



# VIRGINIA

## REGISTER OF REGULATIONS

VOL. 29 ISS. 3

PUBLISHED EVERY OTHER WEEK BY THE VIRGINIA CODE COMMISSION

OCTOBER 8, 2012

### TABLE OF CONTENTS

<b>Register Information Page</b> .....	337
<b>Publication Schedule and Deadlines</b> .....	338
<b>Notices of Intended Regulatory Action</b> .....	339
<b>Regulations</b> .....	342
4VAC10-30. Virginia State Forests Regulations (Emergency).....	342
4VAC20-260. Pertaining to Designation of Seed Areas and Clean Cull Areas (Final) .....	343
4VAC20-720. Pertaining to Restrictions on Oyster Harvest (Final) .....	344
4VAC25-150. Virginia Gas and Oil Regulation (Final) .....	355
4VAC25-160. Virginia Gas and Oil Board Regulations (Final) .....	380
6VAC35-20. Regulations Governing the Monitoring, Approval, and Certification of Juvenile Justice Programs (Proposed) .....	386
8VAC40-31. Regulations Governing Certification of Certain Institutions to Confer Degrees, Diplomas and Certificates (Proposed).....	405
8VAC55-10. Prohibition of Weapons (Final) .....	431
9VAC5-50. New and Modified Stationary Sources (Rev. H05) (Final) .....	431
9VAC5-80. Permits for Stationary Sources (Rev. H05) (Final).....	431
9VAC15-70. Small Renewable Energy Projects (Combustion) Permit by Rule (Proposed) .....	463
11VAC15-22. Charitable Gaming Rules and Regulations (Final) .....	473
11VAC15-31. Supplier Regulations (Final).....	473
11VAC15-40. Charitable Gaming Regulations (Final).....	473
12VAC5-490. Virginia Radiation Protection Regulations: Fee Schedule (Fast-Track).....	507
12VAC5-520. Regulations Governing the Dental Scholarship and Loan Repayment Programs (Final).....	511
12VAC30-50. Amount, Duration, and Scope of Medical and Remedial Care Services (Emergency) .....	515
12VAC30-80. Methods and Standards for Establishing Payment Rates; Other Types of Care (Emergency) .....	515
12VAC30-120. Waivered Services (Proposed).....	518
18VAC5-22. Board of Accountancy Regulations (Final) .....	563
18VAC50-22. Board for Contractors Regulations (Final) .....	564
18VAC60-20. Regulations Governing Dental Practice (Fast-Track).....	576
18VAC60-20. Regulations Governing Dental Practice (Emergency).....	578
18VAC65-20. Regulations of the Board of Funeral Directors and Embalmers (Emergency) .....	585
18VAC65-30. Regulations for Preneed Funeral Planning (Fast-Track) .....	587
18VAC85-150. Regulations Governing the Practice of Behavior Analysis (Emergency) .....	592
18VAC90-20. Regulations Governing the Practice of Nursing (Proposed).....	596
18VAC110-20. Regulations Governing the Practice of Pharmacy (Emergency) .....	601
18VAC120-30. Regulations Governing Polygraph Examiners (Proposed) .....	605
18VAC160-20. Board for Waterworks and Wastewater Works Operators and Onsite Sewage System Professionals Regulations (Fast-Track) .....	613
20VAC5-201. Rules Governing Utility Rate Applications and Annual Informational Filings (Proposed) .....	620
24VAC27-30. General Regulations for Towing and Recovery Operators (Emergency) .....	627
24VAC30-271. Economic Development Access Fund Policy (Final) .....	628
<b>General Notices/Errata</b> .....	631

Virginia Code Commission

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# THE VIRGINIA REGISTER INFORMATION PAGE

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**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 12 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. **28:2 VA.R. 47-141 September 26, 2011**, refers to Volume 28, Issue 2, pages 47 through 141 of the *Virginia Register* issued on September 26, 2011.

*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.

Members of the Virginia Code Commission: **John S. Edwards**, Chairman; **Gregory D. Habeeb**; **James M. LeMunyon**; **Ryan T. McDougle**; **Robert L. Calhoun**; **E.M. Miller, Jr.**; **Thomas M. Moncure, Jr.**; **Wesley G. Russell, Jr.**; **Charles S. Sharp**; **Robert L. Taverner**; **Christopher R. Nolen**; **J. Jasen Eige** or **Jeffrey S. Palmore**.

Staff of the Virginia Register: **Jane D. Chaffin**, Registrar of Regulations; **June T. Chandler**, Assistant Registrar; **Rhonda Dyer**, Publications Assistant; **Terri Edwards**, Operations Staff Assistant; **Karen Perrine**, Staff Attorney.

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## PUBLICATION SCHEDULE AND DEADLINES

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

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### October 2012 through November 2013

<u>Volume: Issue</u>	<u>Material Submitted By Noon*</u>	<u>Will Be Published On</u>
29:3	September 19, 2012	October 8, 2012
29:4	October 3, 2012	October 22, 2012
29:5	October 17, 2012	November 5, 2012
29:6	October 31, 2012	November 19, 2012
29:7	November 13, 2012 ( <b>Tuesday</b> )	December 3, 2012
29:8	November 28, 2012	December 17, 2012
29:9	December 11, 2012 ( <b>Tuesday</b> )	December 31, 2012
29:10	December 26, 2012	January 14, 2013
29:11	January 9, 2013	January 28, 2013
29:12	January 23, 2013	February 11, 2013
29:13	February 6, 2013	February 25, 2013
29:14	February 20, 2013	March 11, 2013
29:150	March 6, 2013	March 25, 2013
29:16	March 20, 2013	April 8, 2013
29:17	April 3, 2013	April 22, 2013
29:18	April 17, 2013	May 6, 2013
29:19	May 1, 2013	May 20, 2013
29:20	May 15, 2013	June 3, 2013
29:21	May 29, 2013	June 17, 2013
29:22	June 12, 2013	July 1, 2013
29:23	June 26, 2013	July 15, 2013
29:24	July 10, 2013	July 29, 2013
29:25	July 24, 2013	August 12, 2013
29:26	August 7, 2013	August 26, 2013
30:1	August 21, 2013	September 9, 2013
30:2	September 4, 2013	September 23, 2013
30:3	September 18, 2013	October 7, 2013
30:4	October 2, 2013	October 21, 2013
30:5	October 16, 2013	November 4, 2013
30:6	October 30, 2013	November 18, 2013

\*Filing deadlines are Wednesdays unless otherwise specified.

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# NOTICES OF INTENDED REGULATORY ACTION

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## TITLE 4. CONSERVATION AND NATURAL RESOURCES

### DEPARTMENT OF FORESTRY

#### Notice of Intended Regulatory Action

Notice is hereby given in accordance with § 2.2-4007.01 of the Code of Virginia that the Department of Forestry intends to consider amending **4VAC10-30, Virginia State Forest Regulations**. The purpose of the proposed action is to amend the regulations to implement Chapter 484 of the 2012 Acts of Assembly relating to state forest special use permits to hunt, trap, fish, ride bikes, and ride horses in a state forest. The regulations will establish an annual fee of \$15 for special use permits to hunt, fish, trap, ride bikes, or ride horses.

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

Statutory Authority: §§ 10.1-1101 and 10.1-1152 of the Code of Virginia.

Public Comment Deadline: November 7, 2012.

Agency Contact: Ronald S. Jenkins, Administrative Officer, Department of Forestry, 900 Natural Resources Drive, Suite 800, Charlottesville, VA 22903, telephone (434) 977-6555, FAX (434) 293-2768, or email ron.jenkins@dof.virginia.gov.

VA.R. Doc. No. R13-3185; Filed September 18, 2012, 10:22 a.m.



## TITLE 12. HEALTH

### STATE BOARD OF HEALTH

#### Notice of Intended Regulatory Action

Notice is hereby given in accordance with § 2.2-4007.01 of the Code of Virginia that the State Board of Health intends to consider amending **12VAC5-20, Regulations for the Conduct of Human Research**. The purpose of the proposed action is to amend the regulations for clarity, efficiency, and effectiveness relating to (i) the elements that each review committee shall consider in conducting a review of a proposed human research project; (ii) the expedited review process, including the committee's authority to suspend or terminate approval of research; (iii) the informed consent process; and (iv) the elimination of references to repealed Code of Virginia sections and the addition of a reference to the Virginia Immunization Information System. The proposed amendments are the result of a completed periodic review.

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

Statutory Authority: § 32.1-12.1 of the Code of Virginia.

Public Comment Deadline: November 7, 2012.

Agency Contact: Joseph Hilbert, Director of Governmental and Regulatory Affairs, Department of Health, 109 Governor Street, Richmond, VA 23219, telephone (804) 864-7006, FAX (804) 864-7022, or email joe.hilbert@vdh.virginia.gov.

VA.R. Doc. No. R13-3401; Filed September 17, 2012, 5:15 p.m.

### DEPARTMENT OF MEDICAL ASSISTANCE SERVICES

#### 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 Medical Assistance Services intends to consider amending **12VAC30-50, Amount, Duration, and Scope of Medical and Remedial Care and Services and 12VAC30-80, Methods and Standards for Establishing Payment Rate; Other Types of Care**. The purpose of the proposed action is to conform the regulations to the legislative mandate of Item 297 UUUU of Chapter 890 of the 2011 Acts of Assembly to provide case management services for children who receive services through the Part C of the Individuals with Disabilities Education Act (IDEA) program.

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

Statutory Authority: § 32.1-325 of the Code of Virginia; 42 USC § 1396 et seq.

Public Comment Deadline: November 9, 2012.

Agency Contact: Molly Carpenter, Policy Analyst, Division of Maternal and Child Health, Department of Medical Assistance Services, 600 East Broad Street, Suite 1300, Richmond, VA 23219, telephone (804) 786-1493, FAX (804) 786-1680, or email molly.carpenter@dmas.virginia.gov.

VA.R. Doc. No. R13-2955; Filed September 12, 2012, 11:41 a.m.



## TITLE 18. PROFESSIONAL AND OCCUPATIONAL LICENSING

### BOARD OF DENTISTRY

#### 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 Dentistry intends to consider amending **18VAC60-20, Regulations Governing Dental Practice**. The purpose of the proposed action is to revise the regulations to provide for permits for dentists who provide or administer conscious/moderate sedation or deep sedation/general anesthesia in a dental office as required by Chapter 526 of the 2011 Acts of Assembly. The key provisions of the regulations are to establish (i) definitions for words and terms used in sedation and anesthesia regulations; (ii) general provisions for administration, including

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# Notices of Intended Regulatory Action

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recordkeeping and requirements for emergency management; (iii) requirements for deep sedation/general anesthesia permits including training, delegation of administration emergency equipment, and monitoring and discharge of patients; and (iv) requirements for conscious/moderate sedation permits including training, delegation of administration emergency equipment, and monitoring and discharge of patients. Emergency regulations are currently in effect.

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

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

Public Comment Deadline: November 7, 2012.

Agency Contact: Sandra Reen, Executive Director, Board of Dentistry, 9960 Mayland Drive, Suite 300, Richmond, VA 23233-1463, telephone (804) 367-4538, FAX (804) 527-4428, or email [sandra.reen@dhp.virginia.gov](mailto:sandra.reen@dhp.virginia.gov).

VA.R. Doc. No. R13-2984; Filed September 5, 2012, 2:41 p.m.

## BOARD OF FUNERAL DIRECTORS AND EMBALMERS

### 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 Funeral Directors and Embalmers intends to consider amending **18VAC65-20, Regulations of the Board of Funeral Directors and Embalmers**. The purpose of the proposed action is to implement identification prerequisites for cremation as mandated by Chapter 377 of the 2010 Acts of Assembly.

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

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

Public Comment Deadline: November 7, 2012.

Agency Contact: Lisa Russell Hahn, Executive Director, Board of Funeral Directors and Embalmers, 9960 Mayland Drive, Suite 300, Richmond, VA 23233-1463, telephone (804) 367-4424, FAX (804) 527-4637, or email [lisa.hahn@dhp.virginia.gov](mailto:lisa.hahn@dhp.virginia.gov).

VA.R. Doc. No. R13-2543; Filed September 11, 2012, 1:06 p.m.

## 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 promulgating **18VAC85-150, Regulations Governing the Practice of Behavior Analysis**. The purpose of the proposed action is to promulgate regulations for the licensure of behavior analysts and assistant behavior analysts pursuant to Chapter 3 of the 2012 Acts of Assembly.

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

Statutory Authority: §§ 54.1-2400 and 54.1-2957.16 of the Code of Virginia.

Public Comment Deadline: November 7, 2012.

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](mailto:william.harp@dhp.virginia.gov).

VA.R. Doc. No. R13-3281; Filed September 12, 2012, 1:25 p.m.

## BOARD OF PHARMACY

### 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 Pharmacy intends to consider amending **18VAC110-20, Regulations Governing the Practice of Pharmacy**. The purpose of the proposed action is to specify the elements of a continuous quality improvement program in a pharmacy as mandated by Chapter 123 of the 2011 Acts of Assembly. A noticed of intended regulatory action was previously published in [27:24 VA.R. 2579 August 1, 2011](#).

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

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

Public Comment Deadline: November 7, 2012.

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](mailto:caroline.juran@dhp.virginia.gov).

VA.R. Doc. No. R11-2888; Filed September 18, 2012, 9:52 a.m.

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## TITLE 22. SOCIAL SERVICES

### BOARD OF SOCIAL SERVICES

#### Notice of Intended Regulatory Action

Notice is hereby given in accordance with § 2.2-4007.01 of the Code of Virginia that the State Board of Social Services intends to consider amending **22VAC40-25, Auxiliary Grants Program**. The Auxiliary Grant (AG) is an income supplement for individuals who receive Supplemental Security Income and certain other aged, blind, or disabled individuals who reside in a licensed assisted living facility or approved adult foster home. The purpose of the proposed action is to (i) add third-party payments to the regulation, (ii) clarify and simplify requirements for assisted living facility (ALF) and adult foster care providers in implementing third-party payments, and (iii) ensure third-party payments are applied appropriately as a payment source. The changes are needed due to Code of Virginia changes made during the 2012 Session of the General Assembly based on recommendations of the 2011 Joint Legislative Audit and

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## Notices of Intended Regulatory Action

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Review Commission study, "Funding Options for Low-Income Residents of Assisted Living Facilities."

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

Statutory Authority: §§ 63.2-217 and 63.2-800 of the Code of Virginia.

Public Comment Deadline: November 7, 2012.

Agency Contact: Tishaun Harris-Ugworji, Adult Services Consultant, Department of Social Services, Division of Family Services, 801 East Main Street, Richmond, VA 23219, telephone (804) 726-7560, FAX (804) 726-7895, TTY (800) 828-1120, or email [tishaun.harrisugworji@dss.virginia.gov](mailto:tishaun.harrisugworji@dss.virginia.gov).

VA.R. Doc. No. R13-3204; Filed September 14, 2012, 8:36 a.m.

### Notice of Intended Regulatory Action

Notice is hereby given in accordance with § 2.2-4007.01 of the Code of Virginia that the State Board of Social Services intends to consider repealing **22VAC40-185, Standards for Licensed Child Day Centers**, and adopting **22VAC40-186, Standards for Licensed Child Day Centers**. Legislation enacted at the 2012 Session of the General Assembly abolished the Child Day-Care Council (council) and transferred authority for promulgating council regulations to the State Board of Social Services. As a result of this transfer, the Registrar of Regulations created a new number for the Standards for Licensed Child Day Centers, 22VAC40-186. The renumbering of the regulation becomes effective November 1, 2012, to allow time for systems updates.

This regulatory action has several purposes. The first purpose is to ensure that parents have sufficient information to make informed decisions about placing their children in licensed child day centers. The second is to facilitate the social, emotional, and intellectual development of children receiving care in licensed child day centers. The third is to ensure the safety of children receiving care in licensed child day centers. The fourth is to improve understanding and interpretation leading to enhanced compliance and enforcement by the adjusted structure, format, and simplified language.

The current regulation has been amended six times since its adoption in 1993 and its current terminology and format is burdensome and confusing for providers, parents, and Division of Licensing Programs (DOLP) staff to navigate. In fact, the current regulations are supplemented by a 63-page guidance document to assist providers, parents, and DOLP staff in interpreting and enforcing the current regulation.

Repeal of the existing regulation and adoption of a new regulation was determined as the most efficient and effective way to make the necessary changes to achieve clarity and consistency, and to protect children.

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

Statutory Authority: §§ 63.2-217 and 63.2-1734 of the Code of Virginia.

Public Comment Deadline: November 7, 2012.

Agency Contact: Debra O'Neill, Child Care Consultant, Department of Social Services, 801 East Main Street, Richmond, VA 23219, telephone (804) 726-7648, FAX (804) 726-7132, or email [debra.oneill@dss.virginia.gov](mailto:debra.oneill@dss.virginia.gov).

VA.R. Doc. No. R13-3376; Filed September 17, 2012, 8:03 a.m.

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# REGULATIONS

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

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## Symbol Key

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

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## TITLE 4. CONSERVATION AND NATURAL RESOURCES

### DEPARTMENT OF FORESTRY

#### Emergency Regulation

Title of Regulation: **4VAC10-30. Virginia State Forests Regulations (amending 4VAC10-30-40, 4VAC10-30-120, 4VAC10-30-200, 4VAC10-30-210).**

Statutory Authority: §§ 10.1-1101 and 10.1-1152 of the Code of Virginia.

Effective Dates: September 18, 2012, through September 17, 2013.

Agency Contact: Ronald S. Jenkins, Administrative Officer, Department of Forestry, 900 Natural Resources Drive, Suite 800, Charlottesville, VA 22903, telephone (434) 977-6555, FAX (434) 293-2768, or email ron.jenkins@dof.virginia.gov.

Preamble:

*Chapter 484 of the 2012 Acts of Assembly amended and reenacted § 10.1-1152 of the Code of Virginia relating to state forest special use permits, mandating that the Department of Forestry promulgate emergency regulations to implement the provision of the act that establishes a fee for the special use permit to hunt, trap, fish, ride bikes, and ride horses in a state forest. The act requires the agency to promulgate regulations within 280 days of the enactment of the act. This regulation is not exempt under the provisions of subdivision A 4 of § 2.2-4006 of the Code of Virginia. The changes to the existing regulation provide that any person who hunts, fishes, traps, rides a bike, or rides a horse in a state forest is required to purchase an annual special use permit for a fee of \$15.*

#### 4VAC10-30-40. Permits.

A permit to do any act shall authorize the same only insofar as it may be performed in strict accordance with the terms and conditions thereof. Any violation by its holder or his agents or employees of any term or condition thereof shall constitute grounds for its revocation by the department, or by its authorized representative. In case of revocation of any permit, all moneys paid for or on account thereof shall, at the option of the department, be forfeited to and be retained by it; and the holder of such permit, together with his agents and employees who violated such terms and conditions, shall be jointly and severally liable to the department for all damages and loss suffered by it in excess of money so forfeited and retained; but neither such forfeiture and retention by the department of the whole or any part of such moneys nor the

recovery or collection thereby of such damages, or both, shall in any manner relieve such person or persons from liability to punishment for any violation of any provision of any Virginia State Forests Regulation. A state forest ~~hunting~~ special use permit will be required to hunt ~~or, trap, fish, ride bikes, or ride horses~~ on any state forest or portion thereof on which hunting ~~and, trapping, fishing, riding bikes, or riding horses~~ is permitted.

#### 4VAC10-30-120. Charges.

No person 16 years of age or older shall make, use, or gain admittance to, or attempt to use or gain admittance to the facilities in any forest for the use of which a ~~charge~~ special use permit is made required by the department unless he shall ~~pay the charge or price fixed by the department~~ obtain a special use permit and pay an annual fee of \$15. Any person 16 years of age may hunt, trap, fish, ride bikes, or ride horses on any state forest and is not required to obtain a special use permit or pay an annual fee.

#### 4VAC10-30-200. Hunting and fishing.

No person within the confines of any forest, shall hunt, trap, shoot, injure, kill or molest in any way any bird or animal, nor shall any person have in his possession any bird or animal, dead or alive, within the forest except any bird or animal designated as a game bird or animal by the Virginia Board of Game and Inland Fisheries, and the trapping of, hunting of, shooting at, or possession of any such bird or animal is prohibited except during the lawful hunting season set for the forest or portion thereof by the Virginia Board of Game and Inland Fisheries and only in those forests or portion thereof designated by the Forest Superintendent as lawful hunting areas. A state forest ~~hunting~~ special use permit will be required. All provisions of the Virginia Code concerning hunting must be complied with.

#### 4VAC10-30-210. Fishing.

Fishing is permitted in designated areas in each forest, the only stipulation being that persons fishing must have a state fishing license, have a special use permit, and comply with the Virginia Game and Inland Fisheries rules and regulations.

VA.R. Doc. No. R13-3185; Filed September 18, 2012, 10:22 a.m.

## MARINE RESOURCES COMMISSION

### Final Regulation

<p><u>REGISTRAR'S NOTICE:</u> The Marine Resources Commission is claiming an exemption from the Administrative Process Act in accordance with § 2.2-4006 A 11 of the Code of Virginia; however, the commission is required to publish the full text of final regulations.</p>
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**Title of Regulation: 4VAC20-260. Pertaining to Designation of Seed Areas and Clean Cull Areas (amending 4VAC20-260-20 through 4VAC20-260-60).**

**Statutory Authority:** § 28.2-201 of the Code of Virginia.

**Effective Date:** October 1, 2012.

**Agency Contact:** Jane Warren, Agency Regulatory Coordinator, Marine Resources Commission, 2600 Washington Avenue, 3rd Floor, Newport News, VA 23607, telephone (757) 247-2248, FAX (757) 247-2002, or email betty.warren@mrc.virginia.gov.

**Summary:**

*The proposed amendments clarify the coordinates and locations of oyster seed areas and clean cull areas, and clarify the penalties for inspection violations.*

**4VAC20-260-20. Designation of seed areas and clean cull areas.**

A. Seed areas. The following natural public oyster beds, rocks, or shoals are designated for the harvest of seed oysters:

1. James River. All of the public oyster grounds in the James River and its tributaries above a line drawn from Cooper's Creek in Isle of Wight County on the south side of the James River to a line in a northeasterly direction across the James River to the Newport News municipal water tank located on Warwick Boulevard between 59th and 60th Street in the City of Newport News.

2. ~~Deep Water Shoal State Repletion Seed Area in the James River (574.66 acres). Beginning at a point approximately 530 feet west of Deep Water Shoal Light, said point being Corner 1 as located by Virginia State Plane Coordinates, South Zone, NAD 1927, North 302,280.00, East 2,542,360.00; thence North Azimuth 30°49'59", 4,506.99 feet to Corner 2, North 306,150.00, East 2,544,670.00; thence North Azimuth 135°08'57", 5,430.60 feet to Corner 3, North 302,300.00, East 2,548,500.00; thence North Azimuth 212°13'54", 3,487.42 feet to Corner 4, North 299,350.00, East 2,546,640.00; thence North Azimuth 269°10'16", 2,765.29 feet to Corner 5, North 299,310.00, East 2,543,875.00; thence North Azimuth 332°58'26", 3,334.09 feet to Corner 1, being the point of beginning. (Map 1) Deep Water Shoal State Replenishment Seed Area (DWS). That area in the James River near Mulberry Island, beginning at a point approximately 530 feet west of Deep Water Shoal Light, said point being Corner 1, located at Latitude 37° 08.9433287' N., Longitude 76° 38.3213007' W.; thence southeasterly to Corner 2, Latitude 37° 09.5734380' N., Longitude 76° 37.8300582' W.; thence southwesterly to Corner 3, Latitude 37° 08.9265524' N., Longitude 76° 37.0574269' W.; thence westerly to Corner 4, Latitude 37° 08.4466039' N., Longitude 76° 37.4523346' W.; thence northwesterly to Corner 5, Latitude 37° 08.4491489' N., Longitude 76° 38.0215553' W.; thence northeasterly to Corner 1, said corner being the point of beginning.~~

B. Clean cull areas. All natural public oyster beds, rocks, or shoals in the tidal waters of Virginia, except those designated by the Marine Resources Commission as seed areas shall be considered clean cull areas.

**EDITOR'S NOTICE:** The map designating Deep Water Shoal Repletion Seed Area (Map 1) is not printed and is deleted by this regulatory action.

**4VAC20-260-30. Minimum cull size.**

In order to encourage a continued supply of marketable oysters, minimum size limits are hereby established. Undersized oysters or shells shall be returned immediately to their natural beds, rocks, or shoals where taken. When small oysters are adhering so closely to the shell of the marketable oyster as to render removal impossible without destroying the young oyster, then it shall not be necessary to remove it. Allowances for undersized oysters and shells incidentally retained during culling are found in 4VAC20-260-40.

1. Oysters taken from clean cull areas shall not have shells less than three inches in length, except as described in subdivision 5 of this section.
2. In the James River seed areas, there shall be no size limit on oysters harvested for replanting as seed oysters and seed oysters shall not be marketed for direct consumption.
3. In the James River seed areas, the shells of oysters harvested for direct consumption shall not be less than three inches in length.
4. On the seaside of the Eastern Shore ~~seed area~~, the shells of oysters marketed for direct consumption shall not be less than three inches in length. The provisions of this subdivision shall not apply to oysters raised in aquaculture cages by licensed aquaculture facilities.
5. In the Rappahannock River, the shells of oysters harvested for direct consumption from the areas known as Russ' Rock and Carter's Rock shall not be less than 2-1/2 inches in length.

**4VAC20-260-40. Culling tolerances or standards.**

A. In the clean cull areas, if more than ~~one~~ a four-quart measure of any combination of undersized (less than three inches) oysters or shells is of any size are found per bushel inspected, it shall constitute a violation of this chapter, except as described in subdivision 5 of 4VAC20-260-30.

B. In the James River seed areas, if more than ~~one~~ a six-quart measure of shells is found per bushel of seed oysters inspected, it shall constitute a violation of this chapter.

C. In the James River seed areas, if more than ~~one~~ a four-quart measure of any combination of undersized (less than three inches) oysters or shells is of any size are found per bushel of clean cull oysters inspected, it shall constitute a violation of this chapter.

D. On the seaside of Eastern Shore ~~seed areas~~, if more than ~~one~~ a four-quart measure of any combination of undersized (less than three inches) oysters and shells is of any size are



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# Regulations

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found per bushel of clean cull oysters to be marketed for direct consumption inspected, it shall constitute a violation of this chapter.

## **4VAC20-260-50. Culling and inspection procedures.**

A. All oysters taken from natural public beds, rocks, or shoals shall be placed on the culling board and culled by hand to the inside open part of the boat in a loose pile; however, when oysters are taken by hand and held in baskets or other containers they shall be culled as taken and transferred from the container to the inside open part of the boat in a loose pile and subject to inspection by any Marine Resources Commission law-enforcement officer.

B. If oysters from leased grounds and oysters from public grounds are mixed in the same cargo on a boat or motor vehicle, the entire cargo shall be subject to inspection under this chapter.

C. ~~It shall be unlawful for any harvester to store oysters taken from public grounds on any boat in any type of container, except as described for the James River in 4VAC20-1230-30 M.~~ All oysters taken from public grounds shall be sold or purchased in the regular oyster one-half bushel or one bushel measure as described in § 28.2-526 of the Code of Virginia, or the alternate container described in subsection D of this section; except that on the seaside of the Eastern Shore oysters may be sold without being measured if both the buyer and the seller agree to the number of bushels of oysters in the transaction.

D. An alternate container produced by North Machine Shop in Mathews, Virginia, may be used for measuring oysters to be sold or purchased. The dimensions of this metallic cylindrical container shall be 18.5 inches inside diameter and 11 inches inside height.

E. In the inspection of oysters the law-enforcement officer shall, with a shovel, take at least one bushel of oysters at random, provided that the entire bushel shall be taken at one place in the open pile of oysters.

## **4VAC20-260-60. Penalty.**

A. As set forth in §§ 28.2-510 and 28.2-511 of the Code of Virginia, any person, firm, or corporation violating any provision of this chapter except 4VAC20-260-50 C shall be guilty of a Class 3 misdemeanor.

B. As set forth in § 28.2-526 of the Code of Virginia, any person violating any provision of 4VAC20-260-50 C of the chapter shall be guilty of a Class 1 misdemeanor.

~~C. In addition to the penalty prescribed by law, any person violating any provision of this chapter shall destroy, in the presence of a marine police officer, all shellfish in his possession, or, at the direction of the marine police officer, shall place the shellfish overboard on the nearest oyster sanctuary or closed shellfish area, and shall cease harvesting on that day. All harvesting apparatus may be subject to seizure, and, pursuant to § 28.2-232 of the Code of Virginia, all licenses and permits may be subject to revocation~~

~~following a hearing before the Marine Resources Commission.~~

C. In addition to the penalty prescribed by law, any person violating any provision of this chapter shall place the entire load of shellfish overboard on the nearest oyster sanctuary or closed shellfish area, at the direction of the marine police officer, and shall cease harvesting on that day. In cases where shellfish associated with a violation, by any person, cannot be returned overboard, that person shall destroy, in the presence of a marine police officer, all shellfish in his possession. All harvesting apparatus may be subject to seizure and, pursuant to § 28.2-232 of the Code of Virginia, all licenses and permits may be subject to revocation following a hearing before the Marine Resources Commission.

VA.R. Doc. No. R13-3307; Filed September 6, 2012, 10:58 a.m.

## **Final Regulation**

<p><u>REGISTRAR'S NOTICE:</u> The Marine Resources Commission is claiming an exemption from the Administrative Process Act in accordance with § 2.2-4006 A 11 of the Code of Virginia; however, the commission is required to publish the full text of final regulations.</p>
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Title of Regulation: **4VAC20-720. Pertaining to Restrictions on Oyster Harvest (amending 4VAC20-720-10 through 4VAC20-720-91, 4VAC20-720-100; repealing 4VAC20-720-95).**

Statutory Authority: § 28.2-201 of the Code of Virginia.

Effective Date: October 1, 2012.

Agency Contact: Jane Warren, Agency Regulatory Coordinator, Marine Resources Commission, 2600 Washington Avenue, 3rd Floor, Newport News, VA 23607, telephone (757) 247-2248, FAX (757) 247-2002, or email betty.warren@mrc.virginia.gov.

### Summary:

*The amendments clarify the coordinates and locations of oyster grounds and establish the open oyster harvest seasons, areas, and bushel limits.*

### **4VAC20-720-10. Purpose.**

The purpose of this chapter is to ~~protect and~~ conserve Virginia's oyster ~~resource~~ resources, and ~~promote the preservation of especially~~ oyster broodstock, which has been depleted by disease, harvesting, and natural disasters.

### **4VAC20-720-20. Definitions.**

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

"Aid to navigation" means any public or private day beacon, lighted channel marker, channel buoy, lighted channel buoy, or lighthouse that may be at, or adjacent to, any latitude and longitude used in area descriptions.

"Coan River Area" means that area of the Coan River inside of Public Grounds 77 and 78 of Northumberland County.

"Deep Rock Patent Tong Area (Lower Chesapeake Bay)" means the area described as follows: starting at Cherry Point, Gwynns Island, thence northeast to G"1P" along the south side of the channel to Piankatank River; thence east-southeast to G"1R"; thence southwest to Sandy Point, Gwynns Island, North of Hole in the Wall.

"Deep Water Shoal State Replenishment Seed Area (DWS)" in the James River (574.66 Acres) means the areas beginning at a point approximately 530 feet west of Deep Water Shoal Light, said point being Corner 1 as located by Virginia State Plane Coordinates, South Zone, NAD 1927, north 302,280.00, east 2,542,360.00; thence north azimuth 30°49'59", 4,506.99 feet to Corner 2, north 306,150.00, east 2,544,670.00; thence north azimuth 135°08'57", 5,430.60 feet to Corner 3, north 302,300.00, east 2,548,500.00; thence north azimuth 212°13'54", 3,487.42 feet to Corner 4, north 299,350.00, east 2,546,640.00; thence north azimuth 269°10'16", 2,765.29 feet to Corner 5, north 299,310.00, east 2,543,875.00; thence north azimuth 332°58'26", 3,334.09 feet to Corner 1, being the point of beginning.

"Great Wicomico River Hand Scrape Area" means that area east of a line drawn from Sandy Point to Cockrell Point.

Public Ground 77 of Northumberland County is located near the mouth of the Coan River, beginning at a point approximately 2,300 feet northeast of Honest Point and 1,300 feet southwest of Travis Point, said point being Corner 1, located at Latitude 37° 59.5257207' N., Longitude 76° 27.8810639' W.; thence southwesterly to Corner 2, Latitude 37° 59.3710259' N., Longitude 76° 27.9962148' W.; thence southwesterly to Corner 3, Latitude 37° 59.2953830' N., Longitude 76° 28.0468953' W.; thence northwesterly to Corner 4, Latitude 37° 59.3350863' N., Longitude 76° 28.0968837' W.; thence northeasterly to Corner 5, Latitude 37° 59.3965161' N., Longitude 76° 28.0287342' W.; thence northwesterly to Corner 6, Latitude 37° 59.4758507' N., Longitude 76° 28.1112280' W.; thence north-northwesterly to Corner 7, Latitude 37° 59.5079401' N., Longitude 76° 28.1230058' W.; thence northeasterly to Corner 8, Latitude 37° 59.5579153' N., Longitude 76° 27.9889429' W.; thence southeasterly to Corner 1, said corner being the point of beginning.

Public Ground 78 of Northumberland County is located near the mouth of the Coan River, beginning at a point approximately 3,420 feet southeast of Travis Point and 3,260 feet northwest of Great Point, said point being Corner 1, located at Latitude 37° 59.4822275' N., Longitude 76° 27.1878637' W.; thence southeasterly to Corner 2, Latitude 37° 59.3824046' N., Longitude 76° 27.1088650' W.; thence southwesterly to Corner 3, Latitude 37° 59.2283287' N., Longitude 76° 27.8632901' W.; thence northeasterly to Corner 4, Latitude 37° 59.4368502' N., Longitude 76° 27.6868001' W.; thence continuing northeasterly to Corner 5, Latitude 37°

59.5949216' N., Longitude 76° 27.5399436' W.; thence southeasterly to Corner 1, said corner being the point of beginning.

"Deep Rock Area" means all public grounds and unassigned grounds, in that area of the Chesapeake Bay near Gwynn Island, beginning at Cherry Point at the western-most point of the eastern headland of Kibble Pond located at Latitude 37° 30.9802148' N., Longitude 76° 17.6764393' W.; thence northeasterly to the Piankatank River, Flashing Green Channel Light "3", Latitude 37° 32.3671325' N., Longitude 76° 16.7038334' W.; thence east-southeasterly to the Rappahannock River Entrance Lighted Buoy G"1R", Latitude 37° 32.2712833' N., Longitude 76° 11.4813666' W.; thence southwesterly to the southern-most point of Sandy Point, the northern headland of "The Hole in the Wall", Latitude 37° 28.1475258' N., Longitude 76° 15.8185670' W.; thence northwesterly along the Chesapeake Bay mean low water line of the barrier islands of Milford Haven, connecting headland to headland at their eastern-most points, and of Gwynn Island to the western-most point of the eastern headland of Kibble Pond on Cherry Point, said point being the point of beginning.

"Deep Water Shoal State Replenishment Seed Area (DWS)" means that area in the James River near Mulberry Island, beginning at a point approximately 530 feet west of Deep Water Shoal Light, said point being Corner 1, located at Latitude 37° 08.9433287' N., Longitude 76° 38.3213007' W.; thence southeasterly to Corner 2, Latitude 37° 09.5734380' N., Longitude 76° 37.8300582' W.; thence southwesterly to Corner 3, Latitude 37° 08.9265524' N., Longitude 76° 37.0574269' W.; thence westerly to Corner 4, Latitude 37° 08.4466039' N., Longitude 76° 37.4523346' W.; thence northwesterly to Corner 5, Latitude 37° 08.4491489' N., Longitude 76° 38.0215553' W.; thence northeasterly to Corner 1, said corner being the point of beginning.

"Great Wicomico River Area" means all public grounds and unassigned grounds, in that area of the Great Wicomico River, Ingram Bay, and the Chesapeake Bay, beginning at a point on Sandy Point, Latitude 37° 49.3269652' N., Longitude 76° 18.3821766' W.; thence easterly to the southern-most point of Cockrell Point, Latitude 37° 49.2664838' N., Longitude 76° 17.3454434' W.; thence easterly following the mean low water line of Cockrell Point to a point on the boundary of Public Ground 115 at Cash Point, Latitude 37° 49.2695619' N., Longitude 76° 17.2804046' W.; thence southeasterly to the gazebo on the pierhead at Fleets Point, Latitude 37° 48.7855824' N., Longitude 76° 16.9609311' W.; thence southeasterly to the Great Wicomico Lighthouse; thence due south to a point due east of the southern-most point of Dameron Marsh, Latitude 37° 46.6610003' N., Longitude 76° 16.0570007' W.; thence due east to the southern-most point of Dameron Marsh, Latitude 37° 46.6609070' N., Longitude 76° 17.2670707' W.; thence along the mean low water line of Dameron Marsh, north and west to Garden Point, Latitude 37° 47.2519872' N.,

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# Regulations

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Longitude 76° 18.4028142' W.; thence northwesterly to Windmill Point, Latitude 37° 47.5194547' N., Longitude 76° 18.7132194' W.; thence northerly along the mean low water to the western headland of Harveys Creek, Latitude 37° 47.7923573' N., Longitude 76° 18.6881450' W.; thence east-southeasterly to the eastern headland of Harveys Creek, Latitude 37° 47.7826936' N., Longitude 76° 18.5469879' W.; thence northerly along the mean low water line, crossing the entrance to Towels Creek at the offshore ends of the jetties and continuing to Bussel Point, Latitude 37° 48.6879208' N., Longitude 76° 18.4670860' W.; thence northwesterly to the northern headland of Cranes Creek, Latitude 37° 48.8329168' N., Longitude 76° 18.7308073' W.; thence following the mean low water line northerly to a point on Sandy Point, said point being the point of beginning.

"Hand scrape" means any device or instrument with a catching bar having an inside measurement of no more than 22 inches, which is used or usable for the purpose of extracting or removing shellfish from a water bottom or the bed of a body of water.

~~"James River Hand Scrape Area" means those public oyster grounds of the James River west of the Monitor and Merrimac Bridge Tunnel and northeast of the Mills E. Godwin/Nansemond River Bridge (Route 17) to the James River Bridge (Route 17).~~

"Hand tong" or "ordinary tong" means any pincers, nippers, tongs, or similar device used in catching oysters, which consist of two shafts or handles attached to opposable and complementary pincers, baskets, or containers operated entirely by hand, from the surface of the water and has no external or internal power source.

"James River Area" means those public grounds of the James River and Nansemond River west of the Monitor Merrimac Memorial Bridge Tunnel (Route I-664), northeast of the Mills E. Godwin, Jr. Bridge (U.S. Route 17) on the Nansemond River, and south of the James River Bridge (U.S. Route 17).

"Latitude and longitude" means values that are based upon a geodetic reference system of the North American Datum of 1983 (NAD83). When latitude and longitude are used in any area description, in conjunction with any physical landmark, to include aids to navigation, the latitude and longitude value is the legal point defining the boundary.

"Little Wicomico River" means that area of the Little Wicomico River inside of Public Ground 43 of Northumberland County, located in the Little Wicomico River near Bridge Creek, beginning at a point approximately 150 feet north of Peachtree Point, said point being Corner 1, located at Latitude 37° 53.2910650' N., Longitude 76° 16.7312926' W.; thence southwesterly to Corner 2, Latitude 37° 53.2601877' N., Longitude 76° 16.8662408' W.; thence northwesterly to Corner 3, Latitude 37° 53.2678470' N., Longitude 76° 16.8902408' W.; thence northeasterly to Corner 4, Latitude 37° 53.3113148' N., Longitude 76° 16.8211543'

W.; thence southeasterly to Corner 1, said corner being the point of beginning.

~~"Lower Machodoc Area" means that area of the Lower Machodoc River to the Virginia Maryland state line (PRV5A to PRV5C).~~

"Milford Haven" means that area of Milford Haven inside of Public Ground 7, within these coordinates: 37° 28.32', N., 76° 16.45', W.; 37° 28.35', N., 76° 16.42', W.; 37° 28.37', N., 76° 16.47', W.; 37° 28.35', N., 76° 16.50', W. of Mathews County, beginning at a point approximately 1,380 feet east of Point Breeze, said point being Corner 1, located at Latitude 37° 28.3500000' N., Longitude 76° 16.5000000' W.; thence northeasterly to Corner 2, Latitude 37° 28.3700000' N., Longitude 76° 16.4700000' W.; thence southeasterly to Corner 3, Latitude 37° 28.3500000' N., Longitude 76° 16.4200000' W.; thence southwesterly to Corner 4, Latitude 37° 28.3200000' N., Longitude 76° 16.4500000' W.; thence northwesterly to Corner 1, said corner being the point of beginning.

~~"Mobjack Bay Hand Scrape Area" shall consist of all of Public Ground No. 25, Gloucester County (Tow Stake) within these coordinates: 37° 20.59', N., 76° 23.24', W.; 37° 20.38', N., 76° 22.72', W.; 37° 19.86', N., 76° 23.59', W.; 37° 20.03', N., 76° 23.77', W.; and 37° 20.39', N., 76° 23.58', W. and that portion of Public Ground No. 2, Mathews County (Pultz Bar), within these coordinates: 37° 21.25', N., 76° 21.37', W.; 37° 21.27', N., 76° 20.96', W.; 37° 21.02', N., 76° 20.94', W.; and 37° 21.05', N., 76° 21.33', W.~~

~~"Nomini River" means that area of the Nomini River inside of Public Ground 26 (Deans) and Public Ground 28 (Cut).~~

"Mobjack Bay Area" means those areas of Mobjack Bay consisting of Public Ground 25 of Gloucester County (Tow Stake) and that portion of Public Ground 2 of Mathews County known as Pultz Bar described as:

Public Ground 25 of Gloucester County, known as Tow Stake, is located in Mobjack Bay, near the mouth of the Severn River, beginning at a point approximately 2,880 feet east-northeast of Tow Stake Point, said point being Corner 1, located at Latitude 37° 20.3883888' N., Longitude 76° 23.5883836' W.; thence northeasterly to Corner 2, Latitude 37° 30.5910482' N., Longitude 76° 23.2372184' W.; thence southeasterly to Corner 3, Latitude 37° 20.3786971' N., Longitude 76° 22.7241180' W.; thence southwesterly to Corner 4, Latitude 37° 19.8616759' N., Longitude 76° 23.5914937' W.; thence northwesterly to Corner 5, Latitude 37° 20.0284019' N., Longitude 76° 23.7717423' W.; thence northeasterly to Corner 1, said corner being the point of beginning.

Public Ground 2 of Mathews County, known as Pultz Bar, is located in Mobjack Bay, beginning at a point approximately 5,420 feet south of Minter Point, said point being Corner 1, located at Latitude 37° 21.2500000' N., Longitude 76° 21.3700000' W.; thence easterly to Corner 2, Latitude 37° 21.2700000' N., Longitude 76° 20.9600000'

W.; thence southerly to Corner 3, Latitude 37° 21.0200000' N., Longitude 76° 20.9400000' W.; thence westerly to Corner 4, Latitude 37° 21.0500000' N., Longitude 76° 21.3300000' W.; thence northerly to Corner 1, said corner being the point of beginning.

"Nomini Creek Area" means that area of Nomini Creek inside of Public Grounds 26 and 28 of Westmoreland County.

Public Ground 26 of Westmoreland County is located in Nomini Creek, north of Beales Wharf and east of Barnes Point, beginning at a point approximately 1,400 feet north of Barnes Point, said point being Corner 1, located at Latitude 38° 07.2690219' N., Longitude 76° 42.6784210' W.; thence southeasterly to Corner 2, Latitude 38° 07.0924060' N., Longitude 76° 42.4745767' W.; thence southwesterly to Corner 3, Latitude 38° 06.8394053' N., Longitude 76° 42.6704025' W.; thence northwesterly to Corner 4, Latitude 38° 06.8743004' N., Longitude 76° 42.7552151' W.; thence northeasterly to Corner 5, Latitude 38° 07.0569717' N., Longitude 76° 42.5603535' W.; thence northwesterly to Corner 1, said corner being the point of beginning.

Public Ground 28 of Westmoreland County is located at the mouth of Nomini Creek, beginning at a point approximately 50 feet west of White Oak Point, said point being Corner 1, located at Latitude 38° 07.6429987' N., Longitude 76° 43.0337082' W.; thence south-southeasterly to Corner 2, Latitude 38° 07.2987193' N., Longitude 76° 43.1101420' W.; thence northwesterly to Corner 3, Latitude 38° 07.7029267' N., Longitude 76° 43.3337762' W.; thence west to the mean low water line, Latitude 38° 07.7031535' N., Longitude 76° 43.3378345' W.; thence northerly and westerly along the mean low water line of Nomini Creek to a point southwest of Cedar Island, Latitude 38° 07.8986449' N., Longitude 76° 43.6329097' W.; thence northeasterly to a point on the mean low water line at the southern-most point of Cedar Island, Latitude 38° 07.8986449' N., Longitude 76° 43.6329097' W.; thence following the mean low water line of the southern and eastern sides of Cedar Island to a point, Latitude 38° 08.0164430' N., Longitude 76° 43.4773169' W.; thence northeasterly to Corner 4, Latitude 38° 08.0712849' N., Longitude 76° 43.4416606' W.; thence northeasterly to a point on the northern headland of Nomini Creek at the mean low water line, said point being Corner 5, Latitude 38° 08.2729626' N., Longitude 76° 43.3105315' W.; thence following the mean low water line of White Point to a point northwest of Snake Island, Corner 6, Latitude 38° 08.4066960' N., Longitude 76° 42.9105565' W.; thence southeast, crossing the mouth of Buckner Creek, to a point on the mean low water line of Snake Island, Corner 7, Latitude 38° 08.3698254' N., Longitude 76° 42.8939656' W.; thence southeasterly following the mean low water line of Snake Island to Corner 8, Latitude 38° 08.2333798' N., Longitude 76° 42.7778877' W.; thence south-southwesterly, crossing the mouth of Buckner Creek, to

Corner 9, Latitude 38° 08.2134371' N., Longitude 76° 42.7886409' W.; thence southeasterly to a point on the mean low water line of the southern headland of Buckner Creek, Corner 10, Latitude 38° 08.1956281' N., Longitude 76° 42.7679625' W.; thence southwesterly following the mean low water line of Nomini Creek, crossing the mouth of an un-named cove at the narrowest point between the headlands and continuing to follow the mean low water line to a point on White Oak Point, Latitude 38° 07.6428228' N., Longitude 76° 43.0233530' W.; thence west to Corner 1, said point being the point of beginning.

"Oyster dredge" means any device having a maximum weight of 150 pounds with attachments, maximum width of 50 inches, and maximum tooth length of four inches.

"Oyster Patent Tong" means any patent tong not exceeding 100 pounds in gross weight, including any attachment other than rope and with the teeth not to exceed four inches in length.

"Pocomoke and Tangier Sounds Management Area (PTSMA)" means the area as defined in § 28.2-524 of the Code of Virginia.

"Pocomoke and Tangier Sounds Rotation Area 1" means all public grounds and unassigned grounds, within an area of the PTSMA, in Pocomoke and Tangier Sounds, bounded by a line beginning at a point on the Maryland-Virginia state line, located at Latitude 37° 54.6136000' N., Longitude 75° 53.9739600' W.; thence south to the house on Great Fox Island, Latitude 37° 53.6946500' N., Longitude 75° 53.8898800' W.; thence westerly to a point, Latitude 37° 53.3633500' N., Longitude 75° 56.5589600' W.; thence south to a point, Latitude 37° 48.4429100' N., Longitude 75° 56.4883600' W.; thence easterly to the north end of Watts Island, Latitude 37° 48.7757800' N., Longitude 75° 53.5994100' W.; thence northerly to the house on Great Fox Island, Latitude 37° 53.6946500' N., Longitude 75° 53.8898800' W.; thence southeasterly to Pocomoke Sound Shoal Flashing Light Red "8", Latitude 37° 52.4583300' N., Longitude 75° 49.4000000' W.; thence southeasterly to Messongo Creek Entrance Buoy Green Can "1", Latitude 37° 52.1000000' N., Longitude 75° 47.8083300' W.; thence southeast to Guilford Flats Junction Light Flashing 2+1 Red "GF", Latitude 37° 50.9533300' N., Longitude 75° 46.6416700' W.; thence southerly to a point on a line from Guilford Flats Junction Light to the northern-most point of Russell Island, where said line intersects the PTSMA boundary, Latitude 37° 48.4715943' N., Longitude 75° 46.9955932' W.; thence clockwise following the PTSMA boundary to a point on the Maryland-Virginia state line, said point being the point of beginning.

"Pocomoke and Tangier Sounds Rotation Area 2" means all public grounds and unassigned grounds, within an area of the PTSMA, in Pocomoke and Tangier Sounds, bounded by a line beginning at the house on Great Fox Island, located at Latitude 37° 53.6946500' N., Longitude 75° 53.8898800' W.;

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# Regulations

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thence southerly to the north end of Watts Island, Latitude  $37^{\circ} 48.7757800'$  N., Longitude  $75^{\circ} 53.5994100'$  W.; thence westerly to a point, Latitude  $37^{\circ} 48.4429100'$  N., Longitude  $75^{\circ} 56.4883600'$  W.; thence northerly to a point, Latitude  $37^{\circ} 53.3633500'$  N., Longitude  $75^{\circ} 56.5589600'$  W.; thence easterly to the house on Great Fox Island, said house being the point of beginning. Also, Pocomoke and Tangier Sounds Rotation Area 2 shall include all public grounds and unassigned grounds in the PTSMA in Pocomoke Sound bounded by a line beginning at a point on the Maryland-Virginia state line, Latitude  $37^{\circ} 54.6136000'$  N., Longitude  $75^{\circ} 53.9739600'$  W.; thence following the PTSMA boundary clockwise to a point on the line from the northern-most point of Russell Island to Guilford Flats Junction Light Flashing 2+1 Red "GF", where said line intersects the PTSMA boundary, Latitude  $37^{\circ} 48.4715943'$  N., Longitude  $75^{\circ} 46.9955932'$  W.; thence northerly to Guilford Flats Junction Light Flashing 2+1 Red "GF", Latitude  $37^{\circ} 50.9533300'$  N., Longitude  $75^{\circ} 46.6416700'$  W.; thence northwesterly to Messongo Creek Entrance Buoy Green Can "1", Latitude  $37^{\circ} 52.1000000'$  N., Longitude  $75^{\circ} 47.8083300'$  W.; thence northwesterly to Pocomoke Sound Shoal Flashing Light Red "8", Latitude  $37^{\circ} 52.4583300'$  N., Longitude  $75^{\circ} 49.4000000'$  W.; thence northwesterly to the house on Great Fox Island, Latitude  $37^{\circ} 53.6946500'$  N., Longitude  $75^{\circ} 53.8898800'$  W.; thence northerly to a point on the Maryland-Virginia state line, said point being the point of beginning.

"Public oyster ground" means all those grounds defined in §28.2-551 of the Code of Virginia or by any other acts of the General Assembly pertaining to those grounds, all ground those grounds set aside as public oyster ground by court order, and all ground those grounds set aside as public oyster ground by order of the Marine Resources Commission, and may be redefined by any of these legal authorities.

"Rappahannock River Rotation Area 1" shall consist of all public grounds in the Rappahannock River with a boundary defined as beginning at the MLW west of Broad Creek ( $37^{\circ} 33.952'$ , N.,  $76^{\circ} 19.309'$ , W.); thence north to a VMRC buoy on the Baylor line ( $37^{\circ} 34.539'$ , N.,  $76^{\circ} 19.022'$ , W.) to VMRC buoy ( $37^{\circ} 34.683'$ , N.,  $76^{\circ} 19.100'$ , W.); thence, northeasterly to VMRC Buoy ( $37^{\circ} 35.017'$ , N.,  $76^{\circ} 19.450'$ , W.); thence, northeasterly to Sturgeon Bar Light (7R) ( $37^{\circ} 35.150'$ , N.,  $76^{\circ} 19.733'$ , W.); thence, continuing northwest to Mosquito Point Light (8R) ( $37^{\circ} 36.100'$ , N.,  $76^{\circ} 21.300'$ , W.); thence to the house on Mosquito Point ( $37^{\circ} 36.523'$ , N.,  $76^{\circ} 21.595'$ , W.) bounded on the east by a line from Windmill Point ( $37^{\circ} 35.793'$ , N.,  $76^{\circ} 14.180'$ , W.); thence, southeast to Windmill Point Light ( $37^{\circ} 35.793'$ , N.,  $76^{\circ} 14.180'$ , W.); thence southwesterly to Stingray Point Light ( $37^{\circ} 33.673'$ , N.,  $76^{\circ} 16.362'$ , W.); thence, westerly to Stingray Point ( $37^{\circ} 33.692'$ , N.,  $76^{\circ} 17.986'$ , W.)

"Rappahannock River Rotation Area 2" shall consist of all public grounds in the Rappahannock River with a boundary on the east side defined as beginning at the house at Mosquito Point ( $37^{\circ} 36.523'$ , N.,  $76^{\circ} 21.595'$ , W.); thence, southeast to

Mosquito Point Light "8R" ( $37^{\circ} 36.100'$ , N.,  $76^{\circ} 21.300'$ , W.); thence, continuing southeasterly to Sturgeon Bar Beacon "7R" ( $37^{\circ} 35.150'$ , N.,  $76^{\circ} 19.733'$ , W.); thence, southwesterly to VMRC buoy ( $37^{\circ} 34.933'$ , N.,  $76^{\circ} 21.050'$ , W.); thence, southwesterly to VMRC buoy ( $37^{\circ} 34.883'$ , N.,  $76^{\circ} 21.100'$ , W.); thence, to a pier west of Hunting Creek at Grinels ( $37^{\circ} 34.436'$ , N.,  $76^{\circ} 26.288'$ , W.). Rappahannock River Rotation Area 2 is bordered on the west by a line beginning at Mill Creek channel marker "4" ( $37^{\circ} 35.083'$ , N.,  $76^{\circ} 26.950'$ , W.); thence, northeasterly to Mill Creek channel marker "2" ( $37^{\circ} 35.483'$ , N.,  $76^{\circ} 24.567'$ , W.); thence, northeasterly to the house at Mosquito Point ( $37^{\circ} 36.523'$ , N.,  $76^{\circ} 21.595'$ , W.).

"Rappahannock River Rotation Area 3" shall consist of all public grounds in the Rappahannock River with a boundary defined as beginning from the north channel fender at the Norris Bridge ( $37^{\circ} 37.483'$ , N.,  $76^{\circ} 25.345'$ , W.); thence, southeast to the house on Mosquito Point ( $37^{\circ} 36.523'$ , N.,  $76^{\circ} 21.595'$ , W.); thence southwest to Mill Creek channel marker "2" ( $37^{\circ} 35.483'$ , N.,  $76^{\circ} 24.567'$ , W.); thence southwesterly to Mill Creek channel marker "4" ( $37^{\circ} 35.083'$ , N.,  $76^{\circ} 24.950'$ , W.); thence northeasterly to Parrotts Creek channel marker "1" ( $37^{\circ} 36.033'$ , N.,  $76^{\circ} 25.417'$ , W.); thence northerly to VMRC buoy ( $37^{\circ} 36.333'$ , N.,  $76^{\circ} 25.200'$ , W.); thence returning northerly to the Norris Bridge north channel fender.

