplies already covered by ~~a service provided for in~~ the State Plan shall not be purchased under the waiver as AT. Such examples ~~are, but shall not necessarily be limited to~~ include:

(a) Specialized medical equipment, durable or nondurable medical equipment (DME), ancillary equipment, and supplies necessary for life support;

(b) Adaptive devices, appliances, and controls that enable an individual to be more independent in areas of personal care and ADLs/IADLs; and

(c) Equipment and devices that enable an individual to communicate more effectively.

(4) AT services shall not be approved for purposes of the convenience of the caregiver, restraint of the individual, recreation or leisure, educational purposes, or diversion activities. Examples of these types of items shall be listed in DMAS guidance documents.

4. Environmental modifications services shall be covered as defined in 12VAC30-120-1700. Medicaid reimbursement shall not occur before service authorization of EM services is completed by DMAS or the DMAS-designated service authorization contractor. EM services shall entail limited physical adaptations to preexisting structures and shall not include new additions to an existing structure that simply increase the structure's square footage.

a. In order to qualify for EM services, the individual shall have a demonstrated need for modifications of a remedial nature or medical benefit to the primary residence to specifically improve the individual's personal functioning. Such modifications may include, but shall not necessarily be limited to, the installation of ramps and grab-bars, widening of doorways and other adaptations to accommodate wheelchairs, modification of

bathroom facilities to accommodate wheelchairs (but not strictly for cosmetic purposes), or installation of specialized electrical and plumbing systems required to accommodate the medical equipment and supplies that are necessary for the individual's welfare. Modifications may include a generator for waiver individuals who are dependent on mechanical ventilation for 24 hours a day and when the generator is used to support the medical equipment and supplies necessary for the individual's welfare.

b. EM shall be available costing up to a maximum amount of $5,000 per calendar year regardless of waiver for individuals who are receiving skilled PDN services.

c. Costs for EM shall not be carried over from one calendar year to the next year. Each item shall be service authorized by DMAS or the DMAS-designated agent for each calendar year. Unexpended portions of this maximum amount shall not be accumulated across one or more years to be expended in a later year.

d. When two or more waiver individuals live in the same home or congregate living arrangement, the EM shall be shared to the extent practicable consistent with the type of requested modification.

e. Only the actual cost of material and labor is reimbursed. There shall be no additional markup.

f. EM shall be carried out in the most cost-effective manner possible to achieve the goal required for the individual's health, safety, and welfare. The cost of EM waiver services shall be included in the individual's costs of all other waiver services, which shall not exceed the total annual cost for placement in an institution.

g. All services shall be provided in the individual's primary residence in accordance with applicable state or local building codes and appropriate permits or building inspections, which shall be provided to DMAS or the DMAS contractor.

h. Proposed modifications that are to be made to rental properties must have prior written approval of the property's owner. Modifications to rental properties shall only be valid if it is an independently operated rental facility with no direct or indirect ties to any other Medicaid service provider.

i. Modifications may be made to a vehicle if it is the primary vehicle used by the individual. This service shall not include the purchase of or the general repair of vehicles. Repairs of modifications that have been reimbursed by DMAS shall be covered.

j. The EM provider shall ensure that all work and products are delivered, installed, and in good working order prior to seeking reimbursement from DMAS. The date of service on this provider's claim shall be within the service authorization approval dates, which may be prior to the completion date as long as the work commenced during the approval dates. The service authorization shall not be modified to accommodate installation delays. All requests for cost changes (either increases or decreases) shall be submitted to DMAS or the DMAS-designated service authorization contractor for revision to the previously issued service authorization and shall include justification and supporting documentation of medical needs.

k. EM exclusions.

(1) There shall be no duplication of previous EM services within the same residence such as (i) multiple wheelchair ramps or (ii) previous modifications to the same room. There shall be no duplication of EM within the same plan year.

(2) Adaptations or improvements to the primary home that shall be excluded are of general utility and are not of direct medical or remedial benefit to the waiver individual, such as, but not necessarily limited to, carpeting, flooring, roof repairs, central air conditioning or heating, general maintenance and repairs to a home, additions or maintenance of decks, maintenance/replacement or addition of sidewalks, driveways, carports, or adaptations that only increase the total square footage of the home.

(3) EM shall not be covered by Medicaid for general leisure or diversion items or those items that are recreational in nature or those items that may be used as an outlet for adaptive/maladaptive behavioral issues. Such noncovered items may include, but shall not necessarily be limited to, swing sets, playhouses, climbing walls, trampolines, protective matting or ground cover, sporting equipment or exercise equipment, such as special bicycles or tricycles.

(4) EM shall not be approved for Medicaid coverage when the waiver individual resides in a residential provider's facility program, such as sponsored homes and congregate residential and supported living settings. EM shall not be covered by Medicaid if, for example, the Fair Housing Act (42 USC § 3601 et seq.), the Virginia Fair Housing Law (§ 36-96.1 et seq. of the Code of Virginia) or the Americans with Disabilities Act (42 USC § 12101 et seq.) requires the modification and the payment for such modifications are to be made by a third party.

(5) EM shall not include the costs of removal or disposal, or any other costs, of previously installed modifications, whether paid for by DMAS or any other source.

(6) Providers of EM shall not be the waiver individual's spouse, parent (natural, adoptive, legal guardians), other legal guardians, or conservator. Providers who supply EM to waiver individuals shall not perform assessments/consultations or write EM specifications for such individuals.

5. Personal care (PC) services as defined in 12VAC30-120-1700, shall be covered for individuals older than 21 years of age who have a demonstrated need for assistance with ADLs and IADLs and who have a trained primary caregiver for skilled PDN interventions during portions of their day. PC services shall be rendered by a provider who has a DMAS provider agreement to provide PC, home health care, or skilled PDN. Due to the complex medical needs of this waiver population and the need for 24-hour supervision, the trained primary caregiver shall be present in the home and rendering the required skilled services during the entire time that the PCA is providing nonskilled care.

a. PC services are either of a supportive or health-related nature and ~~may include, but are not limited to~~ include assistance with ADLs/IADLs, community access (such as, but not necessarily limited to, going to medical appointments), monitoring of self-administration of medication or other medical needs, and monitoring of health status and physical condition. In order to receive PC, the individual must require assistance with ADLs/IADLs. When specified in the POC, PC services may also include assistance with IADLs to include making or changing beds, and cleaning areas used by the individual. Assistance with IADLs must be essential to the health and welfare of the individual, rather than the individual's representative, as applicable.

(1) The unit of service for PC services shall be one hour. The hours that may be authorized by DMAS or the designated service authorization contractor shall be based on the individual's need as documented in the individual's POC and assessed on the Technology Assisted Waiver Adult Aide Plan of Care (DMAS-97 T).

(2) Supervision of the waiver individual shall not be covered as part of the tech waiver personal care service.

(3) Individuals may have skilled PDN, PC, and skilled private duty nursing respite care in their plans of care but shall not be authorized to receive these services simultaneously.

b. PC services shall not include either practical or professional nursing services or those practices regulated in Chapters 30 (§ 54.1-3000 et seq.) and 34 (§ 54.1-3400 et seq.) of Title 54.1 of the Code of Virginia, as appropriate, with the exception of skilled nursing tasks that may be delegated in accordance with Part VIII (18VAC90-20-420 et seq.). The PCA may perform ADL functions such as assistance to the primary caregiver but shall not perform any nursing duties or roles except as permitted by Part VIII (18VAC90-20-420 et seq.). At a minimum, the staff providing PC must have been certified through coursework as either PCAs or home health aides.

c. DMAS will pay for any PC services that the ~~PC aide~~ PCA gives to individuals to assist them in preparing for school or when they return home. DMAS shall not pay for the ~~PC aide~~ PCA to assist the individual with any functions related to the individual completing post-secondary school functions or for supervision time during school.

d. PC exclusions.

(1) Time spent driving the waiver individual shall not be reimbursed.

(2) Regardless of the combination of skilled PDN and PC hours, the total combined number of hours that shall be reimbursed by DMAS in a ~~24-hour period~~ week shall not exceed ~~16~~ 112 hours.

(3) The consumer-directed services model shall not be covered for any services provided in the tech waiver.

(4) Spouses, parents (natural, adoptive, legal guardians), siblings, grandparents, grandchildren, adult children, other legal guardians, or any person living under the same roof with the individual shall not provide PC services for the purpose of Medicaid reimbursement for the waiver individual.

6. Transition services shall be covered two ways: (i) as defined at 12VAC30-120-1700 to provide for applicants to move from institutional placements to community private homes and shall be service authorized by DMAS or the designated service authorization contractor in order for reimbursement to occur, and (ii) for applicants who have already moved from an institution to the community within 30 days of their transition. The applicant's transition from an institution to the community shall be coordinated by the facility's discharge planning team. The discharge planner shall coordinate with the DMAS staff to ensure that technology assisted waiver eligibility criteria shall be met.

a. Transition services shall be service authorized by DMAS or its designated service authorization contractor in order for reimbursement to occur. ~~These services shall include those set out in the MFP demonstration.~~

b. For the purposes of transition funding for the technology assisted waiver, an institution means an ICF/ID, a specialized care nursing facility or a long-stay hospital as defined at 42 CFR 435.1009. Transition funding shall not be available for individuals who have been admitted to an acute care hospital.

~~c. When the Money Follows the Person demonstration is terminated or expires by federal action, the portion of this service covered through MFP shall also terminate. The remaining transition services shall continue until modified.~~

C. Changes to services or termination of services.

1. DMAS or its designated agent shall have the final authority to approve or deny a requested change to an individual's skilled PDN and PC hours. Any request for an increase to an individual's skilled PDN or PC hours that exceeds the number of hours allowed for that individual's

LOC shall be service authorized by DMAS staff and accompanied by adequate documentation justifying the increase.

a. The provider may decrease the amount of authorized care if the revised skilled PDN hours are appropriate and based on the needs of the individual. The provider agency shall work with the DMAS staff for coordination and final approval of any decrease in service delivery. A revised tech waiver skilled PDN authorization shall be completed by DMAS for final authorization and forwarded to the provider agency.

b. The provider shall be responsible for documenting in writing the physician's verbal orders and for inclusion of the changes on the recertification POC in accordance with the DMAS skilled private duty nursing authorization. The provider agency's RN supervisor, who is responsible for supervising the individual's care, shall use a person-centered approach in discussing the change in care with the individual and the individual's representative to include documentation in the individual's record. The DMAS staff or the DMAS designated service authorization contractor shall notify in writing the individual or the individual's representative of the change.

c. The provider shall be responsible for submitting the DMAS-225 form to the local department of social services when the following situations occur: (i) when Medicaid eligibility status changes; (ii) when the individual's level of care changes; (iii) when the individual is admitted to or discharged from an institution, a home and community-based waiver, or a provider agency's care; (iv) the individual dies; or (v) any other information that causes a change in the individual's eligibility status or patient pay amounts.

2. At any time the individual no longer meets LOC criteria for the waiver, termination of waiver enrollment shall be initiated by DMAS staff who is assigned to the individual. In such instances, DMAS shall forward the DMAS-225 form to the local department of social services.

3. In an emergency situation when the health, safety, or welfare of the provider staff is endangered, the provider agency may immediately initiate discharge of the individual and contact the DMAS staff. The provider must issue written notification containing the reasons for and the effective date of the termination of services. The written notification period in subdivision 4 of this subsection shall not be required. Other entities (e.g., licensing authorities, APS, CPS) shall also be notified as appropriate. A copy of this letter shall be forwarded to the DMAS staff within five business days of the letter's date.

4. In a nonemergency situation (i.e., when the health, safety, or welfare of the waiver individual or provider personnel is not endangered), the provider shall provide the individual and the individual's representative 14 calendar days' written notification (plus three days to allow for mail transmission) of the intent to discharge the individual from agency services. Written notification shall provide the reasons for and the effective date of the termination of services as well as the individual's appeal rights. A copy of the written notification shall also be forwarded to the DMAS staff within five business days of the date of the notification.

5. Individuals who no longer meet the tech waiver criteria as certified by the physician for either children or adults shall be terminated from the waiver. In such cases, a reduction in skilled PDN hours may occur that shall not exceed two weeks in duration as long as such skilled PDN was previously approved in the individual's POC. The agency provider of skilled PDN for such individuals shall document with DMAS the decrease in skilled PDN hours and prepare for cessation of skilled PDN hours and waiver services.

6. When a waiver individual, regardless of age, requires admission to a specialized care nursing facility or long-stay hospital, the individual shall be discharged from waiver services while he is in the specialized care nursing facility or long-stay hospital. Readmission to waiver services may resume once the individual has been discharged from the specialized care nursing facility or long-stay hospital as long as the waiver eligibility and medical necessity criteria continue to be met. For individuals 21 years of age and older, the individual shall follow the criteria for specialized care nursing facility admission. For individuals who are younger than 21 years of age, the individual shall follow the criteria for long-stay hospital admissions as well as the age appropriate criteria.

7. When a waiver individual, regardless of age, requires admission to ~~a~~ an acute care hospital for 30 days or more, the individual shall be discharged from waiver services ~~while he is in the hospital~~. When such hospitalization exceeds 30 days and upon hospital discharge, readmission to waiver services ~~requires a~~ is required. Such readmission requires reassessment by the ~~PAS~~ discharge team ~~for~~ and a determination that the individual ~~currently meets~~ continues to meet Medicaid eligibility, ~~functional~~ level of care criteria~~,~~ and ~~specialized nursing facility waiver criteria~~ medical criteria on the DMAS-108 or DMAS-109 form, as appropriate. If these criteria are met, the individual shall be readmitted to waiver services. For adults, ages 21 years and older, the individual shall meet the criteria for specialized care admissions. For children, younger than 21 years of age, the individual shall meet the criteria for long-stay hospital admissions and the age appropriate criteria.

8. Waiver individuals, regardless of age, who require admission to any type of acute care facility for less than 30 days shall, upon discharge from such acute care facility, be eligible for waiver services as long as all other requirements continue to be met.

12VAC30-120-1730. General requirements for participating providers.

A. All agency providers shall sign the appropriate technology assisted waiver provider agreement in order to bill and receive Medicaid payment for services rendered. Requests for provider enrollment shall be reviewed by DMAS to determine whether the provider applicant meets the requirements for Medicaid participation and demonstrates the abilities to perform, at a minimum, the following activities:

1. Be able to render the medically necessary services required by the waiver individuals. Accept referrals for services only when staff is available and qualified to initiate and perform the required services on an ongoing basis.

2. Assure the individual's freedom to reject medical care and treatment.

3. Assure freedom of choice to individuals in seeking medical care from any institution, pharmacy, or practitioner qualified to perform the service or services that may be required and participating in the Medicaid program at the time the service or services are performed.

4. Actively involve the individual and the authorized representative, as applicable, in the assessment of needs, strengths, goals, preferences, and abilities and incorporate this information into the person-centered planning process. A provider shall protect and promote the rights of each individual for whom he is providing services and shall provide for each of the following individual rights:

a. The individual's rights are exercised by the person appointed under state law to act on the individual's behalf in the case of an individual adjudged incompetent under the laws of the Commonwealth by a court of competent jurisdiction.

b. The individual, who has not been adjudged incompetent by the state court, may designate any legal-surrogate in accordance with state law to exercise the individual's rights to the extent provided by state law.

c. The individual shall have the right to receive services from the provider with reasonable accommodation of individual needs and preferences, except when the health or safety of the individual or other waiver individuals would be endangered.