"Rappahannock River Rotation Area 4" shall consist of all public grounds in the Rappahannock River with the boundary defined as beginning at the White Stone end of the Norris Bridge ( $37^{\circ} 38.129'$ , N.,  $76^{\circ} 24.722'$ , W.); thence, along the Norris Bridge to the north channel fender ( $37^{\circ} 37.483'$ , N.,  $76^{\circ} 25.345'$ , W.); thence westerly to the VMRC buoy 5 4 ( $36^{\circ} 38.005'$ , N.,  $76^{\circ} 30.028'$ , W.); thence, north to Old House Point ( $37^{\circ} 39.139'$ , N.,  $76^{\circ} 29.685'$ , W.); thence, northerly to Ball Point ( $37^{\circ} 41.660'$ , N.,  $76^{\circ} 28.632'$ , W.); thence, continuing northerly to Bar Point ( $37^{\circ} 41.666'$ , N.,  $76^{\circ} 28.866'$ , W.); thence easterly to Black Stump Point ( $37^{\circ} 41.737'$ , N.,  $76^{\circ} 28.111'$ , W.); thence, southeasterly to the western headland of Taylor Creek ( $37^{\circ} 40.983'$ , N.,  $76^{\circ} 27.602'$ , W.); thence, southwesterly to VMRC Buoy at Ferry Bar north ( $37^{\circ} 40.300'$ , N.,  $76^{\circ} 28.500'$ , W.); thence, southeasterly to VMRC Buoy at Ferry Bar South ( $37^{\circ} 40.167'$ , N.,  $76^{\circ} 28.583'$ , W.); thence, southwesterly to Corrotoman Point Duck Blind ( $37^{\circ} 39.876'$ , N.,  $76^{\circ} 28.420'$ , W.); thence, southerly to VMRC Buoy 543 ( $37^{\circ} 39.267'$ , N.,  $76^{\circ} 27.850'$ , W.); thence, southerly to VMRC Buoy at Drumming West ( $37^{\circ} 38.883'$ , N.,  $76^{\circ} 27.683'$ , W.); thence, southerly to VMRC buoy at Drumming East ( $37^{\circ} 38.833'$ , N.,  $76^{\circ} 27.567'$ , W.); thence, northeasterly to Orchard Point ( $37^{\circ} 38.924'$ , N.,  $76^{\circ} 27.126'$ , W.).

"Rappahannock River Rotation Area 5" shall consist of all public grounds in the Rappahannock River with a boundary defined as beginning east of a line from the east headland of Whiting Creek ( $37^{\circ} 36.658'$ , N.,  $76^{\circ} 30.312'$ , W.); thence, north to Towles Point buoy "6" ( $37^{\circ} 38.033'$ , N.,  $76^{\circ} 30.283'$ ,

W.); thence, easterly to VMRC buoy 5 4 (37° 38.005', N., 76° 30.028', W.) continuing easterly to the Norris Bridge north channel fender (37° 37.483', N., 76° 25.345', W.); thence, along the Norris Bridge southwest to Grey's Point (37° 36.833', N., 76° 25.999', W.).

"Rappahannock River Rotation Area 6" shall consist of all public grounds in the Rappahannock River with a boundary defined as beginning from Balls Point (37° 39.355', N., 76° 34.444', W.); thence, northeast to the flashing red buoy "8" off Rogue Pt. (37° 40.158', N., 76° 32.939', W.); thence, southeasterly to VMRC Towles Point Area buoy (37° 38.833', N., 76° 31.536', W.); thence, southwesterly to VMRC White House Sanctuary buoy (37° 38.150', N., 76° 30.533', W.); thence, southeasterly to red buoy "6" (37° 38.033', N., 76° 30.283', W.); thence, southerly to the eastern headland of the mouth of Whiting Creek (37° 36.658', N., 76° 30.312', W.).

"Rappahannock River Area 7" shall consist of all public grounds in the Rappahannock River with a boundary defined as beginning south of a line from Punchbowl Point (37° 44.675', N., 76° 37.325', W.) to Monaskon Point (37° 44.063', N., 76° 34.108', W.) to a line from Rogue's Point (37° 40.040', N., 76° 32.253', W.); thence, northwest to flashing red buoy "8" (37° 40.158', N., 76° 32.939', W.) continuing southwest to Balls Point (37° 39.355', N., 76° 34.444', W.).

"Rappahannock River Area 8" shall consist of all public grounds in the Rappahannock River with a boundary defined as beginning east and south of a line from Jones Point (37° 46.786', N., 76° 40.835', W.) to Sharps Point (37° 49.364', N., 76° 42.087', W.) to a line from Punchbowl Point (37° 44.675', N., 76° 37.325', W.) to Monaskon Point (37° 44.063', N., 76° 34.108', W.).

"Rappahannock River Area 9" shall consist of all public grounds in the Rappahannock River with a boundary defined as beginning west of the line drawn from Sharps Pt. (37° 49.364', N., 76° 42.087', W.) to Jones Pt (37° 46.786', N., 76° 40.835', W.) to the Route 360 (Downing Bridge).

"Standard oyster dredge" means any device or instrument having a maximum weight of 150 pounds with attachments, maximum width of 50 inches and maximum tooth length of four inches.

"Tangier Pocomoke Sounds Rotation Area 1" shall include all public and unassigned grounds within the PTSMA, in Tangier Sound, that are west and south of a line beginning at the Maryland Virginia Line (37° 54.61360', N., 75° 53.97396', W.) continuing south on Great Fox Island (37° 53.69465', N., 75° 53.88988', W.); thence continuing west to point "Area 2 NW" (37° 53.36335', N., 75° 56.55896', W.); thence south to a point "Area 2 SW" (37° 48.44291', N., 75° 56.48836', W.); thence continuing east to the north end of Watts Island (37° 48.77578', N., 75° 53.59941', W.). Area 1 shall also include all of the public and unassigned grounds in the PTSMA in Pocomoke Sound south and west of a line beginning at the house on Great Fox Island (37° 53.69465',

N., 75° 53.88988', W.); thence east southeast to Red Channel Marker # 8 (37° 52.45833', N., 75° 49.40000', W.); thence south southeast to Green Channel Marker "C 1" (37° 52.10000', N., 75° 47.80833', W.) thence southeast to Flashing Red "2+1" (37° 50.95333', N., 75° 46.64167', W.); thence south to the northernmost tip of Russell Island (37° 48.38796', N., 75° 47.02241', W.).

"Tangier Pocomoke Sounds Rotation Area 2" shall include all public and unassigned grounds in the PTSMA with a boundary defined as beginning at the house on Great Fox Island (37° 53.69465', N., 75° 53.88988', W.); thence south to the north end of Watts Island (37° 48.77578', N., 75° 53.59941', W.); thence west to a point "Area 2 SW" (37° 48.44291', N., 75° 56.48836', W.); thence north to point "Area 2 NW" (37° 53.36335', N., 75° 56.55896', W.); thence back east to the house on Great Fox Island. This area includes Public Ground No. 7, known as "Thoroughfare Rock" and Public Ground No. 8, known as "California Rock" in Tangier Sound. Area 2 shall also include all public and unassigned grounds in the PTSMA in Pocomoke Sound northeast of a line beginning at the house on Great Fox Island (37° 53.69465', N., 75° 53.88988', W.); thence east southeast to Red Channel Marker # 8 (37° 52.45833', N., 75° 49.40000', W.); thence south southeast to Green Channel Marker "C 1" (37° 52.10000', N., 75° 47.80833', W.); thence southeast to Flashing Red "2+1" (37° 50.95333', N., 75° 46.64167', W.); thence south to the northernmost tip of Russell Island (37° 48.38796', N., 75° 47.02241', W.).

"Tangier Sound Hand Tong Area" means that area in the PTSMA south and west of a line from Fishbone Island thence southeast to bell buoy #5, thence south southwest to buoy #3 (such area to include all of Public Ground 3 and Flat Rock) and shall be a hand tong area only and Cod Harbor (approximately 1,124 acres) beginning at a point of East Point Marsh, said point having the Virginia state coordinates, south section, coordinates of north 555,414.89, east 2,730,388.85; thence south 79°59', east 2,260 feet to a line designating the western extent of the PTSMA as described in § 28.2-524 of the Code of Virginia; thence south 10°16', west 2,800 feet; thence south 28°46', west 8,500 feet to a point on Sand Spit, position north 545,131.78, east, 2,728,014.94; thence along the mean low water line of Cod Harbor in a west, north and northeast direction crossing Canton Creek and Mailboat Harbor from headland to headland to the point of beginning.

"Thomas Rock Hand Scrape Area" means the public grounds and unassigned grounds in an area of the James River with an eastern boundary being the upstream side of the James River Bridge (Route 17), and a western boundary being a line drawn from the south side of the river at Rainbow Farm Point, a point on the shore, in line with markers "STH" and "SMT" located at 37° 00.1965862' N., 76° 34.0712010' W.; thence north northeasterly to a VMRC marker "STH" located at 37° 00.9815328' N., 76° 33.5955842' W.; thence to a Virginia Marine Resources Commission (VMRC) marker "SMT" located at 37° 01.3228160' N., 76° 33.3887351' W.;

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# Regulations

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thence to the Flashing Green Channel Light #5, located at 37° 02.3449949' N., 76° 32.7689936' W.; thence northeasterly to a VMRC marker "NMT" located at 37° 02.7740540' N., 76° 32.0960864' W.; thence to a VMRC marker "NTH" located at 37° 03.2030055' N., 76° 31.4231211' W.; thence to a point on the north shore of the river at Blunt (Blount) Point, said point being in line with markers "NMT" and "NTH" and located at 37° 03.3805862' N., 76° 31.1444562' W.

"Rappahannock River Area 7" means all public grounds, in that area of the Rappahannock River, bounded downstream by a line from Rogue Point, located at Latitude 37° 40.0400000' N., Longitude 76° 32.2530000' W.; thence west-northwesterly to Flashing Red Buoy "8", Latitude 37° 40.1580000' N., Longitude 76° 32.9390000' W.; thence southwesterly to Balls Point, Latitude 37° 39.3550000' N., Longitude 76° 34.4440000' W.; and bounded upstream by a line from Punchbowl Point, Latitude 37° 44.6750000' N., Longitude 76° 37.3250000' W.; thence southeasterly to Monaskon Point, Latitude 37° 44.0630000' N., Longitude 76° 34.1080000' W.

"Rappahannock River Area 8" means all public grounds, in that area of the Rappahannock River, bounded downstream by a line from Monaskon Point, located at Latitude 37° 44.0630000' N., Longitude 76° 34.1080000' W.; thence northwesterly to Punchbowl Point, Latitude 37° 44.6750000' N., Longitude 76° 37.3250000' W.; and bounded upstream by a line from Jones Point, Latitude 37° 46.7860000' N., Longitude 76° 40.8350000' W.; thence north-northwesterly to Sharps Point, Latitude 37° 49.3640000' N., Longitude 76° 42.0870000' W.

"Rappahannock River Area 9" means all Public Grounds, in that area of the Rappahannock River, bounded downstream by a line from Sharps Point, located at Latitude 37° 49.3640000' N., Longitude 76° 42.0870000' W.; thence south-southeasterly to Jones Point, Latitude 37° 46.7860000' N., Longitude 76° 40.8350000' W.; and bounded upstream by the Thomas J. Downing Bridge (U.S. Route 360).

"Rappahannock River Rotation Area 1" means all public grounds, in that area of the Rappahannock River and Chesapeake Bay, bounded by a line offshore and across the mouth of the Rappahannock River from a point on the mean low water line of Windmill Point, located at Latitude 37° 35.7930000' N., Longitude 76° 14.1800000' W.; thence southeast to Windmill Point Light, Latitude 37° 35.7930000' N., Longitude 76° 14.1800000' W.; thence southwesterly to Stingray Point Light, Latitude 37° 33.6730000' N., Longitude 76° 16.3620000' W.; thence westerly to a point on the mean low water line of Stingray Point, Latitude 37° 33.6920000' N., Longitude 76° 17.9860000' W.; and bounded upstream by a line from the mean low water line west of Broad Creek, Latitude 37° 33.9520000' N., Longitude 76° 19.3090000' W.; thence northeasterly to a VMRC Buoy on the Baylor line, Latitude 37° 34.5390000' N., Longitude 76° 19.0220000' W.; thence northeasterly to a VMRC Buoy, Latitude 37°

34.6830000' N., Longitude 76° 19.1000000' W.; thence northwesterly to a VMRC Buoy, Latitude 37° 35.0170000' N., Longitude 76° 19.4500000' W.; thence northwesterly to Sturgeon Bar Light "7R", Latitude 37° 35.1500000' N., Longitude 76° 19.7330000' W.; thence continuing northwesterly to Mosquito Point Light "8R", Latitude 37° 36.1000000' N., Longitude 76° 21.3000000' W.; thence northwesterly to the southern-most corner of the house on Mosquito Point, Latitude 37° 36.5230000' N., Longitude 76° 21.5950000' W.

"Rappahannock River Rotation Area 2" means all public grounds, in that area of the Rappahannock River, bounded downstream by a line from the southern-most corner of the house on Mosquito Point, located at Latitude 37° 36.5230000' N., Longitude 76° 21.5950000' W.; thence southeast to Mosquito Point Light "8R", Latitude 37° 36.1000000' N., Longitude 76° 21.3000000' W.; thence continuing southeasterly to Sturgeon Bar Beacon "7R", Latitude 37° 35.1500000' N., Longitude 76° 19.7330000' W.; thence west-southwesterly to a VMRC Buoy, Latitude 37° 34.9330000' N., Longitude 76° 21.0500000' W.; thence southwesterly to a VMRC Buoy, Latitude 37° 34.8830000' N., Longitude 76° 21.1000000' W.; thence southwesterly to a pier west of Hunting Creek at Grinels, Latitude 37° 34.4360000' N., Longitude 76° 26.2880000' W.; and bounded on the upstream by a line from Mill Creek Channel Marker "4", Latitude 37° 35.0830000' N., Longitude 76° 26.9500000' W.; thence northeasterly to Mill Creek Channel Marker "2", Latitude 37° 35.4830000' N., Longitude 76° 24.5670000' W.; thence northeasterly to the southern-most corner of the house on Mosquito Point, Latitude 37° 36.5230000' N., Longitude 76° 21.5950000' W.

"Rappahannock River Rotation Area 3" means all public grounds, in that area of the Rappahannock River, beginning from the north channel fender at the Robert O. Norris, Jr. Bridge, located at Latitude 37° 37.4830000' N., Longitude 76° 25.3450000' W.; thence southeast to the southern-most corner of the house on Mosquito Point, Latitude 37° 36.5230000' N., Longitude 76° 21.5950000' W.; thence southwest to Mill Creek Channel Marker "2", Latitude 37° 35.4830000' N., Longitude 76° 24.5670000' W.; thence southwesterly to Mill Creek Channel Marker "4", Latitude 37° 35.0830000' N., Longitude 76° 24.9500000' W.; thence northeasterly to Parrotts Creek Channel Marker "1", Latitude 37° 36.0330000' N., Longitude 76° 25.4170000' W.; thence northerly to VMRC Buoy, Latitude 37° 36.3330000' N., Longitude 76° 25.2000000' W.; thence northerly to the north channel fender of the Robert O. Norris, Jr. Bridge, said point being the point of beginning.

"Rappahannock River Rotation Area 4" means all public grounds, in that area of the Rappahannock River, Corrotoman River and Carter Creek, beginning at the White Stone end of the Robert O. Norris, Jr. Bridge (State Route 3), located at Latitude 37° 38.1290000' N., Longitude 76° 24.7220000' W.; thence along said bridge to the north channel fender, Latitude



37° 37.4830000' N., Longitude 76° 25.3450000' W.; thence westerly to the VMRC Buoy "5-4", Latitude 37° 38.0050000' N., Longitude 76° 30.0280000' W.; thence northerly to Old House Point, Latitude 37° 39.1390000' N., Longitude 76° 29.6850000' W.; thence northeasterly to Ball Point, Latitude 37° 41.6600000' N., Longitude 76° 28.6320000' W.; thence northerly to Bar Point, Latitude 37° 41.6660000' N., Longitude 76° 28.6660000' W.; thence easterly to Moran Point (Black Stump Point), Latitude 37° 41.7370000' N., Longitude 76° 28.1110000' W.; thence southeasterly to the western headland of Taylor Creek, Latitude 37° 40.9830000' N., Longitude 76° 27.6020000' W.; thence southwesterly to VMRC reef marker "Ferry Bar – North", Latitude 37° 40.3000000' N., Longitude 76° 28.5000000' W.; thence southwesterly to VMRC reef marker "Ferry Bar – South", Latitude 37° 40.1670000' N., Longitude 76° 28.5830000' W.; thence southeasterly to a duck blind west of Corrotoman Point, Latitude 37° 39.8760000' N., Longitude 76° 28.4200000' W.; thence southerly to VMRC Buoy "543", Latitude 37° 39.2670000' N., Longitude 76° 27.8500000' W.; thence southerly to VMRC Buoy "Drumming-West", Latitude 37° 38.8830000' N., Longitude 76° 27.6830000' W.; thence southerly to VMRC Buoy "Drumming-East", Latitude 37° 38.8330000' N., Longitude 76° 27.5670000' W.; thence northeasterly to Orchard Point, Latitude 37° 38.9240000' N., Longitude 76° 27.1260000' W.

"Rappahannock River Rotation Area 5" means all public grounds, in that area of the Rappahannock River, beginning at the Greys Point end of the Robert O. Norris, Jr. Bridge (State Route 3), located at Latitude 37° 36.8330000' N., Longitude 76° 25.9990000' W.; thence northeasterly along the bridge to the north channel fender, Latitude 37° 37.4830000' N., Longitude 76° 25.3450000' W.; thence west-northwesterly to VMRC Buoy "5-4", Latitude 37° 38.0050000' N., Longitude 76° 30.0280000' W.; thence westerly to Buoy "R6", Latitude 37° 38.0330000' N., Longitude 76° 30.2830000' W.; thence south to the eastern headland of Whiting Creek, Latitude 37° 36.6580000' N., Longitude 76° 30.3120000' W.

"Rappahannock River Rotation Area 6" means all public grounds, in that area of the Rappahannock River, beginning on the eastern headland of Whiting Creek, located at Latitude 37° 36.6580000' N., Longitude 76° 30.3120000' W.; thence north to Buoy "R6", Latitude 37° 38.0330000' N., Longitude 76° 30.2830000' W.; thence northwesterly to VMRC White House Sanctuary Buoy, Latitude 37° 38.1500000' N., Longitude 76° 30.5330000' W.; thence northwesterly to VMRC Towles Point Area Buoy, Latitude 37° 38.8330000' N., Longitude 76° 31.5360000' W.; thence northwesterly to Flashing Red Buoy "8" off Rogue Point, Latitude 37° 40.1580000' N., Longitude 76° 32.9390000' W.; thence southwesterly to Balls Point, Latitude 37° 39.3550000' N., Longitude 76° 34.4440000' W.

"Thomas Rock Area" means all public grounds and unassigned grounds, in that area of the James River, with an eastern boundary being the upstream side of the James River

Bridge (U.S. Route 17), and a western boundary being a line drawn from the south side of the river at Rainbow Farm Point, a point on the shore, in line with VMRC Markers "STH" and "SMT", located at Latitude 37° 00.1965862' N., Longitude 76° 34.0712010' W.; thence north-northeasterly to a VMRC Marker "STH", Latitude 37° 00.9815328' N., Longitude 76° 33.5955842' W.; thence to a VMRC Marker "SMT", at Latitude 37° 01.3228160' N., Longitude 76° 33.3887351' W.; thence to the Flashing Green Channel Light #5, at Latitude 37° 02.3449949' N., Longitude 76° 32.7689936' W.; thence northeasterly to a VMRC Marker "NMT", Latitude 37° 02.7740540' N., Longitude 76° 32.0960864' W.; thence to a VMRC Marker "NTH" located at Latitude 37° 03.2030055' N., Longitude 76° 31.4231211' W.; thence to a point on the north shore of the river at Blunt (Blount) Point, said point being in line with VMRC Markers "NMT" and "NTH" and located at Latitude 37° 03.3805862' N., Longitude 76° 31.1444562' W.

"Unassigned ground" means all grounds other than public oyster ground as defined by this chapter and which have not been set aside or assigned by lease, permit, or easement by the Marine Resources Commission those grounds defined by any other acts of the General Assembly pertaining to those grounds, all those grounds set aside by court order, and all those grounds set aside by order of the Marine Resources Commission, and may be redefined by any of these legal authorities.

"Upper Chesapeake Bay (Blackberry Hangs Hand Scrape Area)" means the area in Public Ground Number 118, south from the Smith Point Light to the Great Wicomico Light.

"Yeocomico River Area" means that area of the Yeocomico River inside Public Grounds 8, 102, 104, and 107.

"York River Hand Scrape Area" means the public grounds in an area of the York River upstream of the Coleman Bridge (Route 17), along the north side of the river, to just upstream of Aberdeen Creek, with said public grounds being: Public Grounds Numbers 30 and 31 of Gloucester County, the additional public ground near Pages Rock as described by § 28.2-649 of the Code of Virginia, and the additional area to Public Ground 30 as set aside by court order.

"Upper Chesapeake Bay - Blackberry Hangs Area" means all public grounds and unassigned grounds, in that area of the Chesapeake Bay, bounded by a line, beginning at a point approximately 300 feet east of the mean low water line of the Chesapeake Bay and approximately 1,230 feet southwest of the end of the southern-most stone jetty at the mouth of the Little Wicomico River, said point being Corner 1, Latitude 37° 53.1811193' N., Longitude 76° 14.1740146' W.; thence east-southeasterly to Corner 2, Latitude 37° 52.9050025' N., Longitude 76° 11.9357257' W.; thence easterly to Corner 3, Latitude 37° 52.9076552' N., Longitude 76° 11.6098145' W.; thence southwesterly to Corner 4, Latitude 37° 52.8684955' N., Longitude 76° 11.6402444' W.; thence east-southeasterly to Corner 5, Latitude 37° 52.7924853' N., Longitude 76°

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# Regulations

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11.0253352' W.; thence southwesterly to Corner 6, Latitude 37° 49.4327736' N., Longitude 76° 13.2409959' W.; thence northwesterly to Corner 7, Latitude 37° 50.0560555' N., Longitude 76° 15.0023234' W.; thence north-northeasterly to Corner 8, Latitude 37° 50.5581183' N., Longitude 76° 14.8772805' W.; thence north-northeasterly to Corner 9, Latitude 37° 52.0260950' N., Longitude 76° 14.5768550' W.; thence northeasterly to Corner 1, said corner being the point of beginning.

"Yeocomico River Area" means that area of the North West Yeocomico River, inside Public Ground 8 of Westmoreland County and those areas of the South Yeocomico River inside Public Grounds 102, 104, and 107 of Northumberland County.

Public Ground 8 of Westmoreland County is located in the North West Yeocomico River, beginning at a point approximately 1,455 feet northeast of Crow Bar and 1,850 feet northwest of White Point, said point being Corner 1, located at Latitude 38° 02.7468214' N., Longitude 76° 33.0775726' W.; thence southeasterly to Corner 2, Latitude 38° 02.7397202' N., Longitude 76° 33.0186286' W.; thence southerly to Corner 3, Latitude 38° 02.6021644' N., Longitude 76° 33.0234175' W.; thence westerly to Corner 4, Latitude 38° 02.6006669' N., Longitude 76° 33.0824799' W.; thence northerly to Corner 1, said corner being the point of beginning.

Public Ground 102 of Northumberland County is located in the South Yeocomico River, beginning at a point approximately 630 feet south of Mundy Point and 1,745 feet southwest of Tom Jones Point, said point being Corner 1, located at Latitude 38° 01.2138059' N., Longitude 76° 32.5577201' W.; thence east-northeasterly to Corner 2, Latitude 38° 01.2268644' N., Longitude 76° 32.4497849' W.; thence southwesterly to Corner 3, Latitude 38° 01.1091209' N., Longitude 76° 32.5591101' W.; thence northerly to Corner 1, said corner being the point of beginning.

Public Ground 104 of Northumberland County is located in the South Yeocomico River, beginning at a point approximately 670 feet north of Walker Point and 1,900 feet northwest of Palmer Point, said point being Corner 1, located at Latitude 38° 00.8841841' N., Longitude 76° 32.6106215' W.; thence southeasterly to Corner 2, Latitude 38° 00.8609163' N., Longitude 76° 32.5296302' W.; thence southeasterly to Corner 3, Latitude 38° 00.6693092' N., Longitude 76° 32.4161866' W.; thence southwesterly to Corner 4, Latitude 38° 00.6418466' N., Longitude 76° 32.5394849' W.; thence northwesterly to Corner 1, said corner being the point of beginning.

Public Ground 107 of Northumberland County is located in the South Yeocomico River, beginning at a point approximately 1,000 feet southwest of Barn Point and 1,300 feet northwest of Tom Jones Point, said point being Corner 1, located at Longitude 38° 01.1389367' N.,

Latitude 76° 32.3425617' W.; thence east-southeasterly to Corner 2, Latitude 38° 01.4106421' N., Longitude 76° 32.1077962' W.; thence southwesterly to Corner 3, Latitude 38° 01.2717197' N., Longitude 76° 32.2917989' W.; thence north-northwesterly to Corner 1, said corner being the point of beginning.

"York River Area Rotation Area 1" means all public grounds in the York River, within Gloucester County, between a line from Upper York River Flashing Red Channel Marker", Latitude 37° 17.8863666' N., Longitude 76° 34.6534166' W.; thence northeasterly to Red Day Marker "2" at the mouth of Cedar Bush Creek, Latitude 37° 18.6422166' N., Longitude 76° 33.8216000' W.; upstream to a line from the Flashing Yellow VIMS Data Buoy "CB", Latitude 37° 20.4670000' N., Longitude 76° 37.4830000' W.; thence northeasterly to the inshore end of the wharf at Clay Bank.

"York River Area Rotation Area 2" means all public grounds in the York River, within Gloucester County, from the George P. Coleman Memorial Bridge (U.S. Route 17), upstream to a line from Upper York River Flashing Red Channel Marker "8", Latitude 37° 17.8863666' N., Longitude 76° 34.6534166' W.; thence northeasterly to Red Day Marker "2" at the mouth of Cedar Bush Creek, Latitude 37° 18.6422166' N., Longitude 76° 33.8216000' W.

#### **4VAC20-720-30. Standing stock criteria.**

Any public oyster ground or unassigned ground may be closed to harvest by the Marine Resources Commissioner of Marine Resources, when it is determined by the Oyster Replenishment Office Department that the standing stock of oysters has been depleted by 50% or more. The initial estimate of standing stock for each area shall be the volume of oysters as of October 1 of ~~each~~ the current year as determined by the Oyster Replenishment Office Department.

#### **4VAC20-720-35. Public oyster ground harvest season.**

The Marine Resources Commissioner of the Marine Resources Commission shall, ~~when it is determined to be warranted and appropriate,~~ be authorized to extend the public oyster harvest season in the James River Seed Area, including the Deep Water Shoal State Replenishment Area, but the extension shall not be established to go beyond June 30.

#### **4VAC20-720-40. Open oyster harvest season and areas.**

A. It shall be unlawful for any person to harvest oysters from public and unassigned grounds outside of the seasons and areas set forth in this section.

B. The lawful seasons and areas for the harvest of oysters from the public oyster grounds and unassigned grounds are as described in the following subdivisions of this subsection:

1. James River Seed Area, including the Deep Water Shoal State Replenishment Seed Area: ~~October 1, 2011~~ October 1, 2012, through April 30, 2012 April 30, 2013.
2. James River ~~Hand Scrape~~ Area and the Thomas Rock ~~Hand Scrape~~ Area (James River): ~~November 1, 2011~~

~~November 1, 2012, through January 31, 2012~~ January 31, 2013.

~~3. York River Hand Scrape Area 1: January 1, 2012~~ January 1, 2013, through February 29, 2012 February 28, 2013.

~~4. Mobjack Bay Hand Scrape Area: March 1, 2012,~~ through March 31, 2012.

~~5. 4. Milford Haven: December 1, 2011~~ December 1, 2012, through February 29, 2012 February 28, 2013.

~~6. 5. Deep Rock Patent Tong Area: December 1, 2011~~ December 1, 2012, through February 29, 2012 February 28, 2013.

~~7. 6. Rappahannock River Rotation Area 4 5: October 1, 2011~~ October 1, 2012, through November 30, 2011 November 30, 2012.

~~8. 7. Rappahannock River Rotation Area 2 3: November 1, 2011~~ November 1, 2012, through December 31, 2011 December 31, 2012.

~~9. 8. Rappahannock River Area 7: December 1, 2011~~ December 1, 2012, through January 31, 2012 January 31, 2013.

~~10. 9. Rappahannock River Area 8: December 1, 2011~~ December 1, 2012, through January 31, 2012 January 31, 2013.

~~11. 10. Rappahannock River Area 9: November 1, 2011~~ November 1, 2012, through December 31, 2011 December 31, 2012.

~~12. 11. Great Wicomico River Hand Scrape Area: December 1, 2011~~ December 1, 2012, through January 31, 2012 January 31, 2013.

~~13. 12. Upper Chesapeake Bay, - Blackberry Hangs Hand Scrape Area: December 1, 2011~~ December 1, 2012, through January 31, 2012 January 31, 2013.

~~14. 13. Little Wicomico River: October 1, 2011~~ October 1, 2012, through December 31, 2011 December 31, 2012.

~~15. 14. Coan River: October 1, 2011~~ October 1, 2012, through December 31, 2011 December 31, 2012.

~~16. 15. Yeocomico River: October 1, 2011~~ October 1, 2012, through December 31, 2011 December 31, 2012.

~~17. 16. Nomini River Creek: October 1, 2011~~ October 1, 2012, through December 31, 2011 December 31, 2012.

~~18. 17. Tangier Pocomoke Pocomoke and Tangier Sounds Rotation Area 4 2: December 1, 2011~~ December 1, 2012, through February 29, 2012 February 28, 2013.

~~19. 18. Seaside of the Eastern Shore (for clean cull oysters only): November 1, 2011~~ November 1, 2012, through February 29, 2012 February 28, 2013.

**4VAC20-720-60. Day and time limit.**

A. It shall be unlawful to take, catch, or possess oysters on Saturday and Sunday from the public oyster grounds or unassigned grounds in the waters of the Commonwealth of

Virginia, for commercial purposes, except that this provision shall not apply to any person harvesting no more than one bushel per day by hand or ordinary tong for household use only during the season when the public oyster grounds or unassigned grounds are legally open for harvest. ~~The presence of any gear normally associated with the harvesting of oysters on board the boat or other vehicle used during any harvesting under this exception shall be prima facie evidence of violation of this chapter.~~

B. It shall be unlawful for any person to harvest or attempt to harvest oysters prior to sunrise or after 2 p.m. from the areas described in 4VAC20-720-40 B 1 through ~~18~~ 17, except as described in 4VAC20-1230. In addition, it shall be unlawful for any boat with an oyster dredge aboard to leave the dock until one hour before sunrise or return to the dock after sunset, and it shall be unlawful for any boat with a hand scrape aboard to leave the dock until one-half hour before sunrise or return to the dock after sunset.

**4VAC20-720-70. Gear restrictions.**

A. It shall be unlawful for any person to harvest oysters in the James River Seed Areas, including the Deep Water Shoal State Replenishment Seed Area; the Rappahannock River Area 9; Milford Haven and Little Wicomico, Coan, Nomini and Yeocomico Rivers, except by hand tong ~~or ordinary tong.~~ It shall be unlawful for any person to have a hand scrape on board a boat that is harvesting or attempting to harvest oysters from public grounds by hand tong ~~or ordinary tong.~~

B. It shall be unlawful to harvest oysters from the area as described in 4VAC20-720-40 B ~~19~~ 18, except by hand.

C. It shall be unlawful to harvest oysters in the Rappahannock River Rotation Areas ~~4 3 and 2 5~~; the Rappahannock River Areas 7 and 8, James River ~~Hand Scrape Area, Thomas Rock Hand Scrape Area, Upper Chesapeake Bay (Blackberry Blackberry Hangs Hand Scrape Area) Area, and York River Rotation Area 1, and Great Wicomico, and Mobjack Bay Hand Scrape Areas,~~ except by hand scrape.

D. It shall be unlawful for any person to have more than one hand scrape on board any boat that is harvesting oysters or attempting to harvest oysters from public grounds. It shall be unlawful for any person to have a hand tong on board a boat that is harvesting or attempting to harvest oysters from public grounds by hand scrape.

E. It shall be unlawful to harvest oysters from the area as described in 4VAC20-720-40 B ~~18~~ 17, except by ~~a standard~~ an oyster dredge.

F. It shall be unlawful to harvest oysters from the Deep Rock Patent Tong Area, except by ~~a standard~~ an oyster patent tong.

**4VAC20-720-75. Gear license.**

A. It shall be unlawful for any person to harvest shellfish, from the hand scrape areas in the Rappahannock River, James River, Upper Chesapeake Bay, York River, ~~Mobjack Bay~~ and

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# Regulations

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Great Wicomico River, unless that person has first obtained a ~~current~~ valid hand scrape license.

B. It shall be unlawful for any person to harvest shellfish, with a an oyster dredge from the public oyster grounds in the area as described in 4VAC20-720-40 B ~~18~~ 17, unless that person has first obtained a ~~current~~ valid oyster dredge license.

C. It shall be unlawful for any person to harvest shellfish, with a ~~patent tong~~ from the public oyster grounds in the Deep Rock ~~Patent Tong~~ Area, unless that person has first obtained a ~~current~~ valid oyster patent tong license.

D. It shall be unlawful for any person to harvest shellfish, with a ~~an ordinary tong or a~~ hand tong from the public oyster grounds, as described in subsection A of 4VAC20-720-70, unless that person has first obtained a ~~current ordinary tong or~~ valid hand tong license.

#### **4VAC20-720-80. Quotas and harvest limits.**

A. The lawful daily harvest and possession limit of clean cull oysters harvested from the areas described in 4VAC20-720-40 B 2 through ~~17~~ 16 shall be ~~10~~ eight bushels per registered commercial fisherman licensee. It shall be unlawful for any registered commercial fisherman licensee to harvest or possess more than ~~10~~ eight bushels per day. The lawful daily vessel limit of clean cull oysters harvested from the areas described in 4VAC20-720-40 B 2 through ~~17~~ 16 shall be determined as the number of registered commercial fisherman licensees on board the vessel multiplied by ~~10~~ eight bushels with a maximum daily landing and possession limit of ~~30~~ 24 bushels of clean cull oysters per vessel. It shall be unlawful to possess on board any vessel or to land more than the lawful daily vessel limit of clean cull oysters described in this subsection.

B. In the area described in 4VAC20-720-40 B ~~18~~ 17, where harvesting is allowed by oyster dredge, there shall be a daily harvest and possession limit of ~~10~~ eight bushels of clean cull oysters per registered commercial fisherman licensee. It shall be unlawful for any registered commercial fisherman licensee to harvest or possess more than ~~10~~ eight bushels per day. The lawful daily vessel limit of clean cull oysters harvested by oyster dredge shall be determined as the number of registered commercial fisherman licensees on board the vessel multiplied by ~~10~~ eight bushels with a maximum daily landing and possession limit of ~~30~~ 24 bushels of clean cull oysters per vessel. It shall be unlawful to possess on board any vessel or to land more than the lawful daily vessel limit of clean cull oysters harvested by oyster dredge, as described in this subsection. No blue crab bycatch is allowed. It shall be unlawful to possess on board any vessel more than 250 hard clams.

C. Harvesters who export the oysters to an out-of-state market or do not sell the oysters to a licensed and Department of Health certified Virginia buyer but sell the oysters directly to the public for human consumption shall report oysters harvested on a daily basis and pay oyster taxes weekly.

#### **4VAC20-720-85. James River seed quota and monitoring.**

A. An oyster seed harvest quota of 120,000 bushels of seed is established for the James River Seed Area, including the Deep Water Shoal State Replenishment Seed Area, ~~for the 2011/2012 harvest season~~. Once it has been projected and announced that the quota of seed has been attained, it shall be unlawful for any person to harvest seed oysters from these areas.

B. Of the 120,000-bushel seed quota described in subsection A of this section no more than 40,000 bushels of this quota may be harvested from October 1, ~~2011~~, through December 31, ~~2011~~. However, if it is projected and announced that 40,000 bushels of seed have been harvested before December 31, ~~2011~~, it shall be unlawful for any person to harvest seed oysters from that date forward until January 1, ~~2012~~.

C. Any person harvesting or landing oyster seed from the James River Seed Area, including the Deep Water Shoal State Replenishment Seed Area, shall report monthly on forms provided by the Virginia Marine Resources Commission all harvest of seed oysters. Reporting requirements shall consist of that person's Commercial Fisherman Registration License number, daily number of bushels of seed oysters harvested, harvest rock location, planting location (any lease numbers), and buyer name.

D. It shall be unlawful for any person harvesting seed oysters from the James River Seed Area, including the Deep Water Shoal State Replenishment Seed Area, to fail to contact the Virginia Marine Resources Commission Interactive-Voice-Response (IVR) System within 24 hours of harvest or landing and provide that person's name, Commercial Fisherman Registration License number, time, date, daily number of bushels of seed oysters harvested, harvest rock location, planting location (any lease numbers), and buyer name.

#### **4VAC20-720-90. Harvest permit required for the James River ~~Hand Scrape~~ Area and Thomas Rock ~~Hand Scrape~~ Area.**

A permit is required for the James River ~~Hand Scrape~~ Area and the Thomas Rock ~~Hand Scrape~~ Area. It shall be unlawful for any person to harvest, or attempt to harvest, oysters from the James River ~~Hand Scrape~~ Area and the Thomas Rock ~~Hand Scrape~~ Area without first obtaining a harvest permit from the Marine Resources Commission as required by § 28.2-518 of the Code of Virginia.

#### **4VAC20-720-91. Harvest permit ~~shall be~~ required for the James River Seed Area, including the Deep Water Shoal State Replenishment Area.**

A harvest permit shall be required for the James River Seed Area, including the Deep Water Shoal State Replenishment Seed Area, for the harvesting of seed oysters. It shall be unlawful for any person to harvest or attempt to harvest seed oysters from the James River Seed Area, including the Deep

Water Shoal State Replenishment Seed Area, without first obtaining and having on board a harvest permit.

**4VAC20-720-95. ~~Harvesting permit required for the Rappahannock River Rotation Areas 1 through 6. (Repealed.)~~**

~~A harvesting permit is required for the Rappahannock River Rotation Areas 1 through 6. Included with this permit will be a map of the two rotation areas that are open for harvesting in any given year. It shall be unlawful for any person to harvest or attempt to harvest oysters from the Rappahannock River Rotation Areas 1 through 6 without first obtaining and having on board a harvest permit with a map of lower Rappahannock Rotation Areas 1 through 6 that are open for harvesting in any given year.~~

**4VAC20-720-100. Seed oyster planting procedures.**

A. The marine police officer at the point of seed harvest may require that an officer be present during the seed planting. When this is required, it will be specified on the seed transfer permit. If an officer is required to be present at planting, the planter shall notify the marine police officer in the area prior to planting. It shall be unlawful for the permittee or planter to plant the oysters without a marine police officer being present.

B. The planting of seed oysters shall consist of spreading the oysters loosely on the bottom of the planting area. It shall be unlawful to plant seed oysters in any manner except by spreading the oysters loosely on the bottom.

C. Seed oysters shall be placed on a designated and marked area of the private ground from which said oysters are not to be removed until after ~~March 31~~ April 30. It shall be unlawful to reharvest these seed oysters prior to ~~April 1~~ May 1.

VA.R. Doc. No. R13-3351; Filed September 6, 2012, 11:06 a.m.

**DEPARTMENT OF MINES, MINERALS AND ENERGY**

**Final Regulation**

Title of Regulation: **4VAC25-150. Virginia Gas and Oil Regulation (amending 4VAC25-150-10, 4VAC25-150-60, 4VAC25-150-80, 4VAC25-150-90, 4VAC25-150-100, 4VAC25-150-110, 4VAC25-150-120, 4VAC25-150-135, 4VAC25-150-140, 4VAC25-150-150, 4VAC25-150-160, 4VAC25-150-180, 4VAC25-150-190, 4VAC25-150-200, 4VAC25-150-210, 4VAC25-150-220, 4VAC25-150-230, 4VAC25-150-240, 4VAC25-150-250, 4VAC25-150-260, 4VAC25-150-280, 4VAC25-150-300, 4VAC25-150-310, 4VAC25-150-340, 4VAC25-150-360, 4VAC25-150-380, 4VAC25-150-390, 4VAC25-150-420, 4VAC25-150-460, 4VAC25-150-490, 4VAC25-150-500, 4VAC25-150-510, 4VAC25-150-520, 4VAC25-150-530, 4VAC25-150-550, 4VAC25-150-560, 4VAC25-150-590, 4VAC25-150-600, 4VAC25-150-610, 4VAC25-150-620, 4VAC25-150-630, 4VAC25-150-650, 4VAC25-150-660, 4VAC25-150-670, 4VAC25-150-680, 4VAC25-150-690, 4VAC25-150-700,**

**4VAC25-150-711, 4VAC25-150-720, 4VAC25-150-730, 4VAC25-150-740, 4VAC25-150-750).**

Statutory Authority: §§ 45.1-161.3 and 45.1-361.27 of the Code of Virginia.

Effective Date: November 8, 2012.

Agency Contact: Michael Skiffington, Regulatory Coordinator, Department of Mines, Minerals and Energy, 1100 Bank Street, 8th Floor, Richmond, VA 23219-3402, telephone (804) 692-3212, FAX (804) 692-3237, TTY (800) 828-1120, or email mike.skiffington@dmme.virginia.gov.

Summary:

*As a result of periodic review, the Department of Mines, Minerals and Energy is amending 4VAC25-150, Virginia Gas and Oil Regulation. Sections within 4VAC25-150 are amended to correct technical areas for accuracy, improve worker safety, and provide clarity. Amending 4VAC25-150-150 will reduce workload and increase efficiency for applicants by providing flexibility and economy to the permit process. 4VAC25-150-90 is updated to include symbols that are consistent with current industry usage and available CAD technology. Amendments to 4VAC25-150-80, 4VAC25-150-260, 4VAC25-150-300, 4VAC25-150-380, and 4VAC25-150-630 will protect the safety and health of oil and gas industry employees. An amendment to 4VAC25-150-90 is made to bring consistency to data submission requirements for the Division of Gas and Oil.*

*Changes to the proposed regulation (i) increase the timeframe for reclamation of permits from 90 to 180 days, (ii) correct citations, (iii) clarify requirements, and (iv) provide consistency with other department regulations.*

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

Part I

Standards of General Applicability

Article 1

General Information

**4VAC25-150-10. Definitions.**

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

"Act" means the Virginia Gas and Oil Act of 1990, Chapter 22.1 (§ 45.1-361.1 et seq.) of Title 45.1 of the Code of Virginia.

"Adequate channel" means a watercourse that will convey the designated frequency storm event without overtopping its banks or causing erosive damage to the bed, banks and overbank sections.

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# Regulations

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"Applicant" means any person or business who files an application with the Division of Gas and Oil.

"Approved" means accepted as suitable for its intended purpose when included in a permit issued by the director or determined to be suitable in writing by the director.

"Berm" means a ridge of soil or other material constructed along an active earthen fill to divert runoff away from the unprotected slope of the fill to a stabilized outlet or sediment trapping facility.

"Board" means the Virginia Gas and Oil Board.

"Bridge plug" means an obstruction intentionally placed in a well at a specified depth.

"Cased completion" means a technique used to make a well capable of production in which production casing is set through the productive zones.

"Cased/open hole completion" means a technique used to make a well capable of production in which at least one zone is completed through casing and at least one zone is completed open hole.

"Casing" means all pipe set in wells except conductor pipe and tubing.

"Causeway" means a temporary structural span constructed across a flowing watercourse or wetland to allow construction traffic to access the area without causing erosion damage.

"Cement" means hydraulic cement properly mixed with water.

"Channel" means a natural stream or man-made waterway.

"Chief" means the Chief of the Division of Mines of the Department of Mines, Minerals and Energy.

"Coal-protection string" means a casing designed to protect a coal seam by excluding all fluids, oil, gas or gas pressure from the seam, except such as may be found in the coal seam itself.

"Cofferdam" means a temporary structure in a river, lake or other waterway for keeping the water from an enclosed area that has been pumped dry so that bridge foundations, pipelines, etc., may be constructed.

"Completion" means the process which results in a well being capable of producing gas or oil.

"Conductor pipe" means the short, large diameter string used primarily to control caving and washing out of unconsolidated surface formations.

"Corehole" means any ~~shaft or hole sunk, drilled, bored or dug, that breaks or disturbs the surface of the earth as part of a geophysical operation~~ solely for the purpose of obtaining rock samples or other information to be used in the exploration for coal, gas, or oil. The term shall not include a borehole used solely for the placement of an explosive charge or other energy source for generating seismic waves.

"Days" means calendar days.

"Denuded area" means land that has been cleared of vegetative cover.

"Department" means the Department of Mines, Minerals and Energy.

"Detention basin" means a stormwater management facility which temporarily impounds and discharges runoff through an outlet to a downstream channel. Infiltration is negligible when compared to the outlet structure discharge rates. The facility is normally dry during periods of no rainfall.

"Dike" means an earthen embankment constructed to confine or control fluids.

"Directional survey" means a well survey that measures the degree of deviation of a hole, ~~or distance from the vertical and the direction of deviation~~ from true vertical, and the distance and direction of points in the hole from vertical.

"Director" means the Director of the Department of Mines, Minerals and Energy or his authorized agent.

"Diversion" means a channel constructed for the purpose of intercepting surface runoff.

"Diverter" or "diverter system" means an assembly of valves and piping attached to a gas or oil well's casing for controlling flow and pressure from a well.

"Division" means the Division of Gas and Oil of the Department of Mines, Minerals and Energy.

[ "Division director" means the Director of the Division of Gas and Oil, also known as the Gas and Oil Inspector as defined in the Act. ]

"Erosion and sediment control plan" means a document containing a description of materials and methods to be used for the conservation of soil and the protection of water resources in or on a unit or group of units of land. It may include appropriate maps, an appropriate soil and water plan inventory and management information with needed interpretations, and a record of decisions contributing to conservation treatment. The plan shall contain a record of all major conservation decisions to ensure that the entire unit or units of land will be so treated to achieve the conservation objectives.

"Expanding cement" means any cement approved by the director which expands during the hardening process, including but not limited to regular oil field cements with the proper additives.

[ ~~"Form prescribed by the director" means a form issued by the division, or an equivalent facsimile, for use in meeting the requirements of the Act or this chapter.~~ ]

"Firewall" means an earthen dike or fire resistant structure built around a tank or tank battery to contain the oil in the event a tank ruptures or catches fire.

"Flume" means a constructed device lined with erosion-resistant materials intended to convey water on steep grades.

"Flyrock" means any material propelled by a blast that would be actually or potentially hazardous to persons or property.

[ "Form prescribed by the director" means a form issued by the division, or an equivalent facsimile, for use in meeting the requirements of the Act or this chapter. ]

"Gas well" means any well which produces or appears capable of producing a ratio of 6,000 cubic feet (6 Mcf) of gas or more to each barrel of oil, on the basis of a gas-oil ratio test.

"Gob well" means a coalbed methane gas well which is capable of producing coalbed methane gas from the de-stressed zone associated with any full-seam extraction of coal that extends above and below the mined-out coal seam.

"Groundwater" means all water under the ground, wholly or partially within or bordering the Commonwealth or within its jurisdiction, which has the potential for being used for domestic, industrial, commercial or agricultural use or otherwise affects the public welfare.

"Highway" means any public street, public alley, or public road.

"Inclination survey" means ~~a well or corehole survey, using the surface location of the well or corehole as the apex, to determine the deviation of the well or corehole from the true vertical beneath the apex on the same horizontal subsurface plane~~ survey taken inside a wellbore that measures the degree of deviation of the point of the survey from true vertical.

"Inhabited building" means a building, regularly occupied in whole or in part by human beings, including, but not limited to, a private residence, church, school, store, public building or other structure where people are accustomed to assemble except for a building being used on a temporary basis, on a permitted site, for gas, oil, or geophysical operations.

"Intermediate string" means a string of casing that prevents caving, shuts off connate water in strata below the water-protection string, and protects strata from exposure to lower zone pressures.

"Live watercourse" means a definite channel with bed and banks within which water flows continuously.

"Mcf" means, when used with reference to natural gas, 1,000 cubic feet of gas at a pressure base of 14.73 pounds per square inch gauge and a temperature base of 60°F.

"Mud" means ~~any mixture of water and clay or other material as the term is commonly used in the industry~~ a mixture of materials that creates a weighted fluid to be circulated down hole during drilling operations for the purpose of lubricating and cooling the bit, removing cuttings, and controlling formation pressures and fluid.

"Natural channel" or "natural stream" means nontidal waterways that are part of the natural topography. They usually maintain a continuous or seasonal flow during the

year, and are characterized as being irregular in cross section with a meandering course.

"Nonerrodible" means a material such as riprap, concrete or plastic that will not experience surface wear due to natural forces.

"Oil well" means any well which produces or appears capable of producing a ratio of less than 6,000 cubic feet (6 Mcf) of gas to each barrel of oil, on the basis of a gas-oil ratio test.

"Open hole completion" means a technique used to make a well capable of production in which no production casing is set through the productive zones.

"Person" means any individual, corporation, partnership, association, company, business, trust, joint venture or other legal entity.

"Petitioner" means any person or business who files a petition, appeal, or other request for action with the Division of Gas and Oil or the Virginia Gas and Oil Board.

"Plug" means the ~~stopping sealing of,~~ or a device or material used for the stopping sealing of, the flow of water, a gas or oil wellbore or casing to prevent the migration of water, gas, or oil from one stratum to another.

"Pre-development" means the land use and site conditions that exist at the time that the operations plan is submitted to the division.

"Produced waters" means water or fluids produced from a gas well, oil well, coalbed methane gas well or gob well as a byproduct of producing gas, oil or coalbed methane gas.

"Producer" means a permittee operating a well in Virginia that is producing or is capable of producing gas or oil.

"Production string" means a string of casing or tubing through which the well is completed and may be produced and controlled.

"Red shales" means the undifferentiated shaley portion of the ~~bluestone~~ Bluestone formation normally found above the Pride Shale Member of the formation, and extending upward to the base of the Pennsylvanian strata, which red shales are predominantly red and green in color but may occasionally be gray, grayish green and grayish red.

"Red zone" is a zone in or contiguous to a permitted area that could have potential hazards to workers or to the public.

"Retention basin" means a stormwater management facility which, similar to a detention basin, temporarily impounds runoff and discharges its outflow through an outlet to a downstream channel. A retention basin is a permanent impoundment.

"Sediment basin" means a depression formed from the construction of a barrier or dam built to retain sediment and debris.

"Sheet flow," also called overland flow, means shallow, unconcentrated and irregular flow down a slope. The length



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# Regulations

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of strip for sheet flow usually does not exceed 200 feet under natural conditions.

"Slope drain" means tubing or conduit made of nonerosive material extending from the top to the bottom of a cut or fill slope.

"Special diligence" means the activity and skill exercised by a good ~~businessman~~ businessperson in ~~his~~ a particular specialty, which must be commensurate with the duty to be performed and the individual circumstances of the case; not merely the diligence of an ordinary person or nonspecialist.

"Stabilized" means able to withstand normal exposure to air and water flows without incurring erosion damage.

"Stemming" means the inert material placed in a borehole after an explosive charge for the purpose of confining the explosion gases in the borehole or the inert material used to separate the explosive charges (decks) in decked holes.

"Storm sewer inlet" means any structure through which stormwater is introduced into an underground conveyance system.

"Stormwater management facility" means a device that controls stormwater runoff and changes the characteristics of that runoff, including but not limited to, the quantity, quality, the period of release or the velocity of flow.

"String of pipe" or "string" means the total footage of pipe of uniform size set in a well. The term embraces conductor pipe, casing and tubing. When the casing consists of segments of different size, each segment constitutes a separate string. A string may serve more than one purpose.

"Sulfide stress cracking" means embrittlement of the steel grain structure to reduce ductility and cause extreme brittleness or cracking by hydrogen sulfide.

"Surface mine" means an area containing an open pit excavation, surface operations incident to an underground mine, or associated activities adjacent to the excavation or surface operations, from which coal or other minerals are produced for sale, exchange, or commercial use; and includes all buildings and equipment above the surface of the ground used in connection with such mining.

"Target formation" means the geologic gas or oil formation identified by the well operator in his application for a gas, oil or geophysical drilling permit.

"Temporary stream crossing" means a temporary span installed across a flowing watercourse for use by construction traffic. Structures may include bridges, round pipes or pipe arches constructed on or through nonerodible material.

"Ten-year storm" means a storm that is capable of producing rainfall expected to be equaled or exceeded on the average of once in 10 years. It may also be expressed as an exceedance probability with a 10% chance of being equaled or exceeded in any given year.

"Tubing" means the small diameter string set after the well has been drilled from the surface to the total depth and

through which the gas or oil or other substance is produced or injected.

"Two-year storm" means a storm that is capable of producing rainfall expected to be equaled or exceeded on the average of once in two years. It may also be expressed as an exceedance probability with a 50% chance of being equaled or exceeded in any given year.

"Vertical ventilation hole" means any hole drilled from the surface to the coal seam used only for the safety purpose of removing gas from the underlying coal seam and the adjacent strata, thus, removing the gas that would normally be in the mine ventilation system.

"Water bar" means a small obstruction constructed across the surface of a road, pipeline right-of-way, or other area of ground disturbance in order to interrupt and divert the flow of water down the on a grade of the road and divert the water to provide for sediment control for the purpose of controlling erosion and sediment migration.

"Water-protection string" means a string of casing designed to protect groundwater-bearing strata.

## **4VAC25-150-60. Due dates for reports and decisions.**

A. Where the last day fixed for ~~(i) submitting a request for a hearing, holding a hearing or issuing a decision in an enforcement action under Article 3 (4VAC25 150 170 et seq.) of this part, (ii) submitting a monthly or annual report under Article 4 (4VAC25 150 210 et seq.) of this part, (iii) submitting a report of commencement of activity under 4VAC25 150 230, (iv) submitting a drilling report, a completion report or other report under 4VAC25 150 360, or (v) submitting a plugging affidavit under 4VAC25 150 460 or any required report~~ falls on a Saturday, Sunday, or any day on which the Division of Gas and Oil office is closed as authorized by the Code of Virginia or the Governor, the required action may be done on the next day that the office is open.

B. All submittals to or notifications of the Division of Gas and Oil identified in subsection A of this section shall be made to the division office no later than 5 p.m. on the day required by the Act or by this chapter.

### Article 2 Permitting

## **4VAC25-150-80. Application for a permit.**

### A. Applicability.

1. Persons required in §45.1-361.29 of the Code of Virginia to obtain a permit or permit modification shall apply to the division on the forms prescribed by the director. All lands on which gas, oil or geophysical operations are to be conducted shall be included in a permit application.

2. In addition to specific requirements for variances in other sections of this chapter, any applicant for a variance

shall, in writing, document the need for the variance and describe the alternate measures or practices to be used.

B. The application for a permit shall, as applicable, be accompanied by the fee in accordance with § 45.1-361.29 of the Code of Virginia, the bond in accordance with § 45.1-361.31 of the Code of Virginia, and the fee for the Orphaned Well Fund in accordance with § 45.1-361.40 of the Code of Virginia.