5. Perform a criminal background check on all employees, including the business owner, who may have any contact or provide services to the waiver individual. Such record checks shall be performed by the Virginia State Police for the Commonwealth. When the Medicaid individual is a minor child, searches shall also be made of the Virginia CPS Central Registry.

a. Provider documentation of the results of these searches must be made available upon request of DMAS or its authorized representatives. Persons convicted of having committed barrier crimes as defined in § 32.1-162.9:1 of the Code of Virginia shall not render services to waiver individuals for the purposes of seeking Medicaid reimbursement.

b. Persons having founded dispositions in the CPS Central Registry at DSS shall not be permitted to render services to children in this waiver and seek Medicaid reimbursement. Medicaid reimbursement shall not be made for providers' employees who have findings with the Virginia Board of Nursing of the Department of Health Professions concerning abuse, neglect, or mistreatment of individuals or misappropriation of their property.

6. Screen all new and existing employees and contractors to determine whether any of them have been excluded from participation in federal programs. Search the HHS-OIG List of Excluded Individuals and Entities (LEIE) website monthly by name for employees, contractors and entities to validate the eligibility of such persons and entities for federal programs.

a. Immediately report to DMAS any exclusion information identified.

b. Such information shall be sent in writing and shall include the individual or business name, provider identification number (if applicable), and what, if any, action has been taken to date.

c. Such information shall be sent to: DMAS, ATTN: Program Integrity/Exclusions, 600 E. Broad St., Suite 1300, Richmond, VA 23219 or emailed to providerexclusion@dmas.virginia.gov.

7. Provide services and supplies to individuals in full compliance with Title VI of the Civil Rights Act of 1964, as amended (42 USC § 2000 et seq.), which prohibits discrimination on the grounds of race, color, religion, or national origin; the Virginians with Disabilities Act (§ 51.5-1 et seq. of the Code of Virginia); § 504 of the Rehabilitation Act of 1973, as amended (29 USC § 794), which prohibits discrimination on the basis of a disability; and the ADA of 1990, as amended (42 USC § 12101 et seq.), which provides comprehensive civil rights protections to individuals with disabilities.

8. Report all suspected violations, pursuant to § 63.2-100, §§ 63.2-1508 through 63.2-1513, and § 63.2-1606 et seq. of the Code of Virginia, involving mistreatment, neglect, or abuse, including injuries of an unknown source, and misappropriation of individual property to either CPS, APS, or other officials in accordance with state law. Providers shall also train their staff in recognizing all types of such injuries and how to report them to the appropriate authorities. Providers shall ensure that all employees are aware of the requirements to immediately report such suspected abuse, neglect, or exploitation to APS, CPS or human rights, as appropriate.

9. Notify DMAS or its designated agent immediately, in writing, of any change in the information that the provider previously submitted to DMAS. When ownership of the provider changes, notify DMAS at least 15 calendar days before the date of such a change.

10. Provide services and supplies to individuals in full compliance of the same quality and in the same mode of delivery as are provided to the general public. Submit charges to DMAS for the provision of services and supplies to individuals in amounts not to exceed the provider's usual and customary charges to the general public.

11. Accept as payment in full the amount established and reimbursed by DMAS' payment methodology beginning with individuals' authorization dates for the waiver services. The provider shall not attempt to collect from the individual or the individual's responsible relative or relatives any amount the provider may consider a balance due amount or an uncovered amount. Providers shall not collect balance due amounts from individuals or individuals' responsible relatives even if such persons are willing to pay such amounts. Providers shall not bill DMAS, individuals or their responsible relatives for broken or missed appointments.

12. Collect all applicable patient pay amounts pursuant to 12VAC30-40-20, 12VAC30-40-30, 12VAC30-40-40, 12VAC30-40-50, and 12VAC30-40-60.

13. Use only DMAS-designated forms for service documentation. The provider shall not alter the required DMAS forms in any manner unless DMAS' approval is obtained prior to using the altered forms.

14. Not perform any type of direct-marketing activities to Medicaid individuals.

15. Furnish access to the records of individuals who are receiving Medicaid services and furnish information, on request and in the form requested, to DMAS or its designated agent or agents, the Attorney General of Virginia or his authorized representatives, the state Medicaid Fraud Control Unit, the State Long-Term Care Ombudsman and any other authorized state and federal personnel. The Commonwealth's right of access to individuals receiving services and to provider agencies and records shall survive any termination of the provider agreement.

16. Disclose, as requested by DMAS, all financial, beneficial, ownership, equity, surety, or other interests in any and all firms, corporations, partnerships, associations, and business enterprises, joint ventures, agencies, institutions, or other legal entities providing any form of services to participants of Medicaid.

17. Pursuant to 42 CFR 431.300 et seq. and § 32.1-325.3 of the Code of Virginia, all information associated with a waiver applicant or individual that could disclose the individual's identity is confidential and shall be safeguarded. Access to information concerning waiver applicants or individuals shall be restricted to persons or agency representatives who are subject to the standards of confidentiality that are consistent with that of the agency, and any such access must be in accordance with the provisions found in 12VAC30-20-90.

18. Meet staffing, financial solvency, disclosure of ownership, assurance of comparability of services requirements, and other requirements as specified in the provider's written program participation agreement with DMAS.

19. Maintain and retain business and professional records sufficient to document fully and accurately the nature, scope, and details of the services provided fully and accurately with documentation necessary to support services billed. Failure to meet this requirement may result in DMAS' recovery of expenditures resulting from claims payment.

20. Maintain a medical record for each individual who is receiving waiver services. Failure to meet this requirement may result in DMAS recovering expenditures made for claims paid that are not adequately supported by the provider's documentation.

21. Retain business and professional records at least six years from the last date of service or as provided by applicable federal and state laws, whichever period is longer. However, if an audit is initiated within the required retention period, the records shall be retained until the audit is completed and every exception resolved. Policies regarding retention of records shall apply even if the provider discontinues operation. DMAS shall be notified in writing of the storage location and procedures for obtaining records for review should the need arise. The location, agent, or trustee shall be within the Commonwealth.

22. Retain records of minors for at least six years after such minors have reached 21 years of age.

23. Ensure that all documentation in the individual's record is completed, signed, and dated with the name or names of the person or persons providing the service and the appropriate title, dated with month, day, and year, and in accordance with accepted professional practice. This documentation shall include the nurses' or PCAs', as appropriate, arrival and departure times for each shift that is worked.

24. Begin PDN services for which it expects reimbursement only when the admission packet is received and DMAS' authorization for skilled PDN services has been given. This authorization shall include the enrollment date that shall be issued by DMAS staff. It shall be the provider agency's responsibility to review and ensure the receipt of a complete and accurate screening packet.

25. Ensure that there is a backup caregiver who accepts responsibility for the oversight and care of the individual in order to ensure the health, safety, and welfare of the individual when the primary caregiver is ill, incapacitated, or using PDN respite. Documentation in the medical record shall include this backup caregiver's name and phone number.

26. Notify the DMAS staff every time the waiver individual's primary residence changes.

27. Ensure that minimum qualifications of provider staff are met as follows:

a. All RN and LPN employees shall have a satisfactory work record, as evidenced by at least two references from prior job experiences. In lieu of this requirement for personal care aides only, employees who have worked for only one employer shall be permitted to provide two personal references. Providers who are not able to obtain previous job references about personal care aides shall retain written documentation showing their good faith efforts to obtain such references in the new employee's work record.

b. Staff and agencies shall meet any certifications, licensure, or registration, as applicable and as required by applicable state law. Staff qualifications shall be documented and maintained for review by DMAS or its designated agent. All additional provider requirements as may be required under a specific waiver service in this part shall also be met.

c. ~~In addition, the RN as well as all nurses~~ All RNs and LPNs providing ~~the~~ skilled PDN ~~service~~ services shall be currently ~~and validly~~ licensed to practice nursing in the Commonwealth ~~and have at least six months of related clinical experience, which may include work in acute care hospitals, long stay hospitals, rehabilitative hospitals or specialized care nursing facilities~~. The LPN shall be under the direct supervision of an RN.

d. ~~The RN supervisor shall be currently licensed to practice nursing in the Commonwealth and have at least one year of related clinical nursing experience, which may include work in an acute care hospital, long stay hospital, rehabilitation hospital, or specialized care nursing facility.~~ All RNs and LPNs who provide skilled PDN services shall have either (i) at least six months of related clinical experience as documented in their history, which may include work in acute care hospitals, long-stay hospitals, rehabilitation hospitals, or specialized care nursing facilities, or (ii) completed a provider training program related to the care and technology needs of the assigned tech waiver individual.

e. Training programs established by providers shall include, at a minimum, the following:

(1) Trainers (either RNs or respiratory therapists) shall have at least six months hands-on successful experience in the areas in which they provide training, such as ventilators, tracheostomies, peg tubes, and nasogastric tubes.

(2) Training shall include classroom time as well as direct hands-on demonstration of mastery of the specialized skills required to work with individuals in the technology assisted waiver by the trainee.

(3) The training program shall include the following subject areas as they relate to the care to be provided by the tech waiver nurse: (i) human anatomy and physiology, (ii) medications frequently used by technology dependent individuals, (iii) emergency management, and (iv) the operation of the relevant equipment.

(4) Providers shall assure the competency and mastery of the skills necessary to successfully care for tech waiver individuals by the nurses prior to assigning them to a tech waiver individual. Documentation of successful completion of such training course and mastery of the specialized skills required to work with individuals in the technology assisted waiver shall be maintained in the provider's personnel records. This documentation shall be provided to DMAS upon request.

f. The RN supervisor shall be currently licensed to practice nursing in the Commonwealth and have at least one year of related clinical nursing experience, which may include work in an acute care hospital, long-stay hospital, rehabilitation hospital, or specialized care nursing facility.

B. DMAS shall have the authority to require the submission of any other medical documentation or information as may be required to complete a decision for a waiver individual's eligibility, waiver enrollment, or coverage for services.

1. Review of individual-specific documentation shall be conducted by DMAS or its designated agent. This documentation shall contain, up to and including the last date of service, all of the following, as may be appropriate for the service rendered:

a. All supporting documentation, including physicians' orders, from any provider rendering waiver services for the individual;

b. All assessments, reassessments, and evaluations (including the complete UAI screening packet or risk evaluations) made during the provision of services, including any required initial assessments by the RN supervisor completed prior to or on the date services are initiated and changes to the supporting documentation by the RN supervisor;

c. Progress notes reflecting individual's status and, as appropriate, progress toward the identified goals on the POC;

d. All related communication with the individual and the family/caregiver, the designated agent for service

authorization, consultants, DMAS, DSS, formal and informal service providers, referral to APS or CPS and all other professionals concerning the individual, as appropriate;

e. Service authorization decisions performed by the DMAS staff or the DMAS-designated service authorization contractor;

f. All POCs completed for the individual and specific to the service being provided and all supporting documentation related to any changes in the POCs; and

g. Attendance logs documenting the date and times services were rendered, the amount and type of services rendered and the dated professional signature with title.

2. Review of provider participation standards and renewal of provider agreements. DMAS shall be responsible for ensuring continued adherence to provider participation standards by conducting ongoing monitoring of compliance.

a. DMAS shall recertify each provider for agreement renewal, contingent upon the provider's timely license renewal, to provide home and community-based waiver services.

b. A provider's noncompliance with DMAS policies and procedures, as required in the provider agreement, may result in a written request from DMAS for a corrective action plan that details the steps the provider shall take and the length of time required to achieve full compliance with the corrective action plan that shall correct the cited deficiencies.

c. A provider that has been convicted of a felony, or who has otherwise pled guilty to a felony, in Virginia or in any other of the 50 states, the District of Columbia, or the U.S. territories must, within 30 days of such conviction, notify DMAS of this conviction and relinquish its provider agreement. Upon such notice, DMAS shall immediately terminate the provider's Medicaid provider agreement pursuant to § 32.1-325 D of the Code of Virginia and as may be required for federal financial participation. Such provider agreement terminations shall be immediate and conform to § 32.1-325 E of the Code of Virginia.

d. Providers shall not be reimbursed for services that may be rendered between the conviction of a felony and the provider's notification to DMAS of the conviction.

e. Except as otherwise provided by applicable state or federal law, the Medicaid provider agreement may be terminated at will on 30 days' written notice. The agreement may be terminated if DMAS determines that the provider poses a threat to the health, safety, or welfare of any individual enrolled in a DMAS administered program.

12VAC30-120-1740. Participation standards for provision of services.

A. Skilled PDN, skilled PDN respite, and PC services. DMAS or its designated agent shall periodically review and audit providers' records for these services for conformance to regulations and policies, and concurrence with claims that have been submitted for payment. When an individual is receiving multiple services, the records for all services shall be separated from those of non-home and community-based care services, such as companion or home health services. The following documentation shall be maintained for every individual for whom DMAS-enrolled providers render these services:

1. Physicians' orders for these services shall be maintained in the individual's record as well as at the individual's primary residence. All recertifications of the POC shall be performed within the last five business days of each current 60-day period. The physician shall sign the recertification before Medicaid reimbursement shall occur;

2. All assessments, reassessments, and evaluations (including the complete UAI screening packet or risk evaluations) made during the provision of services, including any required initial assessments by the RN supervisor completed prior to or on the date services are initiated and changes to the supporting documentation by the RN supervisor;

3. Progress notes reflecting the individual's status and, as appropriate, progress toward the identified goals on the POC;

4. All related communication with the individual and the individual's representative, the DMAS designated agent for service authorization, consultants, DMAS, DSS, formal and informal service providers, all required referrals, as appropriate, to APS or CPS and all other professionals concerning the individual;

5. All service authorization decisions rendered by the DMAS staff or the DMAS-designated service authorization contractor;

6. All POCs completed with the individual, or family/caregiver, as appropriate, and specific to the service being provided and all supporting documentation related to any changes in the POC;

7. Attendance logs documenting the date and times services were rendered, the amount and type of services rendered and the dated signatures of the professionals who rendered the specified care, with the professionals' titles. Copies of all nurses' records shall be subject to review by either state or federal Medicaid representatives or both. Any required nurses' visit notes, PCA notes, and all dated contacts with service providers and during supervisory visits to the individual's home and shall include:

a. The private duty nurse's or PCA's daily visit note with arrival and departure times;

b. The RN, LPN, or PCA daily observations, care, and services that have been rendered, observations concerning the individual's physical and emotional condition, daily activities and the individual's response to service delivery; and

c. Observations about any other services, such as and not limited to meals-on-wheels, companion services, and home health services, that the participant may be receiving shall be recorded in these notes;

8. Provider's HIPAA release of information form;

9. All Long Term Care Communication forms (DMAS-225);

10. Documentation of rejection or refusal of services and potential outcomes resulting from the refusal of services communicated to the individual or the individual's representative;

11. Documentation of all inpatient hospital or specialized care nursing facility admissions to include service interruption dates, the reason for the hospital or specialized care nursing facility admission, the name of the facility or facilities and primary caregiver notification when applicable including all communication to DMAS;

12. The RN, LPN, or PCA's and individual's, or individual's representative's weekly or daily, as appropriate, signatures, including the date, to verify that services have been rendered during that week as documented in the record. For records requiring weekly signatures, such signatures, times, and dates shall be placed on these records no earlier than the last day of the week in which services were provided and no later than seven calendar days from the date of the last service. An employee providing services to the tech waiver individual cannot sign for the individual. If the individual is unable to sign the nurses' records, it shall be documented in the record how the nurses' records will be signed or who will sign in the individual's place. An employee of the provider shall not sign for the individual unless he is a family member of the individual or legal guardian of the individual;

13. Contact notes or progress notes reflecting the individual's status; and

14. Any other documentation to support that services provided are appropriate and necessary to maintain the individual in the home and in the community.