C. Each application for a permit shall include information on all activities, including those involving associated facilities, to be conducted on the permitted site. This shall include the following:

1. The name and address of:
  - a. The gas, oil or geophysical applicant;
  - b. The agent required to be designated under § 45.1-361.37 of the Code of Virginia; and
  - c. Each person whom the applicant must notify under § 45.1-361.30 of the Code of Virginia;
2. The certifications required in § 45.1-361.29 E of the Code of Virginia;
3. The proof of notice to affected parties required in § 45.1-361.29 E of the Code of Virginia, which shall be:
  - a. A copy of a signed receipt or electronic return receipt of delivery of notice by certified mail;
  - b. A copy of a signed receipt acknowledging delivery of notice by hand; or
  - c. If all copies of receipt of delivery of notice by certified mail have not been signed and returned within 15 days of mailing, a copy of the mailing log or other proof of the date the notice was sent by certified mail, return receipt requested;
4. If the application is for a permit modification, proof of notice to affected parties, as specified in subdivision C 3 of this section:
  4. 5. Identification of the type of well or other gas, oil or geophysical operation being proposed;
  5. 6. The plat in accordance with 4VAC25-150-90;
  6. 7. The operations plan in accordance with 4VAC25-150-100;
  7. 8. The information required for operations involving hydrogen sulfide in accordance with 4VAC25-150-350;
  8. 9. The location where the Spill Prevention Control and Countermeasure (SPCC) plan is available, if one is required;
  9. 10. The Department of Mines, Minerals and Energy, Division of Mined Land Reclamation's permit number for any area included in a Division of Mined Land Reclamation permit on which a proposed gas, oil or geophysical operation is to be located;
  10. 11. For an application for a conventional well, the information required in 4VAC25-150-500;

~~11.~~ 12. For an application for a coalbed methane gas well, the information required in 4VAC25-150-560;

~~12.~~ 13. For an application for a geophysical operation, the information required in 4VAC25-150-670; and

~~13.~~ 14. For an application for a permit to drill for gas or oil in Tidewater Virginia, the environmental impact assessment meeting the requirements of § 62.1-195.1 B of the Code of Virginia.

D. After July 1, 2009, all permit applications and plats submitted to the division shall be in electronic form or a format prescribed by the director.

**4VAC25-150-90. Plats.**

A. When filing an application for a permit for a well or corehole, the applicant also shall file an accurate plat certified by a licensed professional engineer or licensed land surveyor on a scale, to be stated thereon, of 1 inch equals 400 feet (1:4800). The scope of the plat shall be large enough to show the board approved unit and all areas within the greater of 750 feet or one half of the distance specified in § 45.1-361.17 of the Code of Virginia from the proposed well or corehole, ~~or within a unit established by the board for the subject well.~~ The plat shall be submitted on a form prescribed by the director.

B. The known courses and distances of all property lines and lines connecting the permanent points, landmarks or corners within the scope of the plat shall be shown thereon. All lines actually surveyed shall be shown as solid lines. Lines taken from deed or chain of title descriptions only shall be shown by broken lines. All property lines shown on a plat shall agree with surveys, deed descriptions, or acreages used in county records for tax assessment purposes.

C. A north and south line shall be given and shown on the plat, and point to the top of the plat.

- D. Wells or coreholes shall be located on the plat as follows:
1. The proposed or actual surface elevation of the subject well or corehole shall be shown on the plat, within an accuracy of one vertical foot. The surface elevation shall be tied to either a government benchmark or other point of proven elevation by differential or aerial survey, ~~or~~ by trigonometric leveling, or by Global Positioning System (GPS) survey. The location of the government benchmark or the point of proven elevation and the method used to determine the surface elevation of the subject well or corehole shall be noted and described on the plat.
  2. The proposed or actual horizontal location of the subject well or corehole determined by survey shall be shown on the plat. The proposed or actual well or corehole location shall be shown in accordance with the Virginia Coordinate System of 1983, as defined in Chapter 17 (§ 55-287 et seq.) of Title 55 of the Code of Virginia, also known as the State Plane Coordinate System.
  3. The courses and distances of the well or corehole location from two permanent points or landmarks on the

# Regulations

tract shall be shown; such landmarks shall be set stones, iron pipes, T-rails or other manufactured monuments, including mine coordinate monuments, and operating or abandoned wells which are platted to the accuracy standards of this section and on file with the division. If temporary points are to be used to locate the actual well or corehole location as provided for in 4VAC25-150-290, the courses and distances of the well or corehole location from the two temporary points shall be shown.

4. Any other well, permitted or drilled, within the distance specified in § 45.1-361.17 of the Code of Virginia or the distance to the nearest well completed in the same pool, whichever is less, or within the boundaries of a drilling unit established by the board around the subject well shall be shown on the plat or located by notation. The type of each well shall be designated by the following symbols as described in the Federal Geographic Data Committee (FGDC) Digital Cartographic Standard for Geologic Map Symbolization:

**EDITOR'S NOTICE:** The symbols in subdivision 4 a through l designating well types are replaced with the following table.

OPERATION TYPE	SYMBOL	FGDC REF. NO.
<b>CBM</b>		
Active		19.5.57
Plugged/Abandoned		19.5.59
<b>Conventional</b>		
Active		19.5.54
Plugged/Abandoned		19.5.56
<b>Oil</b>		
Active		19.5.40
Plugged/Abandoned		19.5.42
<b>Pipeline</b>		
Aboveground		30.3.24
Underground		30.3.23
<b>Other</b>		
Proposed Well		19.5.10
Horizontal Well		19.5.14
Waste Disposal Well		19.5.26
Gas Storage Well		19.5.92
Facility		30.3.15

Symbols for additional features as required in 4VAC25-150-510, 4VAC25-150-590, and 4VAC25-150-680 should be taken from the FDGC standard where applicable.

E. Plats shall also contain:

1. For a conventional gas and oil or injection well, the information required in 4VAC25-150-510;
2. For a coalbed methane gas well, the information required in 4VAC25-150-590; or
3. For a corehole, the information required in 4VAC25-150-680.

F. Any subsequent application for a new permit or permit modification shall include an accurate copy of the well plat,

updated as necessary to reflect any changes on the site, newly discovered data or additional data required since the last plat was submitted. Any revised plat shall be certified as required in subsection A of this section.

## 4VAC25-150-100. Operations plans.

A. Each application for a permit or permit modification shall include an operations plan, in a format approved by or on a form prescribed by the director. The operations plan and accompanying maps or drawings shall become part of the terms and conditions of any permit which is issued.

B. The applicant shall indicate how risks to the public safety or to the site and adjacent lands are to be managed, consistent with the requirements of § 45.1-361.27 B of the Code of Virginia, and shall provide a short narrative, if pertinent. The operations plan shall identify "red zone" areas.

## 4VAC25-150-110. Permit supplements and permit modifications.

A. Permit supplements.

1. Standard permit supplements. A permittee shall be allowed to submit a permit supplement when work being performed ~~either~~:

- a. Does not change the disturbance area as described in the original permit; ~~or~~ and
- b. Involves activities previously permitted.

The permittee shall submit written documentation of the changes made to the permitted area ~~within seven working~~ no later than 30 days after completing the change. All other changes to the permit shall require a permit modification in accordance with § 45.1-361.29 of the Code of Virginia.

2. Emergency permit supplements. If a change must be implemented immediately for an area off the disturbance area as described in the original permit, or for an activity not previously permitted due to actual or threatened imminent danger to the public safety or to the environment, the permittee shall:

- a. Take immediate action to minimize the danger to the public or to the environment;
- b. ~~Orally notify~~ Notify the director as soon as possible of actions taken to minimize the danger and, if the director determines an emergency still exists and grants oral approval, commence additional changes if necessary; and
- c. Submit a ~~written~~ supplement to the permit within seven working days of notifying the director with a written description of the emergency and action taken. The supplement shall contain a description of the activity which was changed, a description of the new activity, and any amended data, maps, plats, or other information required by the director. An incident report may also be required as provided for in 4VAC25-150-380.

Any changes to the permit are to be temporary and restricted to those that are absolutely necessary to minimize danger. Any permanent changes to the permit

shall require a permit modification as provided for in subsection B of this section.

B. Permit modifications.

1. Applicability. All changes to the permit which do not fit the description contained in subsection A of this section shall require a permit modification in accordance with § 45.1-361.29 of the Code of Virginia.

2. Notice and fees. Notice of a permit modification shall be given in accordance with § 45.1-361.30 of the Code of Virginia. The application for a permit modification shall be accompanied, as applicable, by the fee in accordance with § 45.1-361.29 of the Code of Virginia and the bond in accordance with § 45.1-361.31 of the Code of Virginia.

3. Waiver of right to object. Upon receipt of notice, any person may, on a form approved by the director, waive the time requirements and their right to object to a proposed permit modification. The department shall be entitled to rely upon the waiver to approve the permit modification.

4. Permit modification. The permittee shall submit a written application for a permit modification on a form prescribed by the director. The permittee may not undertake the proposed work until the permit modification has been issued. ~~The~~ As appropriate, the application shall include, but not be limited to:

- a. The name and address of:
  - (1) The permittee; and
  - (2) Each person whom the applicant must notify under § 45.1-361.30 of the Code of Virginia;
- b. The certifications required in § 45.1-361.29 E of the Code of Virginia;
- c. The proof of notice required in § 45.1-361.29 E of the Code of Virginia, as provided for in 4VAC25-150-80 C 3;
- d. Identification of the type of work for which a permit modification is requested;
- e. The plat in accordance with 4VAC25-150-90;
- f. All data, maps, plats and plans in accordance with 4VAC25-150-100 necessary to describe the activity proposed to be undertaken;
- g. When the permit modification includes abandoning a gas or oil well as a water well, a description of the plugging to be completed up to the water-bearing formation and a copy of the permit issued for the water well by the Virginia Department of Health;
- h. The information required for operations involving hydrogen sulfide in accordance with 4VAC25-150-350 if applicable to the proposed operations;
- i. The location where the Spill Prevention Control and Countermeasure (SPCC) plan is available, if one has been developed for the site of the proposed operations;

j. The Department of Mines, Minerals and Energy, Division of Mined Land Reclamation's permit number for any area included in a Division of Mined Land Reclamation permit; and

k. The information, as appropriate, required in 4VAC25-150-500, 4VAC25-150-560, ~~or~~ 4VAC25-150-670, or 4VAC25-150-720.

**4VAC25-150-120. Transfer of permit rights.**

A. Applicability.

- 1. No transfer of rights granted by a permit shall be made without prior approval from the director.
- 2. Any approval granted by the director of a transfer of permit rights shall be conditioned upon the proposed new operator complying with all requirements of the Act, this chapter and the permit.

B. Application. Any person requesting a transfer of rights granted by a permit shall submit a written application on a form prescribed by the director. The application shall be accompanied by a fee of ~~\$65~~ \$75 and bond, in the name of the person requesting the transfer, in accordance with § 45.1-361.31 of the Code of Virginia. The application shall contain, but is not limited to:

- 1. The name and address of the current permittee, the current permit number and the name of the current operation;
- 2. The name and address of the proposed new operator and the proposed new operations name;
- 3. Documentation of approval of the transfer by the current permittee;
- 4. If the permit was issued on or before September 25, 1991, an updated operations plan, in accordance with 4VAC25-150-100, showing how all permitted activities to be conducted by the proposed new permittee will comply with the standards of this chapter;
- 5. If the permit was issued on or before September 25, 1991, for a well, a plat meeting the requirements of 4VAC25-150-90 updated to reflect any changes on the site, newly discovered data or additional data required since the last plat was submitted, including the change in ownership of the well; and
- 6. If the permit was issued on or before September 25, 1991, if applicable, the docket number and date of recordation of any order issued by the board for a pooled unit, pertaining to the current permit.

C. Standards for approval. The director shall ~~not~~ approve the transfer of permit rights ~~unless~~ when the proposed new permittee:

- 1. Has registered with the department in accordance with § 45.1-361.37 of the Code of Virginia;
- 2. Has posted acceptable bond in accordance with § 45.1-361.31 of the Code of Virginia; and

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# Regulations

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3. Has no outstanding debt pursuant to § 45.1-361.32 of the Code of Virginia.

D. The new permittee shall be responsible for any violations of or penalties under the Act, this chapter, or conditions of the permit after the director has approved the transfer of permit rights.

#### **4VAC25-150-135. Waiver of right to object to permit applications.**

Upon receipt of notice, any person may, on a form approved by the director, waive the time requirements and their right to object to a proposed permit application. The ~~department~~ division shall be entitled to rely upon the waiver to approve the permit application.

#### **4VAC25-150-140. Objections to permit applications.**

A. Objections shall be filed in writing, at the office of the ~~Division~~ division, in accordance with § 45.1-361.35 of the Code of Virginia. The director shall notify affected parties of an objection as soon as practicable.

B. If after the director has considered notice to be given under 4VAC25-150-130 B of this chapter, a person submits an objection with proof of receipt of actual notice within 15 days prior to submitting the objection, then the director shall treat the objection as timely.

C. Objections to an application for a new or modified permit shall contain:

1. The name of the person objecting to the permit;
2. The date the person objecting to the permit received notice of the permit application;
3. Identification of the proposed activity being objected to;
4. A statement of the specific reason for the objection;
5. A request for a stay to the permit, if any, together with justification for granting a stay; and
6. Any other information the person objecting to the permit wishes to provide.

D. When deciding to convene a hearing pursuant to § 45.1-361.35 of the Code of Virginia, the director shall consider the following:

1. Whether the person objecting to the permit has standing to object as provided in § 45.1-361.30 of the Code of Virginia;
2. Whether the objection is timely; and
3. Whether the objection meets the applicable standards for objections as provided in § 45.1-361.35 of the Code of Virginia.

E. If the director decides not to hear the objection, then he shall notify the person who objects and the permit applicant in writing, indicating his reasons for not hearing the objection, and shall advise the objecting person of his right to appeal the decision.

#### **4VAC25-150-150. Hearing and decision on objections to permit applications.**

A. In any hearing on objections to a permit application:

1. The hearing shall be an informal fact finding hearing in accordance with the Administrative Process Act, § ~~9-6-14:11~~ 2.2-4019 of the Code of Virginia.
2. The permit applicant and any person with standing in accordance with § 45.1-361.30 of the Code of Virginia may be heard.
3. Any valid issue in accordance with § 45.1-361.35 of the Code of Virginia may be raised at the hearing. The director shall determine the validity of objections raised during the hearing.

B. The director shall, as soon after the hearing as practicable, issue his decision in writing and hand deliver or send the decision by certified mail to all parties to the hearing. ~~The director shall mail the decision, or a summary of the decision, to all other persons given notice of the hearing.~~ The decision shall include:

1. The subject, date, time and location of the hearing;
2. The names of the persons objecting to the permit;
3. A summary of issues and objections raised at the hearing;
4. Findings of fact and conclusions of law;
5. The text of the decision, including any voluntary agreement; and
6. Appeal rights.

C. Should the director deny the permit issuance and allow the objection, a written notice of the decision shall be sent to any person receiving notice of the [ permit application ].

#### **4VAC25-150-160. Approval of permits and permit modifications.**

A. Permits, permit modifications, permit renewals, and transfer of permit rights shall be granted in writing by the director.

B. The director may not issue a permit, permit renewal, or permit modification prior to the end of the time period for filing objections pursuant to § 45.1-361.35 of the Code of Virginia unless, upon receipt of notice, any person may, on a form approved by the director, waive the time requirements and their right to object to a proposed permit application or permit modification application. The ~~department~~ division shall be entitled to rely upon the waiver to approve the permit application or permit modification.

C. The director may not issue a permit to drill for gas or oil in Tidewater Virginia until he has considered the findings and recommendations of the Department of Environmental Quality, as provided for in § 62.1-195.1 of the Code of Virginia and, where appropriate, has required changes in the permitted activity based on the Department of Environmental Quality's recommendations.

D. The provisions of any order of the Virginia Gas and Oil Board that govern a gas or oil well permitted by the director shall become conditions of the permit.

**4VAC25-150-180. Notices of violation.**

A. The director may issue a notice of violation if he finds a violation of any of the following:

1. Chapter 22.1 (§ 45.1-361.1 et seq.) of Title 45.1 of the Code of Virginia;
2. This chapter;
3. 4VAC25 Chapter 160 (~~4VAC25-160-10 et seq.~~) (4VAC25-160) entitled "The Virginia Gas and Oil Board Regulation";
4. Any board order; or
5. Any condition of a permit, which does not create an imminent danger or harm for which a closure order must be issued under 4VAC5-150-190.

B. A notice of violation shall be in writing, signed, and set forth with reasonable specificity:

1. The nature of the violation, including a reference to the section or sections of the Act, applicable regulation, order or permit condition which has been violated;
2. A reasonable description of the portion of the operation to which the violation applies, including an explanation of the condition or circumstance that caused the portion of the operation to be in violation, if it is not self-evident in the type of violation itself;
3. The remedial action required, which may include interim steps; and
4. A reasonable deadline for abatement, which may include a deadline for accomplishment of interim steps.

C. The director may extend the deadline for abatement or for accomplishment of an interim step, if the failure to meet the deadline previously set was not caused by the permittee's lack of diligence. An extension of the deadline for abatement may not be granted when the permittee's failure to abate has been caused by a lack of diligence or intentional delay by the permittee in completing the remedial action required.

D. If the permittee fails to meet the deadline for abatement or for completion of any interim steps, the director shall issue a closure order under 4VAC25-150-190.

E. The director shall terminate a notice of violation by written notice to the permittee when he determines that all violations listed in the notice of violation have been abated.

F. A permittee issued a notice of violation may request, in writing to the director, an informal fact-finding hearing to review the issuance of the notice. This written request ~~should~~ shall be made within 10 days of receipt of the notice. The permittee may request, in writing to the director, an expedited hearing.

G. A permittee is not relieved of the duty to abate any violation under a notice of violation during an appeal of the

notice. A permittee may apply for an extension of the deadline for abatement during an appeal of the notice.

H. The director shall issue a decision on any request for an extension of the deadline for abatement under a notice of violation within five days of receipt of such request. The director shall conduct an informal fact-finding hearing, in accordance with the Administrative Process Act, § ~~9-6.14:14~~ 2.2-4019 of the Code of Virginia, no later than 10 days after receipt of the hearing request.

I. The director shall affirm, modify, or vacate the notice in writing to the permittee within five days of the date of the hearing.

**4VAC25-150-190. Closure orders.**

A. The director shall immediately order a cessation of operations or of the relevant portion thereof, when he finds any condition or practice which:

1. Creates or can be reasonably expected to create an imminent danger to the health or safety of the public, including miners; or
2. Causes or can reasonably be expected to cause significant, imminent, environmental harm to land, air or water resources.

B. The director may order a cessation of operations or of the relevant portion thereof, when:

1. A permittee fails to meet the deadline for abatement or for completion of any interim step under a notice of violation;
2. Repeated notices of violations have been issued for the same condition or practice; or
3. Gas, oil or geophysical operations are being conducted by any person without a valid permit from the Division of Gas and Oil.

C. A closure order shall be in writing, signed and shall set forth with reasonable specificity:

1. The nature of the condition, practice or violation;
2. A reasonable description of the portion of the operation to which the closure order applies;
3. The remedial action required, if any, which may include interim steps; and
4. A reasonable deadline for abatement, which may include deadline for accomplishment of interim steps.

D. A closure order shall require the person subject to the order to take all steps the director deems necessary to abate the violations covered by the order in the most expeditious manner physically possible.

E. If a permittee fails to abate a condition or practice or complete any interim step as required in a closure order, the director shall issue a show cause order under 4VAC25-150-200.

F. The director shall terminate a closure order by written notice to the person subject to the order when he determines

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# Regulations

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that all conditions, practices or violations listed in the order have been abated.

G. A person issued a closure order may request, in writing to the director, an informal fact-finding hearing to review the issuance of the order within 10 days of receipt of the order. The person may request, in writing to the director, an expedited hearing within three days of receipt of the order.

H. A person is not relieved of the duty to abate any condition under, or comply with, any requirement of a closure order during an appeal of the order.

I. The director shall conduct an informal fact-finding hearing, in accordance with the Administrative Process Act, § ~~9-6.14:11~~ 2.2-4019 of the Code of Virginia, no later than 15 days after the order was issued, or in the case of an expedited hearing, no later than five days after the order was issued.

J. The director shall affirm, modify, or vacate the closure order in writing to the person the order was issued to no later than five days after the date of the hearing.

## **4VAC25-150-200. Show cause orders.**

A. The director may issue a show cause order to a permittee requiring justification for why his permit should not be suspended or revoked whenever:

1. A permittee fails to abate a condition or practice or complete any interim step as required in a closure order;
2. A permittee fails to comply with the provisions of 4VAC25 Chapter 160 (~~4VAC25-160-10 et seq.~~) (4VAC25-160) entitled "The Virginia Gas and Oil Board Regulation"; or
3. A permittee fails to comply with the provisions of an order issued by the Virginia Gas and Oil Board.

B. A show cause order shall be in writing, signed, and set forth with reasonable specificity:

1. The permit number of the operation subject to suspension or revocation; and
2. The reason for the show cause order.

C. The permittee shall have five days from receipt of the show cause order to request in writing an informal fact-finding hearing.

D. The director shall conduct an informal fact-finding hearing, in accordance with the Administrative Process Act, § ~~9-6.14:11~~ 2.2-4019 of the Code of Virginia, no later than five days after receipt of the request for the hearing.

E. The director shall issue a written decision within five days of the date of the hearing.

F. If the permit is revoked, the permittee shall immediately cease operations on the permit area and complete reclamation within the deadline specified in the order.

G. If the permit is suspended, the permittee shall immediately commence cessation of operations on the permit area and complete all actions to abate all conditions, practices or violations, as specified in the order.

## Article 4 Reporting

### **4VAC25-150-210. Monthly reports.**

A. Each producer shall submit a monthly report, on a form prescribed by the director or in a format approved by the director to the division no later than ~~45~~ 90 days after the last day of each month.

B. Reports of gas production.

1. Every producer of gas shall report in Mcf the amount of production from each well.
2. Reports shall be summarized by county or city.
3. Reports shall provide the date of any new connection of a well to a gathering pipeline or other marketing system.

C. Reports of oil production.

1. Every producer of oil shall report in barrels the amount of oil production, oil on hand and oil delivered from each well.
2. Reports shall be summarized [ by ] county or city.
3. Reports shall provide the date of any new connection of a well to a gathering pipeline or other marketing system.

D. Reports of shut-in wells. If a well is shut-in or otherwise not produced during any month, it shall be so noted on the monthly report.

### **4VAC25-150-220. Annual reports.**

A. Each permittee shall submit a calendar-year annual report to the division by no later than March 31 of the next year.

B. The annual report shall include as appropriate:

1. A confirmation of the accuracy of the permittee's current registration filed with the division or a report of any change in the information;
2. The name, address and phone number or numbers of the persons to be contacted at any time in case of an emergency;
3. Production of gas or oil on a well-by-well and county-by-county or city-by-city basis for each permit or as prescribed by the director and the average price received for each Mcf of gas and barrel of oil;
4. Certification by the permittee that the permittee has paid all severance taxes for each permit; ~~and~~
5. When required, payment to the Gas and Oil Plugging and Restoration Fund as required in § 45.1-361.32 of the Code of Virginia; ~~and~~
6. Certification by the permittee that bonds on file with the director have not been changed.

## Article 5 Technical Standards

### **4VAC25-150-230. Commencement of activity.**

A. Gas, oil or geophysical activity commences with ground-disturbing activity.



B. A permittee shall notify the division at least ~~two working days~~ 48 hours prior to commencing ground-disturbing activity, drilling a well or corehole, completing or recompleting a well or plugging a well or corehole. The permittee shall notify the division, either orally or in writing, of the ~~permit number~~ operation name and the date and time that the work is scheduled to commence. Should activities not commence as first noticed, the permittee shall make every effort to update the division and reschedule the commencement of activity, indicating the specific date and time the work will be commenced.

C. For dry holes and in emergency situations, the operator ~~may~~ shall notify the division, orally or in writing, within ~~two working days~~ 48 hours of commencing plugging activities.

**4VAC25-150-240. Signs.**

A. Temporary signs. Each permittee shall keep a sign posted at the point where the access road enters the permitted area of each well or corehole being drilled or tested, showing the name of the well or corehole permittee, the well name and the permit number, the telephone number for the Division of Gas and Oil and a telephone number to use in case of an emergency or for reporting problems.

The sign shall be posted from the commencement of construction until:

1. The well is completed;
2. The dry hole or corehole is plugged;
3. The site is stabilized; or
4. The permanent sign is posted.

B. Permanent signs. Each permittee shall keep a permanent sign posted in a conspicuous place on or near every producing well or well capable of being placed into production and on every associated facility. For any well drilled or sign replaced after September 25, 1991, the sign shall:

1. Be a minimum of 18 inches by 14 inches in size;
2. Contain, at a minimum, the permittee's name, the well name and the permit number, the Division of Gas and Oil phone number and the telephone number to use in case of an emergency or for reporting problems;
3. Contain lettering a minimum of ~~1-1/4~~ 1-1/4; inches high; and
4. For a well, be located on the well or on a structure such as a meter house or pole located within 50 feet of the well head.

C. Signs designating "red zone" areas within the permit boundary are to be maintained in good order, include reflective material or be lighted so to be visible at night, and located as prescribed by the operator's "red zone" safety plan internal to the operations plan.

~~C. D.~~ All signs shall be maintained or replaced as necessary to be kept in a legible condition.

**4VAC25-150-250. Blasting and explosives.**

A. Applicability. This section governs all blasting on gas, oil or geophysical sites, except for:

1. Blasting being conducted as part of seismic exploration where explosives are placed and shot in a borehole to generate seismic waves; or
2. Use of a device containing explosives for perforating a well.

B. Certification.

1. All blasting on gas, oil and geophysical sites shall be conducted by a person who is certified by the department, the Board of Coal Mining Examiners, or by the Virginia Department of Housing and Community Development.
2. The director may accept a certificate issued by another state in lieu of the certification required in subdivision B 1 of this section, provided the department, the Board of Coal Mining Examiners, or the Department of Housing and Community Development has approved reciprocity with that state.

C. Blasting safety. Blasting shall be conducted in a manner as prescribed by 4VAC25-110, Regulations Governing Blasting in Surface Mining Operations, designed to prevent injury to persons, ~~or~~ and damage to features described in the operations plan under 4VAC25-150-100 B.

~~1. When blasting is conducted within 200 feet of a pipeline or high voltage transmission line, the blaster shall take due precautionary measures for the protection of the pipeline or high voltage transmission line, and shall notify the owner of the facility or his agent that such blasting is intended.~~

~~2. Flyrock shall not be allowed to fall farther from the blast than one half the distance between the blast and the nearest inhabited building, and in no case outside of the permitted area.~~

~~3. When blasting near a highway, the blaster must ensure that all traffic is stopped at a safe distance from the blast. Blasting areas shall be posted with warning signs.~~

~~4. All blasting shall be conducted during daylight hours, one half hour before sunrise to one half hour after sunset, unless approved by the director.~~

~~5. Misfires.~~

~~a. The handling of a misfired blast shall be under the direct supervision of a certified blaster.~~

~~b. When a misfire occurs, the blaster shall wait for at least 15 minutes or the period of time recommended by the manufacturer of the explosives and the detonator, whichever is longer, before allowing anyone to return to the blast site.~~

~~6. Blasting signals.~~

~~a. Before a blast is fired, a warning signal audible to a distance of at least one half mile shall be given by the blaster in charge, who shall make certain that all surplus~~

# Regulations

explosives are in a safe place and that all persons are at a safe distance from the blast site or under sufficient cover to protect them from the effects of the blast.

b. A code of warning signals shall be established and posted in one or more conspicuous places on the permitted site, and all employees shall be required to conform to the code.

7. Explosives and detonators shall be placed in substantial, nonconductive, closed containers (such as those containers meeting standards prescribed by the Institute of Makers of Explosives) when brought on the permitted site. Explosives and detonators shall not be kept in the same container. Containers shall be posted with warning signs.

8. Storage of explosives and detonators on gas, oil or geophysical sites is allowed only with prior approval by the director.

9. The permittee shall report to the Division of Gas and Oil by the quickest means possible any theft or unaccounted-for loss of explosives. When reporting such a theft or loss, the permittee shall indicate other local, state and federal authorities contacted.

10. Damaged or deteriorated explosives and detonators shall be destroyed by a certified blaster in accordance with the manufacturer's recommendations.

## D. Ground vibration.

1. The ground vibration limits in this subsection shall not apply on surface property owned or leased by the permittee, or on property for which the surface owner gives a written waiver specifically releasing the operator from the limits.

2. ~~Blasting without seismographic monitoring. Blasting may be conducted by a certified blaster without seismographic monitoring provided the maximum charge is determined by the formula  $W = (D/D_s)^2$  where  $W$  is the maximum weight of explosive in pounds per delay (eight milliseconds or greater);  $D$  is the actual distance in feet from the blast location to the nearest inhabited building; and  $D_s$  is the scaled distance factor to be applied without seismic monitoring, as found in Table 1.25.D 1.~~

TABLE 1.25.D 1: MAXIMUM ALLOWABLE PEAK VELOCITY

Distance (D) from blasting site in feet	Maximum allowable peak particle velocity ( $V_{max}$ ) for ground vibration, in inches/second	Scaled Distance Factor ( $D_s$ ) to be applied without seismic monitoring
0 to 300	1.25	50
301 to 5000	1.00	55
5001 and beyond	0.75	65

## 3. Blasting with seismographic monitoring.

a. ~~A permittee may use the ground vibration limits in Table 1.25.D 2 to determine the maximum allowable peak particle velocity. If Table 1.25.D 2 is used, a seismographic record including both particle velocity and vibration frequency levels shall be provided for each blast. The method for the analysis of the predominant frequency contained in the blasting records shall be approved by the director before implementation of this alternative blasting level.~~

b. ~~The permittee may choose to record every blast. As long as the seismographic records indicate particle velocities have remained within the limits prescribed in Tables 1.25.D 1 or 1.25.D 2, the permittee shall be considered to be in compliance with this subsection.~~

**EDITOR'S NOTICE:** Table 1.25 D-2: Alternative Blasting Level Criteria is not printed and is deleted by this regulatory action.

e. ~~Ground vibration shall be measured as the particle velocity. Particle velocity shall be recorded in three mutually perpendicular directions. The maximum allowable peak particle velocity shall apply to each of the three measurements.~~

d. ~~All seismic tests carried out for the purposes of this section shall be analyzed by a qualified seismologist.~~

e. ~~All seismic tests carried out for the purposes of this section shall be conducted with a seismograph that has an upper-end flat frequency response of at least 200 Hz.~~

E. ~~Airblast shall not exceed the maximum limits prescribed in Table 1.25.E 1 at the location of any inhabited building. The 0.1 Hz or lower, flat response or C weighted, slow response shall be used only when approved by the director.~~

Table 1.25.E 1: AIRBLAST LIMITS

Lower Frequency Limit of measuring system, in Hz (+3db)		Measurement Level, in db
0.1 Hz or Lower	Flat Response	134 Peak
2 Hz or Lower	Flat Response	133 Peak
6 Hz or Lower	Flat Response	129 Peak
C weighted	Slow Response	105 Peak

F. ~~If the director concludes that blasting on a particular site has potential to create unsafe conditions, then he may:~~

1. ~~Require the permittee to monitor ground vibration and airblast for all blasts on the site for a specified period of time;~~

2. ~~Impose more stringent limits on ground vibration and airblast levels than those specified in this section. The director may order the permittee to obtain an evaluation of~~

~~the blast site by a vibration consultant or a technical representative of the explosives manufacturer before imposing a more stringent limit. Blasting may not resume on the site being evaluated until the evaluation and recommendations are submitted to the director, and the director has given his approval.~~

~~G. Records.~~

~~1. The permittee shall keep records of all blasts, and these records shall contain the following:~~

- ~~a. Name of company or contractor;~~
- ~~b. Location, date, and time of the blast;~~
- ~~c. Name, signature, and certification number of the blaster in charge;~~
- ~~d. Type of material blasted;~~
- ~~e. Number of holes; their burden and spacing;~~
- ~~f. Diameter and depth of the holes;~~
- ~~g. Types of explosives used;~~
- ~~h. Total amount of explosives used per hole;~~
- ~~i. Maximum weight of explosives per delay period;~~
- ~~j. Method of firing and the type of circuit;~~
- ~~k. Direction and distance in feet to the nearest inhabited building;~~
- ~~l. Weather conditions (including wind directions, etc.);~~
- ~~m. Height or length of stemming;~~
- ~~n. Description of any mats or other protection used;~~
- ~~o. Type of detonators and delay periods used; and~~
- ~~p. Any seismograph reports, including:~~
  - ~~(1) The name and signature of the person operating the seismograph;~~
  - ~~(2) The name of the person analyzing the seismograph record;~~
  - ~~(3) The exact location of the seismograph in relation to the blast;~~
  - ~~(4) The date and time of the reading; and~~
  - ~~(5) The seismograph reading.~~

~~2. The permittee shall retain all records of blasting, including seismograph reports, for at least three years. On request, the permittee shall make these records available for inspection by the director division.~~

**4VAC25-150-260. Erosion, sediment control and reclamation.**

A. Applicability. Permittees shall meet the erosion and sediment control standards of this section whenever there is a ground disturbance for a gas, oil or geophysical operation. Permittees shall reclaim the land to the standards of this section after the ground-disturbing activities are complete and the land will not be used for further permitted activities.

B. Erosion and sediment control plan. Applicants for a permit shall submit an erosion and sediment control plan as part of their operations plan. The plan shall describe how erosion and sedimentation will be controlled and how reclamation will be achieved.

C. Erosion and sediment control standards. Whenever ground is disturbed for a gas, oil or geophysical operation, the following erosion and sediment control standards shall be met.

1. All trees, shrubs and other vegetation shall be cleared as necessary before any blasting, drilling, or other site construction, including road construction, begins.

a. Cleared vegetation shall be either removed from the site, properly stacked on the permitted site for later use, burned, or placed in a brush barrier if needed to control erosion and sediment control. Only that material necessary for the construction of the permitted site shall be cleared. When used as a brush barrier, the cleared vegetation shall be cut and windrowed below a disturbed area so that the brush barrier will effectively control sediment migration from the disturbed area. The material shall be placed in a compact and uniform manner within the brush barrier and not perpendicular to the brush barrier. Brush barriers shall be constructed so that any concentrated flow created by the barrier is released into adequately protected outlets and adequate channels. Large diameter trunks, limbs, and stumps that may render the brush barrier ineffective for sediment control shall not be placed in the brush barrier.

b. ~~During construction of the project, topsoil, soil sufficient to provide a suitable growth medium for permanent stabilization with vegetation shall be segregated and stockpiled. Soil stockpiles shall be stabilized used to stabilize the site in accordance with the standards of subdivisions C 2 and C 3 of this section to prevent erosion and sedimentation.~~

2. Except as provided for in subdivisions C 5 and C 12 c of this section, permanent or temporary stabilization measures shall be applied to denuded areas within 30 days of achievement of final grade on the site unless the area will be redisturbed within 30 days.

a. If no activity occurs on a site for a period of 30 consecutive days then stabilization measures shall be applied to denuded areas within seven days of the last day of the 30-day period.

b. Temporary stabilization measures shall be applied to denuded areas that may not be at final grade but will be left inactive for one year or less.

c. Permanent stabilization measures shall be applied to denuded areas that are to be left inactive for more than one year.

3. A permanent vegetative cover shall be established on denuded areas to achieve permanent stabilization on areas

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# Regulations

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not otherwise permanently stabilized. Permanent vegetation shall not be considered established until a ground cover is uniform, mature enough to survive and will inhibit erosion.

4. Temporary sediment control structures such as basins, traps, berms or sediment barriers shall be constructed prior to beginning other ground-disturbing activity and shall be maintained until the site is stabilized.

5. Stabilization measures shall be applied to earthen structures such as sumps, diversions, dikes, berms and drainage windows within 30 days of installation.

6. Sediment basins.

a. Surface runoff from disturbed areas that is composed of flow from drainage areas greater than or equal to three acres shall be controlled by a sediment basin. The sediment basin shall be designed and constructed to accommodate the anticipated sediment loading from the ground-disturbing activity. The spillway or outfall system design shall take into account the total drainage area flowing through the disturbed area to be served by the basin.

b. If surface runoff that is composed of flow from other drainage areas is separately controlled by other erosion and sediment control measures, then the other drainage area is not considered when determining whether the three-acre limit has been reached and a sediment basin is required.

7. Cut and fill slopes shall be designed and constructed in a manner that will minimize erosion. No trees, shrubs, stumps or other woody material shall be placed in fill.

8. Concentrated runoff shall not flow down cut or fill slopes unless contained within an adequate temporary or permanent channel, flume or slope drain structure.

9. Whenever water seeps from a slope face, adequate drainage or other protection shall be provided.

10. All storm sewer inlets that are made operable during construction shall be protected so that sediment-laden water cannot enter the conveyance system without first being filtered or otherwise treated to remove sediment.

11. Before newly constructed stormwater conveyance channels or pipes are made operational, adequate outlet protection and any required temporary or permanent channel lining shall be installed in both the conveyance channel and receiving channel.

12. Live watercourses.

a. When any construction required for erosion and sediment control, reclamation or stormwater management must be performed in a live watercourse, precautions shall be taken to minimize encroachment, control sediment transport and stabilize the work area. Nonerodible material shall be used for the construction of causeways and cofferdams. Earthen fill may be used for

these structures if armored by nonerodible cover materials.

b. When the same location in a live watercourse must be crossed by construction vehicles more than twice in any six-month period, a temporary stream crossing constructed of nonerodible material shall be provided.

c. The bed and banks of a watercourse shall be stabilized immediately after work in the watercourse is completed.

13. If more than 500 linear feet of trench is to be open at any one time on any continuous slope, ditchline barriers shall be installed at intervals no more than the distance in the following table and prior to entering watercourses or other bodies of water.

Distance Barrier Spacing

Percent of Grade	Spacing of Ditchline Barriers in Feet
3–5	135
6–10	80
11–15	60
16+	40

14. Where construction vehicle access routes intersect a paved or public road, provisions, such as surfacing the road, shall be made to minimize the transport of sediment by vehicular tracking onto the paved surface. Where sediment is transported onto a paved or public road surface, the road surface shall be cleaned by the end of the day.

15. The design and construction or reconstruction of roads shall incorporate appropriate limits for grade, width, surface materials, surface drainage control, culvert placement, culvert size, and any other necessary design criteria required by the director to ensure control of erosion, sedimentation and runoff, and safety appropriate for their planned duration and use. This shall include, at a minimum, that roads are to be located, designed, constructed, reconstructed, used, maintained and reclaimed so as to:

a. Control or prevent erosion and siltation by vegetating or otherwise stabilizing all exposed surfaces in accordance with current, prudent engineering practices;

b. Control runoff to minimize downstream sedimentation and flooding; and

c. Use nonacid or nontoxic substances in road surfacing.

16. Unless approved by the director, all temporary erosion and sediment control measures shall be removed within 30 days after final site stabilization or after the temporary measures are no longer needed. Trapped sediment and the disturbed soil areas resulting from the disposition of temporary measures shall be permanently stabilized within

the permitted area to prevent further erosion and sedimentation.

D. Final reclamation standards.

1. All equipment, structures or other facilities not required for monitoring the site or permanently marking an abandoned well or corehole shall be removed from the site, unless otherwise approved by the director.

2. ~~Each pipeline abandoned in place shall be disconnected from all sources of natural gas or produced fluids and purged. Each gathering line abandoned in place, unless otherwise agreed to be removed under a right-of-way or lease agreement, shall be disconnected from all sources and supplies of natural gas and petroleum, purged of liquid hydrocarbons, depleted to atmospheric pressure, and cut off three feet below ground surface, or at the depth of the gathering line, whichever is less, and sealed at the ends. The operator shall provide to the division documentation of the methods used, the date and time the pipeline was purged and abandoned [ and copies of any right of way or lease agreements that apply to the abandonment or removal ].~~

3. If final stabilization measures are being applied to access roads or ground-disturbed pipeline rights-of-way, or if the rights-of-way will not be redisturbed for a period of 30 days, water bars shall be placed across them at 30-degree angles at the head of all pitched grades and at intervals no more than the distance in the following table:

Percent of Grade	Spacing of Water Bars in Feet
3-5	135
6-10	80
11-15	60
16+	40

4. The permittee shall notify the division when the site has been graded and seeded for final reclamation in accordance with subdivision C 3 of this section. Notice may be given orally or in writing. The vegetative cover shall be successfully maintained for a period of two years after notice has been given before the site is eligible for bond release.

5. If the land disturbed during gas, oil or geophysical operations will not be reclaimed with permanent vegetative cover as provided for in subsection C of this section, the permittee or applicant shall, ~~in the operations plan,~~ request a variance to these reclamation standards and propose alternate reclamation standards and an alternate schedule for bond release.

E. The director may waive or modify any of the requirements of this section that are deemed inappropriate or too restrictive for site conditions. A permittee requesting a variance shall, in writing, document the need for the variance

and describe the alternate measures or practices to be used. Specific variances allowed by the director shall become part of the operations plan. The director shall consider variance requests judiciously, keeping in mind both the need of the applicant to maximize cost effectiveness and the need to protect off-site properties and resources from damage.

**4VAC25-150-280. Logs and surveys.**

A. Each permittee drilling a well or corehole shall complete a driller's log, a gamma ray log or other log showing the top and bottom points of geologic formations and any other log required under this section. The driller's log shall state, at a minimum, the character, depth and thickness of geological formations encountered, including groundwater-bearing strata, coal seams, mineral beds and gas- or oil-bearing formations.

B. When a permittee or the director identifies that a well or corehole is to be drilled or deepened in an area of the Commonwealth which is known to be underlain by coal seams, the following shall be required:

1. The vertical location of coal seams in the ~~borehole well or corehole~~ shall be determined and shown in the driller's log and gamma ray or other log.

2. The horizontal location of the ~~borehole well or corehole~~ in coal seams shall be determined through an inclination survey from the surface to the lowest known coal seam. Each inclination survey shall be conducted as follows:

- a. The first survey point shall be taken at a depth not greater than the most shallow coal seam; and
- b. Thereafter shot points shall be taken at each coal seam or at intervals of 200 feet, whichever is less, to the lowest known coal seam.

3. Prior to drilling any ~~borehole into well or corehole within 500 feet of~~ a coal seam ~~in which active mining is being conducted within 500 feet of where the borehole will penetrate the seam where workers are assigned or travel, as well as any connected sealed or gob areas, or where a mine plan is on file with the Division of Mines,~~ the permittee shall conduct an inclination survey to determine whether the deviation of the ~~borehole well or corehole~~ exceeds one degree from true vertical. If the ~~borehole well or corehole~~ is found to exceed one degree from vertical, then the permittee shall:

- a. Immediately cease operations;
- b. Immediately notify the coal owner and the division;
- c. Conduct a directional survey to drilled depth to determine both horizontal and vertical location of the ~~borehole well or corehole~~; and
- d. Unless granted a variance by the director, correct the ~~borehole well or corehole~~ to within one degree of true vertical.

4. Except as provided for in subdivision B 3 of this section, if the deviation of the ~~borehole well or corehole~~ exceeds

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# Regulations

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one degree from true vertical at any point between the surface and the lowest known coal seam, then the permittee shall:

- a. Correct the ~~borehole~~ well or corehole to within one degree of true vertical; or
- b. Conduct a directional survey to the lowest known coal seam and notify the coal owner of the actual ~~borehole~~ well or corehole location.

5. The director may grant a variance to the requirements of subdivisions B 3 and B 4 of this section only after the permittee and coal owners have jointly submitted a written request for a variance stating that a directional survey or correction to the ~~borehole~~ well or corehole is not needed to protect the safety of any person engaged in active coal mining or to the environment.

6. If the director finds that the lack of assurance of the horizontal location of the ~~bore~~ of a well or corehole to a known coal seam poses a danger to persons engaged in active coal mining or the lack of assurance poses a risk to the public safety or the environment, the director may, until 30 days after a permittee has filed the completion report required in 4VAC25-150-360, require that a directional survey be conducted by the permittee.

7. The driller's log shall be updated on a daily basis. The driller's log and results of any other required survey shall be kept at the site until drilling and casing or plugging a dry hole or corehole are completed.

## **4VAC25-150-300. Pits.**

### **A. General requirements.**

1. Pits are to be temporary in nature and are to be reclaimed when the operations using the pit are complete. All pits shall be reclaimed within [ 90 180 ] days unless a variance is requested and granted by the field inspector.
2. Pits may not be used as erosion and sediment control structures or stormwater management structures, and surface drainage may not be directed into a pit.
3. Pits shall have a properly installed and maintained liner or liners made of 10 mil or thicker high-density polyethylene or its equivalent.

### ~~B. Technical requirements.~~

- ~~1. 4. Pits shall be constructed of sufficient size and shape to contain all fluids and maintain a two-foot freeboard.~~
- ~~2. Pits shall be lined in accordance with the requirements for liners in subdivision A 3 of this section. If solids are not to be disposed of in the pit, the permittee may request a variance to the liner specifications.~~

### **C. B. Operational requirements.**

1. The integrity of lined pits must be maintained until the pits are reclaimed or otherwise closed. Upon failure of the lining or pit, the operation shall be shut down until the liner and pit are repaired or rebuilt. The permittee shall notify

the division, by the quickest available means, of any pit leak.

2. Motor oil and, to the extent practicable, crude oil shall be kept out of the pit. Oil shall be collected and disposed of properly. Litter and other solid waste shall be collected and disposed of properly and not thrown into the pit.

3. At the conclusion of drilling and completion operations or after a dry hole, well or corehole has been plugged, the pit shall be drained in a controlled manner and the fluids disposed of in accordance with 4VAC25-150-420. If the pit is to be used for disposal of solids, then the standards of 4VAC25-150-430 shall be met.

## **4VAC25-150-310. Tanks.**

A. All tanks installed on or after September 25, 1991, shall be designed and constructed to contain the fluids to be stored in the tanks and prevent unauthorized discharge of fluids.

B. All tanks shall be maintained in good condition and repaired as needed to ensure the structural integrity of the tank.

C. Every permanent tank or battery of tanks shall ~~be surrounded by a~~ have secondary containment achieved by constructing a dike or firewall with a capacity of ~~1 1/2~~ 1-1/2 times the volume of the single tank, or largest tank in a battery of tanks largest tank when plumbed at the top, or all tanks when plumbed at the bottom, utilizing a double wall tank or another method approved by the division.

D. Dikes and firewalls shall be maintained in good condition, and the reservoir shall be kept free from brush, water, oil or other fluids.

E. Permittees shall inspect the structural integrity of tanks and tank installations, at a minimum, annually. The report of the annual inspection shall be maintained by the permittee for a minimum of three years and be submitted to the director upon request.

F. Load lines shall be properly constructed and operated on the permitted area.

## **4VAC25-150-340. Drilling fluids.**

A. Operations plan requirements. Applicants for a permit shall provide, prior to commencing drilling, documentation that the water meets the requirements of subsection B of this section, and a general description of the additives and muds to be used in all stages of drilling. Providing that the requirement in 4VAC25-150-340 C is met, variations necessary because of field conditions may be made with prior approval of the director and shall be documented in the driller's log.

### **B. Water quality in drilling.**

1. Before the water-protection string is set, permittees shall use one of the following sources of water in drilling:

- a. Water that is from a water well or spring located on the drilling site; or

b. Conduct an analysis of groundwater within 500 feet of the drilling location, and use:

- (1) Water which is of equal or better quality than the groundwater; or
- (2) Water which can be treated to be of equal or better quality than the groundwater. A treatment plan must be included with the application if water is to be treated.

If, after a diligent search, a groundwater source (such as a well or spring) cannot be found within 500 feet of the drilling location, the applicant may use water meeting the parameters listed in the Department of Environmental Quality's "Water Quality Criteria for Groundwater," [ ~~9VAC25-260-230 et seq.~~ 9VAC25-280-70 ] The analysis shall include, but is not limited to, the following items:

- (1) Chlorides;
- (2) Total dissolved solids;
- (3) Hardness;
- (4) Iron;
- (5) Manganese;
- (6) PH;
- (7) Sodium; and
- (8) Sulfate.

Drilling water analysis shall be taken within a one-year period preceding the drilling application.

2. After the water-protection string is set, permittees may use waters that do not meet the standards of subdivision B 1 of this section.

C. Drilling muds. No permittee may use an oil-based drilling fluid or other fluid which has the potential to cause acute or chronic adverse health effects on living organisms unless a variance has been approved by the director. Permittees must explain the need to use such materials and provide the material data safety sheets. In reviewing the request for the variance, the director shall consider the concentration of the material, the measures to be taken to control the risks, and the need to use the material. Permittees shall also identify what actions will be taken to ensure use of the additives will not cause a lessening of groundwater quality.

**4VAC25-150-360. Drilling, completion and other reports.**

A. Each permittee conducting drilling shall file, electronically or on a form prescribed by the director, a drilling report within ~~30~~ 90 days after a well reaches total depth.

B. Each permittee drilling a well shall file, electronically or on a form prescribed by the director, a completion report within ~~30~~ 90 days after the well is completed.

C. The permittee shall file the driller's log, the results of any other log or survey required to be run in accordance with this chapter or by the director, and the plat showing the actual

location of the well with the drilling report, unless they have been filed earlier.

D. The permittee shall, within ~~two years~~ 90 days of reaching total depth, file with the division the results of any gamma ray, density, neutron and induction logs, or their equivalent, that have been conducted on the wellbore in the normal course of activities that have not previously been required to be filed.

**4VAC25-150-380. ~~Accidents~~ Incidents, spills and unpermitted discharges.**

A. ~~Accidents. Incidents.~~ A permittee shall, by the quickest available means, notify the ~~director~~ division in the event of any unplanned off-site disturbance, fire, blowout, pit failure, hydrogen sulfide release, unanticipated loss of drilling fluids, or other ~~accident~~ incident resulting in serious personal injury or an actual or potential imminent danger to a worker, the environment, or public safety ~~or welfare~~. The permittee shall take immediate action to abate the actual or potential danger. The permittee shall submit a written or electronic report within seven days of the incident containing:

- 1. A description of the incident and its cause;
- 2. The date, time and duration of the incident;
- 3. A description of the steps that have been taken to date; ~~and~~
- 4. A description of the steps planned to be taken to prevent a recurrence of the incident; and
- 5. Other agencies notified.

B. On-site spills.

1. A permittee shall take all reasonable steps to prevent, minimize, or correct any spill or discharge of fluids on a permitted site which has a reasonable likelihood of adversely affecting human health or the environment. All actions shall be consistent with the requirements of an abatement plan, if any has been set, in a notice of violation or closure, emergency or other order issued by the director.

2. A permittee shall orally report on-site spills or unpermitted discharges of fluids which are not required to be reported in subsection A of this section to the division within 24 hours. The oral report shall provide all available details of the incident, including any adverse effects on any person or the environment. A written report shall be submitted within seven days of the spill or unpermitted discharge. The written report shall contain:

- a. A description of the incident and its cause;
- b. The period of release, including exact dates and times;
- c. A description of the steps to date; and
- d. A description of the steps to be taken to prevent a recurrence of the release.

C. Off-site spills. Permittees shall submit a written report of any spill or unpermitted discharge of fluids that originates off



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# Regulations

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of a permitted site with the monthly report under 4VAC25-150-210. The written report shall contain:

1. A listing of all agencies contacted about the spill or unpermitted discharge; and
2. All actions taken to contain, clean up or mitigate the spill or unpermitted discharge.

#### **4VAC25-150-390. Shut-in wells.**

A. If a well is shut-in or otherwise not produced for a period of 12 consecutive months, the permittee shall measure the shut-in pressure on the production string or strings and report such pressures to the division annually. If the well is producing on the backside or otherwise through the casing, the permittee shall measure the shut-in pressure on the annular space.

B. A report of the pressure measurements on the nonproducing well shall be maintained and reported to the director annually by the permittee for a ~~minimum~~ maximum period of three two years ~~and be submitted to the director upon request~~.

C. Should the well remain in a nonproducing status for a period of two years, the permittee shall submit [ either a well plugging plan or ] a [ plan for ] future well production [ plan ] to the director. A nonproducing well shall not remain unplugged for more than a three-year period unless approved by the director.

#### **4VAC25-150-420. Disposal of pit and produced fluids.**

A. Applicability. All fluids from a well, pipeline or corehole shall be handled in a properly constructed pit, tank or other type of container approved by the director.

A permittee shall not dispose of fluids from a well, pipeline or corehole until the director has approved the permittee's plan for permanent disposal of the fluids. Temporary storage of pit or produced fluids is allowed with the approval of the director. Other fluids shall be disposed of in accordance with the operations plan approved by the director.

B. Application and plan. The permittee shall submit an application for either on-site or off-site permanent disposal of fluids on a form prescribed by the director. Maps and a narrative describing the method to be used for permanent disposal of fluids must accompany the application if the permittee proposes to land apply any fluids on the permitted site. The application, maps, and narrative shall become part of the permittee's operations plan.

C. Removal of free fluids. Fluids shall be removed from the pit to the extent practical so as to leave no free fluids. In the event that there are no free fluids for removal, the permittee shall report this on the form provided by the director.

D. On-site disposal. The following standards for on-site land application of fluids shall be met:

1. Fluids to be land-applied shall meet the parameters listed in the Department of Environmental Quality's "Water

Quality Criteria for Groundwater" [ ~~(9VAC25-260-230 et seq.)~~ (9VAC25-280-70) ] following criteria:

Acidity: <alkalinity

Alkalinity: >acidity

Chlorides: <5,000 mg/l

Iron: <7 mg/l

Manganese: <4 mg/l

Oil and Grease: < 15 mg/l

pH: 6-9 Standard Units

Sodium Balance: SAR of 8-12

2. Land application of fluids shall be confined to the permitted area.

3. Fluids shall be applied in a manner which will not cause erosion or runoff. The permittee shall take into account site conditions such as slope, soils and vegetation when determining the rate and volume of land application on each site. As part of the application narrative, the permittee shall show the calculations used to determine the maximum rate of application for each site.

4. Fluid application shall not be conducted when the ground is saturated, snow-covered or frozen.

5. The following buffer zones shall be maintained unless a variance has been granted by the director:

a. Fluid shall not be applied closer than 25 feet from highways or property lines not included in the acreage shown in the permit.

b. Fluid shall not be applied closer than 50 feet from surface watercourses, wetlands, natural rock outcrops, or sinkholes.

c. Fluid shall not be applied closer than 100 feet from water supply wells or springs.

6. The permittee shall monitor vegetation for two years after the last fluid has been applied to a site. If any adverse effects are found, the permittee shall report the adverse effects in writing to the division.

7. The director may require monitoring of groundwater quality on sites used for land application of fluids to determine if the groundwater has been degraded.

E. Off-site disposal of fluids.

1. Each permittee using an off-site facility for disposal of fluids shall submit:

a. A copy of a valid permit for the disposal facility to be used; and

b. Documentation that the facility will accept the fluids.

2. Each permittee using an off-site facility for disposal of fluids shall use a waste-tracking system to document the movement of fluids off of a permitted site to their final disposition. Records compiled by this system shall be reported to the division annually and available for inspection on request. Such records shall be retained until

such time the injection well is reclaimed and has passed bond release.

**4VAC25-150-460. Identifying plugged wells and coreholes; plugging affidavit.**

A. Abandoned wells and coreholes shall be permanently marked in a manner as follows:

1. The marker shall extend not less than 30 inches above the surface and enough below the surface to make the marker permanent.
2. The marker shall indicate the permittee's name, the well name, the permit number and date of plugging.

B. A permittee may apply for a variance from the director to use alternate permanent markers. Such alternate markers shall provide sufficient information for locating the abandoned well or corehole. Provisions shall also be made to provide for the physical detection of the abandoned well or corehole from the surface by magnetic or other means including a certified map with the utilization of current GPS surveys.

C. When any well or corehole has been plugged or replugged in accordance with 4VAC25-150-435, two persons, experienced in plugging wells or coreholes, who participated in the plugging of a well or corehole, shall complete the plugging affidavit designated by the director, setting forth the time and manner in which the well or corehole was plugged and filled, and the permanent marker was placed.

D. One copy of the plugging affidavit shall be retained by the permittee, one shall be mailed to any coal owner or operator on the tract where the well or corehole is located, and one shall be filed with the division within ~~30~~ 90 days after the day the well was plugged.

Part II

Conventional Gas and Oil Wells and Class II Injection Wells

**4VAC25-150-490. Applicability, conventional gas and oil wells and Class II injection wells.**

A. Part II of this chapter sets forth requirements unique to conventional gas and oil wells and wells classified as Class II injection wells by the United States, Environmental Protection Agency under 40 CFR Part 146, Section 146.5.