B. In addition to meeting the general conditions and requirements for home and community-based services participating providers and skilled PDN, private duty respite, and PC services, providers shall also meet the following requirements:

1. This service shall be provided through either a home health agency licensed or certified by the VDH for Medicaid participation and with which DMAS has a contract for either skilled PDN or congregate PDN or both;

2. Demonstrate a prior successful health care delivery;

3. Operate from a business office; and

4. Employ (or subcontract with) and directly supervise an RN or an LPN. The LPN and RN shall be currently licensed to practice in the Commonwealth ~~and~~. Prior to assignment to a tech waiver individual, the RN or LPN shall have either (i) at least six months of related clinical nursing experience~~, which may include work in an acute care hospital, long stay hospital, rehabilitation hospital, or specialized care nursing facility~~ or (ii) completed a provider training program related to the care and technology needs of the tech waiver individual as described in 12VAC30-120-1730 A 27 e. Regardless of whether a nurse has six months of experience or completes a provider training course, the provider agency shall be responsible for assuring all nurses who are assigned to an individual are competent in the care needs of that individual.

5. As part of direct supervision, the RN supervisor shall make, at a minimum, a visit every 30 days to ensure both quality and appropriateness of PDN, PDN respite services, and personal care services to assess the individual's and the individual's representative's satisfaction with the services being provided, to review the medication and treatments and to update and verify the most current physician signed orders are in the home.

a. The waiver individual shall be present when the supervisory visits are made;

b. At least every other visit shall be in the individual's primary residence;

c. When a delay occurs in the RN supervisor's visits because the individual is unavailable, the reason for the delay shall be documented in the individual's record, and the visit shall occur as soon as the individual is available. Failure to meet this standard may result in DMAS' recovery of payments made.

d. The RN supervisor may delegate personal care aide supervisory visits to an LPN. The provider's supervisor shall make supervisory visits at least every 90 days. During visits to the waiver individual's home, the ~~RN/LPN~~ RN or LPN supervisor shall observe, evaluate, and document the adequacy and appropriateness of personal care services with regard to the individual's current functioning status and medical and social needs. The personal care aide's record shall be reviewed and the waiver individual's or family/caregiver's, or both, satisfaction with the type and amount of services discussed.

e. Additional supervisory visits may be required under the following circumstances: (i) at the provider's discretion; (ii) at the request of the individual when a change in the individual's condition has occurred; (iii) any time the health, safety, or welfare of the individual

could be at risk; and (iv) at the request of the DMAS staff.

6. When private duty respite services are routine in nature and offered in conjunction with PC services for adults, the RN supervisory visit conducted for PC may serve as the supervisory visit for respite services. However, the supervisor shall document supervision of private duty respite services separately. For this purpose, the same individual record can be used with a separate section for private duty respite services documentation.

7. For this waiver, personal care services shall only be agency directed and provided by a DMAS-enrolled PC provider to adult waiver individuals.

a. For DMAS-enrolled skilled PDN providers that also provide PC services, the provider shall employ or subcontract with and directly supervise an RN who will provide ongoing supervision of all PCAs. The supervising RN shall be currently licensed to practice nursing in the Commonwealth and have at least one year of related clinical nursing experience, which may include work in an acute care hospital, long-stay hospital, rehabilitation hospital, or specialized care nursing facility.

b. In addition to meeting the general conditions and requirements for home and community-based services participating providers as specified elsewhere in this part, the provision of PC services shall also comply with the requirements of 12VAC30-120-930.

8. Skilled monthly supervisory reassessments shall be performed in accordance with regulations by the PDN agency provider. The agency RN supervisor shall complete the monthly assessment visit and submit the "Technology Assisted Waiver Supervisory Monthly Summary" form (DMAS-103) to DMAS for review by the sixth day of the month following the month when the visit occurred.

9. Failure of the provider to ensure timely submission of the required assessments may result in retraction of all skilled PDN payments for the period of time of the delinquency.

C. Assistive technology and environmental modification.

1. All AT and EM services shall be provided by DMAS-enrolled DME providers that have a DMAS provider agreement to provide AT or EM or both.

2. AT and EM shall be covered in the least expensive, most cost-effective manner. The provider shall document and justify why more cost-effective solutions cannot be used. DMAS and the DMAS-designated service authorization contractor may request further documentation on the alternative cost-effective solutions as necessary.

3. The provider documentation requirements for AT and EM shall be as follows:

a. Written documentation setting out the medical necessity for these services regarding the need for service, the process and results of ensuring that the item is not covered by the State Plan as DME and supplies and that it is not available from a DME provider when purchased elsewhere and contacts with vendors or contractors of service and cost;

b. Documentation of any or all of the evaluation, design, labor costs or supplies by a qualified professional;

c. Documentation of the date services are rendered and the amount of service needed;

d. Any other relevant information regarding the device or modification;

e. Documentation in the medical record of notification by the designated individual or the individual's representative of satisfactory completion or receipt of the service or item;

f. Instructions regarding any warranty, repairs, complaints, or servicing that may be needed; and

g. Any additional cost estimates requested by DMAS.

7. The ~~EM/AT~~ EM or AT provider shall maintain a copy of all building permits and all building inspections for modifications, as required by code. All instructions regarding any warranty, repairs, complaints, and servicing that may be needed and the receipt for any purchased goods or services. More than one cost estimate may be required.

8. Individuals who reside in rental property shall obtain written permission from the property's owner before any EM shall be authorized by DMAS. This letter shall be maintained in the provider's record.

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TITLE 18. PROFESSIONAL AND OCCUPATIONAL LICENSING

BOARD OF DENTISTRY

Fast-Track Regulation

Title of Regulation: **18VAC60-11. Public Participation Guidelines (amending 18VAC60-11-50).**

Statutory Authority: §§ 2.2-4007.02 and 54.1-2400 of the Code of Virginia.

Public Hearing Information: No public hearings are scheduled.

Public Comment Deadline: November 30, 2016.

Effective Date: December 15, 2016.

Agency Contact: Sandra Reen, Executive Director, Board of Dentistry, 9960 Mayland Drive, Suite 300, Richmond, VA 23233, telephone (804) 367-4437, FAX (804) 527-4428, or email sandra.reen@dhp.virginia.gov.

Basis: The Board of Dentistry is authorized under § 54.1-2400 of the Code of Virginia to promulgate regulations that are reasonable and necessary to administer effectively the regulatory system. The action conforms the board's regulation to Chapter 795 of the 2012 Acts of Assembly.

Purpose: The purpose is clarity and conformity to the Administrative Process Act (§ 2.2-4000 et seq. of the Code of Virginia). Participation by the public in the regulatory process is essential to assist the board in the promulgation of regulations that will protect the public health and safety.

Rationale for Using Fast-Track Rulemaking Process: The amendment was recommended by the Department of Planning and Budget and is intended to merely conform the regulation to the statute. Therefore, there is no controversy in its promulgation.

Substance: The board has amended subsection A of 18VAC60-11-50 to provide that interested persons may be accompanied by and represented by counsel or other representative when presenting their views in the promulgation of any regulatory action.

Issues: Other than conformity and consistency between law and regulation, there are no primary advantages or disadvantages to the public in implementing the amended provisions, since the provisions are already in the Code of Virginia. There are no primary advantages and disadvantages to the agency or the Commonwealth.

Department of Planning and Budget's Economic Impact Analysis:

Summary of the Proposed Amendments to Regulation. Pursuant to Chapter 795 of the 2012 Acts of Assembly,[1] the Board of Dentistry (Board) proposes to add language to its public participation guidelines to allow interested parties who are responding to a regulatory action to have counsel or a representative with them.

Result of Analysis. Benefits outweigh costs for all proposed changes.

Estimated Economic Impact. In 2012, the General Assembly passed legislation that allows interested parties who are commenting on proposed regulations to have their counsel or other representative with them while they are presenting "data, views and arguments." The Board now proposes to change its regulation that governs public participation to conform regulation to this statutory change. Benefits likely outweigh costs for this change as it will inform interested parties who turn to this regulation before commenting that they may bring a representative with them when commenting.

Businesses and Entities Affected. This proposed regulatory change will affect all individuals who comment on pending regulatory changes.

Localities Particularly Affected. No locality will be particularly affected by these proposed regulatory changes.

Projected Impact on Employment. These proposed regulatory changes are unlikely to affect employment in the Commonwealth.

Effects on the Use and Value of Private Property. These proposed changes will likely not affect the use or value of private property in the Commonwealth.

Real Estate Development Costs. These proposed regulatory changes are unlikely to affect real estate development costs in the Commonwealth.

Small Businesses:

Definition. Pursuant to § 2.2-4007.04 of the Code of Virginia, small business is defined as "a business entity, including its affiliates, that (i) is independently owned and operated and (ii) employs fewer than 500 full-time employees or has gross annual sales of less than $6 million."

Costs and Other Effects. No small businesses are likely to incur any additional costs on account of these clarifying changes.

Alternative Method that Minimizes Adverse Impact. No small businesses are likely to incur any additional costs on account of these clarifying changes.

Adverse Impacts:

Businesses. No businesses are likely to incur any additional costs on account of these clarifying changes.

Localities. Localities in the Commonwealth are unlikely to see any adverse impacts on account of these proposed regulatory changes.

Other Entities. No other entities are likely to be adversely affected by these proposed changes.

[1] http://leg1.state.va.us/cgi-bin/legp504.exe?121+ful+CHAP0795

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

Summary:

Pursuant to § 2.2-4007.02 of the Code of Virginia, the amendment provides that interested persons submitting data, views, and arguments on a regulatory action may be accompanied by and represented by counsel or another representative.

Part III
Public Participation Procedures

18VAC60-11-50. Public comment.

A. In considering any nonemergency, nonexempt regulatory action, the agency shall afford interested persons an opportunity to (i) submit data, views, and arguments, either orally or in writing, to the agency; and (ii) be accompanied by and represented by counsel or other representative. Such opportunity to comment shall include an online public comment forum on the Town Hall.

1. To any requesting person, the agency shall provide copies of the statement of basis, purpose, substance, and issues; the economic impact analysis of the proposed or fast-track regulatory action; and the agency's response to public comments received.

2. The agency may begin crafting a regulatory action prior to or during any opportunities it provides to the public to submit comments.

B. The agency shall accept public comments in writing after the publication of a regulatory action in the Virginia Register as follows:

1. For a minimum of 30 calendar days following the publication of the notice of intended regulatory action (NOIRA).

2. For a minimum of 60 calendar days following the publication of a proposed regulation.

3. For a minimum of 30 calendar days following the publication of a reproposed regulation.

4. For a minimum of 30 calendar days following the publication of a final adopted regulation.

5. For a minimum of 30 calendar days following the publication of a fast-track regulation.

6. For a minimum of 21 calendar days following the publication of a notice of periodic review.

7. Not later than 21 calendar days following the publication of a petition for rulemaking.

C. The agency may determine if any of the comment periods listed in subsection B of this section shall be extended.

D. If the Governor finds that one or more changes with substantial impact have been made to a proposed regulation, he may require the agency to provide an additional 30 calendar days to solicit additional public comment on the changes in accordance with § 2.2-4013 C of the Code of Virginia.

E. The agency shall send a draft of the agency's summary description of public comment to all public commenters on the proposed regulation at least five days before final adoption of the regulation pursuant to § 2.2-4012 E of the Code of Virginia.

VA.R. Doc. No. R17-4681; Filed October 7, 2016, 8:34 p.m.

DEPARTMENT OF HEALTH PROFESSIONS

Fast-Track Regulation

Title of Regulation: **18VAC76-31. Public Participation Guidelines (amending 18VAC76-31-50).**

Statutory Authority: §§ 2.2-4007.02 and 54.1-2505 of the Code of Virginia.

Public Hearing Information: No public hearings are scheduled.

Public Comment Deadline: November 30, 2016.

Effective Date: December 15, 2016.

Agency Contact: Elaine J. Yeatts, Senior Policy Analyst, Department of Health Professions, 9960 Mayland Drive, Suite 300, Richmond, VA 23233, telephone (804) 367-4688, FAX (804) 527-4434, or email elaine.yeatts@dhp.virginia.gov.

Basis: The Department of Health Professions has regulatory authority under § 54.1-2500 et seq. of the Code of Virginia to promulgate regulations. The action conforms the department's regulation to Chapter 795 of the 2012 Acts of Assembly.

Purpose: The purpose is clarity and conformity to the Administrative Process Act (§ 2.2-4000 et seq. of the Code of Virginia). Participation by the public in the regulatory process is essential to assist the department in the promulgation of regulations that will protect the public health and safety.

Rationale for Using Fast-Track Rulemaking Process: The amendment was recommended by the Department of Planning and Budget and is intended to merely conform the regulation to the statute. Therefore, there is no controversy in its promulgation.

Substance: The department has amended subsection A of 18VAC76-31-50 to provide that interested persons may be accompanied by and represented by counsel or other representative when presenting their views in the promulgation of any regulatory action.

Issues: Other than conformity and consistency between law and regulation, there are no primary advantages or disadvantages to the public in implementing the amended provisions, since the provisions are already in the Code of Virginia. There are no primary advantages and disadvantages to the agency or the Commonwealth.

Department of Planning and Budget's Economic Impact Analysis:

Summary of the Proposed Amendments to Regulation. Pursuant to Chapter 795 of the 2012 Acts of Assembly,[1] the Department of Health Professions (DHP) proposes to add language to its public participation guidelines to allow interested parties who are responding to a regulatory action to have counsel or a representative with them.

Result of Analysis. Benefits outweigh costs for all proposed changes.

Estimated Economic Impact. In 2012, the General Assembly passed legislation that allows interested parties who are commenting on proposed regulations to have their counsel or other representative with them while they are presenting "data, views and arguments." DHP now proposes to change its regulation that governs public participation to conform regulation to this statutory change. Benefits likely outweigh costs for this change as it will inform interested parties who turn to this regulation before commenting that they may bring a representative with them when commenting.

Businesses and Entities Affected. This proposed regulatory change will affect all individuals who comment on pending regulatory changes.

Localities Particularly Affected. No locality will be particularly affected by these proposed regulatory changes.

Projected Impact on Employment. These proposed regulatory changes are unlikely to affect employment in the Commonwealth.

Effects on the Use and Value of Private Property. These proposed changes will likely not affect the use or value of private property in the Commonwealth.

Real Estate Development Costs. These proposed regulatory changes are unlikely to affect real estate development costs in the Commonwealth.

Small Businesses:

Definition. Pursuant to § 2.2-4007.04 of the Code of Virginia, small business is defined as "a business entity, including its affiliates, that (i) is independently owned and operated and (ii) employs fewer than 500 full-time employees or has gross annual sales of less than $6 million."

Costs and Other Effects. No small businesses are likely to incur any additional costs on account of these clarifying changes.

Alternative Method that Minimizes Adverse Impact. No small businesses are likely to incur any additional costs on account of these clarifying changes.

Adverse Impacts:

Businesses. No businesses are likely to incur any additional costs on account of these clarifying changes.

Localities. Localities in the Commonwealth are unlikely to see any adverse impacts on account of these proposed regulatory changes.

Other Entities. No other entities are likely to be adversely affected by these proposed changes.

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[1] http://leg1.state.va.us/cgi-bin/legp504.exe?121+ful+CHAP0795

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

Summary:

Pursuant to § 2.2-4007.02 of the Code of Virginia, the amendment provides that interested persons submitting data, views, and arguments on a regulatory action may be accompanied by and represented by counsel or another representative.

Part III
Public Participation Procedures

18VAC76-31-50. Public comment.

A. In considering any nonemergency, nonexempt regulatory action, the agency shall afford interested persons an opportunity to (i) submit data, views, and arguments, either orally or in writing, to the agency; and (ii) be accompanied by and represented by counsel or other representative. Such opportunity to comment shall include an online public comment forum on the Town Hall.

1. To any requesting person, the agency shall provide copies of the statement of basis, purpose, substance, and issues; the economic impact analysis of the proposed or fast-track regulatory action; and the agency's response to public comments received.

2. The agency may begin crafting a regulatory action prior to or during any opportunities it provides to the public to submit comments.

B. The agency shall accept public comments in writing after the publication of a regulatory action in the Virginia Register as follows:

1. For a minimum of 30 calendar days following the publication of the notice of intended regulatory action (NOIRA).

2. For a minimum of 60 calendar days following the publication of a proposed regulation.

3. For a minimum of 30 calendar days following the publication of a reproposed regulation.

4. For a minimum of 30 calendar days following the publication of a final adopted regulation.

5. For a minimum of 30 calendar days following the publication of a fast-track regulation.

6. For a minimum of 21 calendar days following the publication of a notice of periodic review.

7. Not later than 21 calendar days following the publication of a petition for rulemaking.

C. The agency may determine if any of the comment periods listed in subsection B of this section shall be extended.

D. If the Governor finds that one or more changes with substantial impact have been made to a proposed regulation, he may require the agency to provide an additional 30 calendar days to solicit additional public comment on the changes in accordance with § 2.2-4013 C of the Code of Virginia.

E. The agency shall send a draft of the agency's summary description of public comment to all public commenters on the proposed regulation at least five days before final adoption of the regulation pursuant to § 2.2-4012 E of the Code of Virginia.

VA.R. Doc. No. R17-4761; Filed October 7, 2016, 8:36 p.m.

BOARD OF MEDICINE

Fast-Track Regulation

Title of Regulation: **18VAC85-11. Public Participation Guidelines (amending 18VAC85-11-50).**

Statutory Authority: §§ 2.2-4007.02 and 54.1-2400 of the Code of Virginia.

Public Hearing Information: No public hearings are scheduled.

Public Comment Deadline: November 30, 2016.

Effective Date: December 16, 2016.

Agency Contact: William L. Harp, M.D., Executive Director, Board of Medicine, 9960 Mayland Drive, Suite 300, Richmond, VA 23233, telephone (804) 367-4558, FAX (804) 527-4429, or email william.harp@dhp.virginia.gov.

Basis: The Board of Medicine is authorized under § 54.1-2400 of the Code of Virginia to promulgate regulations that are reasonable and necessary to administer effectively the regulatory system. The action conforms the board's regulation to Chapter 795 of the 2012 Acts of Assembly.

Purpose: The purpose is clarity and conformity to the Administrative Process Act (§ 2.2-4000 et seq. of the Code of Virginia). Participation by the public in the regulatory process is essential to assist the board in the promulgation of regulations that will protect the public health and safety.

Rationale for Using Fast-Track Rulemaking Process: The amendment was recommended by the Department of Planning and Budget and is intended to merely conform the regulation to the statute. Therefore, there is no controversy in its promulgation.

Substance: The board has amended subsection A of 18VAC85-11-50 to provide that interested persons may be accompanied by and represented by counsel or other representative when presenting their views in the promulgation of any regulatory action.

Issues: Other than conformity and consistency between law and regulation, there are no primary advantages or disadvantages to the public in implementing the amended provisions, since the provisions are already in the Code of Virginia. There are no primary advantages and disadvantages to the agency or the Commonwealth.

Department of Planning and Budget's Economic Impact Analysis:

Summary of the Proposed Amendments to Regulation. Pursuant to Chapter 795 of the 2012 Acts of Assembly,[1] the Board of Medicine (Board) proposes to add language to its public participation guidelines to allow interested parties who are responding to a regulatory action to have counsel or a representative with them.

Result of Analysis. Benefits outweigh costs for all proposed changes.

Estimated Economic Impact. In 2012, the General Assembly passed legislation that allows interested parties who are commenting on proposed regulations to have their counsel or other representative with them while they are presenting "data, views and arguments." The Board now proposes to change its regulation that governs public participation to conform regulation to this statutory change. Benefits likely outweigh costs for this change as it will inform interested parties who turn to this regulation before commenting that they may bring a representative with them when commenting.

Businesses and Entities Affected. This proposed regulatory change will affect all individuals who comment on pending regulatory changes.

Localities Particularly Affected. No locality will be particularly affected by these proposed regulatory changes.

Projected Impact on Employment. These proposed regulatory changes are unlikely to affect employment in the Commonwealth.

Effects on the Use and Value of Private Property. These proposed changes will likely not affect the use or value of private property in the Commonwealth.

Real Estate Development Costs. These proposed regulatory changes are unlikely to affect real estate development costs in the Commonwealth.

Small Businesses:

Definition. Pursuant to § 2.2-4007.04 of the Code of Virginia, small business is defined as "a business entity, including its affiliates, that (i) is independently owned and operated and (ii) employs fewer than 500 full-time employees or has gross annual sales of less than $6 million."

Costs and Other Effects. No small businesses are likely to incur any additional costs on account of these clarifying changes.

Alternative Method that Minimizes Adverse Impact. No small businesses are likely to incur any additional costs on account of these clarifying changes.

Adverse Impacts:

Businesses. No businesses are likely to incur any additional costs on account of these clarifying changes.

Localities. Localities in the Commonwealth are unlikely to see any adverse impacts on account of these proposed regulatory changes.

Other Entities. No other entities are likely to be adversely affected by these proposed changes.

[1] http://leg1.state.va.us/cgi-bin/legp504.exe?121+ful+CHAP0795

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

Summary:

Pursuant to § 2.2-4007.02 of the Code of Virginia, the amendment provides that interested persons submitting data, views, and arguments on a regulatory action may be accompanied by and represented by counsel or another representative.

Part III
Public Participation Procedures

18VAC85-11-50. Public comment.

A. In considering any nonemergency, nonexempt regulatory action, the agency shall afford interested persons an

opportunity to (i) submit data, views, and arguments, either orally or in writing, to the agency; and (ii) be accompanied by and represented by counsel or other representative. Such opportunity to comment shall include an online public comment forum on the Town Hall.

1. To any requesting person, the agency shall provide copies of the statement of basis, purpose, substance, and issues; the economic impact analysis of the proposed or fast-track regulatory action; and the agency's response to public comments received.

2. The agency may begin crafting a regulatory action prior to or during any opportunities it provides to the public to submit comments.

B. The agency shall accept public comments in writing after the publication of a regulatory action in the Virginia Register as follows:

1. For a minimum of 30 calendar days following the publication of the notice of intended regulatory action (NOIRA).

2. For a minimum of 60 calendar days following the publication of a proposed regulation.

3. For a minimum of 30 calendar days following the publication of a reproposed regulation.

4. For a minimum of 30 calendar days following the publication of a final adopted regulation.

5. For a minimum of 30 calendar days following the publication of a fast-track regulation.

6. For a minimum of 21 calendar days following the publication of a notice of periodic review.

7. Not later than 21 calendar days following the publication of a petition for rulemaking.

C. The agency may determine if any of the comment periods listed in subsection B of this section shall be extended.

D. If the Governor finds that one or more changes with substantial impact have been made to a proposed regulation, he may require the agency to provide an additional 30 calendar days to solicit additional public comment on the changes in accordance with § 2.2-4013 C of the Code of Virginia.

E. The agency shall send a draft of the agency's summary description of public comment to all public commenters on the proposed regulation at least five days before final adoption of the regulation pursuant to § 2.2-4012 E of the Code of Virginia.

VA.R. Doc. No. R17-4759; Filed October 7, 2016, 8:37 p.m.

BOARD OF PHARMACY

Fast-Track Regulation

Title of Regulation: **18VAC110-11. Public Participation Guidelines (amending 18VAC110-11-50).**

Statutory Authority: §§ 2.2-4007.02 and 54.1-2400 of the Code of Virginia.

Public Hearing Information: No public hearings are scheduled.

Public Comment Deadline: November 30, 2016.

Effective Date: December 15, 2016.

Agency Contact: Caroline Juran, RPh, Executive Director, Board of Pharmacy, 9960 Mayland Drive, Suite 300, Richmond, VA 23233, telephone (804) 367-4578, FAX (804) 527-4472, or email caroline.juran@dhp.virginia.gov.

Basis: The Board of Pharmacy is authorized under § 54.1-2400 of the Code of Virginia to promulgate regulations that are reasonable and necessary to administer effectively the regulatory system. The action conforms the board's regulation to Chapter 795 of the 2012 Acts of Assembly.

Purpose: The purpose is clarity and conformity to the Administrative Process Act (§ 2.2-4000 et seq. of the Code of Virginia). Participation by the public in the regulatory process is essential to assist the board in the promulgation of regulations that will protect the public health and safety.

Rationale for Using Fast-Track Rulemaking Process: The amendment was recommended by the Department of Planning and Budget and is intended to merely conform the regulation to the statute. Therefore, there is no controversy in its promulgation.

Substance: The board has amended subsection A of 18VAC110-11-50 to provide that interested persons may be accompanied by and represented by counsel or other representative when presenting their views in the promulgation of any regulatory action.

Issues: Other than conformity and consistency between law and regulation, there are no primary advantages or disadvantages to the public in implementing the amended provisions, since the provisions are already in the Code of Virginia. There are no primary advantages and disadvantages to the agency or the Commonwealth.

Department of Planning and Budget's Economic Impact Analysis:

Summary of the Proposed Amendments to Regulation. Pursuant to Chapter 795 of the 2012 Acts of Assembly,[1] the Board of Pharmacy (Board) proposes to add language to its public participation guidelines to allow interested parties who are responding to a regulatory action to have counsel or a representative with them.

Result of Analysis. Benefits outweigh costs for all proposed changes.

Estimated Economic Impact. In 2012, the General Assembly passed legislation that allows interested parties who are commenting on proposed regulations to have their counsel or other representative with them while they are presenting "data, views and arguments." The Board now proposes to change its regulation that governs public participation to conform regulation to this statutory change. Benefits likely outweigh costs for this change as it will inform interested parties who turn to this regulation before commenting that they may bring a representative with them when commenting.

Businesses and Entities Affected. This proposed regulatory change will affect all individuals who comment on pending regulatory changes.

Localities Particularly Affected. No locality will be particularly affected by these proposed regulatory changes.

Projected Impact on Employment. These proposed regulatory changes are unlikely to affect employment in the Commonwealth.

Effects on the Use and Value of Private Property. These proposed changes will likely not affect the use or value of private property in the Commonwealth.

Real Estate Development Costs. These proposed regulatory changes are unlikely to affect real estate development costs in the Commonwealth.

Small Businesses:

Definition. Pursuant to § 2.2-4007.04 of the Code of Virginia, small business is defined as "a business entity, including its affiliates, that (i) is independently owned and operated and (ii) employs fewer than 500 full-time employees or has gross annual sales of less than $6 million."

Costs and Other Effects. No small businesses are likely to incur any additional costs on account of these clarifying changes.

Alternative Method that Minimizes Adverse Impact. No small businesses are likely to incur any additional costs on account of these clarifying changes.

Adverse Impacts:

Businesses. No businesses are likely to incur any additional costs on account of these clarifying changes.

Localities. Localities in the Commonwealth are unlikely to see any adverse impacts on account of these proposed regulatory changes.

Other Entities. No other entities are likely to be adversely affected by these proposed changes.

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[1] http://leg1.state.va.us/cgi-bin/legp504.exe?121+ful+CHAP0795

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

Summary:

Pursuant to § 2.2-4007.02 of the Code of Virginia, the amendment provides that interested persons submitting data, views, and arguments on a regulatory action may be accompanied by and represented by counsel or another representative.

Part III
Public Participation Procedures

18VAC110-11-50. Public comment.

A. In considering any nonemergency, nonexempt regulatory action, the agency shall afford interested persons an opportunity to (i) submit data, views, and arguments, either orally or in writing, to the agency; and (ii) be accompanied by and represented by counsel or other representative. Such opportunity to comment shall include an online public comment forum on the Town Hall.

1. To any requesting person, the agency shall provide copies of the statement of basis, purpose, substance, and issues; the economic impact analysis of the proposed or fast-track regulatory action; and the agency's response to public comments received.

2. The agency may begin crafting a regulatory action prior to or during any opportunities it provides to the public to submit comments.

B. The agency shall accept public comments in writing after the publication of a regulatory action in the Virginia Register as follows:

1. For a minimum of 30 calendar days following the publication of the notice of intended regulatory action (NOIRA).

2. For a minimum of 60 calendar days following the publication of a proposed regulation.

3. For a minimum of 30 calendar days following the publication of a reproposed regulation.

4. For a minimum of 30 calendar days following the publication of a final adopted regulation.

5. For a minimum of 30 calendar days following the publication of a fast-track regulation.

6. For a minimum of 21 calendar days following the publication of a notice of periodic review.

7. Not later than 21 calendar days following the publication of a petition for rulemaking.

C. The agency may determine if any of the comment periods listed in subsection B of this section shall be extended.

D. If the Governor finds that one or more changes with substantial impact have been made to a proposed regulation, he may require the agency to provide an additional 30 calendar days to solicit additional public comment on the changes in accordance with § 2.2-4013 C of the Code of Virginia.

E. The agency shall send a draft of the agency's summary description of public comment to all public commenters on the proposed regulation at least five days before final adoption of the regulation pursuant to § 2.2-4012 E of the Code of Virginia.

VA.R. Doc. No. R17-4719; Filed October 7, 2016, 8:39 p.m.

Proposed Regulation

Title of Regulation: **18VAC110-20. Regulations Governing the Practice of Pharmacy (amending 18VAC110-20-20, 18VAC110-20-321; adding 18VAC110-20-215).**

Statutory Authority: §§ 54.1-2400, 54.1-3434.05, and 54.1-3434.5 of the Code of Virginia.

Public Hearing Information:

December 12, 2016 - 9:10 a.m. - Department of Health Professions, Perimeter Center, 9960 Mayland Drive, Suite 201, Board Room 2, Richmond, VA 23233

Public Comment Deadline: December 30, 2016.

Agency Contact: Caroline Juran, RPh, Executive Director, Board of Pharmacy, 9960 Mayland Drive, Suite 300, Richmond, VA 23233-1463, telephone (804) 367-4416, FAX (804) 527-4472, or email caroline.juran@dhp.virginia.gov.

Basis: Section 54.1-2400 of the Code of Virginia establishes the general powers and duties of health regulatory boards including the responsibility to promulgate regulations in accordance with the Administrative Process Act.

Section 54.1-3307 of the Code of Virginia directs the Board of Pharmacy to regulate the practice of pharmacy and the manufacturing, dispensing, selling, distributing, processing, compounding, or disposal of drugs and devices. It further states the board shall also control the character and standard of all drugs, cosmetics, and devices within the Commonwealth; investigate all complaints as to the quality and strength of all drugs, cosmetics, and devices; and take such action as may be necessary to prevent the manufacturing, dispensing, selling, distributing, processing, compounding, and disposal of such drugs, cosmetics, and devices that do not conform to the requirements of law.

The specific authority to issue permits and regulate outsourcing facilities is found in §§ 54.1-3434.05 54.1-3434.5 of the Code of Virginia.

Purpose: The Board of Pharmacy sought legislative authority in 2015 to facilitate the implementation of the Drug Quality and Security Act by creating a new licensing category and oversight for outsourcing facilities and nonresident outsourcing facilities.