B. Permittees must comply with the standards of general applicability in Part I of this chapter and with the standards for conventional gas and oil and Class II injection wells in this part, except that whenever the Environmental Protection Agency imposes a requirement under the Underground Injection Control (UIC) Program, 40 CFR Part 146, Sections 146.3, 146.4, 146.5, 146.6, 146.7, 146.8, 146.22 and 146.23 that governs an activity also governed by this chapter, the Environmental Protection Agency requirement shall control ~~and become part of~~ the permit issued under this chapter.

C. An application for a permit for a Class II injection well which has not been previously drilled under a permit from the director shall be submitted as an application for a new permit. An application for a permit for conversion of a permitted gas

or oil well to a Class II injection well shall be submitted as an application for a permit modification.

D. The director shall not issue a permit for a Class II injection well until after the Environmental Protection Agency has issued its permit for the injection well.

**4VAC25-150-500. Application for a permit, conventional well or Class II injection well.**

A. In addition to the requirements of 4VAC25-150-80 or 4VAC25-150-110, every application for a permit or permit modification for a conventional gas or oil well or a Class II injection well shall contain:

1. The approximate depth to which the well is proposed to be drilled or deepened, or the actual depth to which the well has been drilled;
2. The approximate depth and thickness, if applicable, of all known coal seams, known groundwater-bearing strata, and other known gas or oil strata between the surface and the depth to which the well is proposed to be drilled;
3. If casing or tubing is proposed to be or has been set, a description of the entire casing program, including the size of each string of pipe, the starting point and depth to which each string is to be or has been set, and the extent to which each string is to be or has been cemented; and
4. If the proposed work is for a Class II injection well, a copy of either the permit issued by, or the permit application filed with the Environmental Protection Agency under the Underground Injection Control Program.
5. An explanation of the procedures to be followed to protect the safety of persons working in and around an underground coal mine for any conventional well or Class II injection well to be drilled within 200 feet of areas where workers are assigned or travel, as well as any connected sealed or gob areas, or where a one-year mine plan is on file with the Division of Mines; which shall, at a minimum, require that notice of such drilling be given by the permittee to the mine operator and the Chief of the Division of Mines at least 10 working days prior to drilling.

B. In addition to the requirements of 4VAC25-150-80 and 4VAC25-150-110, every application for a permit or permit modification for a conventional gas or oil well or a Class II injection well may contain, if the proposed work is to drill, redrill or deepen a well, a plan showing the proposed manner of plugging the well immediately after drilling if the proposed well work is unsuccessful.

**4VAC25-150-510. Plats, conventional wells or Class II injection wells.**

A. In addition to the requirements of 4VAC25-150-90, every plat for a conventional gas or oil well shall show:

1. The boundaries of any drilling unit established by the board around the subject well;

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# Regulations

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2. The boundaries and acreage of the tract on which the well is located or is to be located;

3. The boundaries and acreage of all other tracts within one-half of the distance specified in § 45.1-361.17 of the Code of Virginia or within one-half of the distance to the nearest well completed in the same pool, whichever is less, or within the boundaries of a drilling unit established by the board around the subject well;

4. Surface owners on the tract to be drilled and on all other tracts within the unit where the surface of the earth is to be disturbed;

5. All gas, oil or royalty owners on any tract located within one half of the distance specified in § 45.1-361.17 of the Code of Virginia or within one-half of the distance to the nearest well completed in the same pool, whichever is less, or within the boundaries of a drilling unit established by the board around the subject well;

6. Coal owners and mineral owners on the tract to be drilled and on all other tracts located within 500 feet of the subject well location;

7. Coal operators who have registered operations plans with the department for activities located on the tract to be drilled, or who have applied for or obtained a coal mine license, coal surface mine permit or a coal exploration notice or permit from the department with respect to all tracts within 500 feet of a proposed gas or oil well;

8. Any inhabited building, highway, railroad, stream, permitted surface mine or permitted mine opening within 500 feet of the proposed well; and

9. If the plat is for an enhanced oil recovery injection well, any other well within 2,500 feet of the proposed or actual well location, which shall be presumed to embrace the entire area to be affected by an enhanced oil recovery injection well in the absence of a board order establishing units in the target pool of a different size or configuration.

B. If the well location is underlain by known coal seams, or if required by the director, the well plat shall locate the well and two permanent points or landmarks with reference to the mine coordinate system if one has been established for the area of the well location, and shall in any event show all other wells, surface mines and mine openings within the scope of the plat.

## **4VAC25-150-520. Setback restrictions, conventional wells or Class II injection wells.**

No permit shall be issued for any well to be drilled closer than 200 feet from any inhabited building unless site conditions as approved by the director warrant the permission of a lesser distance and there exists a lease or agreement between the operator and the owner of the inhabited building. A copy of the lease or agreement shall accompany the application for a permit.

## **4VAC25-150-530. Casing requirements for conventional gas or oil wells.**

### A. Water-protection string.

1. Except as provided in subdivision A 5 of this section, the permittee shall set a water-protection string to a point at least 300 feet below the surface or 50 feet below the deepest known groundwater horizon, whichever is deeper, circulated and cemented in to the surface. If the cement does not return to the surface, every reasonable attempt shall be made to fill the annular space by introducing cement from the surface.

2. The operator shall test or require the cementing company to test the cement mixing water for pH and temperature prior to mixing the cement and to record the results on the cementing ticket.

3. After the cement is placed, the operator shall wait a minimum of eight hours and allow the cement to achieve a calculated compressive strength of 500 psi before drilling, unless the director approves a shorter period of time. The wait-on-cement (WOC) time shall be recorded within the records kept at the drilling rig while drilling is taking place.

4. When requested by the director, the operator shall submit copies of cement tickets or other documents that indicate the above specifications have been followed.

5. A coal-protection string may also serve as a water-protection string.

### B. Coal-protection strings.

1. When any well penetrates coal seams that have not been mined out, the permittee shall, except as provided in subdivisions B 2 and B 3 of this section, set a coal-protection string. The coal-protection string shall exclude all fluids, oil, gas and gas pressure except that which is naturally present in each coal seam. The coal-protection string shall also exclude all injected material or disposed waste from the coal seams and the wellbore. The string of casing shall be set to a point at least 50 feet below the lowest coal seam, or as provided in subdivision B 3 of this section, and shall be circulated and cemented from that point to the surface or to a point not less than 50 feet into the water-protection string or strings which are cemented to the surface.

2. For good cause shown, either before or after the permit is issued, when the procedure specified in subdivision B 1 is demonstrated by the permittee as not practical, the director may approve a casing program involving the cementing of a coal-protection string in multiple stages, or the cementing of two or more coal-protection strings, or the use of other alternative casing procedures. The director may approve the program provided he is satisfied that the result will be operationally equivalent to compliance with the provisions of subdivision B 1 of this section for the purpose of permitting the subsequent safe mining through

of the well or otherwise protecting the coal seams as required by this section. In the use of multiple coal-protection strings, each string below the topmost string shall be cemented at least 50 feet into the next higher string or strings that are cemented to the surface and be verified by a cement top log.

3. Depth of coal-protection strings:

a. A coal-protection string shall be set to the top of the red shales in any area underlain by them unless, on a showing by the permittee in the permit application, the director has approved the casing point of the coal-protection string at some depth less than the top of the red shales. In such event, the permittee shall conduct a gamma ray/density log survey on an expanded scale to verify whether the well penetrates any coal seam in the uncased interval between the bottom of the coal-protection string as approved and the top of the red shales.

b. If an unanticipated coal seam or seams are discovered in the uncased interval, the permittee shall report the discovery in writing to the director. The permittee shall cement the next string of casing, whether a part of the intermediate string or the production string, in the applicable manner provided in this section for coal-protection strings, from a point at least 50 feet below the lowest coal seam so discovered to a point at least 50 feet above the highest coal seam so discovered.

c. The gamma ray/density log survey shall be filed with the director at the same time the driller's log is filed under 4VAC25-150-360.

d. When the director believes, after reviewing documentation submitted by the permittee, that the total drilling in any particular area has verified the deepest coal seam higher than the red shales, so that further gamma ray/density logs on an expanded scale are superfluous for the area, he may waive the constructing of a coal-protection string or the conducting of such surveys deeper than 100 feet below the verified depth of the deepest coal seam.

C. Coal-protection strings of wells drilled prior to July 1, 1982. In the case of wells drilled prior to July 1, 1982, through coal seams without coal-protection strings substantially as prescribed in subsection B of this section, the permittee shall retain such coal-protection strings as were set. During the life of the well, the permittee shall, consistent with a plan approved by the director, keep the annular spaces between the various strings of casing adjacent to coal seams open to the extent possible, and the top ends of all such strings shall be provided with casing heads, or such other approved devices as will permit the free passage of gas or oil and prevent filling of the annular spaces with dirt or debris.

D. Producing from more than one stratum. The casing program for any well designed or completed to produce from

more than one stratum shall be designed in accordance with the appropriate standard practices of the industry.

E. Casing through voids.

1. When a well is drilled through a void, the hole shall be drilled at least 30 feet below the void, the annular space shall be cemented from the base of the casing up to the void ~~and to the surface from the top of the void,~~ and every reasonable attempt shall be made to fill the annular space from the top of the void to the surface, or it shall be cemented at least 50 feet into the next higher string or strings of casing that are cemented to the surface and be verified by a cement top log.

2. For good cause shown, the director may approve alternative casing procedures proposed by the permittee, provided that the director is satisfied that the alternative casing procedures are operationally equivalent to the requirements imposed by subdivision E 1 of this section.

3. For good cause shown, the director may impose special requirements on the permittee to prevent communication between two or more voids.

F. A well penetrating a mine other than a coal mine. In the event that a permittee has requested to drill a well in such a location that it would penetrate any active mine other than a coal mine, the director shall approve the safety precautions to be followed by the permittee prior to the commencement of activity.

G. Reporting of lost circulation zones. The permittee shall report to the director as soon as possible when an unanticipated void or groundwater horizon is encountered that results in lost circulation during drilling. The permittee shall take every necessary action to protect the lost circulation zone.

Part III  
Coalbed Methane Gas Wells

**4VAC25-150-550. Applicability, coalbed methane wells.**

Part III of this chapter sets forth requirements unique to coalbed methane gas wells. Permittees must comply with the standards of general applicability in Part I of this chapter and with the standards for coalbed methane gas wells in this part.

**4VAC25-150-560. Application for a permit, coalbed methane well operations.**

A. In addition to the requirements of 4VAC25-150-80 or 4VAC25-150-110, every application for a permit or permit modification for a coalbed methane gas well shall contain:

1. An identification of the category of owner or operator, as listed in § 45.1-361.30 A of the Code of Virginia, that each person notified of the application belongs to;
2. The signed consent required in § 45.1-361.29 of the Code of Virginia;
3. Proof of conformance with any mine development plan in the vicinity of the proposed coalbed methane gas well,

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# Regulations

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when the Virginia Gas and Oil Board has ordered such conformance;

4. The approximate depth to which the well is proposed to be drilled or deepened, or the actual depth if the well has been drilled;

5. The approximate depth and thickness, if applicable, of all known coal seams, known groundwater-bearing strata, and other known gas or oil strata between the surface and the depth to which the well is proposed to be drilled;

6. If casing or tubing is proposed to be or has been set, a description of the entire casing program, including the size of each string of pipe, the starting point and depth to which each string is to be or has been set, and the extent to which each string is to be or has been cemented together with any request for a variance under 4VAC25-150-580;

7. An explanation of the procedures to be followed to protect the safety of persons working in and around an underground coal mine for any coalbed methane gas well to be drilled within 200 feet of ~~or into any area of an active underground coal mine~~ areas where workers are assigned or travel, as well as any connected sealed or gob areas, or where a one-year mine plan is on file with the Division of Mines; which shall, at a minimum, require that notice of such drilling be given by the permittee to the mine operator and the Chief of the Division of Mines at least ~~two~~ 10 working days prior to drilling ~~within 200 feet of or into the mine~~; and

8. If the proposed work is for a Class II injection well, a copy of the Environmental Protection Agency permit, or a copy of the application filed with the Environmental Protection Agency under the Underground Injection Control Program.

B. In addition to the requirements of 4VAC25-150-80 or 4VAC25-150-110, every application for a permit or permit modification for a coalbed methane well or a Class II injection well may contain, if the proposed work is to drill, redrill or deepen a well, a plan showing the proposed manner of plugging the well immediately after drilling if the proposed well work is unsuccessful so that the well must be plugged and abandoned.

#### **4VAC25-150-590. Plats, coalbed methane wells.**

A. In addition to the requirements of 4VAC25-150-90, every plat for a coalbed methane gas well shall show:

1. Boundaries and acreage of any drilling unit established by the board around the subject well;

2. Boundaries and acreage of the tract on which the well is located or is to be located;

3. Boundaries and acreage of all other tracts within one-half of the distance specified in § 45.1-361.17 of the Code of Virginia or within one-half of the distance to the nearest well completed in the same pool, whichever is less, or within the boundaries of a drilling unit established by the board around the subject well;

4. Surface owners on the tract to be drilled and on all other tracts within the unit where the surface of the earth is to be disturbed;

5. All gas, oil or royalty owners on any tract located within one-half of the distance specified in § 45.1-361.17 of the Code of Virginia or within one-half of the distance to the nearest well completed in the same pool, whichever is less, or within the boundaries of a drilling unit established by the board around the subject well;

6. Coal owners and mineral owners on the tract to be drilled and on all other tracts located within 750 feet of the subject well location;

7. Coal operators who have registered operations plans with the department for activities located on the tract to be drilled, or who have applied for or obtained a coal mine license, coal surface mine permit or a coal exploration notice or permit from the department with respect to all tracts within 750 feet of a proposed gas or oil well; and

8. Any inhabited building, highway, railroad, stream, permitted surface mine or permitted mine opening within 500 feet of the proposed well.

B. The well plat shall locate the well and two permanent points or landmarks with reference to the mine coordinate system if one has been established for the area of the well location, and shall show all other wells within the scope of the plat.

#### **4VAC25-150-600. Setback restrictions, coalbed methane wells.**

No permit shall be issued for any well to be drilled closer than 200 feet from any inhabited building, unless site conditions as approved by the director warrant the permission of a lesser distance, and there exists a lease or agreement between the operator and the owner of the inhabited building. A copy of the lease or agreement shall accompany the application for a permit.

#### **4VAC25-150-610. Casing requirements for coalbed methane gas wells.**

A. Water protection string.

1. Except as provided in subdivision A 5 of this section, the permittee shall set a water-protection string set to a point at least 300 feet below the surface or 50 feet below the ~~lowest~~ deepest known groundwater horizon, whichever is deeper, circulated and cemented to the surface. If cement does not return to the surface, every reasonable effort shall be made to fill the annular space by introducing cement from the surface.

2. The operator shall test or require the cementing company to test the cement mixing water for pH and temperature prior to mixing the cement and to record the results on the cementing ticket.

3. After the cement is placed, the operator shall wait a minimum of eight hours and allow the cement to achieve a

calculated compressive strength of 500 psi before drilling, unless the director approves a shorter period of time. The wait-on-cement (WOC) time shall be recorded within the records kept at the drilling rig while drilling is taking place.

4. When requested by the director, the operator shall submit copies of cement tickets or other documents that indicate the above specifications have been followed.

5. A coal-protection string may also serve as a water protection string.

## B. Coal protection strings.

1. When any well penetrates coal seams that have not been mined out, the permittee shall, except as provided in subdivisions B 2 and B 3 of this section, set a coal-protection string. The coal-protection string shall exclude all fluids, oil, gas, and gas pressure, except that which is naturally present in each coal seam. The coal-protection string shall also exclude all injected material or disposed waste from the coal seams or the wellbore. The string of casing shall be set to a point at least 50 feet below the lowest coal seam, or as provided in subdivision B 3 of this section, and shall be circulated and cemented from that point to the surface, or to a point not less than 50 feet into the water-protection string or strings which are cemented to the surface.

2. For good cause shown, either before or after the permit is issued, when the procedure specified in subdivision B 1 is demonstrated by the permittee as not practical, the director may approve a casing program involving:

- a. The cementing of a coal-protection string in multiple stages;
- b. The cementing of two or more coal-protection strings; or
- c. The use of other alternative casing procedures.

3. The director may approve the program, provided he is satisfied that the result will be operationally equivalent to compliance with the provisions of subdivision B 1 of this section for the purpose of permitting the subsequent safe mining through the well or otherwise protecting the coal seams as required by this section. In the use of multiple coal-protection strings, each string below the topmost string shall be cemented at least 50 feet into the next higher string or strings that are cemented to the surface and be verified by a cement top log.

4. Depth of coal-protection strings.

- a. A coal-protection string shall be set to the top of the red shales in any area underlain by them unless, on a showing by the permittee in the permit application, the director has approved the casing point of the coal-protection string at some depth less than the top of the red shales. In such event, the permittee shall conduct a gamma-ray/density log survey on an expanded scale to verify whether the well penetrates any coal seam in the

uncased interval between the bottom of the coal-protection string as approved and the top of the red shales.

b. If an unanticipated coal seam or seams are discovered in the uncased interval, the permittee shall report the discovery in writing to the director. The permittee shall cement the next string of casing, whether a part of the intermediate string or the production string, in the applicable manner provided in this section for coal-protection strings, from a point at least 50 feet below the lowest coal seam so discovered to a point at least 50 feet above the highest coal seam so discovered.

c. The gamma-ray/density log survey shall be filed with the director at the same time the driller's log is filed under 4VAC25-150-360.

d. When the director believes, after reviewing documentation submitted by the permittee, that the total drilling in any particular area has verified the deepest coal seam higher than the red shales, so that further gamma-ray/density logs on an expanded scale are superfluous for the area, he may waive the constructing of a coal-protection string or the conducting of such surveys deeper than 100 feet below the verified depth of the deepest coal seam.

C. Coal-protection strings of wells drilled prior to July 1, 1982. In the case of wells drilled prior to July 1, 1982, through coal seams without coal-protection strings as prescribed in subsection B of this section, the permittee shall retain such coal-protection strings as were set. During the life of the well, the permittee shall, consistent with a plan approved by the director, keep the annular spaces between the various strings of casing adjacent to coal seams open to the extent possible, and the top ends of all such strings shall be provided with casing heads, or such other approved devices as will permit the free passage of gas or oil and prevent filling of the annular spaces with dirt or debris.

D. Producing from more than one stratum. The casing program for any well designed or completed to produce from more than one stratum shall be designed in accordance with the appropriate standard practices of the industry.

E. Casing through voids.

1. When a well is drilled through a void, the hole shall be drilled at least 30 feet below the void. The annular space shall be cemented from the base of the casing up to the void, and ~~to the surface from the top of the void every reasonable attempt shall be made to fill up the annular space from the top of the void to the surface;~~ or it shall be cemented at least 50 feet into the next higher string or strings of casing that are cemented to the surface, and shall be verified by a cement top log.

2. For good cause shown, the director may approve alternate casing procedures proposed by the permittee, provided that the director is satisfied that the alternative

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# Regulations

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casing procedures are operationally equivalent to the requirements imposed by subdivision E 1 of this section.

3. For good cause shown, the director may impose special requirements on the permittee to prevent communication between two or more voids.

F. A well penetrating a mine other than a coal mine. In the event that a permittee has requested to drill a well in such a location that it would penetrate any active mine other than a coal mine, the director shall approve the safety precautions to be followed by the permittee prior to the commencement of activity.

G. Production casing.

1. Unless otherwise granted in a variance from the director:

a. For coalbed methane gas wells with cased completions and cased/open hole completions, production casing shall be set and cemented from the bottom of the casing to the surface or to a point not less than 50 feet into the lowest coal-protection or water-protection string or strings which are cemented to the surface.

b. For coalbed methane gas wells with open hole completions, the base of the casing shall be set to not more than 100 feet above the uppermost coalbed which is to be completed open hole. The casing shall be cemented from the bottom of the casing to the surface or to a point not less than 50 feet into the lowest coal-protection or water-protection string or strings which are cemented to the surface.

2. A coal-protection string may also serve as production casing.

H. Reporting of lost circulation zones. The permittee shall report to the director as soon as possible when an unanticipated void or groundwater horizon is encountered that results in lost circulation during drilling. The permittee shall take every necessary action to protect the lost circulation zone.

## **4VAC25-150-620. Coalbed methane gas wellhead equipment.**

Wellhead equipment and facilities installed on any gob well or on any coalbed methane gas well subject to the requirements of §§ 45.1-161.121 and 45.1-161.292 of the Code of Virginia addressing mining near or through a well shall include a safety precaution plan submitted to the director for approval. Such plans shall include, but are shall not be limited to, flame arrestors, back-pressure systems, pressure-relief systems, vent systems and fire-fighting equipment. The director may require additional safety precautions or equipment to be installed on a case-by-case basis.

## **4VAC25-150-630. Report of produced waters, coalbed methane wells.**

All coalbed methane gas well operators are required to submit monthly reports of total produced waters withdrawn from coalbed methane gas wells, in barrels, on a well-by-well

basis, with the monthly report submitted under 4VAC25-150-210 of this chapter. The report shall show monthly produced water withdrawals and cumulative produced water withdrawals. Such reports shall be available for inspection upon request and maintained electronically or by hard copy until the well is abandoned and reclaimed.

## **4VAC25-150-650. ~~Abandonment through conversion~~ Conversion of a coalbed methane well to a vertical ventilation hole.**

A permittee wishing to ~~abandon~~ convert a coalbed methane gas well as to a vertical ventilation hole shall first obtain approval from the Chief of the Division of Mines and submit an application a written request to the division for a permit modification which includes approval from the chief of the Division of Mines release. The director shall consult with the chief, or his designated agent, before approving permit release.

### Part IV

#### Ground-Disturbing Geophysical Exploration

## **4VAC25-150-660. Applicability, ~~ground-disturbing geophysical activity.~~**

Part IV (4VAC25-150-660 et seq.) of this chapter sets forth requirements unique to ground-disturbing geophysical exploration.

## **4VAC25-150-670. Application for a permit, ~~geophysical activity or core holes.~~**

A. In accordance with 4VAC25-150-80 and 4VAC25-150-110, a permit shall be required for ground-disturbing geophysical exploration.

B. In addition to the requirements of 4VAC25-150-80 and 4VAC25-150-110, every application for a corehole permit or permit modification under this part shall contain:

1. The approximate depth to which the corehole is proposed to be drilled or deepened, or the actual depth if the corehole has been drilled;

2. The approximate depth and thickness, if applicable, of all known coal seams, known groundwater-bearing strata, and other known gas or oil strata between the surface and the depth to which the corehole is proposed to be drilled;

3. If casing is proposed to be set, the entire casing program, including the diameter of each string of casing, the starting point and depth to which each string is to be set, whether or not the casing is to remain in the hole after the completion of drilling, and the extent to which each string is to be cemented, if applicable; ~~and~~

4. A plan which shows the proposed manner of plugging or replugging the corehole; ~~and~~

5. An explanation of the procedures to be followed to protect the safety of persons working in and around an underground coal mine for any corehole to be drilled within 200 feet of areas where workers are assigned or travel, as well as any connected sealed or gob areas, or

where a one-year mine plan is on file with the Division of Mines. Such procedures shall, at a minimum, require that notice of such drilling be given by the permittee to the mine operator and the Chief of the Division of Mines at least 10 working days prior to drilling.

**4VAC25-150-680. Plats, core holes.**

A. In addition to the requirements of 4VAC25-150-90, every plat for a corehole shall show:

1. The boundaries of the tract on which the corehole is located or is to be located;
2. Surface owners on the tract to be drilled and surface owners on the tracts where the surface is to be disturbed;
3. Coal owners and mineral owners on the tract to be drilled;
4. Coal operators who have registered operations plans with the department for activities located on the tract to be drilled; and
5. Any inhabited building, highway, railroad, stream, permitted surface mine or permitted mine opening within 500 feet of the proposed corehole.

B. If the corehole location is underlain by known coal seams, the plat shall locate the corehole and two permanent points or landmarks with reference to the mine coordinate system if one has been established for the area of the corehole location, and shall in any event show all other wells within the scope of the plat.

**4VAC25-150-690. Operations plans, core holes.**

In addition to the requirements of 4VAC25-150-100, every operations plan for a corehole shall describe the measures to be followed to protect water quality during the drilling, and the measures to be followed to protect any voids encountered during drilling.

**4VAC25-150-700. Setback restrictions, core holes.**

No permit shall be issued for any corehole to be drilled closer than 200 feet from an inhabited building, unless site conditions as approved by the director warrant the permission of a lesser distance, and there exists a lease or agreement between the operator and the owner of the inhabited building. A copy of the lease or agreement shall accompany the application for a permit.

**4VAC25-150-711. Voids and lost circular circulation zones.**

A. Casing through voids.

1. When a corehole is drilled through a void, the hole shall be drilled at least 30 feet below the void. The annular space shall be cemented from the base of the casing up to the void and ~~to the surface from the top of the void~~ every reasonable attempt shall be made to fill the annular space from the top of the void to the surface; or it shall be cemented at least 50 feet into the next higher string or strings of casing that are cemented to the surface and be verified by a cement top log.

2. For good cause shown, the director may approve alternate casing procedures proposed by the permittee, provided that the director is satisfied that the alternative casing procedures are operationally equivalent to the requirements imposed by this section.

3. For good cause shown, the director may impose special requirements on the permittee to prevent communication between two or more voids.

B. Reporting of lost circulation zones. The permittee shall report to the director as soon as possible when an unanticipated void or groundwater horizon is encountered that results in lost circulation during drilling. The permittee shall take every necessary action to protect the lost circulation zone.

Part V  
Gathering Pipelines

**4VAC25-150-720. Applicability, gathering pipelines.**

A. Part V (4VAC25-150-720 et seq.) of this chapter sets forth requirements unique to gathering pipelines. Permittees must comply with the standards for gathering pipelines in this part and the following standards in Part I:

1. All of Article 1, "General Information"; except 4VAC25-150-50, "Gas or oil in holes not permitted as a gas or oil well";
2. All of Article 2, "Permitting"; except 4VAC25-150-90, "Plats";
3. All of the sections in Article 3, "Enforcement";
4. 4VAC25-150-220, "Annual reports,;" of Article 4, "Reporting";
5. 4VAC25-150-230, 4VAC25-150-240, 4VAC25-150-250, 4VAC25-150-260, 4VAC25-150-270, 4VAC25-150-310, 4VAC25-150-350, 4VAC25-150-380, 4VAC25-150-410, 4VAC25-150-420, and 4VAC25-150-430 of Article 5, "Technical Standards"; and
6. 4VAC25-150-470, "Release of bond,;" of Article 6, "Plugging and Abandonment-";

B. A permit shall be required for installation and operation of every gathering pipeline and associated structures for the movement of gas or oil production from the wellhead to a previously permitted gathering line, a transmission or other line regulated by the United States Department of Transportation or the State Corporation Commission, to the first point of sale, or for oil, to a temporary storage facility for future transportation by a method other than a gathering pipeline.

C. Each gathering pipeline or gathering pipeline system may be permitted separately from gas or oil wells or may be included in the permit for the well being served by the pipeline.



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# Regulations

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## **4VAC25-150-730. General requirements for gathering pipelines.**

A. Gathering pipelines shall be installed to be compatible with other uses of the area.

B. No permit shall be issued for a gathering pipeline to be installed closer than ~~50~~ 100 feet from any inhabited building or railway, unless site conditions as approved by the director warrant the use of a lesser distance and there exists a lease or agreement between the operator, ~~the inhabitants of the building~~ and the owner of the inhabited building or railway. A copy of the lease or agreement shall accompany the application for a permit.

C. Materials used in gathering pipelines shall be able to withstand anticipated conditions. At a minimum this shall include:

1. All plastic gathering pipeline connections shall be fused, not coupled.
2. All buried gathering pipelines shall be detectable by magnetic or other remote means from the surface.

D. All new gathering pipelines shall be tested to maintain a minimum of 110% of anticipated pressure prior to being placed into service.

E. All gathering pipelines shall be maintained in good operating condition at all times.

## **4VAC25-150-740. Operations plans for gathering pipelines.**

A. For a gathering pipeline, the operations plan shall be in a format approved by, or on a form prescribed by, the director.

B. On a form prescribed by the director, the operator shall indicate how risks to the public safety or to the site and adjacent lands are to be managed, and shall provide a short narrative, if pertinent.

## **4VAC25-150-750. Inspections for gathering pipelines.**

Gathering pipelines shall be visually inspected annually by the permittee. The results of each annual inspection shall be maintained by the permittee for a minimum of three years and be submitted to the director upon request.

V.A.R. Doc. No. R08-1318; Filed September 11, 2012, 9:15 a.m.

### **Final Regulation**

**Title of Regulation:** 4VAC25-160. Virginia Gas and Oil Board Regulations (amending 4VAC25-160-10, 4VAC25-160-30 through 4VAC25-160-70, 4VAC25-160-130, 4VAC25-160-190, 4VAC25-160-200).

**Statutory Authority:** § 45.1-361.15 of the Code of Virginia.

**Effective Date:** November 8, 2012.

**Agency Contact:** Michael Skiffington, Regulatory Coordinator, Department of Mines, Minerals and Energy, 1100 Bank Street, 8th Floor, Richmond, VA 23219-3402, telephone (804) 692-3212, FAX (804) 692-3237, TTY (800) 828-1120, or email mike.skiffington@dmme.virginia.gov.

## **Summary:**

*As a result of periodic review, the Department of Mines, Minerals and Energy and the Virginia Gas and Oil Board are amending 4VAC25-160, Virginia Gas and Oil Board Regulations, to make technical corrections, improve clarity, increase efficiency, and restore consistency with other chapters. Two symbols have been updated for consistency with current industry usage and available CAD technology.*

*Two minor changes were made since publication of the proposed regulation. One clarifies that the fee for filing pooling orders before the board is due for each order. The second deletes a requirement that resource owners in an area around a proposed well notify the board "by certified mail" that they wish to receive a copy of the pooling application. Mail and phone notice will suffice.*

**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.

## **4VAC25-160-10. Definitions.**

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

"Act" means the Virginia Gas and Oil Act of 1990, Chapter 22.1 (§ 45.1-361.1 et seq.) of Title 45.1 of the Code of Virginia.

"Applicant" ~~or "petitioner"~~ means a person or business who files an application, petition, appeal or other request ~~for board action with the Division of Gas and Oil.~~

"Board" means the Virginia Gas and Oil Board.

"Complete application" means all the materials required to be filed by the applicant under this chapter.

"Department" means the Department of Mines, Minerals and Energy.

"Director" means the Director of the Department of Mines, Minerals and Energy or his authorized agent.

"Directional survey" means a well survey that measures the degree of deviation of a hole, or distance, from the vertical and the direction of departure.

"Division" means the Division of Gas and Oil of the Department of Mines, Minerals and Energy.

"Division [ ~~Director~~ director" ] means the Director of the Division of Gas and Oil.

"Election" means the performance of an act within the time established or required by statute, order or regulation. An election required to be made by board order or regulation must be in writing and (i) be personally delivered to the person or agent of the person described in the order or regulation by the date established or required, or (ii) be mailed to the person or agent of the person described in the order or regulation at the address stated therein and be

postmarked by the United States Postal Service before midnight on the date established or required.

"Field" means the general area underlain by one or more pools.

"Gas/oil ratio" means the product of the number of Mcf of natural gas produced from a well divided by the number of barrels of oil produced from the well as determined by a gas/oil ratio test.

"Gas well" means any well which produces or appears capable of producing a ratio of 6,000 cubic feet (6 Mcf) of gas or more to each barrel of oil, on the basis of a gas-oil ratio test.

"Inclination survey" means a well survey to determine the deviation, using the surface location of the well as the apex, of a well bore from the true vertical beneath the apex on the same horizontal subsurface plane.

"Mcf" means, when used with reference to natural gas, 1,000 cubic feet of gas at a pressure base of 14.73 pounds per square inch gauge and a temperature base of 60°F.

"Mine development plan" means a permit or license application filed with the Division of Mines or Mined Land Reclamation for legal permission to engage in extraction of coal resources.

"Oil well" means any well which produces or appears capable of producing a ratio of less than 6,000 cubic feet (6 Mcf) of gas to each barrel of oil, on the basis of a gas-oil ratio test.

"Petitioner" means any person or business who files a petition, appeal, or other request for action with the Division of Gas and Oil or the Virginia Gas and Oil Board.

"Pooling" means the combining of all interests or estates in a gas, oil or coalbed methane drilling unit for the development and operations thereof. Pooling may be accomplished either through voluntary agreement or through a compulsory order of the board.

"Respondent" means a person named in an application, petition, appeal or other request for board action and against whom relief is sought by the applicant, or a person who under the terms of a board order, is required to make an election.

"Unit operator" means the gas or oil owner designated by the board to operate in or on a pooled unit.

**4VAC25-160-30. Administrative provisions.**

A. The Virginia Gas and Oil Board shall meet on the third Tuesday of each calendar month unless no action is required by the board or unless otherwise scheduled by the board. All hearings shall be scheduled in accordance with the requirements for notice by publication in § 45.1-361.19 of the Code of Virginia. Except where otherwise established by the Act, the board may establish deadlines for filing materials for meetings or hearings scheduled on other than the third Tuesday of each month.

B. Applications to the board must be filed by the following deadlines:

1. All applications, petitions, appeals or other requests for board action must be received by the division at least 30 calendar days prior to the regularly scheduled meeting of the board. If the 30th day falls on a weekend or a legal holiday, the deadline shall be the prior business day.

2. When required, two copies of the following material must be filed with the division at least seven calendar days prior to the regularly scheduled meeting of the board in order for the application to be considered a complete application:

- a. The affidavit demonstrating that due diligence was used to locate and serve persons in accordance with § 45.1-361.19 of the Code of Virginia and 4VAC25-160-40; and
- b. Proof of notice by publication in accordance with 4VAC25-160-40 D.

C. A complete application that is not filed by the deadlines of this subsection shall be carried over to the next scheduled meeting of the board. A submission that does not contain a complete application shall not be considered by the board until the application is complete.

D. The division shall assign a docket number to each application or petition at the time of payment receipt and filing, and. The division shall notify the applicant of the completed filing and assigned docket number. The docket number shall be referenced when submitting material regarding the application or petition.

E. In addition to the other requirements of this chapter, applications to the board shall meet the following standards:

1. Each application for a hearing before the board shall be headed by a caption which shall contain a heading including:

- a. "Before the Virginia Gas and Oil ~~board~~ Board";
- b. The name of the applicant;
- c. The relief sought; and
- d. The docket number assigned by the division.

2. Each application shall be signed by the applicant, an authorized agent of the applicant, or an attorney for the applicant, certifying that, "The foregoing application to the best of my knowledge, information, and belief is true and correct."

3. Exhibits shall be identified by the docket number and an exhibit number and may be introduced as part of a person's presentation.

4. ~~Persons Applicants~~ shall submit ~~10~~ eight sets of each application and ~~exhibit~~ exhibits. Each person offering exhibits into evidence shall also have available a reasonably sufficient number of exhibits for other persons who are subject to the provisions of §§ 45.1-361.19 and 45.1-361.23 of the Code of Virginia, who have notified the

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# Regulations

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division [ ~~by certified mail notice~~ ] of their request for copies of exhibits, and are expected to be in attendance at the hearing.

F. Applications for the establishment and modification of [ ~~units a unit~~ ], spacing or pooling shall be accompanied by a \$130 nonrefundable fee, payable to the Treasurer of Virginia.

G. All parties in any proceeding before the board are entitled to appear in person or be represented by counsel ~~or other qualified representative~~, as provided for in the Administrative Process Act, § 2.2-4000 et seq. of the Code of Virginia.

#### **4VAC25-160-40. Notice of hearings.**

A. Each applicant for a hearing to establish an exception to statewide spacing under § 45.1-361.17 of the Code of Virginia shall provide notice by certified mail, return receipt requested, to all gas, oil, coal or mineral owners having an interest underlying any tract located within the distances provided in § 45.1-361.17 of the Code of Virginia or the distance to the nearest well completed in the same pool, whichever is less. Each applicant for a hearing to establish an exception to a well location provided for in a drilling unit established by an order of the board shall provide notice by certified mail, return receipt requested, to all gas, oil, coal or mineral owners having an interest underlying the unit where the exception is requested.

B. Each applicant shall include, in or with the mailed notice of the hearing required under § 45.1-361.19 of the Code of Virginia, the following information:

1. The name and address of the applicant and the applicant's counsel, if any;
2. In the case of an application to vacate or amend an order, identification of the order to be vacated or amended;
3. A statement of the relief sought and proposed provisions of the order or proposed order;
4. Citations of statutes, rules, orders and decided cases supporting the relief sought;
5. A statement of the type of well or wells (gas, oil or coalbed methane gas);
6. a. For a pooling order, the notice should include: a plat showing the size and shape of the proposed unit and boundaries of tracts within the unit. The location of the proposed unit shall be shown in accordance with the Virginia Coordinate System of ~~1927~~ 1983, as defined in Chapter 17 (§55-287 et seq.) of Title 55 of the Code of Virginia, also known as the State Plane Coordinate System. ~~The proposed unit shall also be located by taking the measured distance in feet from the unit to the nearest 2.5 minute longitude line to the east and the nearest 2.5 minute latitude line to the north on the 7.5 minute (1:24,000) topographic map, with a notation of the 7.5 minute topographic map name and series.~~ The plat containing shall include property lines taken from (i) deed descriptions and chain of title, (ii) county courthouse records, or (iii) a physical survey for each land track in the unit. The location

of the well and the percentage of acreage in each tract in the unit shall be certified by a licensed land surveyor or a licensed professional engineer and attested by the applicant as to its conformity to existing orders issued by the board;

b. For a field rule, the notice should include: a description of the pool or pools in the field, the boundaries of the field, information on the acreage and boundaries of the units proposed to be in the field and any proposed allowable production rates; or

c. For a location exception, the notice should include: a description of the proposed well location in relation to other wells within statewide spacing limits or in relation to the allowable area for drilling within a unit;

7. A description of the interest or claim of the respondent being notified;

8. A description of the formation or formations to be produced;

9. An estimate of the amount of reserves of the unit;

10. An estimate of the allowable costs in accordance with 4VAC25-160-100; and

11. How interested persons may obtain additional information or a complete copy of the application.

C. When after a diligent search the identity or location of any person to whom notice is required to be given in accordance with subsection A or B of this section is unknown at the time the applicant applies for a hearing before the board, the applicant for the hearing shall cause a notice to be published in a newspaper of general circulation in the county, counties, city, or cities where the land or the major portion thereof which is the subject of the application is located. The notice shall include:

1. The name and address of the applicant;

2. A description of the action to be considered by the board;

3. A map showing the general location of the area ~~which that~~ which that would be affected by the proposed action ~~or and~~ a description ~~which that~~ which that clearly describes the location or boundaries of the area ~~which that~~ which that would be affected by the proposed action sufficient to enable local residents to identify the area;

4. The date, time and location of the hearing at which the application is scheduled to be heard; and

5. How interested persons may obtain additional information or a complete copy of the application.

D. Notice of a hearing made in accordance with § 45.1-361.19 of the Code of Virginia or this section shall be sufficient, and no additional notice is required to be made by the applicant upon a postponement or continuance of the hearing.

E. Each applicant for a hearing to modify an order established under §45.1-361.21 or § 45.1-361.22 of the Code of Virginia shall provide notice in accordance with §°45.1-

361.19 of the Code of Virginia to each person having an interest underlying the tract or tracts to be affected by the proposed modification.

F. An applicant filing a petition to modify a forced pooling order established under § 45.1-361.21 or § 45.1-361.22 of the Code of Virginia to change the unit operator based on a change in the corporate name of the unit operator; a change in the corporate structure of the unit operator; or a transfer of the unit operator's interests to any single subsidiary, parent or successor by merger or consolidation is not required to provide notice. Other applicants for a hearing to modify a forced pooling order shall provide notice in accordance with § 45.1-361.19 of the Code of Virginia to each respondent named in the order to be modified whose interest may be affected by the proposed modification.

**4VAC25-160-50. Applications for field rules.**

Each application filed under § 45.1-361.20 of the Code of Virginia to establish or modify a field rule, a drilling unit or drilling units shall contain:

1. The name and address of the applicant and the applicant's counsel, if any;
2. In the case of an application to vacate or amend an order, identification of the order to be vacated or amended;
3. A statement of the relief sought and the proposed provisions of the order or a proposed order;
4. Citations of statutes, rules, orders, and decided cases supporting the relief sought;
5. In the case where a field rule is proposed to be established or modified:
  - a. A statement of the type of field (gas, oil or coalbed methane gas);
  - b. A description of the proposed formation or formations subject to the petition; and
  - c. A description of the pool or pools included in the field, based on geological and technical data, including the boundaries of the pool or pools and field, shown in accordance with the Virginia Coordinate System of ~~1927~~ 1983, as defined in Chapter 17 (§ 55-287 et seq.) of Title 55 of the Code of Virginia, also known as the State Plane Coordinate System. ~~The boundaries of the pool or pools and field shall also be located by taking the measured distance in feet from the unit to the nearest 2.5 minute longitude line to the east and the nearest 2.5 minute latitude line to the north on the 7.5 minute (1:24,000) topographic map, with a notation of the 7.5 minute topographic map name and series;~~
6. In the case where a drilling unit or units are proposed to be established or modified:
  - a. A statement of the acreage to be embraced within each drilling unit;
  - b. A description of the formation or formations to be produced by the well or wells in the unit or units; and

c. The boundaries of the drilling unit or units shown in accordance with subdivision 5 c of this section;

7. A statement of the amount of acreage to be included in the order;
8. A statement of the proposed allowable production rate or rates and supporting documentation, if applicable;
9. Evidence that any proposal to establish or modify a unit or units for coalbed methane gas will meet the requirements of § 45.1-361.20 C of the Code of Virginia;
10. An affidavit demonstrating that due diligence was used to locate and serve persons in accordance with § 45.1-361.19 of the Code of Virginia and 4VAC25-160-40; and
11. When required, proof of notice by publication in accordance with 4VAC25-160-40 ~~D~~ C.

**4VAC25-160-60. Applications for exceptions to minimum well spacing requirements.**

Applications for an exception to statewide spacing under § 45.1-361.17 of the Code of Virginia or under a field rule issued by the board shall contain the following:

1. The name and address of the applicant and the applicant's counsel, if any;
2. In the case of an application for an exception to spacing established in a field rule, identification of the order governing spacing in the field;
3. A statement of the proposed location of the well in relation to wells permitted or for which a permit application is pending before the Division of Gas and Oil at the time of filing within the distances prescribed in §45.1-361.17 of the Code of Virginia;
4. A description of the formation or formations to be produced by the well proposed for alternative spacing and the wells identified in subdivision 3 of this section;
5. A description of the conditions justifying the alternative spacing;
6. An affidavit demonstrating that due diligence was used to locate and serve persons in accordance with 4VAC25-160-40; and
7. When required, proof of notice by publication in accordance with 4VAC25-160-40 ~~D~~ C.

**4VAC25-160-70. Applications to pool interests in a drilling unit: conventional gas or oil or no conflicting claims to coalbed methane gas ownership.**

A. Applications filed under § 45.1-361.21 of the Code of Virginia to pool interests in a drilling unit for conventional gas or oil or for coalbed methane gas where there are no conflicting claims to ownership of the coalbed methane gas, except as provided for in subsection B of this section, shall contain the following:

1. The name and address of the applicant and the applicant's counsel, if any;

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# Regulations

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2. In the case of an application to vacate or amend an order, identification of the order to be vacated or amended;
3. A statement of the relief sought and proposed provisions of the order or a proposed order;
4. Citations of statutes, rules, orders, and decided cases supporting the relief sought;
5. A statement of the type of well or wells (gas, oil or coalbed methane gas);
6. The permit number or numbers, if any have been issued;
7. A plat showing the size and shape of the proposed unit and boundaries of tracts within the unit, shown in accordance with the Virginia Coordinate System of ~~1927~~ 1983, as defined in Chapter 17 (§ 55-287 et seq.) of Title 55 of the Code of Virginia, also known as the State Plane Coordinate System. ~~The proposed unit shall also be located by taking the measured distance in feet from the unit to the nearest 2.5 minute longitude line to the east and the nearest 2.5 minute latitude line to the north on the 7.5 minute (1:24,000) topographic map, with a notation of the 7.5 minute topographic map name and series.~~ Also included shall be the names of owners of record of the tracts, and the percentage of acreage in each tract, certified by a licensed land surveyor or a licensed professional engineer and attested by the applicant as to its conformity to existing orders issued by the board;
8. A description of the status of interests to be pooled in the unit at the time the application is filed;
9. For an application to pool a coalbed methane gas unit, a statement of the percentage of the total interest held by the applicant in the proposed unit at the time the application for the hearing is filed;
10. A statement of the names of owners and the percentage of interests to be escrowed under § 45.1-361.21 D of the Code of Virginia for each owner whose location is unknown at the time the application for the hearing is filed;
11. A description of the formation or formations to be produced;
12. An estimate of production over the life of well or wells, and, if different, an estimate of the recoverable reserves of the unit;
13. An estimate of the allowable costs in accordance with 4VAC25-160-100;
14. An affidavit demonstrating that due diligence was used to locate and serve persons in accordance with § 45.1-361.19 of the Code of Virginia and 4VAC25-160-40 ~~C~~; and
15. When required, proof of notice by publication in accordance with 4VAC25-160-40 ~~D~~ C.

B. Applications to amend an order pooling interests in a drilling unit may be filed by written stipulation of all persons affected. The application is not required to contain the information specified in subsection A of this section, but shall

contain the proposed amended language to the order, shown by interlineation.

C. ~~After~~ Within 45 days after the time for election provided in any pooling order has expired, the unit operator shall file an affidavit with the board stating whether or not any elections were made. If any elections were made, the affidavit shall name each respondent making an election and describe the election made. The affidavit shall state if no elections were made or if any response was untimely. The affidavit shall be accompanied by a proposed supplemental order to be made and recorded to complete the record regarding elections. The affidavit and proposed supplemental order shall be filed by the unit operator within 45 days of the last day on which a timely election could have been delivered or mailed, or within 45 days of the last date for payment set forth in the pooling order, whichever occurs last. The applicant shall mail a true and correct copy of any supplemental order to all persons identified in the supplemental order.

#### **4VAC25-160-130. Appeals of the director's decisions.**

A. Appeals of the division director's decisions shall be filed in writing, at the office of the division, in accordance with §§ 45.1-361.23 and 45.1-361.36 of the Code of Virginia.

B. A petition to appeal a decision of the division director shall contain:

1. The name and address of the petitioner and the petitioner's counsel, if any;
2. Identification of the decision being appealed, and the date the decision was issued;
3. A statement identifying the standing of the petitioner to appeal;
4. A statement setting forth the reasons for the appeal, including errors alleged in the director's decision and the reasons why the decision is deemed contrary to law or regulation;
5. A statement that the issues on appeal were in fact raised as required by § 45.1-361.36 B of the Code of Virginia;
6. A statement setting forth the specific relief requested; and
7. When a stay to any proposed activity allowed as a result of the director's decision is desired, a request for the stay and the basis for granting the stay.

C. Upon receipt of an appeal containing a request for a stay, the division director shall decide on the request in accordance with § 45.1-361.23 D of the Code of Virginia.

#### **4VAC25-160-190. Civil charges.**

A. Civil charges shall be provided for in accordance with § 45.1-361.8 C of the Code of Virginia.

B. The division director, after finding any violation of the Act, a regulation promulgated under the Act, or order of the director or board, or upon direction from the board, may recommend a civil charge against a gas, oil or geophysical

operator and shall base the recommendation on the Civil Charge Calculation Procedure established by order of the board.

**4VAC25-160-200. Surveys and tests.**

A. Deviation tests.

1. An inclination survey shall be made on all rotary drilled wells located in accordance with a field rule established by the board. An inclination survey is not required for wells drilled in accordance with the distance limitations of § 45.1-361.17 of the Code of Virginia.
2. The first shot point shall be at a depth not greater than the bottom of the surface casing or, for a well drilled through a coal seam, at a depth not greater than that of the bottom of the coal protection string. Succeeding shot points shall be no more than 1,000 feet apart, or as otherwise ordered by the director.
3. Inclination surveys conforming to these requirements may be made either during the normal course of drilling or after the well has reached total depth. Survey data shall be certified in writing as being true and correct by the designated agent or person in charge of a permittee's Virginia operations, or the drilling contractor, and shall indicate the resultant lateral deviation as the maximum calculated lateral displacement determined at any inclination survey point in a horizon approved for production, by an order of the board or a permit approved by the director, assuming that all displacement occurs in the direction of the nearest boundary of the unit. The resultant lateral deviation shall be recorded on the drilling or completion report filed by the permittee.
4. If a directional survey determining the location of the bottom of the hole is filed upon completion of the well, it shall not be necessary to file the inclination survey data.
5. A directional survey shall be made when:
  - a. A well is directionally controlled and is thereby intentionally deflected from vertical;
  - b. The resultant lateral deviation of any well, calculated from inclination survey data, is greater than the distance from the center of the surface location of the well bore to the nearest boundary of the area where drilling is allowed in a unit established by the board; or
  - c. A well is drilled as an exception location and a directional survey is ordered by the board.
6. The board or the director, on their own initiative or at the request of a gas or oil owner on a contiguous unit or tract, may require the permittee drilling any well to make a directional survey of the well if there is reasonable cause therefor. Whenever a survey is required by the board or the director at the request of a contiguous owner and the permittee of the well and contiguous owner are unable to agree as to the terms and conditions for making the directional survey, the permittee shall pay for the survey if the bottom hole location is found to be outside of the area

approved for drilling, and the contiguous owner shall pay for the survey if the bottom hole location is found to be inside of the area approved for drilling.

7. Directional surveys shall be run from total depth to the base of the surface casing or coal protection string, unless otherwise approved by the board or the director. In the event that the proposed or final location of the producing interval or intervals of any well is not in accordance with this section or a board order, the unit operator shall apply to the board for an exception to spacing. However, directional surveys to total depth shall not be required in cases where the interval below the latest survey is less than 500 feet, and in such an instance, a projection of the latest survey shall be deemed to satisfy board requirements.

8. The results of each inclination or directional survey made in accordance with this section shall be filed by the permittee with the first drilling or completion report required by the ~~department~~ division.

B. Flow potential and gas/oil ratio tests: conventional gas or oil wells.

1. If a gas or oil well appears capable of producing gas or oil, the permittee shall conduct a potential flow test and a gas/oil ratio test within ~~40~~ 14 days after the well is completed and capable of producing gas or oil. The permittee shall file the test results, electronically or in writing, with the ~~director~~ division. The ~~director~~ division shall hold the test results confidential in accordance with § 45.1-361.6 of the Code of Virginia.

2. If a permittee deepens or stimulates a well after the initial potential flow test and gas/oil ratio test have been conducted, when determined to be necessary by the permittee or when requested by the board, the permittee shall conduct another potential flow test and gas/oil ratio test and, within 30 days after completing the test, file the results, in writing, with the ~~director~~ division.

3. A back-flow method of determining open flow shall be used, such as ~~provided for in~~ recommended by the Interstate Oil and Gas Compact Commission, "Manual of Back-Pressure Testing of Gas Wells," ~~1979~~ 2000. However, when a back-flow method is believed not to be feasible, the permittee shall obtain prior approval from the ~~director~~ division, and test the well in accordance with, an alternate method approved by the director that does not entail excessive physical waste of gas.

C. Testing of coalbed methane gas wells. If a permittee cannot test the potential flow of a coalbed methane gas well by a back-flow method or complete the test within the time period required in subdivision B 1 of this section, the permittee may request approval from the director to perform a coalbed methane gas production test. Such a test shall only be made when the water production and the gas flow rates are stabilized for a period of not less than ~~40~~ 14 days prior to the test. The test shall be conducted for a minimum of 24 hours in the manner approved by the director. The permittee shall file

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# Regulations

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the test results, electronically or in writing, with the ~~director~~ division. The ~~director~~ division director shall hold the test results confidential in accordance with § 45.1-361.6 of the Code of Virginia.

D. The board may, by order and after notice and hearing, require a permittee to complete other tests on any well.

V.A.R. Doc. No. R08-1317; Filed September 6, 2012, 12:36 p.m.

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## TITLE 6. CRIMINAL JUSTICE AND CORRECTIONS

### STATE BOARD OF JUVENILE JUSTICE

#### Proposed Regulation

Title of Regulation: **6VAC35-20. Regulations Governing the Monitoring, Approval, and Certification of Juvenile Justice Programs (amending 6VAC35-20-10, 6VAC35-20-30, 6VAC35-20-35, 6VAC35-20-37, 6VAC35-20-50, 6VAC35-20-60, 6VAC35-20-69, 6VAC35-20-75, 6VAC35-20-80, 6VAC35-20-90, 6VAC35-20-92, 6VAC35-20-93, 6VAC35-20-94, 6VAC35-20-100, 6VAC35-20-110, 6VAC35-20-120, 6VAC35-20-150; adding 6VAC35-20-36, 6VAC35-20-36.1, 6VAC35-20-61, 6VAC35-20-85, 6VAC35-20-91, 6VAC35-20-115, 6VAC35-20-200, 6VAC35-20-210, 6VAC35-20-220, 6VAC35-20-230, 6VAC35-20-240; repealing 6VAC35-20-63, 6VAC35-20-65, 6VAC35-20-67).**

Statutory Authority: §§ 16.1-233 and 66-10 of the Code of Virginia.

Public Hearing Information: No public hearings are scheduled.

Public Comment Deadline: December 7, 2012.

Agency Contact: Janet VanCuyk, Regulatory Coordinator, Department of Juvenile Justice, P.O. Box 1110, Richmond, VA 23218-1110, telephone (804) 371-4097, FAX (804) 371-0773, or email janet.vancuyk@djj.virginia.gov.

Basis: The board is entrusted with general authority to promulgate regulations by § 66-10 of the Code of Virginia, which states the board may "promulgate such regulations as may be necessary to carry out the provisions of this title and other laws of the Commonwealth administered by the Director or the Department" and "develop and establish programmatic and fiscal policies governing the operation of programs and facilities for which the Department is responsible under this law."

The board also establishes the substantive standards for juvenile court services unit (CSUs) (§§ 16.1-233, 16.1-234, 16.1-235, and 16.1-309.9 of the Code of Virginia), juvenile secure detention centers (§§ 16.1-249, 16.1-284.1, 16.1-291, 16.1-322.7, 16.1-309.9, and 16.1-309.10 of the Code of Virginia), juvenile group homes funded through Virginia

Juvenile Community Crime Control Act (VJCCCA) (§§ 16.1-309.9 and 16.1-309.10 of the Code of Virginia), juvenile halfway houses (§ 66-24 of the Code of Virginia), and juvenile correctional center (JCCs), including juvenile books camps (§ 66-13 of the Code of Virginia) and privately managed JCCs (§ 66-25.3 of the Code of Virginia).

The department is vested with the duty to ensure compliance with standards set by the board. Section 16.1-249 of the Code of Virginia requires juvenile secure detention centers, group homes, and any other residential placement wherein any alleged delinquent juveniles are placed pursuant to an order by the court to be "approved by" the department. Additionally, post-dispositional detention centers in juvenile secure detention centers must be certified pursuant to § 66-25.4 of the Code of Virginia and residential facilities utilized for the care of juveniles in direct state care must be certified pursuant to § 66-24 of the Code of Virginia. Moreover, § 16.1-309.9 of the Code of Virginia authorizes the board to "prohibit, by its order, the placement of juveniles in any place of residence which does not comply with the minimum standards. It may limit the number of juveniles to be detained or housed in a detention home or other facility and may designate some other place of detention or housing for juveniles who would otherwise be held therein."

Additionally, the following sections of the Code of Virginia require the board to promulgate regulations for specific juvenile justice programs:

§ 16.1-233 requires the board to regulate CSU staff, including their appointment and function, with the goal of establishing, as much as practicable, uniform services for juvenile and domestic relations courts throughout the Commonwealth.