As of July 1, 2015, state law recognizes "outsourcing facilities," but regulations are necessary to provide for permits and oversight. There are approximately 50 outsourcing facilities currently registered with the U.S. Food and Drug Administration, and more facilities likely will register in the next year. Without a provision for the Board of Pharmacy to license these facilities, these entities will likely not be able to ship into the Commonwealth. This result has the potential to negatively impact access to critically needed compounded drugs. Unlike outsourcing facilities that may legally compound sterile drugs for office administration, pharmacies under federal law may only compound human drugs pursuant to patient-specific prescriptions. Emergency regulations have been promulgated to allow permitting of in-state facilities and registration of nonresident outsourcing

In response to the meningitis outbreak resulting from contaminated compounded drugs from the New England Compounding Center in 2012 that sickened 751 people and killed 64 people, including five Virginians, the United States Congress passed the Drug Quality and Security Act in the fall of 2013. The Act creates a new licensing category under § 503B of the Federal Food, Drug, and Cosmetic Act called outsourcing facilities. These entities are large scale sterile compounding facilities that provide compounded drugs predominantly to hospitals, physician offices, or medical clinics for administration to patients. Due to the risk associated with compounding sterile drugs on a large scale, these facilities are required under federal law to compound in compliance with current good manufacturing practices, similar to a pharmaceutical manufacturer. Regulations promulgated by the board will ensure that outsourcing facilities located in the state or shipping drugs into Virginia have oversight that will protect public health and safety.

Substance: Regulations set fees for approval of applications and renewal of permits and registration, similar to fees for other facilities regulated by the board. Requirements for pharmacies that are or are not applicable to outsourcing facilities are specified, and requirements for pharmacist supervision, recordkeeping, and renewal are also established. Finally, regulations specify that if a compounding pharmacy shares physical space with an outsourcing facility, the more stringent standards of good manufacturing practices apply.

Issues: The primary advantage to the public is more accountability, safety, and consistency in the sterile compounding of drugs being supplied to hospitals and other facilities for patient administration. There are no disadvantages.

There are no advantages or disadvantages to the agency; this will be a new responsibility for inspectors who must be specifically trained to inspect outsourcing facility. Promulgation of regulations for the issuance of permits to outsourcing facilities is a statutory mandate.

Fees for outsourcing permits should make Virginia a highly competitive place to do business. In New York, the registration fee is $825; in California, the fee for a pharmacy that does sterile compounding is $780; and in Tennessee, the fee for an outsourcing facility that does sterile compounding is $775. In Virginia, the fee is $270.

Department of Planning and Budget's Economic Impact Analysis:

Summary of the Proposed Amendments to Regulation. In accordance with Chapter 300 of the 2015 Acts of Assembly,[1] the Board of Pharmacy (Board) proposes to: 1) require that facilities in the Commonwealth engaged in the sterile compounding of drugs or devices to be dispensed without a prescription for a specific patient obtain a permit as an outsourcing facility from the Board, 2) require that outsourcing facilities located outside of the Commonwealth that deliver in any manner Schedule II through VI drugs or devices into Virginia without a prescription for a specific patient be registered with the Board, 3) establish various requirements for the permits and registrations, and 4) set fees for the approval of applications and renewal of permits and registrations.

Result of Analysis. The benefits likely exceed the costs for all proposed changes.

Estimated Economic Impact. Chapter 300 of the 2015 Acts of Assembly establishes that, "[n]o person shall act as an outsourcing facility without first obtaining a permit from the Board." Further the legislation defines "outsourcing facility" as "a facility that is engaged in the compounding of sterile drugs and is currently registered as an outsourcing facility with the U.S. Secretary of Health and Human Services and that complies with all applicable requirements of federal and state law, including the Federal Food, Drug, and Cosmetic Act." Outsourcing facilities typically compound drugs without a patient-specific prescription to supply large health systems.

This legislation was prompted by a 2012 meningitis outbreak from contaminated drugs compounded by the New England Compounding Center that sickened 751 people and killed 64 people, including five Virginians. In response to this outbreak, Congress passed the Drug Quality and Security Act (2013). This act created a new licensing category under Section 503B of the Federal Food, Drug, and Cosmetic Act for outsourcing facilities. These entities are large-scale sterile compounding facilities that provide compounded drugs predominantly to hospitals, physician offices, or medical clinics for administration to patients. Due to the risk associated with compounding sterile drugs on a large scale, these facilities are required under federal law to compound in compliance with Current Good Manufacturing Practices, similar to a pharmaceutical manufacturer. The legislation is intended to ensure that outsourcing facilities located in the Commonwealth or are shipping drugs into Virginia are subject to oversight to protect public health and safety.

There are approximately 59 outsourcing facilities currently registered with the FDA and likely more will register. Without establishing Board permit and registration requirements to regulate these facilities, these entities are unlikely to be able to ship within or into the Commonwealth. This would have the potential to negatively impact access to critically needed compounded drugs.

There is an emergency regulation currently in effect that allows permitting of in-state facilities and registration of non-resident outsourcing facilities. The emergency regulation is set to expire on June 6, 2017. This proposed regulation will allow the shipping of critically needed compounded drugs on a permanent basis. Additionally, the proposed requirements help reduce the likelihood that contaminated drugs will be distributed in the Commonwealth. Thus the proposed regulation will be beneficial.

Businesses and Entities Affected. The proposed amendments affect large-scale sterile compounding facilities that provide compounded drugs predominantly to hospitals, physician offices, or medical clinics for administration to patients. The FDA has currently registered 59 such facilities. The Virginia Board currently has 19 applications pending registration under the emergency rule.

Localities Particularly Affected. The proposed amendments do not disproportionately affect particular localities.

Projected Impact on Employment. Enabling the shipping of compounded drugs may have a small positive impact on employment.

Effects on the Use and Value of Private Property. The proposed amendments allow the shipping of critically needed compounded drugs beyond June 6, 2017.

Real Estate Development Costs. The proposed amendments do not affect real estate development costs.

Small Businesses:

Definition. Pursuant to § 2.2-4007.04 of the Code of Virginia, small business is defined as "a business entity, including its affiliates, that (i) is independently owned and operated and (ii) employs fewer than 500 full-time employees or has gross annual sales of less than $6 million."

Costs and Other Effects. The proposed amendments do not increase costs for small businesses.

Alternative Method that Minimizes Adverse Impact. The proposed amendments do not adversely affect small businesses.

Adverse Impacts:

Businesses. The proposed amendments do not adversely affect businesses.

Localities. The proposed amendments will not adversely affect localities.

Other Entities. The proposed amendments will not adversely affect other entities.

[1] To view this Chapter, see http://leg1.state.va.us/cgi-bin/legp504.exe?151+ful+CHAP0300

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

Summary:

In accordance with Chapter 300 of the 2015 Acts of Assembly, the proposed amendments (i) require facilities engaged in the compounding of sterile drugs and registered with the U.S. Secretary of Health and Human Services as outsourcing facilities to hold a permit to compound or ship compounded drugs into Virginia; (ii) set fees for approval of applications and renewal of permits and registration; (iii) specify requirements for pharmacies that are or are not applicable to outsourcing facilities; (iv) establish requirements for pharmacist supervision, recordkeeping, and renewal; and (v) specify that if a compounding pharmacy shares physical space with an outsourcing facility, the more stringent standards of good manufacturing practices are applicable.

18VAC110-20-20. Fees.

A. Unless otherwise provided, fees listed in this section shall not be refundable.

B. Unless otherwise provided, any fees for taking required examinations shall be paid directly to the examination service as specified by the board.

C. Initial application fees.

1. Pharmacist license	$180
2. Pharmacy intern registration	$15
3. Pharmacy technician registration	$25
4. Pharmacy permit	$270
5. Permitted physician licensed to dispense drugs	$270
6. Medical equipment supplier permit	$180
7. Humane society permit	$20
8. Outsourcing facility permit	$270
~~8.~~ 9. Nonresident pharmacy registration	$270
10. Nonresident outsourcing facility registration	$270
~~9.~~ 11. Controlled substances registrations	$90
~~10.~~ 12. Innovative program approval. If the board determines that a technical consultant is required in order to make a decision on approval, any consultant fee, not to exceed the actual cost, shall also be paid by the applicant in addition to the application fee.	$250
~~11.~~ 13. Approval of a pharmacy technician training program	$150
~~12.~~ 14. Approval of a continuing education program	$100
~~13.~~ 15. Approval of a repackaging training program	$50

D. Annual renewal fees.

1. Pharmacist active license – due no later than December 31	$90
2. Pharmacist inactive license – due no later than December 31	$45
3. Pharmacy technician registration – due no later than December 31	$25
4. Pharmacy permit – due no later than April 30	$270
5. Physician permit to practice pharmacy – due no later than February 28	$270
6. Medical equipment supplier permit – due no later than February 28	$180
7. Humane society permit – due no later than February 28	$20
8. Outsourcing facility permit – due no later than April 30	$270
~~8.~~ 9. Nonresident pharmacy registration – due no later than the date of initial registration	$270
10. Nonresident outsourcing facility registration – due no later than the date of initial registration	$270
~~9.~~ 11. Controlled substances registrations – due no later than February 28	$90
~~10.~~ 12. Innovative program continued approval based on board order not to exceed $200 per approval period.	
~~11.~~ 13. Approval of a pharmacy technician training program	$75 every two years
~~12.~~ 14. Approval of a repackaging training program	$30 every two years

E. Late fees. The following late fees shall be paid in addition to the current renewal fee to renew an expired license within one year of the expiration date or within two years in the case of a pharmacy technician training program. In addition, engaging in activities requiring a license, permit, or registration after the expiration date of such license, permit, or registration shall be grounds for disciplinary action by the board.

1. Pharmacist license	$30

2. Pharmacist inactive license	$15
3. Pharmacy technician registration	$10
4. Pharmacy permit	$90
5. Physician permit to practice pharmacy	$90
6. Medical equipment supplier permit	$60
7. Humane society permit	$5
8. Outsourcing facility permit	$90
~~8.~~ 9. Nonresident pharmacy registration	$90
10. Nonresident outsourcing facility registration	$90
~~9.~~ 11. Controlled substances registrations	$30
~~10.~~ 12. Approval of a pharmacy technician training program	$15
~~11.~~ 13. Approval of a repackaging training program	$10

F. Reinstatement fees. Any person or entity attempting to renew a license, permit, or registration more than one year after the expiration date, or more than two years after the expiration date in the case of a pharmacy technician training program, shall submit an application for reinstatement with any required fees. Reinstatement is at the discretion of the board and, except for reinstatement following license revocation or suspension, may be granted by the executive director of the board upon completion of an application and payment of any required fees.

1. Pharmacist license	$210
2. Pharmacist license after revocation or suspension	$500
3. Pharmacy technician registration	$35
4. Pharmacy technician registration after revocation or suspension	$125
5. Facilities or entities that cease operation and wish to resume shall not be eligible for reinstatement but shall apply for a new permit or registration. Facilities or entities that failed to renew and continued to operate for more than one renewal cycle shall pay the current and all back renewal fees for the years in which they were operating plus the following reinstatement fees:	
a. Pharmacy permit	$240
b. Physician permit to practice pharmacy	$240
c. Medical equipment supplier permit	$210
d. Humane society permit	$30
e. Outsourcing facility permit	$240
~~e.~~ f. Nonresident pharmacy registration	$115
g. Nonresident outsourcing facility registration	$240
~~f.~~ h. Controlled substances registration	$180
~~g.~~ i. Approval of a pharmacy technician training program	$75
~~h.~~ j. Approval of a repackaging training program	$50

G. Application for change or inspection fees for facilities or other entities.

1. Change of pharmacist-in-charge	$50
2. Change of ownership for any facility	$50
3. Inspection for remodeling or change of location for any facility	$150
4. Reinspection of any facility	$150
5. Board-required inspection for a robotic pharmacy system	$150
6. Board-required inspection of an innovative program location	$150
7. Change of pharmacist responsible for an approved innovative program	$25

H. Miscellaneous fees.

1. Duplicate wall certificate	$25
2. Returned check	$35
3. Duplicate license or registration	$10
4. Verification of licensure or registration	$25

18VAC110-20-215. Outsourcing facilities.

A. Any facility in the Commonwealth engaged in the sterile compounding of drugs or devices to be dispensed without a prescription for a specific patient shall obtain a permit as an outsourcing facility from the board in accordance with § 54.1-3434.05 of the Code of Virginia. Any outsourcing facility located outside of the Commonwealth that delivers in any manner Schedule II through VI drugs or devices into the Commonwealth without a prescription for a specific patient shall be registered with the board in accordance with § 54.1-3434.5 of the Code of Virginia.

B. In order to obtain or renew a permit or registration, outsourcing facilities shall submit to the board (i) documentation that the facility is registered as an outsourcing facility under the Federal Food, Drug, and Cosmetic Act and (ii) a copy of a current inspection report consistent with

§ 54.1-3434.05 or 54.1-3434.5 of the Code of Virginia. Outsourcing facilities that fail to demonstrate that the facility is registered as an outsourcing facility under the Federal Food, Drug, and Cosmetic Act or submit a copy of a current inspection report consistent with § 54.1-3434.05 or 54.1-3434.5 shall not meet the requirements for an initial permit or registration or for renewal of a permit or registration.

C. An outsourcing facility shall comply with all provisions of this chapter relating to a pharmacy in Parts IV (18VAC110-20-110 et seq.) and VI (18VAC110-20-240 et seq.), with the following exceptions:

1. Subsections E and F of 18VAC110-20-190, relating to dispensed prescriptions.

2. Subsection A of 18VAC110-20-200, relating to prescriptions awaiting delivery.

3. Subsections B and C of 18VAC110-20-240, relating to prescriptions and chart orders.

4. 18VAC110-20-250, relating to automated data processing prescription records.

5. Subsections C, D, E, and F of 18VAC110-20-270, relating to preparation and dispensing of prescriptions.

D. In addition to applicable requirements for pharmacies, outsourcing facilities shall comply with the following:

1. Pharmacist supervision. At all times, such facilities shall be under the supervision of a PIC who routinely practices at the location designated on the permit application. A pharmacist shall be present at all times when the facility is open for business.

2. Records.

a. All records, including the receipt and disposition of drugs or devices, shall be maintained by the facility for a period of five years and shall be available to the board upon request.

b. Compounding records shall include identification and strength of the drugs and shall provide the ingredients, expiration dates, and the source of such ingredients. Records shall also include the national drug code number of the source drug or bulk active ingredient, if available; the strength of the active ingredient per unit; the dosage form and route of administration; the package description; the number of individual units produced; the national drug code number of the final product, if assigned, or lot number; and an appropriately assigned expiration date or beyond-use date.

c. Outsourcing facilities shall maintain quality control records to include stability and sterility testing for determining beyond-use dating.

E. No outsourcing facility may distribute or dispense any drug to any person pursuant to a prescription unless it also maintains a current active pharmacy permit. The pharmacy shall comply with all state and federal laws, regulations, and requirements, except it shall compound in compliance with current good manufacturing practices under § 501(a)(2)(B) of the Federal Food, Drug, and Cosmetic Act (21 USC § 351(a)(2)(B)).

Part VIII
Labeling and Packaging Standards for Prescriptions

18VAC110-20-321. Compounding.

A. The compounding of both sterile and nonsterile drug products by a pharmacy that does not share the same physical space with an outsourcing facility shall be performed in accordance with USP-NF compounding standards and § 54.1-3410.2 of the Code of Virginia.

B. The compounding of sterile drug products by an outsourcing facility or by a pharmacy sharing the same physical space with an outsourcing facility shall be performed in accordance with current good manufacturing practices under § 501(a)(2)(B) of the Federal Food, Drug, and Cosmetic Act (21 USC § 351(a)(2)(B)).

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 (18VAC110-20)

Application for Registration as a Pharmacy Intern (rev. 8/07)

Affidavit of Practical Experience, Pharmacy Intern (rev. 8/07)

Application for Licensure as a Pharmacist by Examination (rev. 11/09)

Instructions for Reinstating or Reactivating a Pharmacist License (rev. 3/11)

Application for Approval of a Continuing Education Program (rev. 8/07)

Application for Approval of ACPE Pharmacy School Course(s) for Continuing Education Credit (rev. 6/09)

Application for License to Dispense Drugs (rev. 8/07)

~~Application for a Pharmacy Permit (rev. 6/10)~~

~~Application for a Nonresident Pharmacy Registration (rev. 7/08)~~

Application for a Pharmacy Permit (rev. 12/2015)

Application for a Non-Resident Pharmacy Registration (rev. 12/2015)

Application for a Non-Resident Outsourcing Facility Registration (12/2015)

Application for an Outsourcing Facility Permit (12/2015)

Application for a Permit as a Medical Equipment Supplier (rev. 3/09)

Application for a Controlled Substances Registration Certificate (rev. 4/09)

Application for Registration as a Pharmacy Intern for Graduates of a Foreign College of Pharmacy (rev. 8/07).

Closing of a Pharmacy (rev. 8/07)

Application for Approval of an Innovative (Pilot) Program (rev. 8/07)

Pharmacy Technician Registration Instructions and Application (rev. 3/09)

Instructions for Reinstating a Pharmacy Technician Registration (rev. 3/11)

Application for Approval of a Pharmacy Technician Training Program (rev. 8/07)

Application for Registration for Volunteer Practice (rev. 8/07)

Sponsor Certification for Volunteer Registration (rev. 8/08)

Application for Reinstatement of Registration as a Pharmacy Intern (eff. 9/07)

Affidavit for Limited-Use Pharmacy Technician (rev. 8/07)

Limited-Use Pharmacy Technician Registration Instructions and Application (rev. 7/08)

Registration for a Pharmacy to be a Collection Site for Donated Drugs (eff. 4/09)

Application for Approval of Repackaging Training Program (eff. 12/10)

VA.R. Doc. No. R16-4528; Filed October 7, 2016, 8:45 p.m.

BOARD OF SOCIAL WORK

Fast-Track Regulation

Title of Regulation: **18VAC140-11. Public Participation Guidelines (amending 18VAC140-11-50).**

Statutory Authority: §§ 2.2-4007.02 and 54.1-2400 of the Code of Virginia.

Public Hearing Information: No public hearings are scheduled.

Public Comment Deadline: November 30, 2016.

Effective Date: December 15, 2016.

Agency Contact: Jaime Hoyle, Executive Director, Board of Social Work, 9960 Mayland Drive, Suite 300, Richmond, VA 23233, telephone (804) 367-4406, FAX (804) 527-4435, or email jaime.hoyle@dhp.virginia.gov.

Basis: The Board of Social Work is authorized under § 54.1-2400 of the Code of Virginia to promulgate regulations that are reasonable and necessary to administer effectively the regulatory system. The action conforms the board's regulation to Chapter 795 of the 2012 Acts of Assembly.

Purpose: The purpose is clarity and conformity to the Administrative Process Act (§ 2.2-4000 et seq. of the Code of Virginia). Participation by the public in the regulatory process is essential to assist the board in the promulgation of regulations that will protect the public health and safety.

Rationale for Using Fast-Track Rulemaking Process: The amendment was recommended by the Department of Planning and Budget and is intended to merely conform the regulation to the statute. Therefore, there is no controversy in its promulgation.

Substance: The board has amended subsection A of 18VAC140-11-50 to provide that interested persons may be accompanied by and represented by counsel or other representative when presenting their views in the promulgation of any regulatory action.

Issues: Other than conformity and consistency between law and regulation, there are no primary advantages or disadvantages to the public in implementing the amended provisions, since the provisions are already in the Code of Virginia. There are no primary advantages and disadvantages to the agency or the Commonwealth.

Department of Planning and Budget's Economic Impact Analysis:

Summary of the Proposed Amendments to Regulation. Pursuant to Chapter 795 of the 2012 Acts of Assembly,[1] the Board of Social Work (Board) proposes to add language to its public participation guidelines to allow interested parties who are responding to a regulatory action to have counsel or a representative with them.

Result of Analysis. Benefits outweigh costs for all proposed changes.

Estimated Economic Impact. In 2012, the General Assembly passed legislation that allows interested parties who are commenting on proposed regulations to have their counsel or other representative with them while they are presenting "data, views and arguments." The Board now proposes to change its regulation that governs public participation to conform regulation to this statutory change. Benefits likely outweigh costs for this change as it will inform interested parties who turn to this regulation before commenting that they may bring a representative with them when commenting.

Businesses and Entities Affected. This proposed regulatory change will affect all individuals who comment on pending regulatory changes.

Localities Particularly Affected. No locality will be particularly affected by these proposed regulatory changes.

Projected Impact on Employment. These proposed regulatory changes are unlikely to affect employment in the Commonwealth.

Effects on the Use and Value of Private Property. These proposed changes will likely not affect the use or value of private property in the Commonwealth.

Real Estate Development Costs. These proposed regulatory changes are unlikely to affect real estate development costs in the Commonwealth.

Small Businesses:

Definition. Pursuant to § 2.2-4007.04 of the Code of Virginia, small business is defined as "a business entity, including its affiliates, that (i) is independently owned and operated and (ii) employs fewer than 500 full-time employees or has gross annual sales of less than $6 million."

Costs and Other Effects. No small businesses are likely to incur any additional costs on account of these clarifying changes.

Alternative Method that Minimizes Adverse Impact. No small businesses are likely to incur any additional costs on account of these clarifying changes.

Adverse Impacts:

Businesses. No businesses are likely to incur any additional costs on account of these clarifying changes.

Localities. Localities in the Commonwealth are unlikely to see any adverse impacts on account of these proposed regulatory changes.

Other Entities. No other entities are likely to be adversely affected by these proposed changes.

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[1] http://leg1.state.va.us/cgi-bin/legp504.exe?121+ful+CHAP0795

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

Summary:

Pursuant to § 2.2-4007.02 of the Code of Virginia, the amendment provides that interested persons submitting data, views, and arguments on a regulatory action may be accompanied by and represented by counsel or another representative.

Part III
Public Participation Procedures

18VAC140-11-50. Public comment.

A. In considering any nonemergency, nonexempt regulatory action, the agency shall afford interested persons an opportunity to (i) submit data, views, and arguments, either orally or in writing, to the agency; and (ii) be accompanied by and represented by counsel or other representative. Such opportunity to comment shall include an online public comment forum on the Town Hall.

1. To any requesting person, the agency shall provide copies of the statement of basis, purpose, substance, and issues; the economic impact analysis of the proposed or fast-track regulatory action; and the agency's response to public comments received.

2. The agency may begin crafting a regulatory action prior to or during any opportunities it provides to the public to submit comments.

B. The agency shall accept public comments in writing after the publication of a regulatory action in the Virginia Register as follows:

1. For a minimum of 30 calendar days following the publication of the notice of intended regulatory action (NOIRA).

2. For a minimum of 60 calendar days following the publication of a proposed regulation.

3. For a minimum of 30 calendar days following the publication of a reproposed regulation.

4. For a minimum of 30 calendar days following the publication of a final adopted regulation.

5. For a minimum of 30 calendar days following the publication of a fast-track regulation.

6. For a minimum of 21 calendar days following the publication of a notice of periodic review.

7. Not later than 21 calendar days following the publication of a petition for rulemaking.

C. The agency may determine if any of the comment periods listed in subsection B of this section shall be extended.

D. If the Governor finds that one or more changes with substantial impact have been made to a proposed regulation, he may require the agency to provide an additional 30 calendar days to solicit additional public comment on the changes in accordance with § 2.2-4013 C of the Code of Virginia.

E. The agency shall send a draft of the agency's summary description of public comment to all public commenters on the proposed regulation at least five days before final adoption of the regulation pursuant to § 2.2-4012 E of the Code of Virginia.

VA.R. Doc. No. R17-4770; Filed October 7, 2016, 8:40 p.m.

BOARD OF VETERINARY MEDICINE

Fast-Track Regulation

Title of Regulation: **18VAC150-11. Public Participation Guidelines (amending 18VAC150-11-50).**

Statutory Authority: §§ 2.2-4007.02 and 54.1-2400 of the Code of Virginia.

Public Hearing Information: No public hearings are scheduled.

Public Comment Deadline: November 30, 2016.

Effective Date: December 15, 2016.

Agency Contact: Leslie L. Knachel, Executive Director, Board of Veterinary Medicine, 9960 Mayland Drive, Suite 300, Richmond, VA 23233, telephone (804) 367-4468, FAX (804) 527-4471, or email leslie.knachel@dhp.virginia.gov.

Basis: The Board of Veterinary Medicine is authorized under § 54.1-2400 of the Code of Virginia to promulgate regulations that are reasonable and necessary to administer effectively the regulatory system. The action conforms the

board's regulation to Chapter 795 of the 2012 Acts of Assembly.

Purpose: The purpose is clarity and conformity to the Administrative Process Act (§ 2.2-4000 et seq. of the Code of Virginia). Participation by the public in the regulatory process is essential to assist the board in the promulgation of regulations that will protect the public health and safety.

Rationale for Using Fast-Track Rulemaking Process: The amendment was recommended by the Department of Planning and Budget and is intended to merely conform the regulation to the statute. Therefore, there is no controversy in its promulgation.

Substance: The board has amended subsection A of 18VAC150-11-50 to provide that interested persons may be accompanied by and represented by counsel or other representative when presenting their views in the promulgation of any regulatory action.

Issues: Other than conformity and consistency between law and regulation, there are no primary advantages or disadvantages to the public in implementing the amended provisions, since the provisions are already in the Code of Virginia. There are no primary advantages and disadvantages to the agency or the Commonwealth.

Department of Planning and Budget's Economic Impact Analysis:

Summary of the Proposed Amendments to Regulation. Pursuant to Chapter 795 of the 2012 Acts of Assembly,[1] the Board of Veterinary Medicine (Board) proposes to add language to its public participation guidelines to allow interested parties who are responding to a regulatory action to have counsel or a representative with them.

Result of Analysis. Benefits outweigh costs for all proposed changes.

Estimated Economic Impact. In 2012, the General Assembly passed legislation that allows interested parties who are commenting on proposed regulations to have their counsel or other representative with them while they are presenting "data, views and arguments." The Board now proposes to change its regulation that governs public participation to conform regulation to this statutory change. Benefits likely outweigh costs for this change as it will inform interested parties who turn to this regulation before commenting that they may bring a representative with them when commenting.

Businesses and Entities Affected. This proposed regulatory change will affect all individuals who comment on pending regulatory changes.

Localities Particularly Affected. No locality will be particularly affected by these proposed regulatory changes.

Projected Impact on Employment. These proposed regulatory changes are unlikely to affect employment in the Commonwealth.

Effects on the Use and Value of Private Property. These proposed changes will likely not affect the use or value of private property in the Commonwealth.

Real Estate Development Costs. These proposed regulatory changes are unlikely to affect real estate development costs in the Commonwealth.

Small Businesses:

Definition. Pursuant to § 2.2-4007.04 of the Code of Virginia, small business is defined as "a business entity, including its affiliates, that (i) is independently owned and operated and (ii) employs fewer than 500 full-time employees or has gross annual sales of less than $6 million."

Costs and Other Effects. No small businesses are likely to incur any additional costs on account of these clarifying changes.

Alternative Method that Minimizes Adverse Impact. No small businesses are likely to incur any additional costs on account of these clarifying changes.

Adverse Impacts:

Businesses. No businesses are likely to incur any additional costs on account of these clarifying changes.

Localities. Localities in the Commonwealth are unlikely to see any adverse impacts on account of these proposed regulatory changes.

Other Entities. No other entities are likely to be adversely affected by these proposed changes.

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[1] http://leg1.state.va.us/cgi-bin/legp504.exe?121+ful+CHAP0795

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

Summary:

Pursuant to § 2.2-4007.02 of the Code of Virginia, the amendment provides that interested persons submitting data, views, and arguments on a regulatory action may be accompanied by and represented by counsel or another representative.

Part III
Public Participation Procedures

18VAC150-11-50. Public comment.

A. In considering any nonemergency, nonexempt regulatory action, the agency shall afford interested persons an opportunity to (i) submit data, views, and arguments, either orally or in writing, to the agency; and (ii) be accompanied by and represented by counsel or other representative. Such opportunity to comment shall include an online public comment forum on the Town Hall.

1. To any requesting person, the agency shall provide copies of the statement of basis, purpose, substance, and issues; the economic impact analysis of the proposed or

fast-track regulatory action; and the agency's response to public comments received.

2. The agency may begin crafting a regulatory action prior to or during any opportunities it provides to the public to submit comments.

B. The agency shall accept public comments in writing after the publication of a regulatory action in the Virginia Register as follows:

1. For a minimum of 30 calendar days following the publication of the notice of intended regulatory action (NOIRA).

2. For a minimum of 60 calendar days following the publication of a proposed regulation.

3. For a minimum of 30 calendar days following the publication of a reproposed regulation.

4. For a minimum of 30 calendar days following the publication of a final adopted regulation.

5. For a minimum of 30 calendar days following the publication of a fast-track regulation.

6. For a minimum of 21 calendar days following the publication of a notice of periodic review.

7. Not later than 21 calendar days following the publication of a petition for rulemaking.

C. The agency may determine if any of the comment periods listed in subsection B of this section shall be extended.

D. If the Governor finds that one or more changes with substantial impact have been made to a proposed regulation, he may require the agency to provide an additional 30 calendar days to solicit additional public comment on the changes in accordance with § 2.2-4013 C of the Code of Virginia.

E. The agency shall send a draft of the agency's summary description of public comment to all public commenters on the proposed regulation at least five days before final adoption of the regulation pursuant to § 2.2-4012 E of the Code of Virginia.

VA.R. Doc. No. R17-4824; Filed October 7, 2016, 8:41 p.m.

TITLE 22. SOCIAL SERVICES

DEPARTMENT FOR AGING AND REHABILITATIVE SERVICES

Final Regulation

REGISTRAR'S NOTICE: The Department for Aging and Rehabilitative Services is claiming an exemption from Article 2 of the Administrative Process Act in accordance with § 2.2-4006 A 4 a of the Code of Virginia, which excludes regulations that are necessary to conform to changes in Virginia statutory law where no agency discretion is involved. The Department for Aging and Rehabilitative Services will receive, consider, and respond to petitions by any interested person at any time with respect to reconsideration or revision.

Title of Regulation: **22VAC30-11. Public Participation Guidelines (amending 22VAC30-11-50).**

Statutory Authority: §§ 2.2-4007.02 and 51.5-131 of the Code of Virginia.

Effective Date: November 30, 2016.

Agency Contact: Vanessa S. Rakestraw, Ph.D., CRC, Policy Analyst, Department for Aging and Rehabilitative Services, 8004 Franklin Farms Drive, Richmond, VA 23229, telephone (804) 662-7612, FAX (804) 662-7663, TTY (800) 464-9950, or email vanessa.rakestraw@dars.virginia.gov.

Small Business Impact Review Report of Findings: This final regulatory action serves as the report of the findings of the regulatory review pursuant to § 2.2-4007.1 of the Code of Virginia.