§ 16.1-234 requires the director to ensure that the minimum standards established by the board for CSUs are adhered to by state-operated CSUs.

§ 16.1-309.9 requires the board to regulate the "development, implementation, operation, and evaluation of the range of community-based programs, services, and facilities authorized" by VJCCCA. This section also requires the department to "periodically review all services established and annually review expenditures."

§ 16.1-309.10 authorizes the board to visit, inspect, and regulate detention centers, group homes, and other residential care facilities "for children in need of services or delinquent, or alleged delinquent established by a county, city, or any combination thereof."

§ 16.1-322.7 requires the board to "make, adopt and promulgate regulation" governing the operation of local or regional detention centers. This section also requires a regulation to cover the "methods of monitoring contractor-operated" facilities "by an appropriate state or local governmental entity or entities."

§ 66-13 allows the department "to establish, staff and maintain facilities for the rehabilitation, training and confinement" of juveniles committed to the department. This section also requires the board to set standards for boot camps.

§ 66-24 establishes the board as the licensing agency for "group homes or residential facilities providing care of juveniles in direct state care" and requires the board to "promulgate regulations for licensure or certification of community group homes or other residential care facilities that contract with or are rented for the care of juveniles in direct state care."

§ 66-25.4 authorizes the board to promulgate regulations governing privately operated JCCs.

Several of the aforementioned sections require the board to promulgate specific regulations; however, none specifically require the board to issue regulations governing the regulatory process generally. Thus, the enactment of the Certification Regulation is permissive. Nevertheless, the board and the department have followed a Certification Regulation since 1992 (before the department separated from the Department of Corrections). While there is no specific requirement for a Certification Regulation, the board and the department have continued this regulatory chapter as it is important to have clear, concise, and consistent rules, rights, and responsibilities for the involved parties throughout the Commonwealth, particularly in light of the fact that over 20 juvenile group homes, 24 juvenile secure detention centers, and three CSUs are locally or commission-operated.

**Purpose:** The Regulations Governing the Monitoring, Approval, and Certification of Juvenile Justice Programs (the "Certification Regulation") sets forth the process by which the department and the board monitor compliance with the regulatory provisions applicable to residential facilities (local and state-operated), CSUs, and nonresidential programs and services in Virginia's juvenile justice system. It establishes (i) how the board will measure compliance with its regulations; (ii) thresholds for various regulatory actions available to the board; and (iii) minimum requirements for the department, as the board's regulatory agent, to monitor programs and report its findings. The regulation also provides for scheduled audits and unscheduled visits to ensure compliance with applicable regulations; an administrative review of audits; an appeals process in cases of disagreement with audit findings; and the issuance of variances under certain conditions.

Per the requirements in §§ 2.2-4017 and 2-2-4007.1 of the Code of Virginia and Executive Order 36 (2006), the department is required to conduct a "periodic review." The purpose of this review is to determine (1) whether the regulation is supported by statutory authority (as determined by the Office of the Attorney General) and (2) that the regulation is (a) necessary for the protection of public health, safety, and welfare; and (b) clearly written and easily understandable. This review must be completed every four

years. The last comprehensive review of the Certification Regulation was completed in September 2003. Thus, the regulation must be reviewed in order to maintain compliance with the applicable statutes and Executive Order.

Additionally, the board is currently revamping its regulatory scheme relating to the requirements for residential programs regulated by the board (JCCs, juvenile secure detention centers, and juvenile group homes and halfway houses). The primary intent of this residential regulatory overhaul is to reduce confusion in applying the regulatory requirements in each type of facility. The existing regulatory provisions have been examined to determine whether each was (i) appropriate for the type of facility; (ii) clear in its intent and effect; and (iii) necessary for the proper management of the facility. Amendments were recommended to accommodate the type of facility's specific needs and to enhance program and service requirements to best provide for the residents. These regulations (6VAC35-71 for JCCs; 6VAC35-101 for juvenile secure detention centers; and 6VAC35-41 for juvenile group homes and halfway houses) are currently undergoing the Executive Branch review at the final stage of the regulatory process.

One of the changes approved by the board in the residential regulatory overhaul was to draft each regulation (one for each "type" of facility regulated) with the requirements for each facility, facility administrator, provider, or governing authority. In so doing, any responsibilities of the department, the regulatory authority, or the board currently included in the existing regulatory scheme (the Standards for Juvenile Residential Facilities (6VAC35-140) and the Standards for the Interim Regulation of Children's Residential Facilities (6VAC35-51)) are proposed to be removed (i.e., issuance of licenses/certification and sanction). It was determined that any appropriate provisions relating to the certification and licensure process should be contained in the Certification Regulation as it governs the process of regulating and certifying these facilities. Thus, the Certification Regulation must be amended to incorporate the necessary provisions currently provided for in other regulations. Since the Certification Regulation is (i) scheduled for its required periodic review and (ii) should be amended to incorporate those provisions deleted from the residential regulations applicable to the department and the board, the regulation will undergo a comprehensive review of each provision for appropriateness, effectiveness, clarity in intent, and effect, and will be modified to provide for all regulatory duties and responsibilities of the department and the board in the residential and nonresidential certification processes.

Finally, under the current regulation, the department conducts monitoring visits and audits of programs and facilities regulated by the board and the board makes the determination of whether a program or facility should be certified and, if so, the duration of the certification. In the current Certification Regulation, 6VAC35-20-100 details the actions that may be taken by the board regarding a program's or facility's



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# Regulations

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certification status. What action may be taken is dependent upon any findings of noncompliance determined during the audit completed by department personnel.

Since the last review of the regulation, the authority to approve and certify a facility was reexamined to determine whether the certification function was administrative in nature and should be managed and whether certificates should be issued by the department rather than the board. The following sections of the Code of Virginia were examined: §§ 16.1-234, 16.1-235, 16.1-249, 16.1-278.4, 16.1-278.8, 16.1-284.1, 16.1-291, 16.1-309.9, 16.1-309.10, 66-10, 66-13, 66-24, and 66-25.1:3. After consultation with the Office of the Attorney General and Secretary of Public Safety, it was determined that (i) there is no general certification requirement (however, certification is required by the Department of Social Services and the Comprehensive Services Act for placement of juveniles in group homes and other certifications are required as stated in the "legal basis" section); (ii) the board establishes the substantive standards on which the programs and facilities are audited; (iii) the department ensures that the programs and facilities meet the board's standards; and (iv) the board monitors the activities and effectiveness of the department and may prohibit placement or limit the number of juveniles placed in a facility that does not comply with its standards. The proposed language reflects this interpretation of the certification authority of the department, with oversight by the board.

Having programs and facilities in compliance with their regulatory requirements is essential to the health, safety, and welfare of juveniles served by or placed in the programs or facilities and staff employed therein. The Certification Regulation and proposed changes strengthen the process for monitoring, approving, and certifying programs and facilities in the juvenile justice system. The proposed changes establish clear, concise, and consistent rules, rights, and responsibilities for the involved parties throughout the Commonwealth, particularly in light of the fact that over 20 juvenile group homes, 24 juvenile secure detention centers, and three CSUs are locally or commission-operated. Having such a regulation is essential to protect the safety of juveniles participating in programs, and receiving services from and residing in juvenile residential facilities or nonresidential juvenile justice programs.

There are no known environmental benefits.

**Substance:** The following changes have been proposed for the Regulation Governing the Monitoring, Approval, and Certification of Juvenile Justice Programs (the "Certification Regulation"):

1. 6VAC35-20-10 (Definitions): Update the definitions and terms for clarity and consistency with other regulations promulgated by the board and current standards of practice. Delete several definitions considered unnecessary in the regulation or not needing to be defined due to the common usage of the term. Add other definitions for

clarity and consistency in usage throughout the regulation. Amend other definitions to conform:

a. Delete the following definitions: (i) Administrative probation; (ii) Administrative review; (iii) Certified; (iv) Mandatory standards; (v) Plan of action; (vi) Random sampling; (vii) Substantial compliance; (viii) Systemic deficiency; and (ix) Unresolved life, health, or safety violation.

b. Add the following definitions: (i) Audit team leader, (ii) Certification audit, (iii) Compliance documentation, (iv) Conditional certification, (v) Corrective action plan, (vi) Critical regulatory requirements, (vii) Juvenile residential facility or facility, (viii) Monitoring review, (ix) Office on Youth, (x) Regulatory requirement, (xi) Summary suspension order, (xii) VJCCCA program, (xiii) VJCCCA program or office on youth audit, (xiv) VJCCCA program or office on youth audit report, and (xv) Written.

2. 6VAC35-20-30 (Purpose):

a. Amend to include all Code of Virginia citations providing for the monitoring, approval, and certification of programs and facilities.

b. Clearly distinguish between the certification of CSUs and facilities and monitoring of VJCCCA programs and offices on youth.

c. State the Board's role in reviewing certification audit reports when a CSU or facility is in noncompliance with a regulatory requirement.

3. 6VAC35-20-35 (Guidance documents):

Incorporate technical changes to conform with other changes in the regulation.

4. 6VAC35-20-36 (Program or facility relationship to regulatory authority):

Incorporate the basic components of 6VAC35-51-230 (Relationship to regulatory authority) in the board's Regulation Governing Residential Programs as they are recommended for deletion in the pending overhaul of the residential regulations.

5. 6VAC35-20-36.1 (Department response to reports of health, welfare, or safety violations):

Insert the current provisions, with technical amendments, of 6VAC35-20-65. This is recommended because placement in this section is chronologically logical.

6. 6VAC35-20-37 (Director's authority to take immediate administrative action):

a. Make technical changes.

b. Add the ability for notifications to be by mail, electronic mail, or hand delivery.

7. 6VAC35-20-50 (Preaudit process for certification audits):

- a. Rework the provision regarding notice to the CSU or facility administrator to reflect current practice.
  - b. Delete the provision relating to an administrative review audit as these audits are never performed.
8. 6VAC35-20-60 (Monitoring of programs and facilities):
- a. Reduce the number of required on-site monitoring visits from two (one announced, one unannounced) to one scheduled per year.
  - b. Allow additional monitoring visits to be conducted at the request of the board, the department, or a program or facility administrator.
9. 6VAC35-20-61 (Self-audit of programs and facilities subject to the certification audit):
- Add a requirement for CSUs and facilities to complete self-audits each year, except in the year subject to a certification audit.
10. 6VAC35-20-63 (Reports of monitoring visits):
- Delete this section. The department must report to the board any health, welfare, and safety violation (per 6VAC35-20-36.1).
11. 6VAC35-20-65 (Reports required of life, health, and safety violations):
- a. Move subsection A to 6VAC35-20-36.1.
  - b. Delete subsection B. The board's ability to decertify is provided for in 6VAC35-20-115.
12. 6VAC35-20-67 (Disputes of noncompliance findings):
- Move section to 6VAC35-20-90 C.
13. 6VAC35-20-69 (Newly opened facilities and new construction, expansion, or renovation of residential facilities):
- a. Add a requirement for the potential facility administrator to request a review for conditional certification.
  - b. Cross-reference the applicable substantive regulations for facilities and the certification actions in 6VAC35-20-100.
14. 6VAC35-20-75 (Certification of individual programs or facilities):
- a. Designate the director or designee as the individual responsible for issuing certificates.
  - b. Move provisions relating to post-certification action to and insert certificate action provisions currently provided for in 6VAC35-20-100.
15. 6VAC35-20-80 (Certification audit procedures):
- a. Clarify the burden of proof requirements.
  - b. Incorporate the requirement for the certification audit to include a personal visit to the program or facility.
16. 6VAC35-20-85 (Determining compliance with individual regulatory requirements):
- a. Create a new section specifically addressing the determination of compliance with individual regulatory requirements.
  - b. Incorporate the standards for compliance currently utilized by the Department of Corrections.
17. 6VAC35-20-90 (Certification audit findings):
- a. Move requirements relating to certification audit reports and corrective action plans (in subsection C) to 6VAC35-20-91.
  - b. Require notice of the findings to the program administrator, the program's or facility's supervisory or governing authority, and the director or designee.
  - c. Incorporate the post-audit actions currently provided in 6VAC35-20-67 and 6VAC35-20-75.
18. 6VAC35-20-91 (Corrective action plans and certification audit reports):
- a. Create a separate section containing all provisions relating to corrective action plans and certification audit reports.
  - b. Add components currently provided for in department procedures relating to timelines and required report components.
19. 6VAC35-20-92 (Variance request):
- Include a requirement that any variance requested as a result of a finding of noncompliance in an audit must be submitted with the corrective action plan to be implemented if the variance is denied.
20. 6VAC35-20-93 (Waivers):
- Clearly delineate circumstances when a waiver may be granted.
21. 6VAC35-20-94 (Appeal process):
- a. Amend the time frames for submission and response.
  - b. Add components currently provided for in department procedures.
  - c. Include a requirement that any appeal of a finding of noncompliance does not negate the requirement to submit a corrective action plan.
22. 6VAC35-20-100 (Certification action):
- a. Require the department to notify the program or facility administrator of the audit team's recommended certification action and the time, date, and location when certification action will be taken.
  - b. State that the facility administrator has the right to attend the director's or designee's review of the certification audit report and determination of certification action.
  - c. Set specific criteria and parameters regarding issuance of certificates depending on level, duration, and frequency of noncompliance.
23. 6VAC35-20-110 (Notice of certification action):

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# Regulations

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a. Delete the requirement for facilities to post the certificate. This is recommended for incorporation in the pending residential regulation overhaul.

b. Move the requirement to provide variance documentation to 6VAC35-20-80.

24. 6VAC35-20-115 (Board review of programs and facilities found in noncompliance):

Create a new section providing for the board's authority to review audit reports and to take appropriate action when a program or facility is found to be in noncompliance with a regulatory requirement.

25. 6VAC35-20-120 (Actions following decertification or denial of certification):

Clarify actions to be taken after a program or facility is decertified or denied certification; specifically, the provisions relating to department-operated and local, regional, and privately operated facilities.

26. 6VAC35-20-150 (Critical regulatory requirements for juvenile residential facilities):

Delete reference to outdated "mandatory requirements" and require the board to separately define critical regulatory requirements.

27. 6VAC35-20-200 (Monitoring of VJCCCA programs or offices on youth):

Require the department to set a schedule for monitoring VJCCCA programs and offices on youth.

28. 6VAC35-20-210 (VJCCCA programs and offices on youth self-evaluations):

Require VJCCCA programs and offices on youth to complete self-assessments.

29. 6VAC35-20-220 (VJCCCA program and office on youth audits):

Set criteria for VJCCCA program and office on youth audits.

30. 6VAC35-20-230 (VJCCCA program and office on youth audit findings):

a. Require the department to provide audit findings to the program contact with a copy to the program's supervisory authority.

b. Allow for program appeals of a finding of noncompliance.

c. Require the department to monitor the progress of any program found in noncompliance.

31. 6VAC35-20-240 (Effect of VJCCCA program or office on youth noncompliance):

State the specific effects of a finding of noncompliance.

Issues: Having programs and facilities in compliance with their regulatory requirements is essential to the health, safety, and welfare of juveniles served by or placed in the programs or facilities and staff employed therein. The Certification

Regulation and proposed changes strengthen the process for monitoring, approving, and certifying programs and facilities in the juvenile justice system. The proposed changes establish clear, concise, and consistent rules, rights, and responsibilities for the involved parties throughout the Commonwealth, particularly in light of the fact that over 20 juvenile group homes, 24 juvenile secure detention centers, and three CSUs are locally or commission-operated. Having such a regulation is essential to protect the safety of juveniles participating in programs, and receiving services from and residing in juvenile residential facilities or nonresidential juvenile justice programs.

The proposed amendments have been vetted through an advisory committee consisting of individuals who would be affected by the changes. The proposed amendments would streamline the reporting requirements and would not affect the quality of services provided. The proposed amendments do not pose any disadvantages to the public or the Commonwealth.

### Department of Planning and Budget's Economic Impact Analysis:

Summary of the Proposed Amendments to Regulation. The Board of Juvenile Justice (the Board) proposes to 1) transfer the certification authority from the Board to the Director of the Department of Juvenile Justice, 2) replace the unannounced monitoring visits with self audits for Court Service Units (CSUs) and facilities, 3) require Virginia Juvenile Community Crime Control Act (VJCCCA) programs and offices on youth to complete self-assessments, 4) reduce the time frame to resolve a certification appeal from 15 days to 10 days, 5) require the notice of the audit findings be sent to additional authorities, 6) remove the list of critical requirements for juvenile residential facilities from the regulations, and 7) clarify and reorganize numerous existing requirements.

Result of Analysis. There is insufficient data to accurately compare the magnitude of the benefits versus the costs. Detailed analysis of the benefits and costs can be found in the next section.

Estimated Economic Impact. These regulations establish the process by which the Department of Juvenile Justice (the Department) and the Board monitor compliance with the regulatory provisions applicable to residential facilities, Court Service Units (CSUs), and nonresidential programs and services in Virginia's juvenile justice system.

One of the proposed changes will move the certification authority from the Board to the Department. According to the Department, in consultation with the Office of the Attorney General and Secretary of Public Safety, a reexamination of the legal authority to approve and certify a facility revealed that the certification authority lies with the Department, with oversight by the Board when there is finding of noncompliance. Thus, the proposed changes will make the Director or designee responsible for issuing certifications

when certification criteria are met. However, when a program or facility is found in noncompliance with applicable regulatory requirements the Board's oversight will be required in the certification process.

This change will transfer some of the authority from the Board to the Director. While there are no significant direct economic effects expected from this particular change, this change is procedurally significant. Also, the Department notes that the Board may not have the subject matter expertise as the Director would have. Moreover, certification decisions may be made faster by the Director than by the Board since the Board meets a few times over a year while the Director or his designee would be available throughout the year. Finally, it could be argued that by approving these proposed changes, the Board reveals its willingness to transfer this authority to the Director.

Another proposed change will reduce the number of required onsite monitoring visits from two (one announced, one unannounced) to one scheduled per year for CSUs and facilities, except in the year subject to certification audit. However, the proposed changes also add that CSUs and facilities perform self audits. Thus, the proposed changes essentially replace the unannounced monitoring visits with the self audits. According to the Department, this change will replace approximately 35-40 unannounced monitoring visits with self audits. However, the Department indicates that many facilities have already been voluntarily conducting self audits. Thus, only a few facilities are expected to incur additional compliance costs as a result of this change. Also, the Department believes that cost of unannounced monitoring visits and self audits are comparable for the facilities. However, a reduction in administrative costs of the Department is expected as self audits cost the Department less than the unannounced on-site monitoring visits.

The proposed changes will also require VJCCCA programs and Offices on Youth to complete self-assessments. Currently, there are no required unannounced monitoring visits for these programs, but there are certain reporting requirements in the Virginia Juvenile Community Crime Control Act manual. According to the Department, the intent of the self audit is to capture the intent of the manual requirements. Thus, the Department does not expect additional compliance costs on these programs and localities in approximately 77 jurisdictions.

Another proposed change will reduce the time frame to resolve a certification appeal from 15 days to 10 days. This change may add to the administrative costs of the Department due to shortened time frame to make appeal decisions, but it is expected to help resolve a deficiency quicker. Under the regulations, facilities do not have to take the corrective action plans while the appeal is under review.

The proposed changes will also require the notice of the audit findings be sent to the program's or facility's supervisory or governing authority and the Director or designee in addition

to the program administrator. While there may be small administrative costs associated with issuing additional notices, the Department expects that the dissemination of notices to additional authorities would help in addressing the deficiencies quicker.

Finally, the proposed changes will remove the list of critical requirements for juvenile residential facilities from the regulations and establish that "the board shall designate which regulatory requirements will be classified as critical regulatory requirements." According to the Department, the current list is outdated and the Board needs flexibility since changes to this list may occur frequently. Critical requirement designation is significant because 100 percent compliance is required with the critical requirements for certification. With the proposed change, the Board will be able to change what is considered as a critical requirement and possibly change a facility's certification status without going through the regulatory review process. Ultimate economic effects of this change will depend on what the Board designates as a critical requirement. Since there is no information on what changes the Board may make to the list in the future, this change creates uncertainty for the regulated programs and facilities.

All of the remaining changes are either clarification or reorganization of existing requirements and are not expected to create any significant economic effects other than improving the clarity of the regulations.

**Businesses and Entities Affected.** There are 24 locally or commission-operated juvenile secure detention centers, two halfway houses, 23 locally-operated group homes, 77 local jurisdictions for programs, six state Juvenile Correctional Centers, 32 state-operated CSUs, and three locally-operated CSUs.

**Localities Particularly Affected.** The proposed regulations apply throughout the Commonwealth.

**Projected Impact on Employment.** Replacing the unannounced monitoring visits with self audits for Court Service Units and facilities is expected to reduce the Department's demand for labor.

**Effects on the Use and Value of Private Property.** No significant impact on the use and value of private property is expected.

**Small Businesses: Costs and Other Effects.** No direct significant costs and other effects on small businesses are expected.

**Small Businesses: Alternative Method that Minimizes Adverse Impact.** No direct adverse impact on small businesses is expected.

**Real Estate Development Costs.** No significant impact on real estate development costs is expected.

**Legal Mandate.** The Department of Planning and Budget (DPB) has analyzed the economic impact of this proposed regulation in accordance with §2.2-4007.04 of the Administrative Process Act and Executive Order Number 14

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# Regulations

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

Agency's Response to Economic Impact Analysis: The responsible Virginia Board of Juvenile Justice agency representatives have reviewed the Department of Planning and Budget's (DPB) Economic Impact Analysis of 6VAC35-20 - Regulations Governing the Certification Process (Certification Regulation). Regarding DPB's assessment that removing the critical requirements from the Certification Regulation creates uncertainty for the regulated programs and facilities, the Department of Juvenile Justice (Department) disagrees.

Under the current regulatory scheme, there is confusion as to what should be designated critical regulatory requirements because they are listed in the Certification regulation and not in the substantive regulations (6VAC35-51 and 6VAC35-140). Thus, when the substantive regulations are amended simultaneous changes may not be made to the Certification Regulation's designations. Removing the designations of critical requirements from the Certification Requirements will reduce confusion for the regulated entities. Additionally, in consultation with the regulated entities, it was agreed that having the Board retain the ability to designate would be appropriate as the decisions would be made in open meetings, subject to notice and public comment.

The agency has no additional comment regarding DPB's analysis.

## Summary:

*The proposed amendments include (i) separating the requirements for the certification of court service units and facilities and the auditing of VJCCCA programs and offices on youth; (ii) making the director or designee responsible for issuing certifications, with oversight by the board, when a program or facility is found in*

*noncompliance with applicable regulatory requirements; (iii) reducing the number of required on-site monitoring visits from two (one announced, one unannounced) to one scheduled per year; (iv) adding a requirement for court service units and facilities to perform self audits; (v) clarifying pre-audit, audit, and post-audit procedures, including setting specific time frames; (vi) incorporating the requirements for corrective action plans and certification audit reports by including some requirements from the existing procedures and practices; (vii) setting specific criteria and parameters regarding issuance of certificates depending on level, duration, and frequency of noncompliance; (viii) adding a requirement for the program's or facility's supervisory or governing authority to be provided with notice of the certification action; (ix) incorporating the parameters for the board's review of programs and facilities found in noncompliance; (x) reworking the section regarding actions following decertification to track statutory authority; and (xi) removing the outdated list of "mandatory standards."*

## CHAPTER 20

### REGULATIONS REGULATION GOVERNING THE MONITORING, APPROVAL, AND CERTIFICATION OF JUVENILE JUSTICE PROGRAMS AND FACILITIES

#### Part I

#### Definitions and General Provisions

#### **6VAC35-20-10. Definitions.**

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

~~"Administrative probation" means the status granted to a program or facility in an emergency situation at the discretion of the director pending the next regularly scheduled board meeting.~~

~~"Administrative review" means the audit of the administrative records of a local jurisdiction or governing commission. The administrative review involves only a review of documentation housed at a central office.~~

"Appeal of a finding of noncompliance" means the action taken by a ~~unit~~ facility or program administrator after ~~an~~ a certification audit when there is disagreement with a ~~team~~ finding of noncompliance with an individual regulatory requirement.

"Audit team leader" means the person designated by the director or designee to organize and facilitate the certification audit or the audit of a VJCCCA program or office on youth.

"Board" means the Virginia Board of Juvenile Justice.

"Certification" or "certified" means the ~~board's~~ formal finding that a program ~~meets (i) all mandatory standards; (ii) an acceptable percentage of all other standards as indicated in the chart at 6VAC35-20-100; and (iii) the requirements of applicable board policies; and~~ or facility is consequently

approved to operate for a specific period of time as provided for in 6VAC35-20-100.

"Certification action" means the department's decision to issue or deny certification or to decertify a program or facility as provided for in 6VAC35-20-100 or the board's decision to take action pursuant to 6VAC35-20-115.

"Certification audit" means ~~an on-site visit by~~ the process by which designated personnel ~~to~~ assess a program's or facility's compliance with applicable ~~board standards and policies~~ regulatory requirements, which includes an on-site visit, the results of which are reported ~~to the board for~~ in a certification audit report for certification action as provided for in 6VAC35-20-100. All facilities and court service units regulated by the board shall be subject to certification audits.

"Certification audit report" ~~or "audit report"~~ means the official report of certification audit findings prepared ~~for review by the board~~ by the audit team leader as provided for in 6VAC35-20-90.

"Certification status" means the type of certification ~~approved by the board for~~ issued to a given program or facility, ~~including~~ which includes the period of time specified in the certificate, during which the program or facility is approved to operate and must maintain its ~~standards~~ compliance levels and have acceptable plans of action compliance with its regulatory requirements and any corrective action plan.

~~"Certified" means that the board has approved a program to operate under the conditions set out in 6VAC35-20-100.~~

"Compliance" means meeting the requirements of a standard or an applicable board policy.

"Compliance documentation" means specific documents or information including records, reports, observations, and verbal responses to establish or confirm compliance with a regulatory requirement by a program or facility.

"Conditional certification" means a temporary certification status issued to a new or newly opened facility as provided for in 6VAC35-20-100.

"Corrective action plan" means a written document that, in accordance with 6VAC35-20-91, states what has been or will be done to bring all deficiencies into compliance with regulatory requirements.

"Critical regulatory requirements" means those regulatory requirements for programs or facilities, as defined by the board, that must be maintained at 100% compliance. Critical regulatory requirements were previously termed "mandatory standards."

"Decertified" means ~~that a previously certified program does not meet the requirements to be certified and is no longer approved to operate~~ a status imposed in accordance with 6VAC35-20-120 when it is determined that a program or facility has not met an acceptable percentage of compliance with its regulatory requirements as provided for in 6VAC35-20-85.

"Deficiency" and "noncompliance" means that the program or facility (i) does not meet, or has not demonstrated that it meets, ~~the requirements of a board standard or policy~~ regulatory requirements or (ii) does not comply with the Virginia Juvenile Community Crime Control Act local plan approved by the board.

"Department" means the Virginia Department of Juvenile Justice.

"Director" means the Director of the Department of Juvenile Justice.

~~"Life, health,~~ "Health, welfare, or safety violation" means any action or omission that ~~results in noncompliance with a board standard or policy and~~ causes an immediate and ~~potentially serious~~ substantial threat to the ~~life, health,~~ welfare, or safety of the ~~youth juveniles~~ or staff in ~~juvenile residential programs~~ facilities.

"Juvenile residential facility" or "facility" means a publicly or privately operated facility or placement where 24 hour-per-day care is provided to residents who are separated from their legal guardians and that is certified pursuant to this chapter. ~~As used in this regulation, the term includes juvenile group homes and halfway houses, juvenile secure detention centers, and juvenile correctional centers.~~

~~"Mandatory standards" means those standards of performance for programs as defined by the board which must be maintained in 100% compliance at all times.~~

"Monitoring review" means a review by designated department personnel assessing the program's or facility's compliance with regulatory requirements. A monitoring review may be conducted via electronic means and does not require on-site examination of the program or facility. A monitoring review may be done in conjunction with a program's or facility's self-audit, which is provided for in 6VAC35-20-61.

"Monitoring visit" means an on-site ~~review evaluation and~~ inspection by designated personnel to assess a program's or facility's compliance with ~~board approved standards, policies and, when applicable, Virginia Juvenile Community Crime Control Act local plan~~ regulatory requirements.

"Newly opened facility" means ~~both~~ (i) a facility that is newly constructed ~~and or~~ (ii) an existing facility that is being placed in service as a ~~juvenile residential-program~~ facility.

"Office on Youth" means nonresidential programs funded via the Virginia Delinquency Prevention and Youth Development Act (Chapter 3 (§ 66-26 et seq.) of Title 66 of the Code of Virginia).

~~"Plan of action" means a written document that explicitly states what has been or will be done to bring all deficiencies into compliance with board standards and policies.~~

"Probation" ~~"Probationary certification"~~ means the temporary status granted to a program ~~by the board or facility~~ to provide a period of time in which to ~~come into~~ demonstrate compliance with ~~standards~~ regulatory requirements.

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# Regulations

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"Program" means a ~~juvenile residential facility, court service unit, or a nonresidential service subject to standards or policies of the board~~ applicable regulatory requirements. For the purpose of this regulation, VJCCCA programs and offices on youth are not included in this definition.

"Program or facility administrator" means the ~~staff member individual~~ responsible for the operation operations of a program, or facility or institution subject to regulatory requirements.

"Random sampling" means a ~~system for selecting programs for monitoring visits, by which all programs in a given category have a similar likelihood of being selected for a visit, but which may not result in any given program receiving a monitoring visit during any given period of time.~~

"Regulatory requirement" means a provision of a regulation promulgated by the board to which a program or facility must adhere. A section, subsection, or subdivision of a regulation may include multiple regulatory requirements as provided for in 6VAC35-20-85.

"Substantial compliance" means that the ~~program meets all applicable mandatory standards and at least 90% of all other applicable standards.~~

"Summary suspension order" means an order issued by the ~~director in accordance with § 66-24 of the Code of Virginia and 6VAC35-20-37 temporarily suspending a program's or facility's certification.~~

"Systemic deficiency" means that ~~deficiencies have been found in three or more separate but related standards and have been cited by certification personnel as indicating that a program may have significant problems in a given area such as recordkeeping, training, health services, social services, security, etc.~~

"Unresolved life, health or safety violation" means a ~~life, health or safety violation that is not corrected in an approved corrective plan of action or that has recurred after the life, health or safety violation was noted during an interim monitoring visit.~~

"Variance" means a ~~board action that relieves a program or facility from having to meet a specific standard regulatory requirement or develop a corrective action plan of action for that standard, either permanently or regulatory requirement for a determined period of time, when (i) waiving these requirements will not result in a threat to the life, health or safety of juveniles or staff; (ii) enforcement will create an undue hardship; (iii) the standard is not specifically required by statute or by the regulations of another government agency; (iv) the standard is not designated as mandatory by the board; and (v) juveniles' care or services would not be adversely affected.~~

"VJCCCA program" means a nonresidential program established under the Virginia Juvenile Community Crime Control Act (Article 12.1 (§ 16.1-309.2 et seq.) of Chapter 11 of Title 16.1 of the Code of Virginia).

"VJCCCA program or office on youth audit" means the on-site visit by designated department personnel to assess a program funded through the Virginia Juvenile Community Crime Control Act (Article 12.1 (§ 16.1-309.2 et seq.) of Chapter 11 of Title 16.1 of the Code of Virginia) or the Virginia Delinquency Prevention and Youth Development Act (Chapter 3 (§ 66-26 et seq.) of Title 66 of the Code of Virginia) for compliance with the regulatory requirements as provided for in 6VAC35-150 (Regulation for Nonresidential Services) and 6VAC35-60 (Minimum Standards for Virginia Delinquency Prevention and Youth Development Act Grant Programs), as applicable.

"VJCCCA program or office on youth audit report" means an official report of a VJCCCA program or office on youth audit.

"Waiver" means a formal statement from the department temporarily excusing a program or facility from meeting a ~~nonmandatory standard~~ noncritical regulatory requirement pending board action on a formal variance request.

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

## **6VAC35-20-30. Purpose.**

This regulation prescribes how, in accordance with ~~Code of Virginia §§ 16.1-234, 16.1-309.1, 16.1-249, 16.1-309.9 B, 16.1-309.10, 16.1-349, and 66-10, 66-24, and 66-25.1:3 of the Code of Virginia,~~ (i) the ~~Board and Department of Juvenile Justice~~ department will monitor and ~~approve and audit~~ audit juvenile residential facilities, programs, VJCCCA programs, and offices on youth; (ii) the department will certify residential facilities and ~~nonresidential programs~~ state-operated and local court service units that are part of the Commonwealth's juvenile justice system; and (iii) the board will review certification audit reports of programs and facilities found in noncompliance with applicable regulatory requirements.

## **6VAC35-20-35. Guidance documents.**

To help programs and facilities meet all regulatory and ~~policy~~ requirements, the department shall prepare guidance documents compiling all ~~standards and policies~~ regulatory requirements applicable to each type of program or facility subject to this chapter and stating how compliance will be assessed. The guidance documents will serve as the basis for monitoring visits, monitoring reviews, certification audits, and the board's certification action and VJCCCA program or offices on youth audits.

## **6VAC35-20-36. Program or facility relationship to regulatory authority.**

A. The program or facility shall submit or make available to the audit team leader such reports and information required to establish compliance with applicable regulatory requirements. Documentation supporting compliance with regulatory requirements shall be retained by the program or facility from

the date of the previous certification audit or VJCCCA program or office on youth audit.

B. The program or facility administrator shall notify the director or designee within five business days of any significant change in administrative structure or newly hired chief administrative officer or program or facility administrator or director.

C. The program or facility administrator shall, as required in the applicable guidance documents as prescribed in 6VAC35-20-35, notify the director or designee of the following:

1. Any serious incidents affecting the health, welfare, or safety of citizens, individuals under the supervision of the department, or staff;
2. Lawsuits against or settlements relating to the health, welfare, safety, or human rights of residents; and
3. Any criminal charges or reports of suspected child abuse or neglect against staff relating to the health, welfare, safety, or human rights of residents.

**6VAC35-20-36.1. Department response to reports of health, welfare, or safety violations.**

A. Whenever the department becomes aware of a health, welfare, or safety violation, the department shall take immediate action to correct the situation if not already done by the program or facility. The department's actions may include, but are not limited to, the following:

1. Reporting the situation to child protective services, the Virginia State Police or the law-enforcement agency with jurisdiction, or other enforcement authorities, as applicable and appropriate; or
2. Taking any action authorized in 6VAC35-20-37 for violations in a juvenile residential facility.

B. The department shall report to the board no later than its next regularly scheduled meeting (i) the nature and scope of the health, welfare, or safety violation and (ii) the action taken by the department or the program or facility to correct the violation.

**6VAC35-20-37. Director's authority to take immediate administrative action.**

A. Nothing in this regulation shall be construed to limit the director's authority to take immediate administrative action in accordance with law whenever (i) evidence is found of any ~~life,~~ health, welfare, or safety violation or (ii) a program or facility is not in ~~substantial~~ compliance with ~~board-approved standards, policies, regulatory requirements or local plan for the Virginia Juvenile Community Crime Control Act programs requirements.~~ Such administrative action may include, but is not limited to (a) withholding funds; (b) removing juveniles from the program or facility; ~~or~~ (c) placing the program or facility on ~~administrative probation~~ probationary certification status for up to six months pending ~~certification action~~ review by the board pursuant to 6VAC35-20-115; or (d) summarily suspending the certificate pursuant

to subsection B of this section. In taking such action, the department shall notify the program or facility administrator, the administrative entity ~~that to which~~ the program or facility reports ~~to~~, and the board, in writing, of the reason for the administrative action and the action the program or facility must take to correct the ~~situation~~ violation.

B. In accordance with subsection A of this section and pursuant to the provisions set forth in § 66-24 of the Code of Virginia, the director may issue a preliminary summary order of suspension order of the ~~license or~~ certificate of any ~~group home or the juvenile~~ residential facility ~~so~~ regulated by the ~~department~~ board as follows:

1. ~~Conditions~~ A preliminary order of suspension may be issued when conditions or practices ~~existing~~ exist in the ~~home or~~ facility posing that pose an immediate and substantial threat to the health, welfare, or safety, ~~and welfare~~ of the residents ~~include~~ including, but not limited to, the following:

- a. Violations of any provision of applicable laws or applicable regulations made pursuant to such laws;
- b. Permitting, aiding, or abetting the commission of any illegal act in the regulated ~~home or~~ facility;
- c. Engaging in conduct or practices that are in violation of statutes related to abuse or neglect of children;
- d. Deviating significantly from the program or services for which a ~~license or~~ certificate was issued without obtaining prior written approval from the regulatory authority or failing to correct such deviations within the specified time; or
- e. Engaging in a willful action or gross negligence that jeopardizes the care or protection of the resident.

2. The director shall immediately upon issuance of the preliminary summary suspension order and without delay notify the ~~licensee or~~ certificate holder verbally and by in writing via (i) facsimile, (ii) electronic mail, or (iii) hand delivery of the issuance of the preliminary order of suspension and the opportunity for a hearing before the director or ~~his~~ designee within three ~~working~~ business days of the issuance of the preliminary summary ~~order of~~ suspension order. The chair of the board must be notified immediately when the director issues a preliminary summary suspension order. In accordance with 6VAC35-20-36.1, the director shall report the action taken to the board no later than its regularly scheduled meeting.

- a. The ~~licensee or~~ certificate holder may decline the opportunity for an appeal to the director or ~~his~~ designee.
- b. Whenever an appeal is requested and a criminal charge is also filed against the appellant involving the same conduct, the appeal process shall be stayed until the criminal prosecution is completed. During such stay, the ~~licensee's or~~ certificate holder's right of access to the records of the department regarding the matter being appealed shall also be stayed. Once the criminal



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# Regulations

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prosecution in court has been completed, the department shall advise the appellant in writing of his right to resume his appeal within the ~~timeframes~~ time frames provided by law and regulation.

3. The ~~licensee or~~ certificate holder may appear before the director or ~~his~~ designee by personal appearance or by telephone. Any documents filed may be transmitted by facsimile and the facsimile and any signatures thereon shall serve, for all purposes, as an original document.

a. Upon request, the department shall provide the appellant a summary of the information used in making its determination. Information prohibited from being disclosed by state or federal law or regulation shall not be released. In the case of any information being withheld, the ~~licensee or~~ certificate holder shall be advised of the general nature of the information and the reasons, of privacy or otherwise, that it is being withheld.

b. The director or ~~his~~ designee shall preside over the appeal. With the exception of the director, no person whose regular duties include substantial involvement with the certification ~~or licensing~~ of the facilities shall preside over the appeal.

(1) The ~~licensee or~~ certificate holder may be represented by counsel.

(2) The ~~licensee or~~ certificate holder shall be entitled to present the testimony of witnesses, documents, factual data, arguments, or other submissions of proof.

4. The director or ~~his~~ designee shall have the authority to sustain, amend, or reverse the preliminary summary suspension order. ~~If sustained or amended, the order is considered final.~~ The director or ~~his~~ designee shall notify the ~~licensee or~~ certificate holder in writing of the results of the appeal and of the right to appeal the final order to the appropriate circuit court within 10 days of the hearing decision. Notification of the results of the appeal before the director or ~~his~~ designee shall be mailed certified with return receipt to the ~~licensee or~~ certificate holder.

a. The chair of the board must be immediately notified when the director issues a final ~~order of~~ summary suspension order. In accordance with ~~6VAC35-20-65~~ 6VAC35-20-36.1, the director shall report the action taken to the board no later than its next regularly scheduled meeting ~~the action taken~~.

b. If the ~~licensee or~~ certificate holder is not satisfied, the ~~licensee or~~ certificate holder may dispute the noncompliance finding in accordance with ~~6VAC35-20-67~~ 6VAC35-20-90.

## Part II

### Certification Audits of Programs and Facilities

#### **6VAC35-20-50. Preaudit process for certification audits.**

A. At least six months in advance of ~~an~~ a certification audit, ~~personnel designated by the director~~ the department shall

notify each program or facility to be audited of the scheduled audit date and the name of the designated audit team leader.

B. ~~Up until~~ At least 90 days before the scheduled audit, the program or facility administrator may request that the audit be rescheduled. Except as provided in 6VAC35-20-100, audits, even if rescheduled, must occur before the expiration of the current certification, unless specifically approved by the director.

~~C. Audit team members shall be appointed and notified of their appointment at least 30 days prior to the scheduled audit. The program administrator of the agency to be audited shall receive a list of the team members.~~

~~D. At least 10 days prior to the scheduled audit, C. The audit team leader shall provide the program or facility administrator with a list of audit team members as soon as practicable, but no later than 10 days before the scheduled certification audit. Upon notification of the audit team members, the program or facility administrator may, for just cause, request that one or more members of the audit team be replaced. Every reasonable effort will be made to comply with the request. Any subsequent addition or substitution of the audit team members shall be communicated to the program or facility administrator as soon as practicable and may be made subject to the mutual agreement of the audit team leader and program or facility administrator.~~

~~E. In instances where several programs are operated under the administration of a single commission, the certification team and the program administrator may agree to an administrative review audit.~~

#### **6VAC35-20-60. Monitoring visits of programs and facilities.**

A. All ~~state and local~~ programs or facilities subject to standards regulations issued by the Board of Juvenile Justice board shall be subject to periodic, scheduled monitoring visits, ~~scheduled and~~ or monitoring reviews conducted in accordance with written department procedures. ~~Whenever deemed necessary, the board may require that a monitoring visit be conducted of any program.~~

B. The department shall annually ~~submit to the board~~ develop a plan for monitoring programs and facilities subject to certification audits, which shall provide for at least the following:

1. All ~~residential programs, court service units and offices on youth that are currently receiving state funding~~ programs and facilities that are subject to certification audits shall receive at least one ~~announced~~ scheduled monitoring visit per year. A certification audit ~~may~~ shall satisfy the requirement of a scheduled monitoring visit. ~~In addition, all residential programs and court service units shall receive at least one unannounced monitoring visit per year.~~

2. All ~~nonresidential programs established under the Virginia Juvenile Community Crime Control Act (Article~~

~~12.1 of Title 16.1 of the Code of Virginia) shall be reviewed at least once every two years to determine compliance with the approved local plans and standards promulgated by the board. Additional monitoring visits or monitoring reviews may be conducted at the request of the board, department, or program or facility administrator.~~

~~3. Individual nonresidential programs shall receive monitoring visits according to the department's annual plan, which may provide for random sampling of programs in various categories. However, during each calendar year at least one nonresidential program in each Virginia Juvenile Community Crime Control Act (VJCCCA) plan shall receive a monitoring visit.~~

**6VAC35-20-61. Self-audit of programs and facilities subject to certification audits.**

~~A. All programs and facilities subject to certification audits shall, in accordance with department procedures, conduct, except in the year the program or facility is subject to a certification audit, an annual self-audit for compliance with applicable regulatory requirements.~~

~~B. The self-audit reports shall be made available during the certification audit.~~

**6VAC35-20-63. Reports of monitoring visits. (Repealed.)**

~~The department shall report to the board in writing any significant deficiencies identified through monitoring visits or other means when a program has failed to take needed corrective action.~~

**6VAC35-20-65. Reports required of life, health and safety violations. (Repealed.)**

~~A. Whenever department personnel become aware of a life, health or safety violation, the department shall take immediate action to correct the situation if the program has not already done so. Such action may include but is not limited to reporting the situation to Child Protective Services, the State Police, or other enforcement authorities as appropriate, administrative probation, removal of residents or suspension of finding. The department shall report to the board no later than its next regularly scheduled meeting: (i) the nature and scope of the violation, and (ii) the action taken by the department or the program to correct the deficiency.~~

~~B. When a life, health or safety violation has not been adequately corrected, the board may take certification action up to and potentially including decertification.~~

**6VAC35-20-67. Disputes of noncompliance findings. (Repealed.)**

~~Any program that is cited for noncompliance with board approved standards, policies or local VJCCCA plan may:~~

- ~~1. Request a variance in accordance with 6VAC35-20-92; or~~
- ~~2. Appeal the finding, in writing, within 10 days of receiving notice of the finding, in accordance with department procedures and 6VAC35-20-94.~~

**6VAC35-20-69. New Newly opened facilities and new construction, expansion, or renovation of residential programs facilities.**

~~A. When a newly opened facility seeks certification to allow the admission of residents, the facility administrator shall contact the director or designee to request a review of the facility for conditional certification.~~

~~B. The facility administrator and the department shall follow the requirements of this chapter and department procedures in reviewing a facility prior to admission of residents. New construction, expansions, and renovations in all juvenile residential programs facilities, whether or not the facility or its sponsor is seeking reimbursement for construction or operations, shall conform to applicable the governing provisions in of the board's Regulations for Local Juvenile Residential Facility Construction and Reimbursement of Local Construction Costs (6VAC35-30), and Standards for Interagency Regulation of Children's Residential Facilities (22VAC42-10). In addition, the department shall consider the facility's degree of compliance with the Guidelines for Minimum Standards in Design and Construction of Juvenile Facilities, following regulations and any applicable guidance documents related thereto:~~

- ~~1. Regulation Governing Juvenile Correctional Centers (6VAC35-71);~~
- ~~2. Regulation Governing Juvenile Secure Detention Centers (6VAC35-101);~~
- ~~3. Regulation Governing Juvenile Group Homes and Halfway Houses (6VAC35-41); and~~
- ~~4. Regulation Governing State Reimbursement of Local Juvenile Residential Facility Costs (6VAC35-30).~~

~~B. The department shall not approve the housing of juveniles in a newly opened facility if the facility does not meet the requirements for a conditional certification as provided in 6VAC35-20-100.~~

~~C. The department shall not approve the housing of juveniles in any portion of a facility that has been modified through expansion or renovation, until designated department staff visit the facility and verify that:~~

- ~~1. The facility or applicable portion thereof complies with all applicable mandatory standards and physical plant standards; and~~
- ~~2. The current certification issued by the board is appropriate to the status of its program and construction.~~

~~C. A newly constructed, expanded, or renovated facility shall, except as provided in subsection D of this section, obtain conditional certification as provided in 6VAC35-20-100 prior to the placement of residents in the new facility or portion of an existing facility subject to the expansion or renovation.~~

~~D. The director or designee shall consider the request for certification within 60 days of receiving the request and~~

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# Regulations

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report of the basic audit findings. Actions taken by the director or designee shall be governed by the provisions of 6VAC35-20-100.

## **6VAC35-20-75. Certification of individual programs or facilities.**

A. ~~The board director or designee shall individually certify all (i) juvenile residential facilities, and (ii) court service units and offices on youth that are currently receiving state funding.~~

~~B. The department shall schedule and conduct certification audits in sufficient time for the board to take action on the audit report before a program's current certification expires. The department shall publish procedures for naming audit team members, conducting on-site audits, determining compliance, conducting exit interviews, reviewing and approving corrective plans of action, and instructing programs how to request variances or appeal findings.~~

~~C. Upon the completion of the audit, the certification audit findings shall be reported to the program's administrator and sponsor and to appropriate department personnel. The program administrator or sponsor may appeal any of the certification audit findings in accordance with department procedures that shall specify (i) the timeframes for filing the appeal and for the department's response; and (ii) the department personnel responsible for considering the appeal.~~

~~D. Appeals of audit findings that cannot be resolved by the department shall be forwarded to the board for resolution as provided in 6VAC35-20-94.~~

~~E. Designated department personnel shall review and approve plans of action to address deficiencies identified in the audit report, and summaries of the approved plans of action shall be forwarded to the board along with the audit report.~~

~~F. Requests for variances shall be forwarded to the board along with the department's recommendation to approve or disapprove the variance.~~

~~B. The director or designee may extend a current certification for a specified period of time pending a certification audit and the completion of an administrative review, provided the department is not aware of any health, welfare, or safety violations.~~

~~C. If a program's or facility's certification expires prior to the director's or designee's consideration of the certification audit report, the program's or facility's current certification status shall continue in effect until the director or designee takes certification action.~~

~~D. The director or designee may, upon the request of a program or facility administrator or the department, modify during the term of the certificate the conditions of a certificate relating to a program's or facility's certification status or capacity, the residents' age range or sex, the facility's location, or changes in the services offered and provided.~~

~~E. A certificate is not transferrable and automatically expires when there is a change of ownership or sponsorship of the program or facility.~~

~~F. When the program or facility ceases to operate, the program or facility administrator shall return the certificate to the director or designee. The department shall notify the board of the change in the program's or facility's status.~~

## **6VAC35-20-80. On-site Certification audit procedures.**

~~A. The burden of providing proof of compliance with standards rests with the program staff. Documentation created once the audit has begun shall not be accepted. The program or facility shall demonstrate substantial compliance as required in this chapter and by any applicable guidance documents that require that the program or facility have no areas of noncompliance that pose an immediate and direct danger to residents.~~

~~B. The audit team shall (i) visit the program or facility and (ii) review and examine sufficient documentation to adequately render a determination of compliance as provided for in 6VAC35-20-85.~~

~~1. The burden of providing proof of compliance with regulatory requirements rests with the program or facility staff.~~

~~2. A program or facility with an approved variance or waiver shall provide such documentation to the certification audit team.~~

~~B. 3. It is permissible to provide additional documentation should the certification team request it; however, such documentation must already exist when the audit begins. Once the audit is concluded, any changes made by an agency will not change the compliance determination for a given standard but instead become part of the program's plan of action.~~

~~4. Compliance documentation shall be collected through documentation, interview, and observation.~~

## **6VAC35-20-85. Determining compliance with individual regulatory requirements.**

~~A. During the audit process, the department shall determine whether the program or facility is compliant with each regulatory requirement. To be found in compliance, the following shall be shown:~~

~~1. The program or facility shall:~~

~~a. For critical regulatory requirements, demonstrate 100% compliance;~~

~~b. For noncritical regulatory requirements with multiple elements, the certification audit team will make a determination of compliance as indicated in the applicable compliance document that shall require (i) an acceptable percentage of compliance with the provision and (ii) an absence of any systemic noncompliance in any single element; or~~

c. For all noncritical regulatory requirements, demonstrate an acceptable percentage compliance as provided for in the applicable guidance document.

2. The program or facility shall not have:

- a. Any circumstance or condition constituting a pattern of action that presents a concern for the health, welfare, or safety of the residents, program participants, or staff; or
- b. Any circumstance or condition that presents an immediate threat to the health, welfare, or safety of the residents, program participants, or staff.

B. The determination of noncompliance shall be a decision made by the entire certification team in accordance with the applicable guidance document.

C. For purposes of calculating percentage of compliance, the determination of what constitutes individual regulatory requirements (i.e., section, subsection, subdivision, or element in a list in the regulatory chapter) will be specified in the applicable guidance document.

**6VAC35-20-90. Certification audit reports findings.**

A. Upon the completion of the audit, the certification audit findings shall be discussed with the program's or facility's administrator or designee.

A. B. A written report of the team's findings from the certification audit shall be submitted to the program administrator, within 10 working business days following the compliance certification audit, to (i) the program or facility administrator, (ii) the supervisory or governing authority over the program or facility administrator, and (iii) to the director or designee. Any finding of noncompliance with a regulatory requirement shall be documented.

B. The program administrator shall develop a plan of action to correct all noncompliance findings. The plan of action shall be submitted to the department personnel as designated in department procedures within 15 days of receipt of the report of the team's findings. In exceptional situations, the designated department personnel may grant a 30 day extension to a program administrator for the development of an action plan. C. Any program or facility that is cited for noncompliance with a regulatory requirement may within 10 business days of receiving the written report of the findings for the certification audit:

- 1. Request in writing a variance in accordance with 6VAC35-20-92; or
- 2. Appeal the finding of noncompliance in writing and in accordance with department procedures and 6VAC35-20-94.

C. The department shall issue guidelines, including timeframes, that provide a process for reviewing and approving plans of corrective action, including those that are initially deemed unacceptable and in need of refinement, in time for the plans to be included in the audit report to the board. If an acceptable plan of action is not submitted within

the required time frame, the director or designee shall refer the matter to the board for action.

D. Each certification audit report submitted to the board shall contain:

- 1. The program's name, administrator, sponsor, location and purpose;
- 2. A summary of the program's target audience, its relation to other entities in the community and in the juvenile justice system, and other information relevant to its operation;
- 3. The date of the certification audit and the names of the audit team members;
- 4. Notation of all standards and policies for which noncompliance was found, including especially notation of any life, health or safety violations; a brief description of the circumstances, including extenuating and aggravating factors; and supplemented, when appropriate, with photographic evidence or other documentation; and
- 5. For each deficiency cited, a plan of corrective action that states:
 
  - a. The action taken or required to correct the deficiency and prevent its recurrence;
  - b. The person or agency responsible for the action; and
  - c. The deadline for taking the action.

**6VAC35-20-91. Corrective action plans and certification audit reports.**

A. For each finding of noncompliance, the program or facility administrator shall develop a corrective action plan.

- 1. The corrective action plan shall be submitted to the department within 30 days of receipt of the written certification audit findings. For good cause, the department may grant a 30-day extension to a program or facility administrator for the development of the corrective action plan.
- 2. The department shall issue guidelines that provide for (i) the format, (ii) any content not currently required by this section, and (iii) the process for the department's review and approval of corrective action plans.
- 3. The corrective action plan shall include the following:
 
  - a. A description of any extenuating or aggravating factors contributing to the noncompliant circumstances or conditions;
  - b. A description of each corrective action required or tasks required to correct the deficiency and prevent its recurrence;
  - c. The actual or proposed date of task completion; and
  - d. The identification of the person responsible for oversight of each element of the implementation of the corrective action plan.

If the corrective action proposed by the program or facility involves a request for a variance in accordance with

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# Regulations

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6VAC35-20-92, the corrective action plan must also state what action will be taken to meet or attempt to meet the regulatory requirement should the request for the variance be denied.

4. The program or facility administrator shall be responsible for developing and implementing a written corrective action plan.

5. If a finding of noncompliance results in a request for an appeal of the finding of noncompliance or a variance, documentation of the request for a variance or of the appeal of the finding of noncompliance should be attached to the corrective action plan.

B. Each certification audit report submitted to the director or designee shall contain:

1. The program's or facility's name, administrator, and location;

2. A summary of the program's or facility's population served, programs, and services provided;

3. The date of the certification audit and the names of the audit team leader and members; and

4. Notation of all regulatory requirements for which there was a finding of noncompliance as provided for in 6VAC35-20-85.

If there is a finding of noncompliance with a regulatory requirement, the report shall describe the noncompliance and incorporate the program's or facility's corrective action plan for each area of noncompliance. If a program or facility administrator fails to submit a corrective action plan within the time specified, the certification audit report, with audit team recommendations, shall be submitted to the director or designee for consideration.

C. The program or facility administrator shall submit to the audit team leader, upon completion of the corrective action plan, documentation confirming all corrective actions have been fully executed.

## **6VAC35-20-92. Variance request.**

A. Any request for a variance must be submitted in writing and. If the request is submitted subsequent to a finding of noncompliance in a certification audit, the request must be submitted within 10 days of receiving the written report of the findings from the certification audit. All requests shall include:

1. The ~~nonmandatory standard~~ **noncritical regulatory requirement** for which a variance is requested;

2. The justification for the request;

3. Any actions taken to come into compliance;

4. The person ~~and agency~~ responsible for such action;

5. The date at which time compliance is expected; and

6. The specific time period requested for this variance; ~~and.~~

~~7. A draft plan of corrective action describing how the program would meet the standard should the variance not be granted.~~

~~The department's recommendation to the board as to the certification action to be taken shall address each of the program's variance requests.~~

B. Documentation of any variance requests stemming from a finding of noncompliance in a certification audit shall be submitted along with the corrective action plan for correcting any deficiencies cited during the certification audit as provided for in 6VAC35-20-91.

C. A requested variance shall not be implemented prior to obtaining the approval of the board.

D. Requests for variances shall be placed on the agenda for consideration at the next regularly scheduled board meeting. The requested variance shall be accompanied by the department's recommendation to approve or disapprove the variance.