Summary:

Pursuant to § 2.2-4007.02 of the Code of Virginia, the amendment provides that interested persons submitting data, views, and arguments on a regulatory action may be accompanied by and represented by counsel or another representative.

Part III
Public Participation Procedures

22VAC30-11-50. Public comment.

A. In considering any nonemergency, nonexempt regulatory action, the agency shall afford interested persons an opportunity (i) to submit data, views, and arguments, either orally or in writing, to the agency and (ii) be accompanied by and represented by counsel or other representative. Such opportunity to comment shall include an online public comment forum on the Town Hall.

1. To any requesting person, the agency shall provide copies of the statement of basis, purpose, substance, and issues; the economic impact analysis of the proposed or fast-track regulatory action; and the agency's response to public comments received.

2. The agency may begin crafting a regulatory action prior to or during any opportunities it provides to the public to submit comments.

B. The agency shall accept public comments in writing after the publication of a regulatory action in the Virginia Register as follows:

1. For a minimum of 30 calendar days following the publication of the notice of intended regulatory action (NOIRA).

2. For a minimum of 60 calendar days following the publication of a proposed regulation.

3. For a minimum of 30 calendar days following the publication of a reproposed regulation.

4. For a minimum of 30 calendar days following the publication of a final adopted regulation.

5. For a minimum of 30 calendar days following the publication of a fast-track regulation.

6. For a minimum of 21 calendar days following the publication of a notice of periodic review.

7. Not later than 21 calendar days following the publication of a petition for rulemaking.

C. The agency may determine if any of the comment periods listed in subsection B of this section shall be extended.

D. If the Governor finds that one or more changes with substantial impact have been made to a proposed regulation, he may require the agency to provide an additional 30 calendar days to solicit additional public comment on the changes in accordance with § 2.2-4013 C of the Code of Virginia.

E. The agency shall send a draft of the agency's summary description of public comment to all public commenters on the proposed regulation at least five days before final adoption of the regulation pursuant to § 2.2-4012 E of the Code of Virginia.

VA.R. Doc. No. R17-4882; Filed October 12, 2016, 11:56 a.m.

EXECUTIVE ORDER NUMBER 60 (2016)

Declaration of a State of Emergency for the Commonwealth of Virginia in Support of States Affected by Hurricane Matthew

Importance of the Issue

On this date, October 6, 2016, I am declaring a state of emergency to exist for the Commonwealth of Virginia to support relief efforts to all states affected by Hurricane Matthew. I therefore direct that appropriate assistance be rendered by agencies of state government to respond to the needs of affected states and the potential public safety issues in the Commonwealth presented by oversize and overweight vehicles on the Commonwealth's highways.

The health and general welfare of the citizens require that state action be taken to help alleviate the conditions caused by this situation. The effects of this incident constitute a disaster wherein human life and public and private property are imperiled, as described in § 44-146.16 of the Code of Virginia.

Therefore, by virtue of the authority vested in me by § 44-146.17 of the Code of Virginia, as Governor and as Director of Emergency Management, and by virtue of the authority vested in me by Article V, Section 7 of the Constitution of Virginia and by § 44-75.1 of the Code of Virginia, and subject always to my continuing and ultimate authority and responsibility to act in such matters, I hereby confirm, ratify, and memorialize in writing my verbal orders issued on this date, October 6, 2016, whereby I am proclaiming that a state of emergency exists, and I am directing that appropriate assistance be rendered by agencies of both state and local governments to alleviate any impediments to the transport of relief supplies or utility restoration support.

In order to marshal all public resources and appropriate preparedness, response, and recovery measures to meet this threat and recover from its effects, and in accordance with my authority contained in § 44-146.17 of the Code of Virginia, I hereby order the following protective and restoration measures:

A. The authorization of the Departments of State Police, Transportation, and Motor Vehicles to grant temporary overweight, over width, registration, or license exemptions to all carriers transporting essential relief supplies, livestock or poultry feed, or other critical supplies for livestock or poultry, heating oil, motor fuels, or propane, or providing restoration of utilities (electricity, gas, phone, water, wastewater, and cable) in and through any area of the Commonwealth in order to support the disaster response and recovery, regardless of their point of origin or destination. Weight exemptions are not valid on interstate highways or on posted structures for restricted weight unless there is an associated Federal emergency declaration.

All over width loads, up to a maximum of 12 feet, and over height loads up to a maximum of 14 feet must follow Virginia Department of Motor Vehicles (DMV) hauling permit and safety guidelines.

In addition to described oversize transportation privileges, carriers are also exempt from vehicle registration with the Department of Motor Vehicles. This includes vehicles en route and returning to their home base. The above-cited agencies shall communicate this information to all staff responsible for permit issuance and truck legalization enforcement.

B. This Emergency Declaration implements limited relief from the provisions 49 CFR 390-399. Accordingly, the State Coordinator of Emergency Management recognizes the exemption for hours of service by any carrier when transporting essential relief supplies, passengers, property, livestock, poultry, equipment, food, feed for livestock or poultry, fuel, construction materials, and other critical supplies to or from any portion of the Commonwealth for purpose of providing direct relief or assistance as a result of this disaster, pursuant to § 52-8.4 of the Code of Virginia and Title 49 Code of Federal Regulations, Section 390.23 and Section 395.3.

C. The foregoing oversize transportation privileges, as well as the regulatory exemption provided by § 52-8.4 (A) of the Code of Virginia, and implemented in 19VAC30-20-40 (B) of the "Motor Carrier Safety Regulations," shall remain in effect for 30 days from the onset of the disaster, or until relief is no longer necessary, as determined by the Secretary of Public Safety and Homeland Security in consultation with the Secretary of Transportation, whichever is earlier.

D. The provisions authorized in paragraphs A through C above shall be implemented and disseminated by the publication of administrative notice to all affected and interested parties. I hereby delegate to the Secretary of Public Safety and Homeland Security, after consultation with other affected Cabinet Secretaries, the authority to implement and disseminate this order as set forth in § 2.2-104 of the Code of Virginia.

E. The discontinuance of provisions authorized in paragraph A through C above shall be implemented and disseminated by publication of administrative notice to all affected and interested parties. I hereby delegate to the Secretary of Public Safety and Homeland Security, after consultation with other affected Cabinet-level Secretaries, the authority to implement this order as set forth in § 2.2-104 of the Code of Virginia.

Effective Date of this Executive Order

This Executive Order shall be effective October 6, 2016, and shall remain in full force and effect until November 6, 2016, unless sooner amended or rescinded by further executive order. Termination of the Executive Order is not intended to

terminate any federal-type benefits granted or to be granted due to injury or death as a result of service under this Executive Order.

Given under my hand and under the Seal of the Commonwealth of Virginia, this 6th day of October, 2016.

/s/ Terence R. McAuliffe
Governor

DEPARTMENT OF ENVIRONMENTAL QUALITY

SunEnergy1 - Withdrawal of Notice of Intent for Small Renewable Energy Project (Solar) in the City of Chesapeake

SunEnergy1 has notified the Virginia Department of Environmental Quality that the notice of intent to submit a Permit by Rule Application for the construction of a 20-megawatt, alternating current solar facility located on the eastern side of Highway 17 and on the southern side of Ballahack Road in the City of Chesapeake is being withdrawn. The applicant, Chesapeake Solar, LLC, was unable to obtain the required Conditional Use Permit from the City of Chesapeake. The original notice of intent was published in the Virginia Register on March 21, 2016.

Contact Information: Mary E. Major, Department of Environmental Quality, 629 East Main Street, P.O. Box 1105, Richmond, VA 23218, telephone (804) 698-4423, or email mary.major@deq.virginia.gov.

STATE BOARD OF HEALTH

Notice of Periodic Review and Small Business Impact Review

Pursuant to Executive Order 17 (2014) and §§ 2.2-4007.1 and 2.2-4017 of the Code of Virginia, the Department of Health is conducting a periodic review and small business impact review of **12VAC5-460, Regulations Governing Tourist Establishment Swimming Pools and Other Public Pools**. The review of this regulation will be guided by the principles in Executive Order 17 (2014).

The purpose of this review is to determine whether this regulation should be repealed, amended, or retained in its current form. Public comment is sought on the review of any issue relating to this regulation, including whether the regulation (i) is necessary for the protection of public health, safety, and welfare or for the economical performance of important governmental functions; (ii) minimizes the economic impact on small businesses in a manner consistent with the stated objectives of applicable law; and (iii) is clearly written and easily understandable.

The comment period begins October 14, 2016, and ends November 5, 2016.

Comments may be submitted online to the Virginia Regulatory Town Hall at http://www.townhall.virginia.gov/L/Forums.cfm. Comments may also be sent to Olivia McCormick, Tourist Establishment Services Program Manager, Virginia Department of Health, 109 Governor Street, Richmond, VA 23219, telephone (804) 864-8146, FAX (804) 864-7475, or email olivia.mccormick@vdh.virginia.gov.

Comments must include the commenter's name and address (physical or email) information in order to receive a response to the comment from the agency. Following the close of the public comment period, a report of both reviews will be posted on the Town Hall and a report of the small business impact review will be published in the Virginia Register of Regulations.

Notice of Periodic Review and Small Business Impact Review

Pursuant to Executive Order 17 (2014) and §§ 2.2-4007.1 and 2.2-4017 of the Code of Virginia, the Department of Health is conducting a periodic review and small business impact review of **12VAC5-600, Waterworks Operation Fee**. The review of this regulation will be guided by the principles in Executive Order 17 (2014).

The purpose of this review is to determine whether this regulation should be repealed, amended, or retained in its current form. Public comment is sought on the review of any issue relating to this regulation, including whether the regulation (i) is necessary for the protection of public health, safety, and welfare or for the economical performance of important governmental functions; (ii) minimizes the economic impact on small businesses in a manner consistent with the stated objectives of applicable law; and (iii) is clearly written and easily understandable.

The comment period begins October 7, 2016, and ends November 7, 2016.

Comments may be submitted online to the Virginia Regulatory Town Hall at http://www.townhall.virginia.gov/L/Forums.cfm. Comments may also be sent to Drew Hammond, Deputy Director, Office of Drinking Water, Virginia Department of Health, 109 Governor Street, Richmond, VA 23219, telephone (804) 864-7302, FAX (804) 864-7521, or email drew.hammond@vdh.virginia.gov.

Comments must include the commenter's name and address (physical or email) information in order to receive a response to the comment from the agency. Following the close of the public comment period, a report of both reviews will be posted on the Town Hall and a report of the small business impact review will be published in the Virginia Register of Regulations.

VIRGINIA LOTTERY

Director's Orders

The following Director's Orders of the Virginia Lottery were filed with the Virginia Registrar of Regulations on October 12, 2016. The orders may be viewed at the Virginia Lottery, 900 East Main Street, Richmond, Virginia, or at the office of the Registrar of Regulations, 201 North 9th Street, 2nd Floor, Richmond, Virginia.

Director's Order Number One Hundred Twenty-Nine (16)

Virginia's Computer-Generated Lottery Game "Print 'n Play Smokin' Hot Crossword" Final Rules for Game Operation (effective October 9, 2016)

Director's Order Number One Hundred Thirty (16)

Virginia Lottery's Computer-Generated Game "Print 'n Play Gold Bar Bingo" Final Rules for Game Operation (effective October 9, 2016)

Director's Order Number One Hundred Thirty-One (16)

Virginia Lottery's Computer-Generated Game "Print 'n Play High Stakes Blackjack" Final Rules for Game Operation (effective October 9, 2016)

Director's Order Number One Hundred Thirty-Two (16)

Virginia's Computer-Generated Game Lottery "Print 'n Play Hot 'n Spicy Bingo" Final Rules for Game Operation (effective October 9, 2016)

Director's Order Number One Hundred Thirty-Three (16)

Virginia Lottery's Computer-Generated Game "Print 'n Play Lucky Bingo" Final Rules for Game Operation (effective October 9, 2016)

Director's Order Number One Hundred Thirty-Four (16)

Virginia Lottery's Scratch Game 1718 "Win It All Doubler" Final Rules for Game Operation (effective September 30, 2016)

Director's Order Number One Hundred Thirty-Six (16)

"Wegmans Bin Sales Retailer Incentive Promotion" Virginia Lottery Retailer Incentive Program Requirements (effective January 1, 2017)

Director's Order Number One Hundred Thirty-Seven (16)

"Speedy Rewards Sip & Sell Retailer Incentive Promotion" Virginia Lottery Retailer Incentive Program Requirements (effective February 1, 2017)

Director's Order Number One Hundred Thirty-Eight (16)

Sheetz District Battle Virginia Lottery Retailer Incentive Program Requirements (effective February 1, 2017)

Director's Order Number One Hundred Thirty-Nine (16)

"Pit Stop Mega Free Coffee Fridays" Virginia Lottery Retailer Incentive Program Requirements (effective January 1, 2017)

Director's Order Number One Hundred Forty (16)

"Handy Mart 2 Ways to Win Scratch Incentive" Virginia Lottery Retailer Incentive Program Requirements (effective February 1, 2017)

Director's Order Number One Hundred Forty-One (16)

"Fas Mart Stretch Your Scratch Goal Contest" Virginia Lottery Retailer Incentive Program Requirements (effective February 1, 2017)

Director's Order Number One Hundred Forty-Two (16)

"Fas Mart Mega Lunch Fridays" Virginia Lottery Retailer Incentive Program Requirements (effective January 1, 2017)

Director's Order Number One Hundred Forty-Three (16)

"Virginia Lottery March Bowling Challenge Retailer Incentive Promotion - Handy Mart" Virginia Lottery Retailer Incentive Program Requirements (effective March 1, 2017)

Director's Order Number One Hundred Forty-Four (16)

"Virginia Lottery March Bowling Challenge Retailer Incentive Promotion - Multi-Chain" Virginia Lottery Retailer Incentive Program Requirements (effective March 1, 2017)

Director's Order Number One Hundred Forty-Five (16)

"7-Eleven Market Battles Retailer Incentive Promotion" Virginia Lottery Retailer Incentive Program Requirements (effective January 1, 2017)

Director's Order Number One Hundred Forty-Seven (16)

Certain Virginia Print 'n Play Games; End of Games - Virginia Lottery's Print 'n Play Diamond Club Crossword (18 16); Virginia Lottery's Print 'n Play High Roller Bingo (21 16); Virginia Lottery's Print 'n Play Gold Rush Crossword (24 16); Virginia Lottery's Print 'n Play $50,000 Blackjack (25 16); Virginia Lottery's Print 'n Play Safari Bingo (26 16); Virginia Lottery's Print 'n Play Blackjack Classic (74 16); Virginia Lottery's Print 'n Play Bullseye Bingo (75 16); Virginia Lottery's Print 'n Play Horoscope Crossword (76 16); Virginia Lottery's Print 'n Play Money Bag Crossword (77 16); Virginia Lottery's Print 'n Play Rockin' Bingo (78 16); Virginia Lottery's Print 'n Play Hot 'n Spicy Bingo (20 16); Virginia Lottery's Print 'n Play Smokin' Hot Crossword (13 16) (effective October 8, 2016)

Director's Order Number One Hundred Forty-Nine (16)

Certain Virginia Game Promotion; Prize Drawings Correction - Q1 FY17 eXTRA Chances Scratcher Promotion (97 16) (effective October 3, 2016)

BOARD OF PSYCHOLOGY

Notice of Periodic Review and Small Business Impact Review

Pursuant to Executive Order 17 (2014) and §§ 2.2-4007.1 and 2.2-4017 of the Code of Virginia, the Board of Psychology is currently reviewing each of the regulations listed below to determine whether the regulation should be repealed, amended, or retained in its current form. The review of each regulation will be guided by the principles in Executive Order

17 (2014). Public comment is sought on the review of any issue relating to each regulation, including whether the regulation (i) is necessary for the protection of public health, safety, and welfare or for the economical performance of important governmental functions; (ii) minimizes the economic impact on small businesses in a manner consistent with the stated objectives of applicable law; and (iii) is clearly written and easily understandable.