E. In issuing variances, the board shall specify the scope and duration of the variance.

## **6VAC35-20-93. Waivers.**

A. When a program or facility has submitted a formal variance request to the board concerning a ~~nonmandatory standard~~ **noncritical regulatory requirement**, the director may, but is not required to, grant a waiver temporarily excusing a program or facility from meeting the requirements of the ~~standard regulation~~ when (i) the ~~standard regulatory requirement~~ is not required by statute or by federal or state regulations other than those issued by the board of juvenile justice; (ii) noncompliance with the ~~standard regulatory requirement~~ will not result in a threat to the life, health, welfare, or safety of residents, the community, or staff; (iii) enforcement will create an undue hardship; and (iv) juveniles' care or services would not be adversely affected.

B. A waiver shall be granted only when the program or facility is presented with emergency conditions or circumstances making compliance with the regulatory requirement either impossible or impractical.

C. The waiver shall be in effect only until such time as the board acts on the variance request. The board will act on the matter at its first meeting following notice from the ~~department~~ director or designee that a waiver has been granted.

~~C. D.~~ The director or designee shall promptly notify the board by first class mail of waivers granted, and the rationale for so ~~doing~~ granting.

~~D. E.~~ A program or facility will not be cited for noncompliance with the requirements of a ~~standard regulatory requirement~~ subject to a waiver during the time it operates pursuant to a waiver approved by the director or designee.

**6VAC35-20-94. Appeal process for a finding of noncompliance with an individual regulatory requirement.**

~~If an appeal of any audit findings is being made, the program administrator shall attach the appeal request to any plan of action and submit the appeal to department personnel as designated in agency procedures within 15 days of written notification of the audit findings.~~

~~A. A program or facility administrator may appeal a finding of noncompliance of an audit by submitting the appeal to the director or designee within 10 days of the written notification of the audit findings.~~

~~Department staff as designated in agency procedures B. The manager for the certification team or designee shall contact the program or facility administrator and make every effort to resolve the appeal with the program administrator within 15 10 days of receiving the appeal receipt of the appeal. If the program administrator is not satisfied, he may submit a written request to department staff as designated in department procedures within five days to have the matter reviewed by the Board of Juvenile Justice at its next scheduled meeting. The matter will be placed on the board's agenda pursuant to timeframes adopted by the board for submission of agenda items.~~

~~C. If department personnel and the program or facility administrator are not able to informally resolve the issue on appeal, the request for an appeal shall be forwarded by the manager for the certification team or designee as soon as practicable to the director or designee.~~

~~1. The director or designee shall issue a decision on the appeal within 15 business days of receipt.~~

~~2. The program or facility administrator shall be informed as soon as practicable, but no later than the end of the next business day, of the director's or designee's decision.~~

~~D. If the appealed finding of noncompliance remains unresolved after exhaustion of the informal review and appeal to the director designee, the program or facility administrator may appeal the director's or designee's decision to the board. Upon request, the department shall place the appealed finding of noncompliance on the board's agenda for consideration at its next regularly scheduled meeting.~~

~~E. If the appeal is granted, the finding of noncompliance shall be removed from the certification audit report.~~

~~F. An appeal pursuant to this section does not negate the requirement to submit a corrective action plan, as required by 6VAC35-20-91, on the disputed regulatory requirement.~~

**6VAC35-20-100. Board certification Certification action.**

~~A. The board may extend a current certification for a specified period of time, pending a certification audit and the completion of administrative reviews, provided the program meets all mandatory standards and the board and the department are not aware of any life, health or safety violations.~~

~~B. If a program's certification expires during a period when the board does not meet, the program's current certification status shall continue in effect until the board meets and takes certification action.~~

~~C. Once the board takes certification action, the board will issue a certificate or letter clearly identifying the program, the certification status, and the period of time during which the certification will be effective unless the certificate is revoked or surrendered sooner.~~

~~D. For purposes of calculating percentage of compliance, a standard will be identified either as a section of the Virginia Administrative Code or a subsection identified by an uppercase letter (A, B, C, etc.). Thus, whenever a section of a 6VAC35 regulation contains one or more subsections, each subsection constitutes a distinct standard. Subdivisions (identified by numerals (1, 2, 3, etc.) or lower case letters (a, b, c, etc.) are not separate standards but are elements of the standard. When any element a, b, c or 1, 2, 3 is not met, the standard in which it appears is not met.~~

~~E. A Conditional Certification for up to six months will be issued to a new program that:~~

- ~~1. Demonstrates 100% compliance with all mandatory standards;~~
- ~~2. Demonstrates at least 90% compliance with all nonmandatory standards;~~
- ~~3. Has acceptable plans of action for all noncompliances; and~~
- ~~4. Has no unresolved life, health or safety violations.~~

~~F. A One year Certification will be issued when a program currently holds a Conditional Certification, a One Year Certification, or a Three Year Certification, and:~~

- ~~1. Is in 100 % compliance with all mandatory standards;~~
- ~~2. Demonstrates at least 90% compliance with all other standards;~~
- ~~3. Has acceptable plans of action for all noncompliance;~~
- ~~4. Has no unresolved life, health or safety violations; and~~
- ~~5. Has no more than one systemic deficiency.~~

~~G. A Three year Certification will be issued when a program currently holds a One year Certification or a Three year Certification and the program:~~

- ~~1. Is in 100% compliance with all mandatory standards;~~
- ~~2. Demonstrates at least 95% compliance with all other standards;~~
- ~~3. Has acceptable plans of action for all noncompliance;~~
- ~~4. Has no unresolved life, health or safety violations; and~~
- ~~5. Has no systemic deficiencies.~~

~~H. Any program, in any certification status, will be placed on probation for up to six months when the program:~~

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# Regulations

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- ~~1. Is in less than 100% compliance with all mandatory standards but has acceptable plans of action to address deficiencies;~~
- ~~2. Demonstrates less than 90% compliance with all other standards;~~
- ~~3. Does not have acceptable plans of action for all noncompliance;~~
- ~~4. Has one or more unresolved life, health or safety violations; or~~
- ~~5. Has two or more systemic deficiencies.~~

~~I. Any program, regardless of current certification status, will be decertified or denied certification when:~~

- ~~1. The program is in less than 100% compliance with all mandatory standards without acceptable plans of action to address deficiencies;~~
- ~~2. The program demonstrates less than 90% compliance with all other standards and does not have acceptable plans of action to address deficiencies;~~
- ~~3. The program, if on probation or administrative probation, has not corrected the circumstances that were cited in placing the program on probation or administrative probation to the point that the program would qualify for at least conditional certification; or~~
- ~~4. The program's staff have (i) committed, permitted, aided or abetted any illegal act in the program; or (ii) violated child abuse or neglect laws; or (iii) deviated significantly from the program or services for which a certificate was issued without prior approval from the board; or (iv) failed to correct any such deviations within the time specified by the board; or (v) falsified records.~~

A. The department shall notify the program or facility administrator of (i) the date, time, and location the director or designee will take certification action relating to the program's or facility's certification audit and (ii) any recommendation of the audit team regarding the program's or facility's certification status. The program or facility administrator shall have the right to appear in person or by counsel or other qualified representative when the director or designee considers the audit report and makes a certification decision.

B. A conditional certification for up to six months will be issued to a new program or a newly opened facility that:

1. Demonstrates 100% compliance with (i) all critical regulatory requirements and (ii) any physical plant regulatory requirements;
2. Demonstrates at least 90% compliance with all noncritical regulatory requirements;
3. Has acceptable corrective action plans for all noncompliances; and
4. Has no unresolved health, welfare, or safety violations.

C. Upon review of the audit findings and any acceptable corrective action plans, the director or designee may take the following certification actions:

1. If the certification audit finds the program or facility in (i) 100% compliance with all regulatory requirements or (ii) less than 100% with a corrective action plan demonstrating the program or facility is in 100% compliance, the director or designee shall certify the facility for three years.

2. If the certification audit finds the program or facility in less than 100% compliance with all regulatory requirements and there (i) are no health, welfare, or safety violations and (ii) is an acceptable corrective action plan for any finding of deficiency, the director or designee shall certify the facility for a specific period of time, up to three years.

3. If the certification audit finds the program or facility in less than 100% compliance with all regulatory requirements and there is a health, welfare, or safety violation with an acceptable corrective action plan for any finding of deficiency, the director or designee shall continue the program's or facility's current certification for a specific period of time, with a status report to be provided within a specified period of time, not to exceed six months.

a. If the status report indicates no continued areas of noncompliance, the director or designee shall certify the facility for up to three years, subject to the provisions of subdivision C 7 of this section.

b. If the status report indicates any continued area of noncompliance, none of which is a health, welfare, or safety violation, the director or designee shall continue the program's or facility's certification with a status report required within a specific period of time, not to exceed six months.

(1) If the status report indicates no continued areas of noncompliance, the director or designee shall certify the program or facility for up to three years, subject to the provisions of subdivision C 7 of this section.

(2) If any area of noncompliance continues thereafter, the program or facility shall be placed on probationary certification status, subject to the applicable provisions of subdivision C 5 of this section.

c. If the status report indicates any continued area of noncompliance, any of which are health, welfare, or safety violations, the director or designee shall place the program or facility on probationary certification status, subject to the provisions of subdivision C 5 of this section.

4. If the certification audit finds the program or facility in less than 100% compliance and there are health, welfare, or safety violations without an acceptable corrective action plan for any finding of deficiency, the director or designee

shall place the program or facility on probationary certification status, subject to the provisions of subdivision C 5 of this section.

5. When a program or facility is placed on probationary certification status, (i) the director or designee shall, taking into account the program's or facility's history of compliance with regulatory requirements, specify the duration of the probationary certification status and (ii) the department and program or facility shall provide a status report to the board at all meetings for the duration of this status.

a. If the status report indicates no continued areas of noncompliance, the director or designee shall certify the facility for up to three years, subject to the provisions of subdivision C 7 of this section.

b. If any area of noncompliance continues thereafter, the director or designee may (i) continue the probationary certification status, (ii) decertify the program or facility as provided for in 6VAC35-20-120, or (iii) take any other action provided for by law.

6. If the certification audit report indicates an immediate threat to the health, welfare, or safety to the residents of a facility, notwithstanding the foregoing provisions, the director or designee may decertify the program or facility as provided for in subsection E of this section and 6VAC35-20-120 or take any other action provided for by law.

7. If a program's or facility's certification status is continued after the initial period expires, the subsequent certification will be retroactive to the date of expiration, unless the director or designee specifically issues a certification with different terms.

D. The director or designee may, at any time, change a program's or facility's certification status upon notification of any noncompliance with any regulatory requirements.

E. Any program or facility, regardless of current certification status, may be decertified or denied certification when:

1. The program or facility has an unacceptable level of compliance as provided in the applicable guidance document with applicable regulatory requirements without acceptable corrective action plans to address deficiencies;

2. The program or facility, if on probation or administrative probation, has not corrected the circumstances that were cited in placing the program or facility on probation or administrative probation to the point that the program or facility would qualify for at least conditional certification;

3. The program's or facility's staff have (i) committed, permitted, aided or abetted any illegal act in the program or facility; (ii) violated child abuse or neglect laws; (iii) deviated significantly from the program or services for which a certificate was issued without prior approval from

the director or designee; (iv) failed to correct any such deviations within the time specified by the director or designee; or (v) falsified records; or

4. If the program or facility fails to adequately correct the health, welfare, or safety violation per 6VAC35-20-36.1.

F. Once the director or designee takes certification action, the department shall issue a certificate or letter clearly identifying the program or facility, the certification status, and the period of time during which the certification will be effective unless the certificate is revoked or surrendered sooner. The program or facility administrator shall be informed, briefly and generally, of the factual or procedural basis when any program or facility is issued a probationary certification or is decertified.

G. A program's or facility's status shall remain in effect until subsequent action by the director or designee.

### **6VAC35-20-110. Notice of board certification action.**

A. Within two weeks of any certification action, a designated officer or agent of the board the director or designee shall send formal notice of the board certification action to:

1. The program or facility administrator;
2. The program's sponsoring locality, commission or private operator, as applicable or facility's supervisory or governing authority; and
3. Designated department personnel; and
4. 3. Other state and local authorities, as appropriate to the specific circumstances.

B. The program shall post the certificate or letter issued by the board in a conspicuous place in the facility or program offices where it is visible to the public.

C. All variances approved by the board shall be made available at the program site to certification audit teams and department personnel conducting on site visits.

### **6VAC35-20-115. Board review of programs and facilities found in noncompliance.**

A. When a program or facility is found in noncompliance with one or more regulatory requirements, the audit report with a statement of the director's or designee's certification action taken shall be placed on the agenda at the next regularly scheduled board meeting for oversight and review. The department shall provide the program or facility administrator with notice of the date and time of the board meeting.

B. Whenever a facility is found in noncompliance with one or more regulatory requirements, the board may enter an order, pursuant to § 16.1-309.9 B of the Code of Virginia, prohibiting or limiting the placement of children in the program or facility or take any other action provided by law. In addition to the reports required by this section and 6VAC35-20-100, the board may request the department or the



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# Regulations

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program or facility administrator to provide a status update or report at subsequent board meetings.

## **6VAC35-20-120. Actions following decertification or denial of certification.**

A. When a program or facility operated by the department is decertified or denied certification, ~~the program administrator will take whatever actions are necessary to qualify the program for at least a conditional certification within 90 days. If the program does not qualify for at least conditional certification within 90 days, the department may choose to close the program or facility or relocate the residents. The procedure for such action shall be in compliance with all board, department, state and federal regulations, policies, or requirements of law. If after 90 days the program has not met the requirements for at least conditional certification and the department has not closed the program, the board shall recommend to the Governor and the Secretary of Public Safety appropriate action to be taken under the circumstances.~~

1. A report shall be sent to the board within 90 days after the decertification or denial detailing the actions taken by the department to (i) bring the program or facility into compliance with all regulatory requirements and (ii) protect the health, welfare, or safety of the residents.

2. If after 90 days the program or facility has not met the requirements for at least conditional certification and the department has not closed the program or facility, the board shall recommend to the Governor and the Secretary of Public Safety appropriate action to be taken under the circumstances.

B. When a program or facility that is locally, regionally, or privately operated is decertified or denied certification, the board and the department may take any and all of the following actions as appropriate to the circumstances:

1. The sponsor may be required to reorganize the program structure or take necessary personnel action or any other steps as may be necessary to qualify the program or facility for at least a conditional certification within 90 days; ~~and.~~

2. ~~The Director of the Department~~ director or designee may, as applicable, reduce or suspend funding to the program or facility in accordance with §§ 16.1-322.1, § 16.1-309.9 C, or § 66-30 of the Code of Virginia or may withdraw the approval required by § 16.1-249 A (3) and (4) of the Code of Virginia; ~~and.~~

3. The board may enter an order, pursuant to § 16.1-309.9 B of the Code of Virginia, prohibiting or limiting the placement of children in the program or facility.

4. The department may not utilize facilities that are decertified or denied certification.

## **6VAC35-20-150. ~~Mandatory~~ standards Critical regulatory requirements for juvenile residential facilities.**

~~The following standards, selected from Standards for Juvenile Residential Facilities (6VAC35-140) and Standards for Interdepartmental Regulation of Children's Residential~~

~~Facilities (22VAC42), are designated as "mandatory" as defined in 6VAC35-20-10. Programs that are subject to these standards must be in 100% compliance with the following standards in order to be approved to operate. Failure to comply with these mandatory standards will result in enforcement actions in accordance with the Code of Virginia and as set forth in this chapter.~~

- ~~1. 6VAC35-140-190~~
- ~~2. 6VAC35-140-340~~
- ~~3. 6VAC35-140-460~~
- ~~4. 6VAC35-140-660~~
- ~~5. 6VAC35-140-680~~
- ~~6. 6VAC35-140-690~~
- ~~7. 22VAC42-10-190~~
- ~~8. 22VAC42-10-300~~
- ~~9. 22VAC42-10-330 A, B and E~~
- ~~10. 22VAC42-10-490 B and C~~
- ~~11. 22VAC42-10-700 A and B~~
- ~~12. 22VAC42-10-710 B through I~~
- ~~13. 22VAC42-10-720~~
- ~~14. 22VAC42-10-730 A and C~~
- ~~15. 22VAC42-10-800~~
- ~~16. 22VAC42-10-960 C and D~~
- ~~17. 22VAC42-10-970~~
- ~~18. 22VAC42-10-1000.~~

The board shall designate which regulatory requirements will be defined as critical regulatory requirements.

### Part 3 III

#### VJCCCA Programs and Offices on Youth Program Audits

## **6VAC35-20-200. Monitoring of VJCCCA programs or offices on youth.**

The department shall develop a schedule for monitoring all VJCCCA programs or offices on youth that shall provide for at least one scheduled on-site VJCCCA program or office on youth audit every two years. Whenever deemed necessary or appropriate, additional monitoring visits or reviews may be scheduled.

## **6VAC35-20-210. VJCCCA programs and offices on youth self-evaluations.**

A. All VJCCCA programs and offices on youth shall, in accordance with department procedures or manuals, do the following:

1. Conduct an annual self-evaluation; and
2. Provide the department with a written summary of (i) the self-evaluation process and (ii) the findings of the self-evaluation.

## TITLE 8. EDUCATION

## STATE COUNCIL OF HIGHER EDUCATION FOR VIRGINIA

## Proposed Regulation

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

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

Public Hearing Information: No public hearings are scheduled.

Public Comment Deadline: December 10, 2012.

Agency Contact: Linda H. Woodley, Director, Private & Out-of-State Postsecondary Education, State Council of Higher Education for Virginia, 101 N. 14th Street, 9th Floor, James Monroe Building, Richmond, VA 23219, telephone (804) 371-2938, FAX (804) 225-2604, or email lindawoodley@schev.edu.

Basis: The State Council of Higher Education for Virginia is granted explicit authority to promulgate regulations in § 23-276.3 of the Code of Virginia, which states: "The State Council of Higher Education for Virginia shall adopt, pursuant to the Administrative Process Act (§ 2.2-4000 et seq.) such regulations as may be necessary to implement the provisions of this chapter. The Council's regulations shall include, but need not be limited to, (i) procedures by which a school may apply for Council approval to confer degrees in Virginia; (ii) measures designed to ensure that all postsecondary schools that are subject to the provisions of this chapter meet minimal academic standards; (iii) protections for students pursuing postsecondary education opportunities in schools subject to the provisions of this chapter; and (iv) information to assist persons who rely on postsecondary degrees, diplomas, and certificates in judging the competence of individuals."

Purpose: The regulations governing private and out-of-state postsecondary institutions are designed to ensure the certified schools meet minimal academic standards, provide protections to students pursuing postsecondary educational opportunities at these schools, and provide information to persons who rely on postsecondary degrees in judging the competence of individuals. Amending, modifying, or deleting the current provisions of 8VAC40-31 will ensure that the certified institutions continue to provide a valuable service to, while protecting the welfare of, the citizens of the Commonwealth of Virginia.

Substance: The proposed regulations will enhance consumer protections for students attending certified schools. They

B. The department shall schedule each VJCCCA program or office on youth to conduct the self-evaluation and complete the report.

C. The department shall review each VJCCCA program's or office on youth's self-evaluation report and provide feedback to the VJCCCA program of office on youth.

**6VAC35-20-220. VJCCCA program and office on youth audits.**

A. During the program audit, the VJCCCA program or office on youth shall demonstrate an acceptable level of compliance, as provided in this chapter, with all (i) statutory requirements; (ii) the approved local plan; (iii) applicable regulatory requirements; and (iv) applicable department procedures or manuals.

B. The burden of proving compliance with the applicable requirements rests with the program staff.

C. Any finding of noncompliance shall be documented.

**6VAC35-20-230. VJCCCA program and office on youth audit findings.**

A. Upon completion of the VJCCCA program or office on youth audit, the VJCCCA program or office on youth audit findings shall be reported to the VJCCCA program plan contact or office on youth program director along with a copy to the individual with supervisory authority over that individual.

B. The VJCCCA program plan contact or office on youth program director may appeal the VJCCCA program or office on youth audit findings to the director or designee.

C. The department will monitor the progress of the VJCCCA program or office on youth in correcting the identified noncompliance through subsequent documentation and monitoring visits.

**6VAC35-20-240. Effect of VJCCCA program or office on youth noncompliance.**

A. If the department determines that a VJCCCA program or office on youth is not in substantial compliance, it may suspend all or any portion of the VJCCCA program's or office on youth's funding until there is compliance as provided in subsection C of § 16.1-309.9 of the Code of Virginia.

B. The department shall notify the person responsible for the daily administration of the VJCCCA program or office on youth of the intent to withhold funding prior to such withholding. The notification shall include the justification for the intended withholding and any corrective actions the VJCCCA program or office on youth must complete.

C. The VJCCCA program or office on youth may appeal to the director or designee the withholding of funding, in writing, within 10 business days of receiving notice of the department's intent to withhold the funding.

VA.R. Doc. No. R10-2208; Filed September 11, 2012; 12:04 p.m.

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# Regulations

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clarify certain expectations for schools that had been unwritten previously. Certified schools will better understand equipment and facility requirements, actions that may result in the suspension or revocation of a school's certificate to operate, and standards regarding administrator and faculty requirements. The State Council of Higher Education (SCHEV) may defer to accreditor standards when such expectations may conflict with SCHEV requirements for accredited postsecondary institutions. The proposed regulations provide guidance to schools when closing to ensure student are allowed to complete their program of study via an approved teach-out arrangement. Finally, the proposed regulations will eliminate the noncompliance fee charged when a school is determined to be out of compliance, but add fees for services rendered by SCHEV staff toward the certified schools.

Issues: These regulations will strengthen or enhance protections of students attending certified postsecondary institutions operating within the Commonwealth of Virginia. Examples of regulatory changes that will strengthen or enhance student protections include: specific expectations of faculty and administrator qualifications, requirement that institutions use GAAP in its financial reporting, clarification of actions that may result in the suspension or revocation of an institution's certificate to operate, and description of requirements of a teach-out arrangement in the event of the closure of a certified school.

The regulatory action poses no disadvantages to the public or to the Commonwealth.

## Department of Planning and Budget's Economic Impact Analysis:

Summary of the Proposed Amendments to Regulation. The State Council of Higher Education for Virginia (SCHEV) proposes to 1) revise the fee structure for private and out-of-state postsecondary institutions, 2) introduce required actions if a school loses its accreditation, 3) introduce a presumption of compliance if the standard of the accrediting agency is met, and 4) make numerous other changes to clarify existing requirements.

Result of Analysis. There is insufficient data to accurately compare the magnitude of the benefits versus the costs. Detailed analysis of the benefits and costs can be found in the next section.

Estimated Economic Impact. Private and out-of-state postsecondary institutions are required to obtain recertification every year and submit a recertification fee. The proposed regulations will reduce the recertification fee from \$500 to \$250 for schools whose annual gross tuition is \$50,000 or less; maintain the recertification fee at \$1,000 for schools whose annual gross tuition is greater than \$50,000 but less than or equal to \$100,000; increase the recertification fee from \$1,500 to \$2,500 for schools whose annual gross tuition is greater than \$100,000 but less than or equal to \$150,000; maintain the recertification fee at \$2,500 for schools whose

annual gross tuition is greater than \$150,000 but less than or equal to \$500,000; increase the recertification fee from \$2,500 to \$4,000 for schools whose annual gross tuition is greater than \$500,000 but less than or equal to \$1 million; and increase the recertification fee from \$2,500 to \$5,000 for schools whose annual gross tuition is greater than \$1 million.

The proposed changes to the fee schedule also include elimination of \$100/day (not to exceed \$1,000) late fee, elimination of \$1,000 noncompliance fee for each occurrence; increase of application withdrawal fee from \$300 to \$500 for career technical and to \$1,000 for institutions of higher education; introduction of \$100 fee for duplicate certificates; introduction of \$100 fee for duplicate agent permits; introduction of \$300 application fee for each additional branch; introduction of \$100 application fee for each additional site; and introduction of \$100 application fee for each additional program or modification to an existing program.

The net fiscal effect of the proposed fee changes is estimated to be a \$131,500 increase in fees collected. According to SCHEV, these additional fees will help cover administrative costs. Also, the revised fee schedule is expected to more appropriately align the amount of fees generated with the staff time spent on different types of administrative activities. On the other hand, the postsecondary institutions may see a decrease or increase in their fees depending on the type of administrative action needed from SCHEV.

Another proposed change will introduce a list of required actions if a school loses its accreditation. Under the current rules, exemption from these regulations depends on a school having a valid accreditation. However, the current regulations are silent on what happens if a school loses its accreditation. The proposed regulations will add a list of actions that must be executed following the loss of accreditation which will ensure that the school will be subject to these regulations upon loss of accreditation. This proposed change is expected to reduce the ambiguity in cases where a school loses its accreditation and therefore enhance protections afforded to students.

The proposed changes will also introduce a presumption of compliance if the standard of the accrediting agency is met. Some of the standards such as refund policies established in these regulations may be different than the standards established in other states. SCHEV believes that standards varying from state to state increase the burden on schools operating in multiple states. To simplify compliance with the regulations, the proposed changes will presume that a school is in compliance with these regulations as long as the standard of the accrediting agency is met. It is worth noting that this change will also make the compliance with these regulations to rely on the rules and policies of entities other than SCHEV. Since the rules and policies of accrediting entities can change without SCHEV's approval and/or without going through the

regulatory review process, the potential effects of this proposed change are subject to significant uncertainty.

Finally, SCHEV proposes numerous other changes to clarify existing requirements after conducting a periodic review. None of these changes are expected to create a significant economic effect other than improving the clarity of the regulations.

**Businesses and Entities Affected.** There are 343 private and out-of-state postsecondary institutions certified to operate in Virginia. Approximately 58,600 students enroll in these institutions.

**Localities Particularly Affected.** The proposed regulations apply throughout the Commonwealth.

**Projected Impact on Employment.** The proposed regulations are not expected to have a direct impact on employment.

**Effects on the Use and Value of Private Property.** The proposed regulations may have a small negative or positive impact on the asset value of affected postsecondary institutions as some of the fees are increasing while some other are decreasing affecting profit streams.

**Small Businesses: Costs and Other Effects.** Of the 343 private and out-of-state postsecondary institutions, 194 are estimated to be small businesses based on gross revenues. The costs and other effects on the small businesses are the same as the ones discussed above.

**Small Businesses: Alternative Method that Minimizes Adverse Impact.** There is no known alternative method that accomplishes the same goals.

**Real Estate Development Costs.** The proposed regulations are not expected to have an impact on real estate development costs.

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

small businesses; and (iv) a description of any less intrusive or less costly alternative methods of achieving the purpose of the regulation. The analysis presented above represents DPBs best estimate of these economic impacts.

Agency's Response to Economic Impact Analysis: The State Council of Higher Education for Virginia concurs with the economic impact analysis prepared by the Virginia Department of Budget and Planning.

Summary:

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

Part I

Definitions; Prohibitions; Advertising

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

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

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

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

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

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

"Administrative capability" means a branch (i) maintains or has access to all records and accounts; (ii) ~~designates a named~~

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# Regulations

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

"Institution of higher education" or "institution" means any person, firm, corporation, association, agency, institute, trust, or other entity of any nature whatsoever offering education beyond the secondary school level that has received certification from the council and either: (i) offers courses or programs of study or instruction that lead to, or that may reasonably be understood to be applicable to, a degree; (ii)

operates a facility as a college or university or other entity of whatever kind that offers degrees or other indicia of level of educational attainment beyond the secondary school level; ~~or~~ (iii) uses the term "college" or "university," or words of like meaning, in its name or in any manner in connection with its academic affairs or business; ~~or~~ (iv) offers approved courses of degree credit or programs of study leading to a degree or offers degrees either at a site in Virginia or via telecommunications equipment located within Virginia.

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

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

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

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

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

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

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

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

"Postsecondary education activities" means researching, funding, designing, and/or conducting instructional programs, classes, or research opportunities, designed primarily for

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# Regulations

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students who have completed the requirements for a high school diploma or its equivalent or who are beyond the age of compulsory high school attendance.

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

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

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

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

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

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

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

"Surety instrument" means a surety bond or a clean irrevocable letter of credit issued by a surety company or banking institution authorized to transact business in Virginia adequate to provide refunds to students for the unearned non-Title IV portion of tuition and fees for any given semester,

quarter or term and to cover the administrative cost associated with filing a claim against the instrument.

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

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

"Unearned tuition" means the portion of tuition charges billed to the student but not yet earned by the institution; the unearned tuition represents future educational services to be rendered to presently enrolled students.

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

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

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

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

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

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

1. Each course or degree, diploma, or certificate program offered in Virginia is approved by the governing body of the school; and
2. The appropriate state agency, if any, in the state where the main campus of the school is located has granted whatever approval may be necessary for the school to:

- a. Offer courses or degree, diploma, or certificate programs at the level for which credit is being awarded for those courses or programs in Virginia; and
- ~~b. Offer courses or degree programs outside its state;~~
- ~~c. Offer each course or degree, diploma, or certificate program being offered in Virginia; and~~
- ~~d.~~ b. Ensure that any credit earned for coursework offered by the school in Virginia may be transferred to another of the school's ~~principal location~~ locations outside Virginia as part of an existing degree, diploma, or certificate program offered by the school.

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

Part II  
Exemptions

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

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

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

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

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

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

- 1. The titles of religious degrees that may be awarded include, but are not limited to, (i) Bachelor of Education in a specific religion, (ii) Master of Divinity, and (iii) Doctor of Sacred Theology.
- 2. ~~The titles of secular~~ Secular degrees ~~that~~ may not be awarded in any discipline, including religion, religious education, and biblical studies; Titles of secular degrees that may not be awarded include, but are not limited to, (i)

Associate of Arts, (ii) Associate of Science, (iii) Associate of Applied Science, (iv) Associate of Occupational Science, (v) Bachelor of Arts, (vi) Bachelor of Science, (vii) Master of Arts, (viii) Master of Science, (ix) Doctor of Philosophy, and (x) Doctor of Education.

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

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

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

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

- 1. Any school that claims an exemption under subsections A and B of this section on the basis that its primary purpose is to provide religious training or theological education shall be entitled to a rebuttable presumption of the truth of that claim.
- 2. It shall be the council's responsibility to show that a school is not exempt under subsections A and B of this section.
- 3. The council assumes no jurisdiction or right to regulate religious beliefs under this chapter.

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

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

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

- 1. Any school subject to the provisions of Chapter 16 (§ 22.1-319 et seq.) of Title 22.1 of the Code of Virginia.
- 2. Any honorary degree conferred or awarded by a school, as long as the degree (i) does not represent the satisfactory completion of all or any part of the requirements of a program or course of study and (ii) is normally regarded as



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# Regulations

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one that is intended to be commemorative in nature in recognition of an individual's contributions to society. Such degree must state on its face that it is honorary in nature.

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

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

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

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

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

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

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

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

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

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

regulations prescribed by the relevant governing body of such private school.

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

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

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

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

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

A. The council staff shall:

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

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

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

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

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

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

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

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

### Part IV

Schools for which Certification is Required

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

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

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

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

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

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

1. The determination for certification of telecommunications activities or mail correspondence courses may be based upon, but not limited to, physical presence.
2. With the exception of degree programs, academic credit and other courses offered exclusively from outside the Commonwealth of Virginia through individual and private interstate communication, all telecommunications activities and mail correspondence courses are subject to the certification criteria required for all postsecondary schools.

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

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

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

Part V  
Certification Criteria

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

A. The certification criteria shall include, but not be limited to (i) procedures by which a postsecondary school may apply for certification and (ii) criteria designed to ensure that all

postsecondary schools that are subject to this chapter meet minimal academic or career-technical standards.

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

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

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

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

1. May advertise, provided that all advertisements and promotional materials state that the school is Provisionally Certified to Operate by the State Council of Higher Education;
2. May recruit and register students, however, may not collect more than an initial nonrefundable fee of \$100 from each student;
3. May recruit and hire faculty and staff; and
4. May not offer postsecondary instruction, or confer certificates, diplomas or degrees.

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

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

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

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

1. An associate degree shall be granted only after the successful completion of at least 60 semester hour or 90 quarter credit hours of collegiate level study.
2. A bachelor's degree shall be granted only after the successful completion of at least 120 semester hours or 180 quarter credit hours of collegiate level study.
3. A master's degree shall be granted only after the successful completion of the requirements for a bachelor's

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# Regulations

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degree and at least 30 semester hours or 45 quarter credit hours of collegiate level study.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

b. If teaching occupational/technical courses, hold either (i) an associate degree from an accredited college or university in the discipline being taught or (ii) qualify for a faculty appointment by virtue of scholarly or professional achievements.

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

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

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

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

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

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

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

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

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

2. The elective and required courses for each program are offered on a schedule and in a sequence that enables both full-time and part-time students to complete the program in a reasonable period of time.
3. The institution's instructional faculty at each site location holds either full-time, part-time, or adjunct appointments.
4. The institution's academic programs shall ensure that: (i) a properly credentialed and course qualified instructor teaches each course; (ii) a credentialed and course qualified academic advisor is available to meet the concerns of the student, and that a student contact by any method will elicit a response from the advisor within a reasonable timeline; (iii) continual curriculum development and oversight for each major and concentration/track is maintained; and (iv) a program director is named and designated to oversee each program area.
5. A plan is in place that ensures interaction between student and faculty, and among students.

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

1. The senior administrators shall hold at least an earned baccalaureate degree from an accredited college or university and shall have sufficient experience to qualify for the position.
2. Each branch of the institution certified to operate in Virginia must designate one person as the branch/campus director.
  - a. The director must hold a baccalaureate degree from an accredited college or university with at least one year of experience in administration or institutional management.
  - b. Exception to academic preparation requirements for director may be made in instances where substantial documentation of professional and scholarly achievements and/or demonstrated competences in administration/institutional management can be shown. The institution must document and justify any such exception.
3. Duties of the director include, but are not limited to:
  - a. Be available at the school location for at least 50% of the operational time each week the school has students present unless an assistant director is available. If the

school operates a site in Virginia, a director must be assigned to manage the site's operation; however, the director may designate a person at the site to handle day-to-day administrative matters in his absence.

b. Be responsible for the institution's program or programs, organization of classes, maintenance of the institutional facilities, maintenance of proper administrative records, signing documents pertaining to certification, and all other administrative matters related to certification.

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

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

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

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

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

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

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

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

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

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

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# Regulations

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

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

1. Courses of study conform to state, federal, trade, or manufacturing standards of training for the occupational fields in which such standards have been established or conform to recognized training practices in those fields.
2. A plan is in place that ensures interaction between student and faculty, and among students.

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

1. The person has no felony convictions related to the operation of a school;
2. The person has not been convicted or pleaded guilty to a crime of fraud or theft under state or federal law within the previous 10 years; and has not had a judgment entered against him in his individual capacity in a civil action based upon any theory of fraudulent activity within the previous 10 years;
3. The person has not controlled or managed a postsecondary educational institution that has ceased operation during the past five years without providing for the completion of programs by its students or without providing refunds; and
4. The person has not knowingly falsified or withheld information from the council.

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

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

shall articulate reasons that the accreditation standard is deficient.

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

1. The history and development of the postsecondary school;
2. An identification of any persons, entities, or institutions that have a controlling ownership or interest in the postsecondary school;
3. The purpose of the postsecondary school, including a statement of the relative degree of emphasis on instruction, research, and public service as well as a statement demonstrating that the school's proposed offerings are consistent with its stated purpose;
4. A description of the postsecondary school's activities including telecommunications activities away from its principal location, and a list of all program areas in which courses are offered away from the principal location;
5. A list of all locations in Virginia at which the postsecondary school offers courses and a list of the degree and nondegree programs currently offered or planned to be offered in Virginia;
6. For each Virginia location, and for the most recent academic year, the total number of students who were enrolled as well as the total number and percentage of students ~~claiming Virginia residence~~ who were enrolled in each program offered;
7. For each Virginia location, the total number of students that completed/graduated from the school as of the end of the last academic year and the total number and percentage of students ~~claiming Virginia residence~~ who completed/graduated from each program offered by the school as of the end of the last academic year;
8. For unaccredited institutions of higher education and career-technical schools only, the total number of students ~~claiming Virginia residence~~ who report employment in their field of study within (i) six months of graduation/completion and (ii) one year of graduation/completion.

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

1. The governing board or owners of the school;
2. The chief operating officer, president, or director at that ~~site~~ branch in Virginia;
3. The principal administrators and their credentials at that ~~site~~ branch in Virginia; and
4. The students, if students participate in school governance.

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

1. The standards for academic credit or course completion given for experience;
2. The criteria for acceptance of transfer credit where applicable;
3. The criteria for refunds of tuition and fees;
4. Students' rights, privileges, and responsibilities; and
5. The established grievance process of the school, which shall indicate that students should follow this process and may contact council staff to file a complaint about the school as a last resort. The written policy shall include a provision that students will not be subjected to adverse actions by any school officials as a result of initiating a complaint.

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

1. Each student's application for admission and admissions records containing information regarding the educational qualifications of each regular student admitted that are relevant to the postsecondary school's admissions standards. Each student record must reflect the requirements and justification for admission of the student to the postsecondary school. Admissions records must be maintained by the school, its successors, or its assigns for a minimum of three years after the student's last date of attendance.
2. A transcript of the student's academic or course work at the school, which shall be retained permanently in either hard copy forms or in an electronic database with backup by the school, its successors, or its assigns.
3. A record of student academic or course progress at the school including programs of study, dates of enrollment, courses taken and completed, grades, and indication of the student's current status (graduated, probation, etc.) must be retained permanently. Any changes or alterations to student records must be accurately documented and signed by an appropriate school official.
4. A record of all financial transactions between each individual student and the school including payments from the student, payments from other sources on the student's behalf, and refunds. Fiscal records must be maintained for a minimum of three years after the student's last date of attendance. When tuition and fees are paid by the student in installments, a clear disclosure of truth-in-lending statement must be provided to and signed by the student.
5. ~~A written, binding agreement transacted with another school or records maintenance organization with which the~~

~~school is not corporately connected for the preservation of students' transcripts by another institution or agency, as well as for access to the transcripts, in the event of school closure or revocation of certification in Virginia. State-supported, public schools originating in a state other than Virginia and operating a campus within Virginia may choose to enter into a written, binding agreement regarding student records with the university system of which they are a part.~~ The school shall make the documents referenced in subdivisions 1 through 4 of this subsection available to the student upon request. Academic transcripts shall be provided upon request if the student is in good financial standing.

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

1. The number of students ~~claiming Virginia residency~~ enrolled in each program offered.
2. For each Virginia location, the total number of students that completed/graduated from the school as of the end of the last academic year and the total number and percentage of students ~~claiming Virginia residence~~ who completed/graduated from each program offered by the school as of the end of the last academic year.
3. A description of any financial aid offered by the school including repayment obligations, standards of academic progress required for continued participation in the program, sources of loans or scholarships, the percentage of students receiving federal financial aid (if applicable) and the average student indebtedness at graduation.
4. A broad description, including academic and/or career-technical objectives of each program offered, the number of hours of instruction in each subject and total number of hours required for course completion, course descriptions, and a statement of the type of credential awarded.
5. A statement of tuition and fees and other charges related to enrollment, such as deposits, fees, books and supplies, tools and equipment, and any other charges for which a student may be responsible.
6. The school's refund policy for tuition and fees pursuant to subsection N of this section ~~and the~~.
7. The school's procedures for handling complaints, including procedures to ensure that a student will not be subject to unfair actions as a result of his initiation of a complaint proceeding.
- ~~7.~~ 8. The name and address of the school's accrediting body, if applicable.
- ~~8.~~ 9. The minimum requirements for satisfactory completion of each degree level and degree program, or nondegree certificates/diplomas.
- ~~9.~~ 10. A statement that ~~all school officials~~ accurately represent describes the transferability of any courses ~~or~~

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# Regulations

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~~programs and that indicates whether any of the associate degrees offered by the school are considered terminal degrees.~~

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

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

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

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

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

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

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

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

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

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

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

2. The USDOE composite score range is -1.0 to 3.0. Schools with a score of 1.5 to 3.0 meet fully the stability requirement in subsection I of this section; scores between 1.0 and 1.4 meet the minimum expectations; and scores less than 1.0 do not meet the requirement and shall be immediately considered for audit.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

N. In accordance with § 23-276.3 B of the Code of Virginia, the school shall establish a tuition refund policy and communicate it to students. ~~Accredited institutions shall adhere to the tuition refund requirements of their accrediting body, if required, and if those requirements describe specific refund terms. Otherwise, accredited institutions, as well as all other schools, shall adhere to the following tuition refund~~

~~requirements:~~ Each school shall establish, disclose, and utilize a system of tuition and fee charges for each program of instruction. These charges shall be applied uniformly to all similarly-circumstanced students. This requirement does not apply to group tuition rates to business firms, industry, or governmental agencies that are documented by written agreements between the school and the respective organization.

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

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

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

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

~~5. An individual's status as a student shall be terminated by the school not later than seven consecutive instructional days after the last day on which the student actually attended the school. Termination may be effected earlier by written notice. The date of the institution's determination that the student withdrew should be no later than 14 calendar days after the student's last date of attendance as determined by the institution from its attendance records. The institution is not required to administratively withdraw a student who has been absent for 14 calendar days. However, after 14 calendar days, the institution is expected to have determined whether the student intends to return to classes or to withdraw. In addition, if the student is eventually determined to have~~



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# Regulations

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withdrawn, the end of the 12-day period begins the timeframe for calculating the refunds. In the event that a written notice is submitted, the effective date of termination will shall be the date the student last attended classes of the written notice. The school may require that written notice be transmitted via registered or certified mail, or by electronic transmission provided that such a stipulation is contained in the written enrollment contract. The school may require that the parents or guardians of students under 18 years of age submit notices of termination on behalf of their children or wards. The school is required to submit refunds to individuals who have terminated their status as students within 45 days after receipt of a written request or the date the student last attended classes whichever is sooner. An institution that provides the majority of its program offerings through distance learning shall have a plan for student termination, which shall be provided to council staff for review with its annual or recertification application.

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

- a. The school has a formal, published policy regarding leaves of absence;
- b. The student followed the institution's policy in requesting the leave of absence and submits a signed, dated request with the reasons for the leave of absence;
- c. The school determines that there is a reasonable expectation that the student will return to the school;
- d. The school approved the student's request in accordance with the published policy;
- e. The school does not impose additional charges to the student as a result of the leave of absence;
- f. The leave of absence does not exceed 180 days in any 12-month period; and
- g. Upon the student's return from the leave of absence, the student is permitted to complete the coursework he began prior to the leave of absence;

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

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

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

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

a- (1) A student who enters school but withdraws during the first ¼ (25%) of the period is entitled to receive as a refund a minimum of 50% of the stated cost of the course or program for the period.

b- (2) A student who enters a school but withdraws after completing ¼ (25%), but less than ½ (50%) of the period is entitled to receive as a refund a minimum of 25% of the stated cost of the course or program for the period.

c- (3) A student who withdraws after completing ½ (50%), or more than ½ (50%), of the period is not entitled to a refund.

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

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

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

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

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

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

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

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

(1) A student who starts the program but withdraws up to and including completion of the first quartile (25%) of the program is entitled to receive as a refund a minimum

of 75% of the stated cost of the course or program for the period.

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

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

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

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

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

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

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

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

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

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

O. The school shall keep ~~official~~ relevant academic transcripts for all teaching faculty to document that each has the appropriate educational credentials or other relevant documentation to support reported experience in the area of teaching responsibility or documentation of. In the event teaching qualification is based on professional competencies and/or scholarly achievements, relevant documentation to support reported experience must be retained by the school.

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

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

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

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

c. Not be used to provided labor or replacement for a permanent employee.

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

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

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

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

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

2. Addition a new branch location or instructional site.

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

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

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

1. Naming of new school president.

2. Naming of new campus or branch director.

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# Regulations

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

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

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

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

C. Equipment shall be maintained in good working order.

### Part VI

#### Certification Requirements

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

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

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

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

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

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

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

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

C. An out-of-state postsecondary school seeking certification to operate in the Commonwealth of Virginia must secure written documentation from the higher education coordinating and/or approving agency in the state or country in which the school is formed, chartered, established, or incorporated indicating that the school is operating in good standing. If the school formerly operated in another state or

country but is not operating there at the time of its application to operate in Virginia, the school must secure from the higher education coordinating and/or approving agency documentation that it closed in good standing and would be allowed to re-establish a postsecondary school in that state or country. These written documentations must be provided to council staff.

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

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

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

### 1. The following constitutes a change of ownership:

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

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

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

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

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

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

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

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

1. Out-of-state private degree-granting and career-technical school certificates are valid for one year beginning on September 1 of the calendar year and ending on August 31 of the following calendar year. Applications are due not later than July 2.
2. Out-of-state public institution certificates are valid for one year beginning on September 15 of the calendar year and ending on September 14 of the following calendar year. Applications are due not later than July 16.
3. In-state private nonprofit institution certificates are valid for one year beginning on October 1 of the calendar year and ending on September 30 of the following calendar year. Applications are due not later than August 2.
4. In-state proprietary degree-granting and career-technical school certificates are valid for one year beginning on October 15 of the calendar year and ending on October 14 of the following calendar year. Applications are due not later than August 16.
5. In-state proprietary career-technical school certificates (letters A-D) are valid for one year beginning on November 1 of the calendar year and ending on October 31 of the following calendar year. Applications are due not later than September 2.
6. In-state proprietary career-technical school certificates (letters E-P) are valid for one year beginning on November 15 of the calendar year and ending on November 14 of the following calendar year. Applications are due not later than September 16.
7. In-state proprietary career-technical school certificates (letters Q-Z and others) are valid for one year beginning on December 1 of the calendar year and ending on November 30 of the following calendar year. Applications are due not later than October 2.

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

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

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

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

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

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

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

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

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

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

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

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# Regulations

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1. Provide council staff with a copy of the accreditor's letter and full report explaining the reason for the revocation;
2. Provide council staff with a written explanation why the loss of accreditation should not impact the school's certification to operate in Virginia, and any supporting documentation; and
3. Submit to an audit to determine compliance with the council's regulations.

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

1. Initiate revocation of the school's Certificate to Operate;  
or
2. Grant conditional certification, during which time the school may not enroll new students. The terms of the conditional certification will be fixed at staff discretion based upon their findings.

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

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

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

1. Provide documentation that the issues causing the loss of accreditation have been resolved.
2. Demonstrate full compliance to the provisions of this chapter by virtue of an audit during the conditional certification period.

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

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

1. Violation of any provision of this chapter pursuant to § 23-276 of the Code of Virginia, the council's minimum standards, or any rule made by the council.
2. Furnishing of false, misleading, deceptive, altered, or incomplete information or documents to the council.

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

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

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

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

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

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

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

10. Illegal discrimination in the acceptance of students.

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

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

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

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

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

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

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

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

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# Regulations

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2. Consist of council staff.
- C. Audits shall be random or triggered by, but not limited to, the following events:
  1. Council staff concerns based on questionable information in the initial or recertification application.
  2. Greater than average volume and frequency of negative student complaints or adverse publicity.
  3. Difficulty securing accreditation within the specified time period.
  4. Adverse action by the USDOE or the school's accrediting agency.
  5. A USDOE composite financial responsibility score of less than 1.0.
- D. Following an audit of the school, council staff shall prepare a report with recommendations for review by the council. If a school is found noncompliant, the council may:

1. Determine no action is necessary and have the report filed;
2. Change the status to probationary conditional certification and require remedial action(s) within a specified timeframe;
3. ~~Revoke or suspend certification~~ Initiate suspension or revocation of the school's certificate to operate.

## Part VII

### Procedures for Conducting Fact-Finding Conferences and Hearings

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

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

1. Unless emergency circumstances exist that require immediate action, ~~no certification application shall be denied, suspended or revoked~~ no order shall be issued to refuse to grant a certification, to revoke or suspend a prior certification, or to add conditions to any certification except upon written notice stating the proposed basis for such action and the time and place for a right of the affected parties to appear at an informal fact-finding conference.
2. ~~If a basis exists for a refusal to certify or a suspension or a revocation of a certificate to operate~~ If the council determines that grounds exist to refuse to grant a certification, to revoke or suspend a prior certification, or to add conditions to any certification, the council shall notify, by certified mail or by hand delivery provide written notice of its intention to take the proposed action to the interested parties at the address of record maintained by the council. The notice shall be sent by certified mail, return receipt requested, and shall state the reasons for the proposed action.

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

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

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

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

##### B. Hearing; notification, appearance, conduct.

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

~~the certified letter. Parties may enter into a consent agreement to settle the issues at any time prior to, or subsequent to, an informal fact finding conference.~~

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

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

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

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

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

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

D. Hearing decisions.

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

2. Prior to the recommendation of the hearing officer, the parties concerned shall be given opportunity, on request, to submit in writing for the record (i) proposed findings and conclusions and (ii) a statement of reasons therefore. On request, opportunity shall be afforded for oral arguments to the hearing officer or to the council as it may permit in its discretion. The council shall receive and act on exceptions to the recommendation of the hearing officer prior to rendering a decision.

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

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

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

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

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

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

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

New school orientation session, per person	\$150
Initial fee for all new institutions of higher education =	\$6,000
Initial fee for all new career-technical schools =	\$2,500
Annual fee for all unaccredited institutions of higher education =	\$6,000
Annual fee for all unaccredited out-of-state career-technical schools	\$2,500
Renewal fee for all postsecondary schools with <u>an annual gross tuition collected greater than \$150,000 less than \$50,000</u> , as recorded on most recent financial statement =	<del>\$2,500</del> \$250
Renewal fee for all postsecondary schools with <u>an annual gross tuition collected greater than \$100,000 or equal to \$50,000 but less than or equal to \$150,000</u> , as recorded on most recent financial statement =	<del>\$1,500</del> \$1,000



# Regulations

Renewal fee for all postsecondary schools with <u>an annual gross tuition collected greater than \$50,000 or equal to \$100,000 but less than or equal to \$100,000 \$500,000</u> , as recorded on most recent financial statement =	\$1,000 <del>\$2,500</del>	<u>Application fee for each additional branch</u>	\$300
Renewal fee for all postsecondary schools with <u>an annual gross tuition collected less greater than or equal to \$50,000 \$500,000 but less than \$1,000,000</u> , as recorded on most recent financial statement =	\$500 <del>\$4,000</del>	<u>Application fee for each additional site</u>	\$100
<u>Renewal fee for all postsecondary schools with an annual gross tuition collected greater than or equal to \$1,000,000, as recorded on most recent financial statement</u>	\$5,000	<u>Application fee for each additional program or modification to an existing program</u>	\$100
<del>Late fee =</del>	<del>\$100/day for first 10 business days after expiration of annual certification (Maximum fee = \$1,000) (11th day institution notified to cease and desist and matter referred for prosecution)</del>	<p><del>E. If a late fee is assessed, the school must submit the assessed fee, required certification fee and all required certification documents prior to the issuance of the Certificate to Operate.</del></p> <p>F. <del>E.</del> A school that submits a payment that is returned for any reason must resubmit the required payment, any applicable late fee, and the assessed returned check fee of \$35 via a money order or certified bank check only.</p>	
Returned check fee =	\$35	<b>8VAC40-31-280. Closure of a postsecondary school.</b>	
<del>Noncompliance administrative fees =</del>	<del>\$1,000 for each occurrence of noncompliance found as a result of audit</del>	<p>A. The council, on its own motion, may authorize a postsecondary school whose application for certification to operate is denied in accordance with 8VAC40-31-200 to continue to offer instruction <del>for degree credit</del> to all currently enrolled students until the end of the semester, quarter, or other academic term during which certification is denied.</p> <p>B. The council, on its own motion, may authorize a school whose certification is revoked in accordance with 8VAC40-31-200 to offer the coursework necessary for all currently enrolled students to complete their programs and to award <u>degrees, certificates or diplomas</u> to those students, provided that the school:</p> <ol style="list-style-type: none"> <li>1. Offers <del>degree</del> coursework only to those students who were enrolled at the time the school's certification was revoked; and</li> <li>2. Offers all necessary coursework on a schedule that permits all currently enrolled students to complete their programs in a reasonable period of time.</li> </ol> <p>C. When a school decides to voluntarily cease operations, it must immediately inform the council of the following:</p> <ol style="list-style-type: none"> <li>1. The planned date for the termination of operations.</li> <li>2. The planned date and location for the transfer of student records.</li> <li>3. The name and address of the organization to receive and manage the student records and the name of the official who is designated to manage transcript requests. The organization designated for the preservation of the student records may not be corporately connected to the closing school. <u>The council may receive student records, subject to subsection D of this section, if an appropriate depository has not been established.</u></li> <li>4. Arrangements for the continued education of currently enrolled students via teach-out agreement or other practical solution. <u>The teach-out plan shall consist of, but not be limited to, the following:</u></li> </ol>	
Initial or renewed exemption application/request for name acknowledgement/agent registration =	\$300		
Nonrefundable <del>handling charge</del> <u>administrative fee</u> (withdrawal of application) =	<del>\$300</del> <u>\$500 career-technical, \$1000 institutions of higher education</u>		
<u>Request duplicate certificate to operate due to school name or address change</u>	\$100		
<u>Request duplicate agent permit, to replace lost/stolen/misplaced permit</u>	\$100		

- a. Identification of the school's official date of closure;
- b. A listing by program of students enrolled at the time of the school's closure including addresses, telephone numbers, and estimated graduation dates for each student;
- c. The status of all current refunds due and balances owed;
- d. A listing of those students who had prepaid for any portion of their training and a calculation of the total amount that was prepaid by each student;
- e. Signed agreement with one or more local educational institutions able to provide adequate education to all students in all programs; and
- f. Procedures for awarding graduates their certificates, diplomas, or degrees.

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

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

- 1. Academic transcripts showing the basis of admissions, transfer credits, courses, credits, grades, graduation authorization, and student name changes for each student;
- 2. Transcripts of financial aid for each student, if maintained;
- 3. Foreign student forms for foreign students;
- 4. Veterans Administration records for veterans;
- 5. Copies of degrees, diplomas, and certificates awarded, if maintained;
- 6. One set of course descriptions for all courses offered by the school; and
- 7. Evidence of accreditation, if any, during the years covered by transcripts.

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

institution or organization to teach out the educational programs. Such agreements must be approved by the council.

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

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

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

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

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

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

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

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

E. ~~The director's determination shall be in writing and shall be mailed to the claimant and the school or its owners, or both, and shall become final 30 days after the receipt of the determination unless either the claimant or the school, or its owners, within the 30 day period, files with the director a~~

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# Regulations

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

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

1. The assets of the fund may not be expended for any purpose other than to pay bona fide claims made against the fund;
2. All payments into the fund shall be maintained by the state comptroller who shall deposit and invest the assets of the fund in any savings accounts or funds that are federally or state insured, and all interests or other return on the fund shall be credited to the fund;
3. Payment into the fund shall be made in the form of a company or cashier's check or money order made payable to the "Student Tuition Guaranty Fund."

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

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

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

1. Register with the council prior to soliciting in Virginia; and
2. Pay an annual fee of \$300 per school represented.

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

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

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

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

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

## FORMS (8VAC40-31)

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

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

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

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

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

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

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

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

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

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

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

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

~~Change of Location Application.~~

~~Change of Ownership Application.~~

~~Buyer/Seller Affidavit and Certification.~~

~~Statement of Responsibility of Refund Liability.~~

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

~~Institutional Change of Name Application.~~

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

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

[Acknowledgement of Prior Postsecondary Involvement \(rev. 3/07\).](#)

[Administrator Qualification \(7/08\).](#)

[Application for Agent Permit \(9/09\).](#)

[Certificate, Diploma, or Degree Program Information \(rev. 2/12\).](#)

[Change of Location Application \(rev. 3/07\).](#)

[Change of Ownership Application \(rev. 3/07\).](#)

[Chart of Accounts \(rev. 3/07\).](#)

[Directions for Preparing School Plan Report \(undated\).](#)

- [Institutional Certification Application Form \(rev. 8/08\).](#)
- [Institutional Certification Application Form: Religious Exemption \(rev. 7/11\).](#)
- [Institutional Certification Checklist for Postsecondary Schools \(rev. 7/07\).](#)
- [Institutional Change of Name Application \(3/07\).](#)
- [Institutional Sites Listing \(rev. 1/12\).](#)
- [Instructions for Completing Institutional Certification Applications \(rev. 8/08\).](#)
- [Instructor Qualification \(7/08\).](#)
- [Notification of Program Modification \(rev. 2/12\).](#)
- [Program Notification \(rev. 2/12\).](#)
- [Projected Accounting Budget \(rev. 7/07\).](#)
- [Proprietary School Financial Composite Score Calculation Worksheet \(undated\).](#)
- [Report on the Closing of a Campus \(rev. 3/07\).](#)
- [Request for Name Acknowledgement \(rev. 3/07\).](#)
- [School Catalog Checklist \(rev. 8/08\).](#)
- [Sample Irrevocable Letter of Credit \(rev. 3/07\).](#)
- [Surety Bond \(rev. 4/09\).](#)
- [Surety Instrument Calculation Worksheet \(rev. 2/11\).](#)

VA.R. Doc. No. R09-1980; Filed September 6, 2012, 3:42 p.m.

**UNIVERSITY OF MARY WASHINGTON**

**Final Regulation**

**REGISTRAR'S NOTICE:** The University of Mary Washington is claiming an exemption from the Administrative Process Act in accordance with § 2.2-4002 A 6 of the Code of Virginia, which exempts educational institutions operated by the Commonwealth.

**Title of Regulation:** **8VAC55-10. Prohibition of Weapons (adding 8VAC55-10-10, 8VAC55-10-20, 8VAC55-10-30).**

**Statutory Authority:** § 23-91.40 Code of Virginia.

**Effective Date:** September 26, 2012.

**Agency Contact:** Mark Sandor, Agency Regulatory Coordinator, University of Mary Washington, Brent Hall, 1301 College Ave, Fredericksburg, VA 22401, telephone (540) 286-8121 or email msandor@umw.edu.

**Summary:**

*This action implements the prohibition of weapons on University of Mary Washington property.*

**CHAPTER 10  
PROHIBITION OF WEAPONS**

**8VAC55-10-10. Definitions.**

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

"Police officer" means law-enforcement officials appointed pursuant to Article 3 (§ 15.2-1609 et seq.) of Chapter 16 or Chapter 17 (§ 15.2-1700 et seq.) of Title 15.2, Chapter 17 (§ 23-232 et seq.) of Title 23, Chapter 2 (§ 29.1-200 et seq.) of Title 29.1, or Chapter 1 (§ 52-1 et seq.) of Title 52 of the Code of Virginia or sworn federal law-enforcement officers.

"University property" means any property owned, leased, or controlled by the University of Mary Washington.

"Weapon" means any (i) pistol, revolver, or other weapon designed or intended to propel a missile of any kind; (ii) any dirk, bowie knife, switchblade knife, ballistic knife, razor slingshot, spring stick, metal knucks, or blackjack; (iii) any flailing instrument consisting of two or more rigid parts connected in such manner as to allow them to swing freely, which may be known as nun chahka, nun chuck, nunchaku, shuriken, or fighting chain; or (iv) any disc, of whatever configuration, having at least two points or pointed blades that is designed to be thrown or propelled and that may be known as throwing star or oriental dart.

**8VAC55-10-20. Possession of weapons prohibited.**

Possession or carrying of any weapon by any person, except a police officer, is prohibited on university property in academic buildings, administrative office buildings, student residence buildings, dining facilities, or athletic facilities or while attending sporting, entertainment or educational events. Entry upon the aforementioned university property in violation of this prohibition is expressly forbidden.

**8VAC55-10-30. Person lawfully in charge.**

In addition to individuals authorized by university policy, University of Mary Washington police officers are lawfully in charge for the purposes of forbidding entry upon or remaining upon university property while possessing or carrying weapons in violation of this prohibition.

VA.R. Doc. No. R13-3385; Filed September 24, 2012, 10:31 a.m.



**TITLE 9. ENVIRONMENT**

**STATE AIR POLLUTION CONTROL BOARD**

**Final Regulation**

**Titles of Regulations:** **9VAC5-50. New and Modified Stationary Sources (Rev. H05) (amending 9VAC5-50-240, 9VAC5-50-250, 9VAC5-50-260).**

**9VAC5-80. Permits for Stationary Sources (Rev. H05) (amending 9VAC5-80-1100 through 9VAC5-80-1140, 9VAC5-80-1150 through 9VAC5-80-1220, 9VAC5-80-1240 through 9VAC5-80-1300; adding 9VAC5-80-1105, 9VAC5-80-1255; repealing 9VAC5-80-1320).**

**Statutory Authority:** § 10.1-1308 of the Code of Virginia; federal Clean Air Act (§§ 110, 112, 165, 173, 182, and Title V) 40 CFR Parts 51, 61, 63, 70, and 72.

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# Regulations

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Effective Date: November 7, 2012.

Agency Contact: Gary Graham, Department of Environmental Quality, P.O. Box 10009, Richmond, VA 23240, telephone (804) 698-4103, FAX (804) 698-4510, or email gegraham@deq.virginia.gov.

Background:

The regulation applies to the construction or reconstruction of new stationary sources or modifications (physical or operational changes) to existing ones. Exemptions are provided for smaller facilities. With some exceptions, the owner must obtain a permit from the agency prior to the construction or modification of the source. The owner of the proposed new or modified source must provide information as needed to enable the agency to conduct a preconstruction review in order to determine compliance with applicable control technology and other standards and to assess the impact of the net emissions from the facility on air quality. The regulation also provides the basis for the agency's final action (approval or disapproval) on the permit depending upon the results of the preconstruction review. The regulation provides a sourcewide perspective to determine applicability based upon the net emissions changes due to or directly resulting from the modification (physical or operational change at an existing stationary source). Procedures for making changes to permits are included. There are provisions that allow the use of a general permit. The regulation also allows consideration of additional factors for making Best Available Control Technology (BACT) determinations for sources subject to minor new source review.

Summary:

The primary change being made to the program is to convert from a permit applicability approach for modifications that looks at the net emissions increase due to or directly resultant from the physical or operational changes from all affected units to an approach that only looks at emissions increases from new and modified emissions units. Currently, applicability is based on the net emissions increase based on all the sourcewide emissions changes due to or directly resultant from the physical or operational change. The program would base permit applicability on the emissions increases from only those emissions units that undergo a physical or operational change in the project.

Secondary changes include (i) changes to the way that BACT determinations will be made, (ii) changes to the way that NSPS-affected facilities are exempted, (iii) removal of transportable engines from a nonroad engine exclusion, (iv) resolution of conflicting exemptions for reconstructed emissions units and modified emissions units, (v) exemption of short-term testing and remediation projects and aggregation of emissions units under some other exemptions, (vi) changes to the way that replacement emissions units are exempted, (vii) changes to certain

exemption requirements for portable stationary sources, (viii) changes to the way that emission rates are calculated for certain exemptions, (ix) resolution of regulatory conflicts concerning open pit incinerators, and (x) clarification of other provisions of the minor new source review program.

Changes to the proposed regulation (i) revise the BACT definition; (ii) restore the exemption threshold for fuel burning units using natural gas; (iii) correct the fine particulate matter ( $PM_{2.5}$ ) exemption rate threshold for projects; (iv) provide for the exemption of small farm incinerators; (v) revise the definitions of construction, major modification, major stationary source, significant, and toxic pollutant; (vi) correct the provision for construction in planned incremental phases; (vii) simplify the provisions for permit invalidation; (viii) revise the definition of emergency; and (ix) make various style, numbering, and typographical corrections.

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.

Article 4

Standards of Performance for Stationary Sources (Rule 5-4)

**9VAC5-50-240. Applicability and designation of affected facility.**

A. The affected facilities ~~in~~ at stationary sources to which the provisions of this article apply are ~~facilities~~ emissions units that emit or cause air pollution ~~are subject to the new source review program.~~

B. The provisions of this article apply throughout the Commonwealth of Virginia.

C. The provisions of this article apply ~~only to affected facilities subject to the new source review program~~ to any regulated air pollutant except to the extent that it is regulated under 9VAC5-60 (Hazardous Air Pollutant Sources). However, the exemption provided by this subsection does not extend to other properties of the exempted pollutants that may require regulation under 9VAC5-40 (Existing Stationary Sources) or 9VAC5-50 (New and Modified Stationary Sources).

**9VAC5-50-250. Definitions.**

A. For the purpose of applying this article in the context of the Regulations for the Control and Abatement of Air Pollution and ~~subsequent amendments or any orders issued by the board~~ related uses, the words or terms shall have the meanings given them in subsection C of this section.

B. ~~As used in this article~~ Unless otherwise required by context, all terms not defined ~~here~~ herein shall have the meanings given them in 9VAC5 Chapter 10 (9VAC5-10), unless otherwise required by context 9VAC5-80 (Permits for Stationary Sources), 9VAC5-10 (General Definitions), or

commonly ascribed to them by recognized authorities, in that order of priority.

C. Terms defined.

"Best available control technology" or "BACT" means, as used in 9VAC5-50-260, a standard of performance an emissions limitation (including a visible emission standard) based on the maximum degree of emission reduction for any pollutant which would be emitted from any proposed a new stationary source or project which the board, on a case-by-case basis, taking into account energy, environmental and economic impacts and other costs, determines is achievable for such source the new stationary source or project through the application of production processes or available methods, systems and techniques, including fuel cleaning or treatment or innovative fuel combustion techniques for control of such pollutant. In no event shall application of best available control technology result in emissions of any pollutant which would exceed the emissions allowed by any applicable standard in Article 5 (9VAC5-50-400 et seq.) of this part or Article 1 (9VAC5-60-60 et seq.) or Article 2 (9VAC5-60-90 et seq.) of Part II of ~~9VAC5 Chapter 60~~ 9VAC5-60 (Hazardous Air Pollutant Sources). If the board determines that technological or economic limitations on the application of measurement methodology to a particular emissions unit would make the imposition of an emission standard infeasible, a design, equipment, work practice, operational standard, or combination of them, may be prescribed instead of requiring the application of best available control technology. Such standard shall, to the degree possible, set forth the emission reduction achievable by implementation of such design, equipment, work practice or operation, and shall provide for compliance by means which achieve equivalent results. ~~In determining best available control technology for stationary sources subject to Article 6 (9VAC5 80 1100 et seq.) of Part II of 9VAC5 Chapter 80, consideration shall be given to the nature and amount of the new emissions, emission control efficiencies achieved in the industry for the source type, and the cost effectiveness of the incremental emission reduction achieved. [ In determining best available control technology for stationary sources subject to Article 6 (9VAC5-80-1100 et seq.) of Part II of 9VAC5-80 (Permits for Stationary Sources), consideration shall be given to the nature and amount of the emissions, emission control efficiencies achieved in the industry for the source type, total cost effectiveness, and where appropriate, the cost effectiveness of the incremental emissions reduction achieved between control alternatives. ]~~

"Lowest achievable emission rate" means for any source, the more stringent rate of emissions based on the following:

1. ~~The most stringent emissions limitation which is contained in the implementation plan of any state for such class or category of stationary source, unless the owner of the proposed stationary source demonstrates that such limitations are not achievable; or~~

2. ~~The most stringent emissions limitation which is achieved in practice by such class or category of stationary source. This limitation, when applied to a modification, means the lowest achievable emissions rate for the new or modified emissions units within the stationary source. In no event shall the application of this term permit a proposed new or modified stationary source to emit any pollutant in excess of the amount allowable under an applicable new source standard of performance.~~

~~"New source review (NSR) program" means a preconstruction review and permit program (i) for new stationary sources or modifications (physical changes or changes in the method of operation); (ii) established to implement the requirements of §§ 110(a)(2)(C), 112 (relating to permits for hazardous air pollutants), 165 (relating to permits in prevention of significant deterioration areas), and 173 (relating to permits in nonattainment areas) of the federal Clean Air Act and associated regulations; and (iii) codified in Article 6 (9VAC5 80 1100 et seq.), Article 7 (9VAC5 80 1400 et seq.), Article 8 (9VAC5 80 1605 et seq.) and Article 9 (9VAC5 80 2000 et seq.) of 9VAC5 Chapter 80.~~

**9VAC5-50-260. Standard for stationary sources.**

A. No owner or other person shall cause or permit to be discharged into the atmosphere from any affected facility any emissions in excess of ~~that resultant from using~~ emissions limitations representing best available control technology, as reflected in any term or condition that may be placed upon the minor NSR permit approval for the facility.

B. A new stationary source shall apply best available control technology for each regulated pollutant that it would have the potential to emit in amounts for which there would be an uncontrolled emission rate equal to or greater than the levels in 9VAC5 80 1320 C 9VAC5-80-1105 C. For a new stationary source, a permit may be issued pursuant to Article 6 (9VAC5-80-1100 et seq.) of Part II of 9VAC5-80 (Permits for Stationary Sources) containing such terms and conditions as may be necessary to implement a best available control technology determination for any regulated air pollutant that may be emitted from any affected emissions unit.

C. ~~A modification project shall apply best available control technology for each regulated pollutant for which it would result in a net emissions increase at the source there would be an increase in the uncontrolled emission rate equal to or greater than the levels in 9VAC5-80-1320 D as a result of physical change or change in the method of operation in the unit in the project. For a project, a permit may be issued pursuant to Article 6 (9VAC5-80-1100 et seq.) of Part II of 9VAC5-80 (Permits for Stationary Sources) containing such terms and conditions as may be necessary to implement a best available control technology determination~~

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# Regulations

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for any regulated air pollutant emitted, or that may be emitted, from any affected emissions unit.

D. For the phased construction of new stationary sources or projects, the ~~determination of best available control technology BACT determination~~ shall be reviewed and modified, as appropriate, at the latest reasonable time which occurs no later than 18 months prior to commencement of construction of each independent phase of the new stationary source or project. At such time, the owner of the applicable stationary source or project may be required to demonstrate the adequacy of any previous ~~determination of best available control technology BACT determination~~ for the source affected emissions units.

## Article 6

### Permits for New and Modified Stationary Sources

#### **9VAC5-80-1100. Applicability.**

A. Except as provided in subsection C of this section, the provisions of this article apply to ~~the construction, reconstruction, relocation or modification of any stationary source~~ (i) the construction of any new stationary source or any project (which includes any addition or replacement of an emissions unit, any modification to an emissions unit or any combination of these changes), and (ii) the reduction of any stack outlet elevation at any stationary source.

B. The provisions of this article apply throughout the Commonwealth of Virginia.

C. ~~The~~ Except as provided in subdivision 3 of this subsection, the provisions of this article do not apply to any stationary source, emissions unit or facility that is exempt under the provisions of ~~9VAC5-80-1320~~ 9VAC5-80-1105.

1. Exemption from the requirement to obtain a minor NSR permit ~~under this article~~ shall not relieve any owner of the responsibility to comply with any other applicable provisions of regulations of the board or any other applicable regulations, laws, ordinances and orders of the governmental entities having jurisdiction.

2. Any stationary source, emissions unit or facility which is exempt from the provisions of this article based on the criteria in ~~9VAC5-80-1320~~ 9VAC5-80-1105 but which exceeds the applicability thresholds for any applicable emission standard in ~~9VAC5 Chapter 40 (9VAC5 40) 9VAC5-40 (Existing Stationary Sources)~~ if it were an existing source or any applicable standard of performance in ~~9VAC5 Chapter 50 (9VAC5 50) 9VAC5-50 (New and Modified Stationary Sources)~~ shall be subject to the more restrictive of the provisions of either the emission standard in ~~9VAC5 Chapter 40 (9VAC5 40) 9VAC5-40 (Existing Stationary Sources)~~ or the standard of performance in ~~9VAC5 Chapter 50 (9VAC5 50) 9VAC5-50 (New and Modified Stationary Sources)~~.

3. Any new stationary source or project that would be subject to the provisions of this article except for being exempt based on one or more of the criteria in 9VAC5-80-

1105 may opt to be subject to this article notwithstanding the exemptions in 9VAC5-80-1105. The provisions of this article shall apply to the new stationary source or project as if the applicable exemption criteria did not apply. Opting in to the minor NSR program shall not affect the applicability of such exemptions to any subsequent project.

D. ~~The~~ Except as provided in 9VAC5-80-1105 C 3 and D 3, fugitive emissions of a stationary source, to the extent quantifiable, shall be included in determining whether it is subject to this article. ~~The provisions of this article do not apply to a stationary source or modification that would be subject to this article only if fugitive emissions, to the extent quantifiable, are considered in calculating the uncontrolled emissions rate of the source or net emissions increase.~~

E. ~~An affected facility subject to Article 5 (9VAC5 50 400 et seq.) of Part II of 9VAC5 Chapter 50 shall not be exempt from the provisions of this article, except where:~~

1. ~~The affected facility would be subject only to recordkeeping or reporting requirements or both under Article 5 (9VAC5 50 400 et seq.) of 9VAC5 Chapter 50;~~ ~~or~~

2. ~~The affected facility is constructed, reconstructed or modified at a stationary source which has a current permit for similar affected facilities that requires compliance with emission standards and other requirements that are not less stringent than the provisions of Article 5 (9VAC5 50 400 et seq.) of 9VAC5 Chapter 50.~~

E. Where construction of a new stationary source or a project is accomplished in contemporaneous increments that individually are not subject to approval under this article and that are not part of a program of construction of a new stationary source or project in planned incremental phases approved by the board, all such increments shall be added together for determining the applicability of any particular change under the provisions of this article. An incremental change is contemporaneous with the particular change only if it occurs between the date five years before commencing construction on the particular change and the date that the emissions increase from the particular change occurs.

F. Regardless of the exemptions provided in this article, no owner or other person shall circumvent the requirements of this article by causing or allowing a pattern of ownership or development over a geographic area of a stationary source which, except for the pattern of ownership or development, would otherwise require a minor NSR permit.

G. No provision of this article shall be construed as exempting any stationary source or emissions unit from the provisions of the major new source review program. Accordingly, no provision of the major new source review program regulations shall be construed as exempting any stationary source or emissions unit from this article.

H. Unless specified otherwise, the provisions of this article are applicable to various sources as follows:



1. Provisions referring to "sources," "~~new or modified sources, or both~~" or "stationary sources" are applicable to the construction, relocation, replacement, reconstruction or modification of all stationary sources (including major stationary sources and major modifications) and the emissions from them to the extent that such sources and their emissions are not subject to the provisions of the major new source review program.

2. Provisions referring to "major stationary sources" are applicable to the construction, relocation, or reconstruction replacement of all major stationary sources subject to this article. Provisions referring to "major modifications" are applicable to major modifications of major stationary sources subject to this article.

3. In cases where the provisions of the major new source review program conflict with those of this article, the provisions of the major new source review program shall prevail.

4. Provisions referring to "state and federally enforceable" or "federally and state enforceable" or similar wording shall mean "state-only enforceable" for terms and conditions of a minor NSR permit designated state-only enforceable under 9VAC5-80-1120 F.

I. For sources subject to the federal hazardous air pollutant new source review program, the provisions of the federal hazardous air pollutant new source review program shall be implemented through this article and the applicable article of Part II of 9VAC5-60 (Hazardous Air Pollutant Sources). Implementation of the federal hazardous air pollutant new source review program shall be independent of applicability and exemption criteria of this article. Additional details may be found in subdivisions 1, 2, and 3 of this subsection. Minor NSR permits shall be the administrative mechanism for issuing approvals under the provisions of federal hazardous air pollutant new source review program. Except as noted below, in cases where there are differences between the provisions of this article and the provisions of federal hazardous air pollutant new source review program, the more restrictive provisions shall apply. The provisions of 9VAC5-80-1150 and 9VAC5-80-1160 shall not apply to sources subject to the federal hazardous air pollutant new source review program. Other sections of this article also provide requirements relative to the application of this article to sources subject to the federal hazardous air pollutant new source review program, in which case those provisions shall prevail. This subsection applies only to the extent that the provisions of the federal hazardous air pollutant new source review program are not being implemented by other new source review program regulations of the board.

1. The provisions of 40 CFR 61.05, 40 CFR 61.06, 40 CFR 61.07, 40 CFR 61.08 and 40 CFR 61.15 for issuing approvals of the construction of any new source or modification of any existing source subject to the provisions of 40 CFR Part 61. These provisions of the

federal hazardous air pollutant new source review program shall be implemented through this article and Article 1 (9VAC5 60 60 et seq.) of Part II of 9VAC5-60 (Hazardous Air Pollutant Sources).

2. The provisions of 40 CFR 63.5 for issuing approvals to construct a new source or reconstruct a source subject to the provisions of 40 CFR Part 63, except for Subparts B, D, and E. These provisions of the federal hazardous air pollutant new source review program shall be implemented through this article and Article 2 (9VAC5-60-90 et seq.) of Part II of 9VAC5-60 (Hazardous Air Pollutant Sources).

3. The provisions of 40 CFR 63.50 through 40 CFR 63.56 for issuing Notices of MACT Approval prior to the construction of a new emissions unit. These provisions of the federal hazardous air pollutant new source review program shall be implemented through this article and Article 3 (9VAC5-60-120 et seq.) of Part II of 9VAC5-60. Any information regarding how minor NSR permits are to be issued to a source category or portion of a source category subject to this element of the federal hazardous air pollutant new source review program under the provisions of this article may be found in Article 3 (9VAC5-60-120 et seq.) of Part II of 9VAC5-60 (Hazardous Air Pollutant Sources).

4. The provisions of 40 CFR 63.40 through 40 CFR 63.44 for issuing approvals to construct a new source or reconstruct a source listed in the source category schedule for standards and to construct a new major source or reconstruct a major source even if the source category is not listed in the source category schedule for standards. These provisions of the federal hazardous air pollutant new source review program shall not be implemented through this article but shall be implemented through Article 7 (9VAC5-80-1400 et seq.) of this part.

J. Unless otherwise approved by the board or prescribed in the regulations of the board, when this article is amended, the previous provisions of this article shall remain in effect for all applications that are deemed complete under the provisions of 9VAC5-80-1160 B prior to [ ~~(insert the effective date of the amendment)~~ November 7, 2012, ]. Any minor NSR permit applications that have not been determined to be complete as of [ ~~(insert the effective date of the amendment)~~ November 7, 2012, ] shall be subject to the new provisions of this article.

K. The provisions of 40 CFR Parts 60, 61, and 63 cited in this article apply only to the extent that they are incorporated by reference in Article 5 (9VAC5-50-400 et seq.) of Part II of 9VAC5-50 (New and Modified Sources) and Article 1 (9VAC5-60-60 et seq.) and Article 2 (9VAC5-60-90 et seq.) of Part II of 9VAC5-60 (Hazardous Air Pollutant Sources).

L. The provisions of 40 CFR Parts 51, 58, 60, 61, and 63 cited in this article apply only to the extent that they are incorporated by reference in 9VAC5-20-21.

M. Particulate matter (PM<sub>2.5</sub>) emissions and particulate matter (PM<sub>10</sub>) emissions shall include gaseous emissions from



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# Regulations

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a source or activity that condense to form particulate matter at ambient temperatures. On or after January 1, 2011, such condensable particulate matter shall be accounted for in applicability determinations and in establishing emissions limitations for PM<sub>2.5</sub> and PM<sub>10</sub> in minor NSR permits. Compliance with emissions limitations for PM<sub>2.5</sub> and PM<sub>10</sub> issued prior to this date shall not be based on condensable particulate matter unless required by the terms and conditions of the permit. Applicability determinations made prior to this date without accounting for condensable particulate matter shall not be considered in violation of this section.

## **9VAC5-80-1105. Permit exemptions.**

A. The general requirements for minor NSR permit exemptions are as follows:

1. The provisions of this article do not apply to the following stationary sources or emissions units:

a. The construction of any stationary source or emissions unit that is exempt under the provisions of subsections B through F of this section. In determining whether a source is exempt from the provisions of this article, the provisions of subsections B through D of this section are independent from the provisions of subsections E and F of this section. A source must be determined to be exempt both under the provisions of subsections B through D of this section taken as a group and under the provisions of subsections E and F of this section to be exempt from this article.

b. Vegetative waste recycling/mulching operations that do not exceed 2100 hours of operation in any 12-month consecutive period at a single stationary source. To qualify as an exemption under this subdivision, the total rated capacity of all diesel engines at the source, including portable diesel engines temporarily located at the site, may not exceed 1200 brake horsepower (output).

c. The location of a portable emissions unit at a site subject to the following conditions:

(1) Any new emissions from the portable emissions unit are secondary emissions.

(2) The portable emissions unit is either subject to (i) a minor NSR permit authorizing the emissions unit as a portable emissions unit subject to this subdivision or (ii) a general permit.

(3) The emissions of the portable emissions unit at the site would be temporary.

(4) The portable emissions unit would not undergo modification or replacement that would be subject to this article.

(5) The portable emissions unit is suitable to the area in which it is to be located.

(6) Reasonable notice is given to the board prior to locating the emissions unit to the site identifying the proposed site and the probable duration of operation at

the site. Such notice shall be provided to the board not less than 15 days prior to the date the emissions unit is to be located at the site unless a different notification schedule is previously approved by the board.

d. The reactivation of a stationary source unless a determination concerning shutdown has been made pursuant to the provisions of 9VAC5-20-220.

e. The use by any existing stationary source or emissions unit of an alternative fuel or raw material, if the following conditions are met:

(1) The owner demonstrates to the board that, as a result of trial burns at the owner's facility or other facilities or other sufficient data, the emissions resulting from the use of the alternative fuel or raw material supply are decreased. No demonstration will be required for the use of processed animal fat, processed fish oil, processed vegetable oil, distillate oil, or any mixture thereof in place of the same quantity of residual oil to fire industrial boilers.

(2) The use of an alternative fuel or raw material would not be subject to review under this article as a project.

2. The provisions of this article do not apply to the following stationary sources or emissions units provided the stationary source or emissions unit is (i) exempt under the provisions of subsections E and F of this section and (ii) meets any other applicable criteria or conditions set forth in this subdivision.

a. Replacement of an emissions unit subject to the following criteria:

(1) The replacement emission unit is (i) of an equal or lesser size and (ii) of an equal or lesser rated capacity as compared to the replaced emissions unit.

(2) The replacement emissions unit is functionally equivalent to the replaced emissions unit.

(3) The replacement emissions unit does not change the basic design parameters of the process operation.

(4) The potential to emit of the replacement emissions unit does not exceed the potential to emit of the replaced emissions unit. If the replaced emissions unit is subject to terms and conditions contained in a minor NSR permit, the owner may, concurrently with the notification required in subdivision (6) of this subdivision, request a minor amendment as provided in 9VAC5-80-1280 B 4 to that permit to apply those terms and conditions to the replacement emissions unit. However, the replacement emissions unit's potential to emit is not limited for the purposes of this subdivision unless (and until) the requested minor permit amendment is granted by the board.

(5) The replaced emissions unit is either removed or permanently shut down in accordance with the provisions of 9VAC5-20-220.

(6) The owner notifies the board, in writing, of the proposed replacement at least 15 days prior to commencing construction on the replacement emissions unit. Such notification shall include the size, function, and rated capacity of the existing and replacement emissions units and the registration number of the affected stationary source.

b. A reduction in stack outlet elevation provided that the stack serves only facilities that have been previously determined to be exempt from the minor NSR program.

3. In determining whether a facility is exempt from the provisions of this article under the provisions of subsection B of this section, the definitions in 9VAC5-40 (Existing Stationary Sources) that would cover the facility if it were an existing source shall be used unless deemed inappropriate by the board.

4. Any owner claiming that a facility is exempt from this article under the provisions of this section shall keep records as may be necessary to demonstrate to the satisfaction of the board that the facility was exempt at the time a minor NSR permit would have otherwise been required under this article.

B. Facilities as specified below shall be exempt from the provisions of this article.

1. Fuel burning equipment units (external combustion units, not engines and turbines) and space heaters in a single application as follows:

a. Except as provided in subdivision b of this subdivision, the exemption thresholds in subdivisions (1) through (4) of this subdivision shall be applied on an individual unit basis for each fuel type.

(1) Using solid fuel with a maximum heat input of less than 1,000,000 Btu per hour.

(2) Using liquid fuel with a maximum heat input of less than 10,000,000 Btu per hour.

(3) Using liquid and gaseous fuel with a maximum heat input of less than 10,000,000 Btu per hour.

(4) Using gaseous fuel with a maximum heat input of less than [ ~~30,000,000~~ 50,000,000 ] Btu per hour.

b. In ozone nonattainment areas designated in 9VAC5-20-204 or ozone maintenance areas designated in 9VAC5-20-203, the exemption thresholds in subdivision a of this subdivision shall be applied in the aggregate for each fuel type.

2. Engines and turbines that are used for emergency purposes only and that do not individually exceed 500 hours of operation per year at a single stationary source as follows. All engines and turbines in a single application must also meet the following criteria to be exempt.

a. Gasoline engines with an aggregate rated brake (output) horsepower of less than 910 hp and gasoline engines powering electrical generators having an

aggregate rated electrical power output of less than 611 kilowatts.

b. Diesel engines with an aggregate rated brake (output) horsepower of less than 1,675 hp and diesel engines powering electrical generators having an aggregate rated electrical power output of less than 1125 kilowatts.

c. Combustion gas turbines with an aggregate of less than 10,000,000 Btu per hour heat input (low heating value).

3. Engines that power mobile sources during periods of maintenance, repair, or testing.

4. Volatile organic compound storage and transfer operations involving petroleum liquids and other volatile organic compounds with a vapor pressure less than 1.5 pounds per square inch absolute under actual storage conditions or, in the case of loading or processing, under actual loading or processing conditions; and any operation specified below:

a. Volatile organic compound transfer operations involving:

(1) Any tank of 2,000 gallons or less storage capacity; or  
(2) Any operation outside the volatile organic compound emissions control areas designated in 9VAC5-20-206.

b. Volatile organic compound storage operations involving any tank of 40,000 gallons or less storage capacity.

5. Vehicle customizing coating operations, if production is less than 20 vehicles per day.

6. Vehicle refinishing operations.

7. Coating operations for the exterior of fully assembled aircraft or marine vessels.

8. Petroleum liquid storage and transfer operations involving petroleum liquids with a vapor pressure less than 1.5 pounds per square inch absolute under actual storage conditions or, in the case of loading or processing, under actual loading or processing conditions (kerosene and fuel oil used for household heating have vapor pressures of less than 1.5 pounds per square inch absolute under actual storage conditions; therefore, kerosene and fuel oil are not subject to the provisions of this article when used or stored at ambient temperatures); and any operation or facility specified below:

a. Gasoline bulk loading operations at bulk terminals located outside volatile organic compound emissions control areas designated in 9VAC5-20-206.

b. Gasoline dispensing facilities.

c. Gasoline bulk loading operations at bulk plants:

(1) With an expected daily throughput of less than 4,000 gallons, or

(2) Located outside volatile organic compound emissions control areas designated in 9VAC5-20-206.

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# Regulations

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d. Account/tank trucks; however, permits issued for gasoline storage/transfer facilities should include a provision that all associated account/tank trucks meet the same requirements as those trucks serving existing facilities.

e. Petroleum liquid storage operations involving:

(1) Any tank of 40,000 gallons or less storage capacity;

(2) Any tank of less than 420,000 gallons storage capacity for crude oil or condensate stored, processed or treated at a drilling and production facility prior to custody transfer; or

(3) Any tank storing waxy, heavy pour crude oil.

9. Petroleum dry cleaning plants with a total manufacturers' rated solvent dryer capacity less than 84 pounds as determined by the applicable new source performance standard in 9VAC5-50-410.

10. Any addition of, relocation of, or change to a woodworking machine within a wood product manufacturing plant provided the system air movement capacity, expressed as the cubic feet per minute of air, is not increased and maximum control efficiency of the control system is not decreased.

11. Wood sawmills and planing mills primarily engaged in sawing rough lumber and timber from logs and bolts, or resawing cants and flitches into lumber, including box lumber and softwood cut stock; planing mills combined with sawmills; and separately operated planing mills that are engaged primarily in producing surfaced lumber and standard workings or patterns of lumber. This also includes facilities primarily engaged in sawing lath and railroad ties and in producing tobacco hogshead stock, wood chips, and snow fence lath. This exemption does not include any facility that engages in the kiln drying of lumber.

12. Exhaust flares at natural gas and coalbed methane extraction wells.

13. Temporary facilities subject to the following conditions:

a. The operational period of the temporary facility (the period from the date that the first pollutant-emitting operation is commenced to the date of shutdown of the temporary facility) is 12 months or less.

b. The uncontrolled emissions rate of any regulated air pollutant that would be emitted from the temporary facility during the operational period does not exceed the applicable exempt emission rate as set forth in 9VAC5-80-1105 C (exemption rates for new stationary sources) or 9VAC5-80-1105 D (exemption rates for projects). The uncontrolled emission rate may be calculated based upon the total number of hours in the operational period instead of 8760 hours. All temporary facilities that will be co-located at a stationary source shall be considered in the aggregate when calculating the uncontrolled emissions rate under this subdivision.

c. Upon completion of the operational period, the temporary facility shall be either (i) shut down in accordance with 9VAC5-20-220 or (ii) returned to its original state and condition unless, prior to the end of the operational period, the owner demonstrates in writing to the satisfaction of the board that the facility is exempt under 9VAC5-80-1105 C (exemption rates for new stationary sources) or D (exemption rates for new stationary projects) using 8760 hours of operation per year.

d. Not less than 30 calendar days prior to commencing the operational period, the owner shall notify the board in writing of the proposed temporary facility and shall provide (i) calculations demonstrating that the temporary facility is exempt under this subdivision and under 9VAC5-80-1105 E and F and (ii) proposed dates for commencing the first pollutant-emitting operation and shutdown of the temporary facility.

e. The owner shall provide written notifications to the board of (i) the actual date of commencing the first pollutant-emitting operation and (ii) the actual date of shutdown of the temporary facility. Notifications shall be postmarked not more than 10 days after such dates.

14. Open pit incinerators subject to [ ~~Article 40 (9VAC5-40-5600 et seq.) of Part II of 9VAC5 40 (Existing Stationary Sources)~~ 9VAC5-130 (Regulation for Open Burning) ] and used solely for the purpose of disposal of clean burning waste and debris waste.

[ 15. Poultry or swine incinerators located on a farm where all of the following conditions are met:

a. Auxiliary fuels for the incinerator unit shall be limited to natural gas, liquid petroleum gas, and/or distilled petroleum liquid fuel. Solid fuels, waste materials, or residual petroleum oil products shall not be used to fire the incinerator.

b. The waste incinerated shall be limited to pathological waste (poultry or swine remains). Litter and animal bedding or any other waste materials shall not be incinerated.

c. The design burn rate or capacity rate of the incinerator shall be 400 pounds per hour or less of poultry or swine. This value shall apply only to the mass of the poultry or swine and shall not include the mass of the fuel.

d. The incinerator shall be used solely to dispose of poultry or swine originating on the farm where the incinerator is located.

e. The incinerator shall be owned and operated by the owner or operator of the farm where the incinerator is located.

f. The incinerator shall not be charged beyond the manufacturer's recommended rated capacity.

g. Records shall be maintained on site to demonstrate compliance with the conditions for this exemption.

including but not limited to the total amount of pathological waste incinerated and the fuel usage on a calendar year quarterly basis. ]

C. The exemption of new stationary sources shall be determined as specified below:

1. New stationary sources with uncontrolled emission rates less than all of the emission rates specified below shall be exempt from the provisions of this article. The uncontrolled emission rate of a new stationary source is the sum of the uncontrolled emission rates of the individual affected emissions units. Facilities exempted by subsection B of this section shall not be included in the summation of uncontrolled emissions for purposes of exempting new stationary sources under this subsection.

<u>Pollutant</u>	<u>Emissions Rate</u>
<u>Carbon Monoxide</u>	<u>100 tons per year (tpy)</u>
<u>Nitrogen Oxides</u>	<u>40 tpy</u>
<u>Sulfur Dioxide</u>	<u>40 tpy</u>
<u>Particulate Matter</u>	<u>25 tpy</u>
<u>Particulate Matter (PM<sub>10</sub>)</u>	<u>15 tpy</u>
<u>Particulate Matter (PM<sub>2.5</sub>)</u>	<u>10 tpy</u>
<u>Volatile organic compounds</u>	<u>25 tpy</u>
<u>Lead</u>	<u>0.6 tpy</u>
<u>Fluorides</u>	<u>3 tpy</u>
<u>Sulfuric Acid Mist</u>	<u>6 tpy</u>
<u>Hydrogen Sulfide (H<sub>2</sub>S)</u>	<u>9 tpy</u>
<u>Total Reduced Sulfur (including H<sub>2</sub>S)</u>	<u>9 tpy</u>
<u>Reduced Sulfur Compounds (including H<sub>2</sub>S)</u>	<u>9 tpy</u>
<u>Municipal waste combustor organics (measured as total tetra-throughocta-chlorinated dibenzo-p-dioxins and dibenzofurans)</u>	<u>3.5 x 10<sup>-6</sup> tpy</u>
<u>Municipal waste combustor metals (measured as particulate matter)</u>	<u>13 tpy</u>
<u>Municipal waste combustor acid gases (measured as the sum of SO<sub>2</sub> and HCl)</u>	<u>35 tpy</u>
<u>Municipal solid waste landfill emissions (measured as nonmethane organic compounds)</u>	<u>22 tpy</u>

2. If the particulate matter (PM<sub>10</sub> or PM<sub>2.5</sub>) emissions for a stationary source can be determined in a manner acceptable to the board and the stationary source is deemed exempt using the emission rate for particulate matter (PM<sub>10</sub> or

PM<sub>2.5</sub>), the stationary source shall be considered to be exempt for particulate matter (PM). If the emissions of particulate matter (PM<sub>10</sub> or PM<sub>2.5</sub>) cannot be determined in a manner acceptable to the board, the emission rate for particulate matter (PM) shall be used to determine the exemption status.

3. The provisions of this article do not apply to a new stationary source if all of the emissions considered in calculating the uncontrolled emission rate of the new stationary source are fugitive emissions.

D. The exemption of projects shall be determined as specified below:

1. A project that would result in increases in uncontrolled emission rates at the stationary source less than all of the emission rates specified below shall be exempt from the provisions of this article. The uncontrolled emission rate increase of a project is the sum of the uncontrolled emission rate increases of the individual affected emissions units. Uncontrolled emissions rate decreases are not considered as part of this calculation. Facilities exempted by subsection B of this section shall not be included in the summation of uncontrolled emissions for purposes of exempting projects under this subsection.

<u>Pollutant</u>	<u>Emissions Rate</u>
<u>Carbon Monoxide</u>	<u>100 tons per year (tpy)</u>
<u>Nitrogen Oxides</u>	<u>10 tpy</u>
<u>Sulfur Dioxide</u>	<u>10 tpy</u>
<u>Particulate matter</u>	<u>15 tpy</u>
<u>Particulate matter PM<sub>10</sub></u>	<u>10 tpy</u>
<u>Particulate matter (PM<sub>2.5</sub>)</u>	<u>[ 5-6 ] tpy</u>
<u>Volatile organic compounds</u>	<u>10 tpy</u>
<u>Lead</u>	<u>0.6 tpy</u>
<u>Fluorides</u>	<u>3 tpy</u>
<u>Sulfuric Acid Mist</u>	<u>6 tpy</u>
<u>Hydrogen Sulfide (H<sub>2</sub>S)</u>	<u>9 tpy</u>
<u>Total Reduced Sulfur (including H<sub>2</sub>S)</u>	<u>9 tpy</u>
<u>Reduced Sulfur Compounds (including H<sub>2</sub>S)</u>	<u>9 tpy</u>
<u>Municipal waste combustor organics (measured as total tetra-through octa-chlorinated dibenzo-p-dioxins and dibenzofurans)</u>	<u>3.5 x 10<sup>-6</sup> tpy</u>
<u>Municipal waste combustor metals (measured as particulate matter)</u>	<u>13 tpy</u>

# Regulations

<u>Municipal waste combustor acid gases (measured as the sum of SO<sub>2</sub> and HCl)</u>	<u>35 tpy</u>
<u>Municipal solid waste landfill emissions (measured as nonmethane organic compounds)</u>	<u>22 tpy</u>

2. If the particulate matter (PM<sub>10</sub> or PM<sub>2.5</sub>) emissions for a stationary source can be determined in a manner acceptable to the board and the stationary source is deemed exempt using the emission rate for particulate matter (PM<sub>10</sub> or PM<sub>2.5</sub>), the stationary source shall be considered to be exempt for particulate matter (PM). If the emissions of particulate matter (PM<sub>10</sub> or PM<sub>2.5</sub>) cannot be determined in a manner acceptable to the board, the emission rate for particulate matter (PM) shall be used to determine the exemption status.

3. The provisions of this article do not apply to a project if all of the emissions considered in calculating the uncontrolled emission rate increase of the project are fugitive emissions.

E. Exemptions for stationary sources of toxic pollutants not subject to the federal hazardous air pollutant new source review program shall be as follows:

1. Stationary sources exempt from the requirements of Article 5 (9VAC5-60-300 et seq.) of Part II of 9VAC5-60 (Hazardous Air Pollutant Sources) as provided in 9VAC5-60-300 C 1, C 2, C 7, D, or E shall be exempt from the provisions of this article.

2. Facilities as specified below shall not be exempt, regardless of size or emission rate, from the provisions of this article.

a. Incinerators, unless (i) the incinerator is used exclusively as air pollution control equipment, [ ~~or~~ ] (ii) the incinerator is an open pit incinerator subject to [ ~~Article 40 (9VAC5-40-5600 et seq.) of Part II of 9VAC5-40 (Existing Stationary Sources)~~ 9VAC5-130 (Regulation for Open Burning) ] and used solely for the disposal of clean burning waste and debris waste [ , or (iii) the incinerator is a poultry or swine incinerator located on a farm and all of the conditions of subdivision B 15 of this section are met ].

b. Ethylene oxide sterilizers.

c. Boilers, incinerators, or industrial furnaces as defined in 40 CFR 260.10 and subject to 9VAC20-60 (Hazardous Waste Regulations).

F. This subsection provides information on the extent to which any source category or portion of a source category subject to the federal hazardous air pollutant new source review program may be exempt from the provisions of this article.

1. This subdivision addresses those source categories subject to the provisions of 40 CFR 61.05, 40 CFR 61.06,

40 CFR 61.07, 40 CFR 61.08, and 40 CFR 61.15 that establish the requirements for issuing approvals of the construction of any new source or modification of any existing source subject to the provisions of 40 CFR Part 61. Any source category or portion of a source category subject to this element of the federal hazardous air pollutant new source review program shall be exempt from the provisions of this article if specifically exempted from that program by 40 CFR Part 61.

2. This subdivision addresses those source categories subject to the provisions of 40 CFR 63.5 that establish the requirements for issuing approvals to construct a new source or reconstruct a source subject to the provisions of 40 CFR Part 63, except for Subparts B, D, and E. Any source category or portion of a source category subject to this element of the federal hazardous air pollutant new source review program shall be exempt from the provisions of this article if specifically exempted from that program by 40 CFR Part 63.

3. This subdivision addresses those source categories subject to the provisions of 40 CFR 63.50 through 40 CFR 63.56 that establish the requirements for issuing notices of MACT approval prior to the construction of a new emissions unit listed in the source category schedule for standards. Any information regarding exemptions for a source category or portion of a source category subject to this element of the federal hazardous air pollutant new source review program may be found in Article 3 (9VAC5-60-120 et seq.) of Part II of 9VAC5-60 (Hazardous Air Pollutant Sources).

4. This subdivision addresses those source categories for which EPA has promulgated a formal determination that no regulations or other requirements need to be established pursuant to § 112 of the federal Clean Air Act in the source category schedule for standards. Any source category or portion of a source category subject to this element of the federal hazardous air pollutant new source review program shall be exempt from the provisions of this article.

## **9VAC5-80-1110. Definitions.**

A. For the purpose of applying this article in the context of the Regulations for the Control and Abatement of Air Pollution and related uses, the words or terms shall have the meanings given them in subsection C of this section.

B. As used in this article, all terms not defined ~~here~~ herein shall have the meanings given them in ~~9VAC5-Chapter 10 (9VAC5-10)~~ 9VAC5-10 (General Definitions), unless otherwise required by context.

C. Terms defined.

~~"Allowable emissions" means the emission rate of a stationary source calculated by using the maximum rated capacity of the source (unless the source is subject to state and federally enforceable limits which restrict the operating~~

rate or hours of operation, or both) and the most stringent of the following:

1. ~~Applicable emission standards;~~
2. ~~The emission limitation specified as a state and federally enforceable permit condition, including those with a future compliance date; and~~
3. ~~Any other applicable emission limitation, including those with a future compliance date.~~

"Addition" means the construction of a new emissions unit at or the relocation of an existing emissions unit to a stationary source.

"Affected emissions units" means the following emissions units, as applicable:

1. For a new stationary source, all emissions units.
2. For a project, the added, modified, and replacement emissions units that are part of the project.

"Applicable federal requirement" means all of, but not limited to, the following as they apply to affected emissions units ~~in a source~~ subject to this article (including requirements that have been promulgated or approved by the administrator through rulemaking at the time of permit issuance but have future-effective compliance dates):

1. Any standard or other requirement provided for in an implementation plan established pursuant to § 110, § 111(d), or § 129 of the federal Clean Air Act, including any source-specific provisions such as consent agreements or orders.
2. Any limit term or condition in any construction permit issued under the new source review program or in any operating permit issued pursuant to the state operating permit program. However, those terms or conditions designated as state-only enforceable pursuant to 9VAC5-80-1120 F or 9VAC5-80-820 G shall not be applicable federal requirements.
3. Any emission standard, alternative emission standard, alternative ~~emission~~ emissions limitation, equivalent ~~emission~~ emissions limitation or other requirement established pursuant to § 112 or § 129 of the federal Clean Air Act as amended in 1990.
4. Any new source performance standard or other requirement established pursuant to § 111 of the federal Clean Air Act, and any emission standard or other requirement established pursuant to § 112 of the federal Clean Air Act before it was amended in 1990.
5. Any limitations and conditions or other requirement 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.
6. Any requirement concerning accident prevention under § 112(r)(7) of the federal Clean Air Act.

7. Any compliance monitoring requirements established pursuant to either § 504(b) or § 114(a)(3) of the federal Clean Air Act.

8. Any standard or other requirement for consumer and commercial products under § 183(e) of the federal Clean Air Act.

9. Any standard or other requirement for tank vessels under § 183(f) of the federal Clean Air Act.

10. Any standard or other requirement in 40 CFR Part 55 to control air pollution from outer continental shelf sources.

11. Any standard or other requirement of the regulations promulgated to protect stratospheric ozone under Title VI of the federal Clean Air Act, unless the administrator has determined that such requirements need not be contained in a federal operating permit issued under this article.

12. With regard to temporary sources subject to 9VAC5-80-130, (i) any ambient air quality standard, except applicable state requirements, and (ii) requirements regarding increments or visibility as provided in Article 8 (9VAC5-80-1605 et seq.) of this part.

13. Any standard or other requirement under § 126 (a)(1) and (c) of the federal Clean Air Act.

"Begin actual construction" means initiation of permanent physical on-site construction of an emissions unit. This includes, but is not limited to, installation of building supports and foundations, laying of underground pipework, and construction of permanent storage structures. With respect to a change in method of operation, this term refers to those on-site activities other than preparatory activities which mark the initiation of the change. With respect to the initial location or relocation of a portable emissions unit, this term refers to the delivery of any portion of the portable emissions unit to the site.

"Clean wood" means uncontaminated natural or untreated wood. Clean wood includes but is not limited to byproducts of harvesting activities conducted for forest management or commercial logging, or mill residues consisting of bark, chips, edgings, sawdust, shavings, or slabs. It does not include wood that has been treated, adulterated, or chemically changed in some way; treated with glues, binders, or resins; or painted, stained, or coated.

"Commence," as applied to the construction, ~~reconstruction~~ or modification of an emissions unit, means that the owner has all necessary preconstruction approvals or permits and has either:

1. Begun, or caused to begin, a continuous program of actual on-site construction, ~~reconstruction or modification~~ of the unit, to be completed within a reasonable time; or
2. Entered into binding agreements or contractual obligations, which cannot be canceled or modified without substantial loss to the owner, to undertake a program of

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# Regulations

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actual construction, ~~reconstruction or modification~~ of the unit, to be completed within a reasonable time.

"Complete application" means that the application contains all the information necessary for processing the application and that the provisions of § 10.1-1321.1 of the Virginia Air Pollution Control Law have been met. Designating an application complete for purposes of permit processing does not preclude the board from requesting or accepting additional information.

"Construction" means fabrication, erection, installation, demolition, relocation, addition, replacement, or ~~installation~~ modification of an emissions unit that would result in a change in the uncontrolled emission rate.

"Construction waste" means solid waste that is produced or generated during construction, remodeling, or repair of pavements, houses, commercial buildings, and other structures. Construction wastes include, but are not limited to, lumber, wire, sheetrock, broken brick, shingles, glass, pipe, concrete, paving materials, and metal and plastics if the metal or plastics are a part of the materials of construction or empty containers for such materials. Paints, coatings, solvents, asbestos, any liquid, compressed gases or semi-liquids, and garbage are not construction wastes.

"Debris waste" means wastes resulting from land clearing operations. Debris wastes include, but are not limited to, stumps, wood, brush, leaves, soil, and road spoils.

"Demolition waste" means that solid waste that is produced by the destruction of structures or their foundations, or both, and includes the same materials as construction wastes.

"Diesel engine" means, for the purposes of 9VAC5-80-1105 A 1 b, any internal combustion engine that burns diesel or #2 fuel oil to provide power to processing equipment for a vegetative waste recycling/mulching operation.

~~[ "Emergency" means, in the context of 9VAC5 80 1320 B 2 9VAC5 80 1105 B 2, a situation where immediate action on the part of a source is needed and where the timing of the action makes it impractical to meet the requirements of this article, such as sudden loss of power, fires, earthquakes, floods or similar occurrences.~~

"Emergency" means a condition that arises from sudden and reasonably unforeseeable events where the primary energy or power source is disrupted or disconnected due to conditions beyond the control of an owner or operator of a facility including:

1. A failure of the electrical grid;
2. On-site disaster or equipment failure;
3. Public service emergencies such as flood, fire, natural disaster, or severe weather conditions; or
4. An ISO-declared emergency, where an ISO emergency is:
  - a. An abnormal system condition requiring manual or automatic action to maintain system frequency, to

prevent loss of firm load, equipment damage, or tripping of system elements that could adversely affect the reliability of an electric system or the safety of persons or property;

b. Capacity deficiency or capacity excess conditions;

c. A fuel shortage requiring departure from normal operating procedures in order to minimize the use of such scarce fuel;

d. Abnormal natural events or man-made threats that would require conservative operations to posture the system in a more reliable state; or

e. An abnormal event external to the ISO service territory that may require ISO action. ]

"Emissions cap" means any limitation on the rate of emissions of any air pollutant from one or more emissions units established and identified as an emissions cap in any permit issued pursuant to the new source review program or operating permit program.

"Emissions limitation" means a requirement established by the board that limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis, including any requirement relating to the operation or maintenance of a source to assure continuous emissions reduction, and any design standard, equipment standard, work practice, operational standard, or pollution prevention technique.

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

"Enforceable as a practical matter" means that the permit contains ~~emission~~ emissions limitations that are enforceable by the board or the department and meet the following criteria:

1. Are permanent;
2. Contain a legal obligation for the owner to adhere to the terms and conditions;
3. Do not allow a relaxation of a requirement of the implementation plan;
4. Are technically accurate and quantifiable;
5. Include averaging times or other provisions that allow at least monthly (or a shorter period if necessary to be consistent with the implementation plan) checks on compliance. This may include, but not be limited to, the following: compliance with annual limits in a rolling basis, monthly or shorter limits, and other provisions consistent with 9VAC5 80 1180 this article and other regulations of the board; and
6. Require a level of recordkeeping, reporting and monitoring sufficient to demonstrate compliance.

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

"Federal hazardous air pollutant new source review program" means a program for the preconstruction review and approval of ~~new sources or expansions to existing ones~~ the construction, reconstruction, or modification of any stationary source in accordance with regulations specified below and promulgated to implement the requirements of § 112 (relating to hazardous air pollutants) of the federal Clean Air Act.

1. The provisions of 40 CFR 61.05, 40 CFR 61.06, 40 CFR 61.07, 40 CFR 61.08 and 40 CFR 61.15 for issuing approvals of the construction of any new source or modification of any existing source subject to the provisions of 40 CFR Part 61. ~~These provisions of the federal hazardous air pollutant new source review program shall be implemented through this article and Article 1 (9VAC5-60-60 et seq.) of 9VAC5 Chapter 60.~~

2. The provisions of 40 CFR 63.5 for issuing approvals to construct a new source or reconstruct a source subject to the provisions of 40 CFR Part 63, except for Subparts B, D and E. ~~These provisions of the federal hazardous air pollutant new source review program shall be implemented through this article and Article 2 (9VAC5-60-90 et seq.) of 9VAC5 Chapter 60.~~

3. The provisions of 40 CFR 63.50 through 40 CFR 63.56 for issuing Notices of MACT ~~approval~~ Approval prior to the construction of a new emissions unit. ~~These provisions of the federal hazardous air pollutant new source review program shall be implemented through this article and Article 3 (9VAC5-60-120 et seq.) of 9VAC5 Chapter 60.~~

"Federally enforceable" means all limitations and conditions ~~which that~~ 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 ~~emission~~ emissions limitations, and equivalent ~~emission~~ 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 (unless expressly designated as state-only enforceable) 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 established pursuant to § 110, § 111(d) or § 129 of the federal Clean Air Act.

5. Limitations and conditions (unless expressly designated as state-only enforceable) that are part of a federal

construction permit issued under 40 CFR 52.21 or any construction permit issued under regulations approved by the EPA ~~in accordance with 40 CFR Part 51~~ into the implementation plan.

6. Limitations and conditions (unless expressly designated as state-only enforceable) that are part of ~~an~~ a state operating permit issued pursuant to a program approved by the EPA into an implementation plan as meeting the 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, where the permit and the permit program pursuant to which it was issued meet all of the following criteria:

a. The operating permit program has been approved by the EPA into the implementation plan under § 110 of the federal Clean Air Act.

b. The operating permit program imposes a legal obligation that operating permit holders adhere to the terms and limitations of such permits and provides that permits that do not conform to the operating permit program requirements and the requirements of EPA's underlying regulations may be deemed not federally enforceable by EPA.

c. The operating permit program requires that all emissions limitations, controls, and other requirements imposed by such permits will be at least as stringent as any other applicable limitations and requirements contained in the implementation plan or enforceable under the implementation plan, and that the program may not issue permits that waive, or make less stringent, any limitations or requirements contained in or issued pursuant to the implementation plan, or that are otherwise federally enforceable.

d. The limitations, controls, and requirements in the permit in question are permanent, quantifiable, and otherwise enforceable as a practical matter.

e. The permit in question was issued only after adequate and timely notice and opportunity for comment by the EPA and the public.

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

8. Individual consent agreements that ~~the~~ EPA has legal authority to create.

"Federal operating permit" means a permit issued under the federal operating permit program.

"Federal operating permit program" means an operating permit system (i) for issuing terms and conditions for major stationary sources, (ii) established to implement the requirements of Title V of the federal Clean Air Act and



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# Regulations

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associated regulations, and (iii) codified in Article 1 (9VAC5-80-50 et seq.), Article 2 (9VAC5-80-310 et seq.), Article 3 (9VAC5-80-360 et seq.), and Article 4 (9VAC5-80-710 et seq.) of this part.

"Fixed capital cost" means the capital needed to provide all the depreciable components.