18VAC125-15, Regulations Governing Delegation to an Agency Subordinate

18VAC125-20, Regulations Governing the Practice of Psychology

The comment period begins October 31, 2016, and ends November 30, 2016.

Comments must include the commenter's name and address (physical or email) information in order to receive a response to the comment from the agency. Following the close of the public comment period, a report of both reviews will be posted on the Virginia Regulatory Town Hall, and a report of the small business impact review will be published in the Virginia Register of Regulations.

Contact Information: Elaine J. Yeatts, Agency Regulatory Coordinator, Department of Health Professions, 9960 Mayland Drive, Suite 300, Richmond, VA 23233, FAX (804) 527-4434, or email elaine.yeatts@dhp.virginia.gov.

VIRGINIA INFORMATION TECHNOLOGIES AGENCY

Proposed IMSAC Guidance Documents on Digital Identity Assertions and Federation and Participant Requirements

Notice of action: The Virginia Information Technologies Agency (VITA) is announcing an opportunity for public comment on two proposed guidance documents that were developed by the Identity Management Standards Advisory Council (IMSAC) (§ 2.2-437 of the Code of Virginia).

The IMSAC was created by the General Assembly in 2015 to advise the Secretary of Technology on the adoption of identity management standards and the creation of guidance documents pursuant to § 2.2-436 of the Code of Virginia.

Regulations affected: There are no regulations affected or proposed by this action.

Purpose of notice: IMSAC is seeking comment on whether the two proposed guidance documents should be submitted as is, or if revisions should be made before the final posting.

The guidance documents were developed by VITA, acting on behalf of the Secretary of Technology, and at the direction of IMSAC.

IMSAC recommends to the Secretary of Technology guidance documents relating to (i) nationally recognized technical and data standards regarding the verification and authentication of identity in digital and online transactions; (ii) the minimum specifications and standards that should be included in an identity trust framework, as defined in § 59.1-550 of the Code of Virginia, so as to warrant liability protection pursuant to the Electronic Identity Management Act (§ 59.1-550 et seq. of the Code of Virginia); and (iii) any other related data standards or specifications concerning reliance by third parties on identity credentials, as defined in § 59.1-550 of the Code of Virginia.

Purpose Statement for Digital Identity Assertions Guidance Document:

The purpose of this document is to establish minimum specifications for assertions within a digital identity system. The minimum specifications have been designed to be conformant with NIST SP 800-63-3. The document defines minimum requirements, assertion types, core components, presentation methods, security, and process flows, assurance levels, and privacy and security provisions for assertions within a digital identity system.

The document limits its focus to digital identity assertions. Minimum specifications for other components of a digital identity system have been defined in separate IMSAC guidance documents in this series, pursuant to §§ 2.2-436 and 2.2-437 of the Code of Virginia.

Purpose Statement for Federation and Participant Requirements Guidance Document:

The purpose of this document is to establish minimum specifications for electronic federation and participant requirements within a digital identity system. The minimum specifications have been designed to be conformant with NIST SP 800-63-3. The document defines governance models, minimum requirements processes, assurance levels, and participant requirements for a federated digital identity system.

The document limits its focus to federation and participant requirements. Minimum specifications for other components of a digital identity system have been defined in separate IMSAC guidance documents in this series, pursuant to §§ 2.2-436 and 2.2-437 of the Code of Virginia.

The proposed guidance documents are also available with comments and proposed changes by IMSAC on the VITA website at https://www.vita.virginia.gov/About/default.aspx?id=6442474173.

Public comment period: October 31, 2016, through December 1, 2016.

Public hearing: A public meeting will be held on December 5, 2016, at 11 a.m. The meeting will be held at the Commonwealth Enterprise Solutions Center, 11751 Meadowville Lane, Chester, VA 23836, in Room 1222.

Public comment stage: The two guidance documents were developed by IMSAC and are being posted as general notices pursuant to § 2.2-437 C of the Code of Virginia. Proposed guidance documents, and general opportunity for oral or written submittals as to those guidance documents, shall be posted on the Virginia Regulatory Town Hall and published in the Virginia Register of Regulations as a general notice following the processes and procedures set forth in § 2.2-4031 B of the Virginia Administrative Process Act (§ 2.2-4000 et seq. of the Code of Virginia). IMSAC shall allow at least 30 days for the submission of written comments following the posting and publication and shall hold at least one meeting dedicated to the receipt of oral comment no less than 15 days after the posting and publication.

For the purpose of defining the timeframe for public participation and comment, VITA is defining "days" as "calendar days." IMSAC will receive public comment at its December 5, 2016, meeting. For additional information in the definition of "days," please reference page 6 of 15 of VITA's Information Technology Resource Management (ITRM), Policies, Standards and Guidelines (PSGs) Briefs and Supporting Documents found at https://www.vita.virginia.gov/uploadedFiles/VITA_Main_Public/Library/PSGs/ITRMPSG_Brief_Supportdocs.pdf.

IMSAC will hold a dedicated meeting to public comment on December 5, 2016. Meeting details will be posted on the Commonwealth Calendar and the VITA website at https://www.vita.virginia.gov/About/default.aspx?id=6442474171.

Description of proposal: The proposed guidance documents are being posted for review by the general public with an opportunity for public comment.

Federal information: No federal information.

How to comment: IMSAC accepts written comments by email and postal mail. In order to be considered, comments must include the full name, address, and telephone number of the person commenting and be received by VITA by the last day of the comment period. All materials received are part of the public record.

To review regulation documents: The proposed guidance documents and any supporting documents are available on the VITA website at https://www.vita.virginia.gov/About/default.aspx?id=6442474173. The documents may also be obtained by contacting the VITA representative named below.

Contact Information: Janice Akers, Virginia Information Technologies Agency, 11751 Meadowville Lane, Chester, VA 23836, telephone (804) 416-6083, or email janice.akers@vita.virginia.gov.

STATE WATER CONTROL BOARD

Proposed Enforcement Action for Virginia Electric and Power Company

An enforcement action has been proposed for Virginia Electric and Power Company for violations of state water control law that occurred in Arlington, Virginia and Augusta County, Virginia. A description of the proposed action is available online at www.deq.virginia.gov. Lee Crowell will accept comments by email at lee.crowell@deq.virginia.gov or postal mail at Department of Environmental Quality, P.O. Box 1105, Richmond, VA 23219, from October 31, 2016, through November 30, 2016.

General VPDES Watershed Permit for Total Nitrogen and Total Phosphorus Discharges and Nutrient Trading in the Chesapeake Bay Watershed in Virginia

Notice of action: The State Water Control Board is considering additional amendments of a regulation on water quality.

Purpose of notice: To seek public comment through the Department of Environmental Quality (DEQ) on (i) the proposal, (ii) the costs and benefits of the proposal, (iii) effects of the proposal on farm and forest land preservation, and (iv) impacts on small businesses.

Public comment period: October 11, 2016, through November 9, 2016.

Public comment stage: Notice of informal public comment.

Regulation name: General Virginia Pollutant Discharge Elimination System (VPDES) Watershed Permit Regulation for Total Nitrogen and Total Phosphorus Discharges and Nutrient Trading in the Chesapeake Bay Watershed in Virginia 9VAC25-820 (Watershed General Permit).

Description of Proposed Regulation: The proposed reissuance and amendment of the Watershed General Permit originally public noticed for comment on December 14, 2015, and the public comment period closed on February 12, 2016. On March 11, 2016, the U.S. Environmental Protection Agency (EPA) filed an objection to issuance of the Watershed General Permit. In response, DEQ has developed revisions to the proposal to address EPA's objection and is seeking public comment on the revisions for the board's consideration.

The revision will require facilities in the previously proposed sewage treatment plant (STP) design flow of 0.5-0.999 million gallons per day (MGD), effluent total nitrogen (TN) load limit for industrial facilities of 50,000-99,999 pounds per year (lb/yr), and effluent total phosphorus (TP) load limit for industrial facilities of 5,000-9,999 lb/yr category to collect two 24-hour composite samples per week. The change will also require facilities that are in the previously proposed STP design flow of 1.0-4.999 MGD, effluent TN load limit for

industrial facilities of 100,000-349,999 lb/yr, and effluent TP load limit for industrial facilities of 10,000-34,999 lb/yr category to collect two 24-hour composite samples per week.

This revision to the proposed regulation (9VAC25-820 Part I) is as follows:

E. Monitoring requirements.

1. Discharges shall be monitored by the permittee during weekdays as specified below unless the department determines that weekday only sampling results in a non-representative load. Weekend monitoring and/or or alternative monthly load calculations to address production schedules or seasonal flows shall be submitted to the department for review and approval on a case-by-case basis. Facilities that exhibit instantaneous discharge flows that vary from the daily average discharge flow by less than 10% may submit a proposal to the department to use an alternative sample type; such proposals shall be reviewed and approved by the department on a case-by-case basis.

Parameter	Sample Type and Collection Frequency			
STP design flow	≥20.0 MGD	~~5.0 - 19.999 MGD~~ ~~1.0 - 19.999~~ 1.0 - ~~4.999~~ ~~MGD~~ ~~0.5 - 0.999 MGD~~ [0.5 -19.999 MGD]	~~0.040 - 0.999~~ 0.040 - 0.499 MGD	< 0.040 MGD
Effluent TN load limit for industrial facilities		~~≥350,000 lb/yr~~ ~~>100,000 100,000 - 349,999 lb/yr~~ ~~50,000 - 99,999 lb/yr~~ [50,000 - >350,000 lb/yr]	~~487 - 99,999~~ 487 - 49,999lb/yr	< 487 lb/yr
Effluent TP load limit for industrial facilities		~~≥35,000 lb/yr~~ ~~>10,000 10,000 - 34,999 lb/yr~~ ~~5,000 - 9,999 lb/yr~~ [5,000 - >35,000 lb/yr]	~~37 - 9,999~~ 37 - 4,999 lb/yr	< 37 lb/yr
Flow	Totalizing, Indicating, and Recording			1/Day, see indivi-dual VPDES permit for sample type
Nitrogen Compounds (Total Nitrogen = TKN + NO2- (as N) + NO3- (as N))	24 HC 3 Days /Week	24 HC 2/Week* ~~24 HC 1/Week~~ ~~8 HC 4/Month**~~	8 HC 2/Month, > 7 days apart	1/ Month Grab
Total Phosphorus	24 HC 3 Days /Week	24 HC 2/Week* ~~24 HC 1/Week~~ ~~8 HC 4/Month**~~	8 HC 2/Month, > 7 days apart	1/ Month Grab

*Two 24-hour flow composited samples taken in the same calendar week that are then composited by flow into a single weekly composite sample for analysis shall be considered to be in compliance with this requirement.

~~**Two sets of two 8-hour flow composited samples taken at least one day apart but in the same calendar week that are then composited by flow into two weekly composite samples per month for analysis shall be considered to be in compliance with this requirement.~~

How to comment: DEQ accepts written comments by hand-delivery, email, fax, and postal mail. All written comments must include the full name and address of the person commenting and be received by DEQ no later than the last day of the comment period. All testimony, exhibits and documents received are part of the public record. More detailed information on the proposal is available by contacting the DEQ representative named below.

Contact Information: Matthew Richardson, Department of Environmental Quality, 629 East Main Street, P.O. Box 1105, Richmond, VA 23218, telephone (804) 698-4195, FAX (804) 698-4032, or email matthew.richardson@deq.virginia.gov.

Amendment of Water Quality Management Planning Regulation

Notice of action: The State Water Control Board is considering the amendment of the regulation on water quality management planning in accordance with the Public Participation Procedures for Water Quality Management Planning. A regulation is a general rule governing people's rights or conduct that is upheld by a state agency.

Purpose of notice: The board is seeking comments through the Department of Environmental Quality (DEQ) on the proposed amendment. The purpose of the amendment to the state's Water Quality Management Planning Regulation (9VAC25-720) is to replace two total maximum daily load (TMDL) wasteload allocations in the Water Quality Management Planning Regulation.

Public comment period: October 31, 2016, through November 29, 2016.

Description of proposed action: DEQ staff will propose amendments to the state's Water Quality Management Planning Regulation for the Tennessee-Big Sandy River Basin (9VAC25-720-90 A). Statutory authority for promulgating these amendments can be found in subdivision 10 of § 62.1-44.15 of the Code of Virginia.

Staff intends to recommend (i) that the board approve the TMDL report as the plan for the pollutant reductions necessary for attainment of water quality goals in the impaired segments, (ii) that the board authorize inclusion of the TMDL report in the appropriate Water Quality Management Plan, and (iii) that the board replace two existing TMDL wasteload allocations (WLAs) with the revised values as part of the state's Water Quality Management Planning Regulation in accordance with § 2.2-4006 A 14 and § 2.2-4006 B of the Code of Virginia.

The TMDL report was developed in accordance with federal regulations (40 CFR § 130.7) and is exempt from the provisions of Article 2 of the Virginia Administrative Process Act. The report was subject to the TMDL public participation process contained in DEQ's Public Participation Procedures for Water Quality Management Planning. The public comment process provides the affected stakeholders an opportunity for public appeal of the TMDL.

As of July 1, 2014, TMDL WLAs can receive State Water Control Board approval prior to EPA approval due to amendments outlined in § 2.2-4006 A 14 of the Code of Virginia. The TMDL report in this public notice has been reviewed by EPA for required TMDL elements, however, remains in draft form awaiting State Water Control Board approval. The draft report can be found at http://www.deq.virginia.gov/Programs/Water/WaterQualityInformationTMDLs/TMDL/TMDLDevelopment/DraftTMDLReports.aspx.

Affected Waterbodies and Localities for the two revised TMDL wasteload allocations:

Tennessee-Big Sandy River Basin (9VAC25-720-90 A):

"Bacteria and Benthic Total Maximum Daily Load (TMDL) Development for the Beaver Creek Watershed located in Bristol City and Washington County, Virginia"

- The revised Beaver Creek TMDL, located in the City of Bristol and Washington County, proposes E. coli reductions for the Beaver Creek watershed and provides an E. coli wasteload allocation of 4.38E+12 cfu/yr.
- The revised Beaver Creek TMDL, located in the City of Bristol and Washington County, proposes sediment reductions for the Beaver Creek watershed and provides sediment wasteload allocations of 310.91 tons/year.

How to comment: DEQ accepts written comments by email, fax, and postal mail. All written comments must include the full name, address, and telephone number of the person commenting and be received by Department of Environmental Quality by 5 p.m. on the last day of the comment period.

How a decision is made: After comments have been considered, the board will make the final decision. Citizens who submit statements during the comment period may address the board members during the board meeting at which a final decision is made on the proposal.

To review documents: The TMDL report is available on the DEQ website at http://www.deq.virginia.gov/Programs/Water/WaterQualityInformationTMDLs/TMDL/TMDLDevelopment/DraftTMDLReports.aspx, and by contacting the DEQ representative named below for the report. The electronic copy is in PDF format and may be read online or downloaded.

Contact for public comments, document requests, and additional information: Liz McKercher, Department of Environmental Quality, P.O. Box 1105, Richmond, VA 23218, telephone (804) 698-4291, FAX (804) 698-4032, or email elizabeth.mckercher@deq.virginia.gov.

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; *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.