"Fugitive emissions" means those emissions ~~which that~~ could not reasonably pass through a stack, chimney, vent, or other functionally equivalent opening.

"General permit" means a permit issued under this article that meets the requirements of 9VAC5-80-1250.

"Hazardous air pollutant" means (i) any air pollutant listed in § 112(b) of the federal Clean Air Act, as amended by 40 CFR ~~63.60~~ Subpart C of 40 CFR Part 63, and (ii) incorporated by reference into the regulations of the board at 9VAC5-60-92 B.

[ "Independent system operator" or "ISO" means a person that may receive or has received by transfer pursuant to § 56-576 of the Code of Virginia any ownership or control of, or any responsibility to operate, all or part of the transmission systems in the Commonwealth. ]

"Major modification" means any ~~modification defined as such in 9VAC5-80-1615 C or 9VAC5-80-2010 C, as may apply~~ project at a major stationary source that would result in a significant emissions increase in any regulated air pollutant. For projects, the emissions increase may take into consideration any state and federally enforceable permit conditions that [ ~~are in effect on the date the~~ will be placed in a permit resulting from a permit ] application [ ~~is~~ ] deemed complete under the provisions of 9VAC5-80-1160 B.

"Major new source review (NSR) permit" means a permit issued under the major new source review program.

"Major new source review (major NSR) program" means a preconstruction review and permit program (i) for new major stationary sources or major modifications (physical changes or changes in the method of operation); (ii) established to implement the requirements of §§ 112, 165 and 173 of the federal Clean Air Act and associated regulations; and (iii) codified in Article 7 (9VAC5-80-1400 et seq.), Article 8 (9VAC5-80-1605 et seq.) and Article 9 (9VAC5-80-2000 et seq.) of this part.

"Major stationary source" means any stationary source ~~which that~~ emits, or has the potential to emit, 100 tons or more per year of any regulated air pollutant. For new stationary sources, the potential to emit may take into consideration any state and federally enforceable permit conditions that [ are in effect on the date the will be placed in a permit resulting from a permit ] application [ ~~is~~ ] deemed complete under the provisions of 9VAC5-80-1160 B.

"Minor new source review (NSR) permit" means a permit issued pursuant to this article.

"Minor new source review (minor NSR) program" means a preconstruction review and permit program (i) for regulated

air pollutants from new stationary sources or ~~modifications (physical changes or changes in the method of operation) that do not qualify for~~ projects that are not subject to review under the major new source review program; (ii) established to implement the requirements of §§ 110(a)(2)(C) and 112 of the federal Clean Air Act and associated regulations; and (iii) codified in ~~Article 6 (9VAC5-80-1100 et seq.) of this part~~ this article. The minor NSR program may also be used to implement the terms and conditions described in 9VAC5-80-1120 F 1; however, those terms and conditions shall be state-only enforceable and shall not be applicable federal requirements.

"Modification" means any physical change in, or change in the method of operation of, or addition to, a stationary source that would result in a net emissions increase an emissions unit that increases the uncontrolled emission rate of any regulated air pollutant emitted into the atmosphere by the ~~source unit~~ or ~~which that~~ results in the emission of any regulated air pollutant into the atmosphere not previously emitted, ~~except that the~~. The following shall not, by themselves (unless previously limited by permit conditions), be considered modifications physical changes or changes in the method of operation under this definition:

1. Maintenance, repair and replacement ~~which of~~ components that the board determines to be routine for a source type and which does not fall within the definition of "~~reconstruction~~ replacement";
2. An increase in the throughput or production rate of a unit (unless previously limited by any state enforceable and federally enforceable permit conditions established pursuant to this chapter), if that increase does not exceed the operating design capacity of that unit;
3. An increase in the hours of operation (unless previously limited by any state enforceable and federally enforceable permit conditions established pursuant to this chapter);
4. Use of an alternative fuel or raw material (unless previously limited by any state enforceable and federally enforceable permit conditions established pursuant to this chapter) if, prior to the date any provision of the regulations of the board becomes applicable to the source type, the ~~source~~ emissions unit was designed to accommodate that alternative use. A ~~source~~ unit shall be considered to be designed to accommodate an alternative fuel or raw material if provisions for that use were included in the final construction specifications;
5. Use of an alternative fuel or raw material that the emissions unit is approved to use under any new source review permit;
6. The addition, replacement or use of any system or device whose primary function is the reduction of air pollutants, except when a system or device that is necessary to comply with applicable air pollution control laws ~~and, permit conditions or~~ regulations is replaced by a

system or device which the board considers to be less efficient in the control of air pollution emissions; or

~~6.~~ 7. The removal of any system or device whose primary function is the reduction of air pollutants if the system or device is not (i) necessary for the source to comply with any applicable air pollution control laws, permit conditions, or regulations or (ii) used to avoid any applicable new source review program requirement.

8. A change in ownership at a stationary source.

~~"Modified source" means any stationary source (or portion of it), the modification of which commenced on or after March 17, 1972.~~

"Necessary preconstruction approvals or permits" means those permits or approvals required under ~~federal air quality control laws and regulations, and those air quality control laws and regulations which are~~ the NSR program that is part of the implementation plan.

~~"Net emissions increase" means the amount by which the sum of the following exceeds zero: (i) any increase in the uncontrolled emission rate from a particular physical change or change in the method of operation at a stationary source and (ii) any other increases and decreases in the uncontrolled emission rate at the source that are concurrent with the particular change and are otherwise creditable. An increase or decrease in the uncontrolled emission rate is concurrent with the increase from the particular change only if it is directly resultant from the particular change. An increase or decrease in the uncontrolled emission rate is not creditable if the board has relied on it in issuing a permit for the source under the new source review program and that permit is in effect when the increase in the uncontrolled emission rate from the particular change occurs. Creditable increases and decreases shall be federally enforceable or enforceable as a practical matter.~~

~~"New source" means any stationary source (or portion of it), the construction or relocation of which commenced on or after March 17, 1972; and any stationary source (or portion of it), the reconstruction of which commenced on or after December 10, 1976.~~

"New source review (NSR) permit" means a permit issued under the new source review program.

"New source review (NSR) program" means a preconstruction review and permit program (i) for regulated air pollutants from new stationary sources or ~~modifications projects~~ (physical changes or changes in the method of operation); (ii) established to implement the requirements of §§ 110(a)(2)(C), 112 (relating to permits for hazardous air pollutants), 165 (relating to permits in prevention of significant deterioration areas), and 173 (relating to permits in nonattainment areas) of the federal Clean Air Act and associated regulations; and (iii) codified in ~~Article 6 (9VAC5-80-1100 et seq.)~~ this article, Article 7 (9VAC5-80-1400 et seq.), Article 8 (9VAC5-80-1605 et seq.) and Article 9

(9VAC5-80-2000 et seq.) of this part. The NSR program may also be used to implement the terms and conditions described in 9VAC5-80-1120 F 1; however, those terms and conditions shall be state-only enforceable and shall not be applicable federal requirements.

"New stationary source" means any stationary source to be constructed at or relocated to an undeveloped site.

"Nonroad engine" means any internal combustion engine:

1. In or on a piece of equipment that is self-propelled or serves a dual purpose by both propelling itself and performing another function (such as garden tractors, off-highway mobile cranes and bulldozers); or
2. In or on a piece of equipment that is intended to be propelled while performing its function (such as lawnmowers and string trimmers); ~~or,~~
3. ~~That, by itself or in or on a piece of equipment, is portable or transportable, meaning designed to be capable of being carried or moved from one location to another. Indications of transportability include, but are not limited to, wheels, skids, carrying handles, dollies, trailers, or platforms.~~

~~An internal combustion engine is not a nonroad engine if: 1. The engine is used to propel a motor vehicle or a vehicle used solely for competition, or is subject to standards promulgated under § 202 of the federal Clean Air Act; or,~~

2. ~~The engine otherwise included in subdivision 3 above remains or will remain at a location for more than 12 consecutive months or a shorter period of time for an engine located at a seasonal source.~~

~~For purposes of this definition, a location is any single site at a building, structure, facility or installation. Any engine (or engines) that replaces an engine at a location and that is intended to perform the same or similar function as the engine replaced will be included in calculating the consecutive time period. An engine located at a seasonal source is an engine that remains at a seasonal source during the full annual operating period of the seasonal source. A seasonal source is a stationary source that remains in a single location on a permanent basis (i.e., at least two years) and that operates at the single location approximately three months (or more) each year. This paragraph does not apply to an engine after the engine is removed from the location.~~

"Plantwide applicability limitation (PAL)" means an emissions limitation expressed in tons per year, for a pollutant at a major stationary source, that is enforceable as a practical matter and established sourcewide in accordance with 9VAC5-80-1865 or 9VAC5-80-2144.

"PAL permit" means the state operating permit issued by the board that establishes a PAL for a major stationary source.

"Portable," in reference to emissions units, means an emissions unit that is designed to have the capability of being moved from one location to another for the purpose of operating at multiple locations and storage when idle.

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# Regulations

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Indications of portability include, but are not limited to, wheels, skids, carrying handles, ~~dollies~~ dolly, ~~trailers~~ trailer, or ~~platforms~~ platform.

"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. Secondary emissions do not count in determining the potential to emit of a stationary source.

"Precursor pollutant" means the following:

(1) Volatile organic compounds and nitrogen oxides are precursors to ozone.

(2) Sulfur dioxide is a precursor to PM<sub>2.5</sub>.

(3) Nitrogen oxides are presumed to be precursors to PM<sub>2.5</sub> in all PM<sub>2.5</sub>, unless the board determines that emissions of nitrogen oxides from sources in a specific area are not a significant contributor to that area's ambient PM<sub>2.5</sub> concentrations.

(4) Volatile organic compounds and ammonia are presumed not to be precursors to PM<sub>2.5</sub>, unless the board determines that emissions of volatile organic compounds or ammonia from sources in a specific area are a significant contributor to that area's ambient PM<sub>2.5</sub> concentrations.

"Process operation" means any method, form, action, operation, or treatment of manufacturing or processing, including any storage or handling of materials or products before, during, or after manufacturing or processing.

"Project" means any change at an existing stationary source consisting of the addition, replacement, or modification of one or more emissions units.

"Public comment period" means a time during which the public shall have the opportunity to comment on the ~~new or modified source~~ permit application information (exclusive of confidential information) for a new stationary source or project, the preliminary review and analysis of the effect of the source upon the ambient air quality, and the preliminary decision of the board regarding the permit application.

"Reactivation" means beginning operation of an emissions unit that has been shut down.

"Reconstruction" means, for the sole purposes of 9VAC5-80-1210 A, B, and C, the replacement of an emissions unit or its components to such an extent that:

1. The fixed capital cost of the new components exceeds 50% of the fixed capital cost that would be required to construct a comparable entirely new unit;
2. The replacement significantly extends the life of the emissions unit; and

3. It is technologically and economically feasible to meet the applicable emission standards prescribed under regulations of the board.

Any determination by the board as to whether a proposed replacement constitutes reconstruction shall be based on:

1. The fixed capital cost of the replacements in comparison to the fixed capital cost of the construction of a comparable entirely new unit;
2. The estimated life of the unit after the replacements compared to the life of a comparable entirely new unit;
3. The extent to which the components being replaced cause or contribute to the emissions from the unit; and
4. Any economic or technical limitations on compliance with applicable standards of performance ~~which that~~ are inherent in the proposed replacements.

"Regulated air pollutant" means any of the following:

1. Nitrogen oxides or any volatile organic compound;
2. Any pollutant (including any associated precursor pollutant) for which an ambient air quality standard has been promulgated;
3. Any pollutant subject to any standard promulgated under ~~§ 111 of the federal Clean Air Act;~~ 40 CFR Part 60.
4. Any pollutant subject to a standard promulgated under or other requirements established under ~~§ 112 of the federal Clean Air Act concerning hazardous air pollutants~~ 40 CFR Part 61 and any pollutant regulated under 40 CFR Part 63; ~~or.~~
5. Any pollutant subject to a regulation adopted by the board.

"Relocation" means a change in physical location of a stationary source or an emissions unit from one stationary source to another stationary source.

"Replacement" means the substitution of an emissions unit for an emissions unit located at a stationary source, which will thereafter perform the same function as the replaced emissions unit.

"Secondary emissions" means emissions which occur or would occur as a result of the construction, ~~reconstruction,~~ ~~modification~~ or operation of a new stationary source or an emissions unit, but do not come from the stationary source itself. For the purpose of this article, secondary emissions must be specific, well-defined, and quantifiable; and must affect the same general areas as the stationary source ~~which~~ that causes the secondary emissions. Secondary emissions include emissions from any off site support facility ~~which that~~ would not be constructed or increase its emissions except as a result of the construction or operation of the stationary source or emissions unit. Secondary emissions do not include any emissions ~~which that~~ come directly from a mobile source, such as emissions from the tailpipe of a motor vehicle, from a train, or from a vessel.

"Significant" means:

[ ~~a~~. 1. ] In reference to an emissions increase, an increase in potential to emit that would equal or exceed any of the following rates:

[ a. In ozone nonattainment areas classified as serious or severe in 9VAC5-20-204: ]

Pollutant	Emissions Rate
<u>Carbon Monoxide</u>	<u>100 tons per year (tpy)</u>
<u>Nitrogen Oxides</u>	[ <del>40</del> 25 ] tpy
<u>Sulfur Dioxide</u>	<u>40 tpy</u>
<u>Particulate Matter (PM)</u>	<u>25 tpy</u>
<u>Particulate Matter (PM<sub>10</sub>)</u>	<u>15 tpy</u>
<u>Particulate Matter (PM<sub>2.5</sub>)</u>	<u>10 tpy</u>
<u>Volatile organic compounds</u>	<u>25 tpy</u>
<u>Lead</u>	<u>0.6 tpy</u>

[ b. In all other areas:

Pollutant	Emissions Rate
<u>Carbon Monoxide</u>	<u>100 tons per year (tpy)</u>
<u>Nitrogen Oxides</u>	<u>40 tpy</u>
<u>Sulfur Dioxide</u>	<u>40 tpy</u>
<u>Particulate Matter (PM)</u>	<u>25 tpy</u>
<u>Particulate Matter (PM<sub>10</sub>)</u>	<u>15 tpy</u>
<u>Particulate Matter (PM<sub>2.5</sub>)</u>	<u>10 tpy</u>
<u>Volatile organic compounds</u>	<u>40 tpy</u>
<u>Lead</u>	<u>0.6 tpy ]</u>

[ ~~b~~. 2. ] In reference to an emissions increase for a regulated air pollutant not listed in subdivision [ ~~a~~ 1 ] of this definition, there is no emissions rate that shall be considered significant.

[ ~~c~~. 3. ] If the particulate matter (PM<sub>10</sub> or PM<sub>2.5</sub>) emissions for a stationary source or emissions unit can be determined in a manner acceptable to the board and the emissions increase is determined to be significant using the emission rate for particulate matter (PM<sub>10</sub> or PM<sub>2.5</sub>), the stationary source or emissions unit shall be considered to be

significant for particulate matter (PM). If the emissions of particulate matter (PM<sub>10</sub> or PM<sub>2.5</sub>) cannot be determined in a manner acceptable to the board, the emission rate for particulate matter (PM) shall be used to determine whether the emissions increase is significant.

"Significant emissions increase" means, for a regulated air pollutant, an increase in emissions that is significant for that pollutant.

"Site" means one or more contiguous or adjacent properties under the control of the same person (or persons under common control).

"Source category schedule for standards" means the schedule (i) issued pursuant to § 112(e) of the federal Clean Air Act for promulgating MACT standards issued pursuant to § 112(d) of the federal Clean Air Act and (ii) incorporated by reference into the regulations of the board in subdivision 2 of 9VAC5-60-92.

"Space heater" means any fixed or portable, liquid or gaseous fuel-fired, combustion unit used to heat air in a space, or used to heat air entering a space, for the purpose of maintaining an air temperature suitable for comfort, storage, or equipment operation. Space heaters do not include combustion units used primarily for the purpose of conditioning or processing raw materials or product, such as driers, kilns, or ovens.

"State enforceable" means all limitations and conditions which that are enforceable as a practical matter, including any regulation of the board, those requirements developed pursuant to 9VAC5-170-160, requirements within any applicable order or variance, and any permit requirements established pursuant to this chapter.

"State operating permit" means a permit issued under the state operating permit program.

"State operating permit program" means an operating permit program (i) for issuing limitations and conditions for stationary sources; (ii) promulgated to meet the EPA's minimum criteria for federal enforceability, including adequate notice and opportunity for the EPA and public comment prior to issuance of the final permit, and practicable enforceability; and (iii) codified in Article 5 (9VAC5-80-800 et seq.) of this part.

"Stationary source" means any building, structure, facility or installation which that emits or may emit any regulated air pollutant. A stationary source shall include all of the pollutant-emitting activities which that 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 watercraft or any nonroad engine. Pollutant-emitting activities shall be considered as part of the same industrial grouping if they belong to the same "major group" (i.e., which that have the same two-digit code) as described in

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# Regulations

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the "Standard Industrial Classification Manual," ~~as amended by the supplement~~ (see 9VAC5-20-21).

"Synthetic minor source" means a stationary source ~~whose potential to emit is constrained by state enforceable and federally enforceable limits, so as to place that stationary source below the threshold at which it would be subject to permit or other requirements governing major stationary sources in regulations of the board or in the federal Clean Air Act that otherwise has the potential to emit regulated air pollutants in amounts that are at or above those for major stationary sources, as applicable, but [ that has taken a restriction so is subject to restrictions such ] that its potential to emit is less than such amounts for major stationary sources. Such restrictions must be enforceable as a practical matter. The term "synthetic minor source" applies independently for each regulated air pollutant that the source has the potential to emit.~~

"Temporary facility" means a facility that (i) is operated to achieve a specific objective (such as serving as a pilot test facility, a process feasibility project, or a remediation project) and (ii) ~~does not contribute toward the commercial production of any product or service (including byproduct and intermediate product) during the operational period. Portable emissions units covered by the exemption under 9VAC5-80-1105 A 1 c and facilities used to augment or enable routine production are not considered temporary facilities for the purposes of this definition.~~

"Toxic pollutant" means any air pollutant (i) listed in § 112(b) of the federal Clean Air Act, as amended by Subpart C of 40 CFR Part 63 and (ii) incorporated by reference into the regulations of the board at [ subdivision 1 of ] 9VAC5-60-92 [ ~~B~~ ], or any other air pollutant that the board determines, through adoption of regulation, to present a significant risk to public health. This term excludes asbestos, fine mineral fibers, radionuclides, and any glycol ether that does not have a TLV@.

"Uncontrolled emission rate" means the emission rate from an emissions unit when operating at maximum capacity without air pollution control equipment. Air pollution control equipment includes control equipment that is not vital to its operation, except that its use enables the owner to conform to applicable air pollution control laws and regulations. Annual uncontrolled emissions shall be based on the maximum annual rated capacity (based on 8,760 hours of operation per year) of the emissions unit, unless the emissions unit or stationary source is subject to state and federally enforceable permit conditions that limit the annual hours of operation. Enforceable permit conditions on the type or amount of material combusted, stored, or processed may be used in determining the uncontrolled emission rate of an emissions unit or stationary source. The uncontrolled emission rate of a stationary source is the sum of the uncontrolled emission rates of the individual emissions units. Secondary emissions

do not count in determining the uncontrolled emission rate of a stationary source.

"Undeveloped site" means any site or facility at which no emissions units are located at the time the permit application is deemed complete, or at the time the owner begins actual construction, whichever occurs first. An undeveloped site also includes any site or facility at which all of the emissions units have been determined to be shut down pursuant to the provisions of 9VAC5-20-220.

"Vegetative waste" means decomposable materials generated by land clearing activities and includes shrub, bush and tree prunings, bark, brush, leaves, limbs, roots, and stumps. Vegetative waste does not include construction or demolition waste or any combination of them.

"Vegetative waste recycling/mulching operation" means any activity related to size reduction or separating, or both, of clean wood or vegetative waste, or both, by grinding, shredding, chipping, screening, or any combination of them.

## **9VAC5-80-1120. General.**

A. ~~No owner or other person shall begin actual construction, reconstruction or modification of, or operate, any new stationary source or any project subject to this article without first obtaining from the board a permit to construct and operate or to modify and operate the source under the provisions of this article. The owner may not construct or operate the stationary source or project contrary to the terms and conditions of that permit.~~

B. ~~Except as provided in 9VAC5-80-1320~~ 9VAC5-80-1105 A 1 c, no owner or other person shall relocate any stationary source or emissions unit from one stationary source to another without first obtaining from the board a minor NSR permit to relocate the stationary source or unit.

C. ~~No~~ Except as provided in 9VAC5-80-1105 A 2 b, no owner or other person shall reduce the outlet elevation of any stack or chimney which discharges any regulated air pollutant from an ~~affected facility~~ emissions unit without first obtaining a minor NSR permit from the board.

D. ~~The board may combine the requirements of and the permits for emissions units within a stationary source subject to the new source review program into one permit. Likewise the board may require that applications for permits for emissions units within a stationary source required by any provision of the new source review program be combined into one application. The board will take actions to combine permit terms and conditions as provided in 9VAC5-80-1255. Actions to combine permit terms and conditions involve relocating the terms and conditions contained in two or more permits issued to single stationary source to a single permit document. Actions to combine permit terms and conditions in and of themselves are not a mechanism for making changes to permits; such actions shall be taken under 9VAC5-80-1260 as explained in subsection E of this section.~~

E. ~~The board may incorporate the terms and conditions of a state operating permit into a permit issued pursuant to this article. The permit issued pursuant to this article may supersede the state operating permit provided the public participation provisions of the state operating permit program are followed. The board may incorporate the terms and conditions of a permit issued pursuant to this article into a state operating permit provided all of the permitted emissions units are operational and determined to be in compliance in accordance with 9VAC5-80-1200. The board will take actions to make changes to permit terms and conditions as provided in 9VAC5-80-1260. Nothing in this subsection is intended to imply that once an action has been taken to make a change to a permit, the resulting permit change may not be combined with other terms and conditions in a single permit document as provided in subsection D of this section.~~

F. All terms and conditions of any minor NSR permit issued ~~under this article~~ shall be federally enforceable except those that are designated state-only enforceable under subdivision 1 of this subsection. Any term or condition that is not federally enforceable shall be designated as state-only enforceable as provided in subdivision 2 of this subsection.

1. A term or condition of any minor NSR permit issued ~~under this article~~ shall not be federally enforceable if it is derived from or is designed to implement Article 2 (9VAC5-40-130 et seq.) of ~~9VAC5 Chapter 40 Part II of 9VAC5-40 (Existing Stationary Sources)~~, Article 2 (9VAC5-50-130 et seq.) of ~~9VAC5 Chapter 50 Part II of 9VAC5-50 (New and Modified Stationary Sources)~~, or Article 4 (9VAC5-60-200 et seq.) or Article 5 (9VAC5-60-300 et seq.) of ~~9VAC5 Chapter 60 Part II of 9VAC5-60 (Hazardous Air Pollutant Sources)~~.

2. Any term or condition of any minor NSR permit issued ~~under this article~~ that is not federally enforceable shall be marked in the permit as state-only enforceable and shall ~~only~~ be enforceable only by the board. Incorrectly designating a term or condition as state-only enforceable shall not provide a shield from federal enforcement of a term or condition that is legally federally enforceable.

G. Nothing in the regulations of the board shall be construed to prevent the board from granting minor NSR permits for programs of construction ~~or modification of a new stationary source or project~~ in planned incremental phases. In such cases, all [~~net emissions~~ uncontrolled emission rate] increases from all emissions units covered by the program shall be added together for determining the applicability of this article.

H. ~~For sources subject to the federal hazardous air pollutant new source review program, the provisions of the federal hazardous air pollutant new source review program shall be implemented through this article and the applicable article of 9VAC5 Chapter 60 (9VAC5-60). Permits issued under this article shall be the administrative mechanism for issuing approvals under the provisions of federal hazardous air~~

~~pollutant new source review program. Except as noted below, in cases where there are differences between the provisions of this article and the provisions of federal hazardous air pollutant new source review program, the more restrictive provisions shall apply. The provisions of 9VAC5-80-1150 and 9VAC5-80-1160 shall not apply to sources subject to the federal hazardous air pollutant new source review program. Other sections of this article also provide requirements relative to the application of this article to sources subject to the federal hazardous air pollutant new source review program, in which case those provisions shall prevail. This subsection applies only to the extent that the provisions of the federal hazardous air pollutant new source review program are not being implemented by other new source review program regulations of the board.~~

#### **9VAC5-80-1140. Applications.**

A. A single application is required identifying at a minimum each emissions unit ~~subject to the provisions of this article~~ in the new stationary source or the project, or affected by the stack outlet elevation reduction. The application shall be submitted according to procedures acceptable to the board. ~~However, where several emissions units are included in one project, a single application covering all units in the project may be submitted.~~

B. A separate application is required for each new stationary source or project.

C. For new stationary sources or for projects with phased development, a single application should be submitted covering the entire new stationary source or project.

D. Any application, form, report, or certification submitted to the board shall comply with the provisions of 9VAC5-20-230.

E. Any application submitted pursuant to this article shall contain a certification signed by the applicant as follows:

"I certify that I understand that the existence of a minor new source review permit ~~under this article~~ does not shield the source from potential enforcement of any regulation of the board governing the major new source review program and does not relieve the source of the responsibility to comply with any applicable provision of the major ~~NSR~~ new source review program regulations."

#### **9VAC5-80-1150. Application information required.**

A. The board shall furnish application forms to applicants. Completion of these forms serves as initial registration of ~~new and modified~~ stationary sources and emissions units subject to this article.

B. Each application for a minor NSR permit shall include such information as may be required by the board to determine the effect of the ~~proposed~~ new stationary source or emissions unit on the ambient air quality and to determine compliance with the any emission standards which are applicable. The information required shall include, but is not limited to, the following:

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# Regulations

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1. Company name and address (or plant name and address if different from the company name), owner's name and agent, and telephone number and names of plant site manager or contact or both.

2. A description of the source's processes and products (by Standard Industrial Classification Code).

3. All emissions of regulated air pollutants.

a. A minor NSR permit application shall describe all emissions of regulated air pollutants emitted from any emissions unit or group of emissions units ~~to be covered by the permit in the new stationary source or project or affected by the stack outlet elevation reduction. The permit application shall include a description of all changes in uncontrolled emissions from the project.~~

b. Emissions shall be calculated as required in the minor NSR permit application form or instructions or in a manner acceptable to the board.

c. Fugitive emissions shall be included in the minor NSR permit application to the extent quantifiable.

4. Emissions rates in tons per year and in such terms as are necessary to establish compliance consistent with the applicable standard reference test method.

5. Information needed to determine or regulate emissions as follows: fuels, fuel use, raw materials, production rates, loading rates, and operating schedules.

6. Identification and description of air pollution control equipment and compliance monitoring devices or activities.

7. Limitations on source operation affecting emissions or any work practice standards, where applicable, for all regulated air pollutants at the source.

8. Calculations on which the information in subdivisions 3 through 7 of this subsection is based. Any calculations shall include sufficient detail to permit assessment of the validity of such calculations.

9. Any additional information or documentation that the board deems necessary to review and analyze the air pollution aspects of the new stationary source or emissions unit the project, or the stack outlet elevation reduction, including the submission of measured air quality data at the proposed site prior to construction, ~~reconstruction or modification~~. Such measurements shall be accomplished using procedures acceptable to the board.

C. The above information and analysis shall be determined and presented according to procedures and using methods acceptable to the board.

## **9VAC5-80-1160. Action on permit application.**

A. Prior to submitting an application for processing under subsections B through F of this section, the owner may request a nonbinding applicability determination as to which particular provisions of the new source review program are applicable. The request for the applicability determination

shall include sufficient information as may be necessary for the board to make an applicability determination and may include the same information required for an application. Within 30 days after receipt of a request, the board will (i) notify the applicant of the applicability determination or (ii) provide a determination that the information provided by the owner is insufficient to make an applicability determination, along with the identification of any deficiencies.

B. Within 30 days after receipt of an application, the board will notify the applicant of the status of the application. The notification of the initial determination with regard to the status of the application will be provided by the board in writing and will include (i) a determination as to which provisions of the new source review program are applicable, (ii) the identification of any deficiencies, and (iii) a determination as to whether the application contains sufficient information to begin application review. The determination that the application has sufficient information to begin review is not necessarily a determination that it is complete. Within 30 days after receipt of any additional information, the board will notify the applicant in writing of any deficiencies in such information. The date of receipt of a complete application for processing under subsection ~~B~~ C of this section shall be the date on which the board received all required information, including any applicable permit fees, and the provisions of § 10.1-1321.1 of the Virginia Air Pollution Control Law have been met, if applicable.

~~B~~ C. The board will normally process an application according to the steps specified in subdivisions 1 through 4 of this subsection. Processing time for these steps is normally 90 days following receipt of a complete application. If a public hearing is required, processing time is normally 180 days following receipt of a complete application. The board may extend this time period if additional information is needed.

1. Complete the preliminary review and analysis in accordance with 9VAC5-80-1190 and the preliminary determination of the board. This step may constitute the final step if the provisions of 9VAC5-80-1170 concerning public participation are not applicable.

2. When required, complete the public participation requirements in accordance with 9VAC5-80-1170.

3. Consider the public comments received in accordance with 9VAC5-80-1170.

4. Complete the final review and analysis and the final determination of the board.

~~C~~ D. The board will normally take final action on an application after completion of the applicable steps in subsection ~~B~~ C of this section, except in cases where direct consideration of the application by the board is granted pursuant to 9VAC5-80-25. The board will review any request made under 9VAC5-80-1170 F, and will take final action on the request and application as provided in Part I (9VAC5-80-5 et seq.) of this chapter.

~~D.~~ E. The board shall notify the applicant in writing of its decision on the application, including its reasons, and shall also specify the applicable emission ~~limitations standards~~. These emission ~~limitations standards~~ are applicable during any emission testing conducted in accordance with 9VAC5-80-1200.

~~E.~~ F. The applicant may appeal the decision pursuant to Part VIII (9VAC5-170-190 et seq.) of ~~9VAC5 Chapter 170~~ 9VAC5-170 (Regulation for General Administration).

~~F.~~ G. Within five days after notification to the applicant pursuant to subsection ~~E~~ E of this section, the notification and any comments received pursuant to the public comment period and public hearing shall be made available for public inspection at the same location as was the information in 9VAC5-80-1170 E 1.

**9VAC5-80-1170. Public participation.**

A. No later than 15 days after receiving the initial determination notification required under 9VAC5-80-1160 ~~A~~ B, the applicant for a minor NSR permit for a new major stationary source ~~or a major modification~~ shall notify the public of the proposed major stationary source ~~or major modification~~ in accordance with subsection B of this section.

B. The public notice required by subsection A of this section shall be placed by the applicant in at least one newspaper of general circulation in the affected air quality control region. The notice shall be approved by the board and shall include, but not be limited to, the following:

1. The source name, location, and type;
2. The pollutants and the total quantity of each which the applicant estimates will be emitted, and a brief statement of the air quality impact of such pollutants;
3. The control technology proposed to be used at the time of the publication of the notice; and
4. The name and telephone number of a contact person, employed by the applicant, who can answer questions about the proposed source.

C. Upon a determination by the board that it will achieve the desired results in an equally effective manner, an applicant for a minor NSR permit may implement an alternative plan for notifying the public to that required in subsections A and B of this section.

D. Prior to the decision of the board, minor NSR permit applications as specified below shall be subject to a public comment period of at least 30 days. At the end of the public comment period, a public hearing shall be held in accordance with subsection E of this section.

1. Applications for stationary sources of hazardous air pollutants requiring a case-by-case maximum achievable control technology determination under Article 3 (9VAC5-60-120 et seq.) of ~~9VAC5 Chapter 60~~ Part II of 9VAC5-60 (Hazardous Air Pollutant Sources).

2. Applications for new major stationary sources and major modifications.

3. Applications for projects that would result in an increase in the potential to emit of any regulated air pollutant that would equal or exceed 100 tons per year, considering any state and federally enforceable permit conditions that will be placed on the source by a minor NSR permit.

~~4.~~ Applications for new stationary sources which or projects that have the potential for public interest concerning air quality issues, as determined by the board in its discretion. The identification of such sources may shall be made using the following nonexclusive criteria:

- a. Whether the new stationary source or project is opposed by any person;
- b. Whether the new stationary source or project has resulted in adverse media;
- c. Whether the new stationary source or project has generated adverse comment through any public participation or governmental review process initiated by any other governmental agency; and
- d. Whether the new stationary source or project has generated adverse comment by a local official, governing body or advisory board.

~~4.~~ 5. Applications for stationary sources for which any provision of the minor NSR permit is to be based upon a good engineering practice (GEP) stack height that exceeds the height allowed by subdivisions 1 and 2 of the GEP definition. The demonstration specified in subdivision 3 of the GEP definition ~~must be available during the public comment period and required by 9VAC5-50-20 H 3 shall be included in the application.~~

E. When a public comment period and public hearing are required, the board shall notify the public, by advertisement in at least one newspaper of general circulation in the affected air quality control region, of the opportunity for the public comment and the public hearing on the information available for public inspection under the provisions of subdivision 1 of this subsection. The notification shall be published at least 30 days prior to the day of the public hearing. For permits subject to § 10.1-1307.01 of the Code of Virginia, written comments will be accepted by the board for at least 15 days after any hearing, unless the board votes to shorten the period.

1. Information on the minor NSR permit application (exclusive of confidential information under 9VAC5-170-60), as well as the preliminary review and analysis and preliminary determination of the board, shall be available for public inspection during the entire public comment period in at least one location in the affected air quality control region. Any demonstration included in an application specified in subdivision D 5 of this section shall be available for public inspection during the public comment period.



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# Regulations

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2. A copy of the notice shall be sent to all local air pollution control agencies having jurisdiction in the affected air quality control region, all states sharing the affected air quality control region, and to the regional administrator, U.S. Environmental Protection Agency.

3. Notices of public comment periods and public hearings for major stationary sources and major modifications published under this section shall meet the requirements of § 10.1-1307.01 of the Virginia Air Pollution Control Law.

F. Following the initial publication of the notice required under subsection E of this section, the board will receive written requests for direct consideration of the minor NSR permit application by the board pursuant to the requirements of 9VAC5-80-25. In order to be considered, the request must be submitted no later than the end of the public comment period. A request for direct consideration of an application by the board shall contain the following information:

1. The name, mailing address, and telephone number of the requester.
2. The names and addresses of all persons for whom the requester is acting as a representative (for the purposes of this requirement, an unincorporated association is a person).
3. The reason why direct consideration by the board is requested.
4. A brief, informal statement setting forth the factual nature and the extent of the interest of the requester or of the persons for whom the requester is acting as representative in the application or preliminary determination, including an explanation of how and to what extent such interest would be directly and adversely affected by the issuance, denial or revision of the permit in question.
5. Where possible, specific references to the terms and conditions of the permit in question, together with suggested revisions and alterations of those terms and conditions that the requester considers are needed to conform the permit to the intent and provisions of the Virginia Air Pollution Control Law.

G. The board will review any request made under subsection F of this section, and will take final action on the request as provided in 9VAC5-80-1160 € D.

H. In order to facilitate the efficient issuance of permits under Articles 1 (9VAC5-80-50 et seq.) and 3 (9VAC5-80-360 et seq.) of this part, upon request of the applicant the board shall process the minor NSR permit application ~~under this article~~ using public participation procedures meeting the requirements of this section and 9VAC5-80-270 or 9VAC5-80-670, as applicable.

## **9VAC5-80-1180. Standards and conditions for granting permits.**

A. No minor NSR permit will be granted ~~pursuant to this article~~ unless it is shown to the satisfaction of the board that the source will comply with the following standards:

1. The source shall be designed, built and equipped to comply with standards of performance prescribed under ~~9VAC5 Chapter 50 (9VAC5 50 10 et seq.)~~ 9VAC5-50 (New and Modified Stationary Sources) and with emission standards prescribed under ~~9VAC5 Chapter 60 (9VAC5-60 10 et seq.)~~ 9VAC5-60 (Hazardous Air Pollutant Sources);

2. For sources subject to the federal hazardous air pollutant new source review program, the source shall be designed, built, and equipped to comply with the applicable emission standard and other requirements prescribed in 40 CFR Part 61 or 63 or Article 3 (9VAC5-60-120 et seq.) of ~~9VAC5 Chapter 60~~ Part II of 9VAC5-60 (Hazardous Air Pollutant Sources), as applicable;

3. The source shall be designed, built and equipped to operate without preventing or interfering with the attainment or maintenance of any applicable ambient air quality standard and without causing or exacerbating a violation of any applicable ambient air quality standard; and

4. The source shall be designed, built and equipped to operate without causing a violation of the applicable provisions of regulations of the board or the applicable control strategy portion of the implementation plan.

B. ~~Permits~~ Minor NSR permits may be granted to stationary sources or emissions units that contain emission caps provided the caps are made enforceable as a practical matter using the elements set forth in subsection D of this section. The emission caps may be considered in determining whether a stationary source is a synthetic minor source.

C. ~~Permits granted pursuant to this article~~ Minor NSR permits may contain emissions standards as necessary to implement the provisions of this article and 9VAC5-50-260. The following criteria apply in establishing emission standards to the extent necessary to assure that emissions levels are enforceable as a practical matter:

1. Standards may include limits on the level, quantity, rate, or concentration or any combination of them for each affected pollutant.

2. In no case shall a standard result in emissions which would exceed the emissions rate based on the potential to emit of the emissions unit.

3. The standard may prescribe, as an alternative to or a supplement to ~~an emission limitation~~ a limit prescribed under subdivision 1 of this subsection, ~~an~~ equipment, work practice, fuels specification, process materials, maintenance, or operational ~~standard~~ standards, or any combination of them.

D. ~~Permits issued under this article~~ Minor NSR permits will contain, but need not be limited to, any of the following elements as necessary to ensure that the permits are enforceable as a practical matter:

1. Emission standards.
2. Conditions necessary to enforce emission standards. Conditions may include, but not be limited to, any of the following:
  - a. ~~Limit~~ Limits on fuel sulfur content.
  - b. ~~Limit~~ Limits on production rates with time frames as appropriate to support the emission standards.
  - c. ~~Limit~~ Limits on raw material usage rate.
  - d. Limits on the minimum required capture, removal and overall control efficiency for any air pollution control equipment.
3. Specifications for permitted equipment, identified as thoroughly as possible. The identification shall include, but not be limited to, type, rated capacity, and size. Specifications included in the permit under this subdivision are for informational purposes only and do not form enforceable terms or conditions of the permit unless the specifications are needed to form the basis for one or more of the other terms or conditions in the permit.
4. Specifications for air pollution control equipment installed or to be installed. Specifications included in the permit under this subdivision are for informational purposes only and do not form enforceable terms or conditions of the permit unless the specifications are needed to form the basis for one or more of the other terms or conditions in the permit.
5. Specifications for air pollution control equipment operating parameters and the circumstances under which such equipment shall be operated, where necessary to ensure that the required overall control efficiency is achieved. The operating parameters may include, but need not be limited to, any of the following:
  - a. Pressure indicators and required pressure drop.
  - b. Temperature indicators and required temperature.
  - c. pH indicators and required pH.
  - d. Flow indicators and required flow.
6. Requirements for proper operation and maintenance of any pollution control equipment, and appropriate spare parts inventory.
7. ~~Stack~~ Performance test requirements.
8. Reporting or recordkeeping requirements, or both.
9. Continuous emission or air quality monitoring requirements, or both.
10. Other requirements as may be necessary to ensure compliance with the applicable regulations.

**9VAC5-80-1190. Application review and analysis.**

No minor NSR permit shall be granted ~~pursuant to this article~~ unless compliance with the standards in 9VAC5-80-1180 is demonstrated to the satisfaction of the board by a review and analysis of the application performed on a source-by-source basis as specified below:

1. Applications for new stationary sources and projects shall be subject to the following review and analysis:
  - a. A control technology review to determine if the ~~source~~ emissions units will be designed, built and equipped to comply with all applicable standards of performance prescribed under ~~9VAC5 Chapter 50 (9VAC5 50 10 et seq.)~~ 9VAC5-50 (New and Modified Stationary Sources).
  - b. An air quality analysis to determine the impact of pollutant emissions as may be deemed appropriate by the board.
2. Applications for stationary sources of ~~hazardous~~ toxic air pollutants shall be subject to a control technology review to determine if the source will be designed, built and equipped to comply with all applicable emission standards prescribed under ~~9VAC5 Chapter 60 (9VAC5 60 10 et seq.)~~ 9VAC5-60 (Hazardous Air Pollutant Sources).
3. Applications under 9VAC5-80-1120 C (concerning stack outlet elevation reduction) shall be subject to an air quality analysis to determine the impact of applicable criteria pollutant emissions as may be deemed appropriate by the board.
4. Applications for sources subject to the federal hazardous air pollutant new source review program shall be subject to a control technology review to determine if the source will be designed, built and equipped to comply with all applicable emission standards prescribed under 40 CFR Part 61 or 63 or Article 3 (9VAC5-60-120 et seq.) of ~~9VAC5 Chapter 60~~ Part II of 9VAC5-60 (Hazardous Air Pollutant Sources).

**9VAC5-80-1200. Compliance determination and verification by performance testing.**

A. For stationary sources other than those specified in subsection B of this section, compliance with standards of performance shall be determined in accordance with the provisions of 9VAC5-50-20 and shall be verified by performance tests in accordance with the provisions of 9VAC5-50-30.

B. For stationary sources of ~~hazardous air~~ toxic pollutants, compliance with emission standards shall be determined in accordance with the provisions of 9VAC5-60-20 and shall be verified by emission tests in accordance with the provisions of 9VAC5-60-30.

C. Testing required by subsections A and B of this section shall be conducted by the owner within 60 days after achieving the maximum production rate at which the ~~new or modified~~ source will be operated, but not later than 180 days

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# Regulations

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after initial startup of the source; and 60 days thereafter the board shall be provided by the owner with one or, upon request, more copies of a written report of the results of the tests.

D. For sources subject to the provisions of 40 CFR Part 60, 61 or 63, the compliance determination and performance test requirements of subsections A, B and C of this section shall be met as specified in those parts of Title 40 of the Code of Federal Regulations.

E. For sources other than those specified in subsection D of this section, the requirements of subsections A, B and C of this section shall be met unless the board:

1. Specifies or approves, in specific cases, the use of a reference method with minor changes in methodology;
2. Approves the use of an equivalent method;
3. Approves the use of an alternative method, the results of which the board has determined to be adequate for indicating whether a specific source is in compliance;
4. Waives the requirement for testing because, based upon a technical evaluation of the past performance of similar source types, using similar control methods, the board reasonably expects the ~~new or modified~~ source to perform in compliance with applicable standards; or
5. Waives the requirement for testing because the owner of the source has demonstrated by other means to the board's satisfaction that the source is in compliance with the applicable standard.

F. The provisions for the granting of waivers under subsection E of this section are intended for use in determining the initial compliance status of a source. The granting of a waiver does not obligate the board to grant any waivers once the source has been in operation for more than one year beyond the initial startup date.

G. The granting of a waiver under this section does not shield the source from potential enforcement of any permit term or condition, applicable requirement of the implementation plan, or any other applicable federal requirement promulgated under the federal Clean Air Act.

## **9VAC5-80-1210. Permit invalidation, suspension, revocation and enforcement.**

A. In addition to the sources subject to this article, the provisions of this section shall apply to sources specified below:

1. Any stationary source (or portion of it), the construction, modification, or relocation of which commenced on or after March 17, 1972.
2. Any stationary source (or portion of it), the reconstruction of which commenced on or after December 10, 1976.

B. A minor NSR permit granted pursuant to this article shall become invalid if a program of continuous construction, reconstruction or modification is not commenced within [ ~~the~~

~~latest of the following time frames: 1. Eighteen 18 ] months from the date the minor NSR permit is granted [ ~~;~~ ]~~

[ ~~2. Nine months from the date of the issuance of the last permit or other authorization (other than minor NSR permits) granted pursuant to this article) from any governmental entity; or~~

~~3. Nine months from the date of the last resolution of any litigation concerning any such permits or authorizations (including minor NSR permits) granted pursuant to this article). ]~~

~~B. C.~~ A minor NSR permit granted pursuant to this article shall become invalid if a program of construction, reconstruction or modification is discontinued for a period of 18 months or more, or if a program of construction, reconstruction or modification is not completed within a reasonable time. This provision does not apply to the period between construction of the approved phases of a the phased construction of a new stationary source or project; each phase must commence construction within 18 months of the projected and approved commencement date.

~~C. D.~~ The board may extend the periods prescribed in subsections ~~A B~~ and ~~B C~~ of this section upon a satisfactory demonstration that an extension is justified. Provided there is no substantive change to the application information, the review and analysis, and the decision of the board, such extensions may be granted using the procedures for minor amendments in 9VAC5-80-1280.

~~D. E.~~ Any owner who constructs or operates a ~~new or modified~~ source subject to this section not in accordance with the terms and conditions of any permit to construct or operate, or any owner of a ~~new or modified~~ source subject to this article section who commences construction or operation without receiving a permit hereunder, shall be subject to appropriate enforcement action including, but not limited to, any specified in this section.

~~E. Permits issued under this article~~ F. Minor NSR permits shall be subject to such terms and conditions set forth in the permit as the board may deem necessary to ensure compliance with all applicable requirements of the regulations of the board.

~~F. G.~~ The board may revoke any minor NSR permit if the permittee:

1. Knowingly makes material misstatements in the permit application or any amendments to it;
2. Fails to comply with the terms or conditions of the permit;
3. Fails to comply with any emission standards applicable to an emissions unit included in the permit;
4. Causes emissions from the stationary source which result in violations of, or interfere with the attainment and maintenance of, any ambient air quality standard; or fails to operate in conformance with any applicable control strategy, including any emission standards or ~~emission~~

emissions limitations, in the implementation plan in effect at the time that an application is submitted; or

5. Fails to comply with the applicable provisions of this article.

~~G.~~ H. The board may suspend, under such conditions and for such period of time as the board may prescribe, any minor NSR permit for any of the grounds for revocation contained in subsection ~~F~~ G of this section or for any other violations of the regulations of the board.

~~H.~~ I. The permittee shall comply with all terms and conditions of the minor NSR permit. Any permit noncompliance constitutes a violation of the Virginia Air Pollution Control Law and is grounds for (i) enforcement action or (ii) suspension or revocation.

~~I.~~ J. Violation of the regulations of the board shall be grounds for revocation of minor NSR permits ~~issued under this article~~ and are subject to the civil charges, penalties and all other relief contained in Part V (9VAC5-170-120 et seq.) of ~~9VAC5 Chapter 170~~ 9VAC5-170 (Regulation for General Administration) and the Virginia Air Pollution Control Law.

~~J.~~ K. The board shall notify the applicant in writing of its decision, with its reasons, to change, suspend or revoke a minor NSR permit, or to render a minor NSR permit invalid.

~~K.~~ L. Nothing in the regulations of the board shall be construed to prevent the board and the owner from making a mutual determination that a minor NSR permit is invalid or revoked prior to any final decision rendered under subsection ~~J~~ K of this section.

~~L.~~ M. Nothing in the regulations of the board shall be construed to prevent the board and the owner from making a mutual determination that a minor NSR permit is rescinded because all of the statutory or regulatory requirements (i) upon which the permit is based or (ii) that necessitated issuance of the permit are no longer applicable.

~~M.~~ N. Except with respect to minor NSR permits issued in accordance with Article 3 (9VAC5-60-120 et seq.) of ~~9VAC5 Chapter 60~~ Part II of 9VAC5-60 (Hazardous Air Pollutant Sources), the provisions of subsections ~~A, B and C~~ B, C, and D shall not apply to sources subject to the federal hazardous air pollutant new source review program.

**9VAC5-80-1220. Existence of permit no defense.**

The existence of a minor NSR permit ~~under this article~~ shall not constitute defense to a violation of the Virginia Air Pollution Control Law or the regulations of the board and shall not relieve any owner of the responsibility to comply with any applicable regulations, laws, ordinances and orders of the governmental entities having jurisdiction.

**9VAC5-80-1240. Transfer of permits.**

A. No person shall transfer a minor NSR permit from one location to another, or from one piece of equipment to another.

B. In the case of a transfer of ownership of a stationary source, the new owner shall abide by any current minor NSR permit issued to the previous owner. The new owner shall notify the board of the change in ownership within 30 days of the transfer.

C. In the case of a name change of a stationary source, the owner shall abide by any current minor NSR permit issued under the previous source name. The owner shall notify the board of the change in source name within 30 days of the name change.

D. The provisions of this section concerning the transfer of a minor NSR permit from one location to another shall not apply to the relocation of portable ~~emission~~ emissions units that are exempt from the provisions of this article by ~~9VAC5-80-1320 A 1 e~~ 9VAC5-80-1105 A 1 c.

E. The provisions of this section concerning the transfer of a minor NSR permit from one piece of equipment to another shall not apply to the replacement of an emissions unit that is exempt from the provisions of this article by 9VAC5-80-1105 A 2 a.

**9VAC5-80-1250. General permits.**

A. The requirements for issuance of a general permit are as follows:

1. The board may issue a general permit covering a stationary source or emissions unit category containing numerous similar stationary sources or emissions units that meet the following criteria:

- a. All stationary sources or emissions units in the category shall be essentially the same in terms of operations and processes and emit either the same pollutants or those with similar characteristics.
- b. Stationary sources or emissions units shall not be subject to case-by-case standards or requirements.
- c. Stationary sources or emissions units shall be subject to the same or substantially similar requirements governing operation, emissions, monitoring, reporting, or recordkeeping.

2. Stationary sources or emissions units operating under the authority of a general permit shall comply with all requirements applicable to other permits issued under this article.

3. General permits shall (i) identify the criteria by which stationary sources or emissions units may qualify for the general permit and (ii) describe the process for stationary sources or emissions units to use in applying for the general permit.

4. General permits shall be issued in accordance with § 2.2-4006 A [ ~~9~~ 8 ] of the Administrative Process Act.

5. In addition to fulfilling the requirements specified by law, the notice of public comment shall include, but not be limited to, the following:

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# Regulations

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a. The name, address and telephone number of a department contact from whom interested persons may obtain additional information including copies of the draft general permit;

b. The criteria to be used in determining which stationary sources or emissions units qualify for coverage under the general permit;

c. A brief description of the stationary source or emissions unit category that the department believes qualifies for coverage under the general permit including, but not limited to, an estimate of the number of individual stationary sources or emissions units in the category;

d. A brief description of the application process to be used by owners of stationary sources or emissions units to request coverage under the general permit; and

e. A brief description of the public comment procedures.

B. The requirements for application for coverage under a general permit are as follows:

1. Stationary sources or emissions units which qualify for coverage under a general permit may apply to the board for coverage under the terms of the general permit. Stationary sources or emissions units that do not qualify for coverage under a general permit shall apply for a minor NSR permit issued under the other provisions of this article.

2. The application shall meet the requirements of this article and include all information necessary to determine qualification for and to assure compliance with the general permit.

3. Stationary sources or emissions units that qualify for coverage under the general permit after coverage is granted to other stationary sources or emissions units in the category addressed by the general permit shall file an application with the board using the application process described in the general permit. The board shall grant authority to operate under the general permit to the stationary source or emissions unit if it determines that the stationary source or emissions unit meets the criteria set out in the general permit.

C. The requirements for granting authority to operate under a general permit are as follows:

1. The board shall grant authority to operate under the conditions and terms of the general permit to stationary sources or emissions units that meet the criteria set out in the general permit covering the specific stationary source or emissions unit category.

2. Granting authority to operate under a general permit to a stationary source or emissions unit covered by a general permit shall not require compliance with the public participation procedures under 9VAC5-80-1170.

3. A response to each general permit application may be provided at the discretion of the board. The general permit

may specify a reasonable time period after which the owner of a stationary source or emissions unit that has submitted an application shall be deemed to be authorized to operate under the general permit.

4. Stationary sources or emissions units authorized to operate under a general permit may be issued a letter, a certificate, or a summary of the general permit provisions, limits, and requirements, or any other document which would attest that the stationary source or emissions unit is authorized to operate under the general permit.

5. The general permit shall specify where the general permit and the letter, certificate, summary or other document shall be maintained by the source.

D. The stationary source or emissions unit shall be subject to enforcement action under 9VAC5-80-1210 for operation without a minor NSR permit issued under this article if the stationary source or emissions unit is later determined by the board not to qualify for the conditions and terms of the general permit.

## **9VAC5-80-1255. Actions to combine permit terms and conditions.**

A. General requirements for actions to combine permit terms and conditions are as follows:

1. Except as provided in subdivision 3 of this subsection, the board may take actions to combine permit terms and conditions as provided under subsections B through E of this section.

2. Requests to combine permit terms and conditions may be initiated by the permittee or by the board.

3. Under no circumstances may an action to combine permit terms and conditions be used for any of the following:

a. To combine the terms and conditions of (i) a federal operating permit, (ii) a PAL permit, or (iii) any permit that is or will be part of the implementation plan.

b. To take an action to issue a permit or change a permit for the fabrication, erection, installation, demolition, relocation, addition, replacement, or modification of an emissions unit that would result in a change in emissions that would otherwise (i) be subject to review under this article or (ii) require a permit or permit amendment under the new source review program.

c. To allow any stationary source or emissions unit to violate any federal requirement.

B. The board may take actions to combine the terms and conditions of state operating permits and new source review permits, along with any changes to state operating permits and new source review permits.

C. If the board and the owner make a mutual determination that it facilitates improved compliance or the efficient processing and issuing of permits, the board may take an action to combine the terms and conditions of permits for

emissions units within a stationary source into one or more permits. Likewise the board may require that applications for permits for emissions units within a stationary source required by any permit program be combined into one application.

D. Actions to combine the terms and conditions of permits are subject to the following conditions:

1. Each term or condition in the combined permit shall be accompanied by a statement that specifies and references the origin (enabling permit program) of, along with the regulatory or any other authority for, the term or condition.
2. Each term or condition in the combined permit shall be accompanied by a statement that specifies the effective date of the term or condition.
3. Each term or condition in the combined permit shall be identified by its original designation (i.e., state-only enforceable or federally and state enforceable) consistent with the applicable enforceability designation of the term or condition in the contributing permit.
4. Except as provided in subsection E of this section, all terms and conditions in the contributing permits shall be included in the combined permit without change. The combined permit will supersede the contributing permits, which will no longer be effective.

E. Actions to make changes to permit terms and conditions as may be necessary to facilitate actions to combine permit terms and conditions may be accomplished in accordance with the minor amendment procedures (unless specified otherwise in this section) of the enabling permit program (i.e., the permit program that is the origin of the term or condition), subject to the following conditions:

1. Updates to regulatory or other authorities may be accomplished in accordance with the administrative amendment procedures of the enabling permit program.
2. If two or more terms or conditions apply to the same emissions unit or emissions units and are substantively equivalent, the more restrictive of the duplicate terms or conditions may be retained and the less restrictive one removed, subject to the provisions of subdivision 4 of this subsection.
3. If two or more similar terms or conditions apply to the same emissions unit or emissions units and one is substantively more restrictive than the others, the more restrictive of the terms or conditions shall be retained, regardless of whether the less restrictive terms or conditions are removed. If the less restrictive of the similar terms or conditions is removed, the provisions of subdivision 4 of this subsection apply.
4. The removal of similar terms or conditions from contributing permits is subject to the following conditions:
  - a. If any one of the terms or conditions removed is federally and state enforceable, the more restrictive term

or condition that is retained in the combined permit shall be federally and state enforceable.

b. If any one of the terms or conditions originates in a permit subject to a major NSR program, that major NSR program shall become the effective enabling permit program for the more restrictive term or condition that is retained in the combined permit. If more than one major NSR program is the basis for a term or condition, all of the applicable major NSR programs shall be the enabling permit program for that term or condition.

c. The regulatory basis for all of the similar terms or conditions that are removed shall be included in the reference for the term or condition that is retained.

**9VAC5-80-1260. ~~Changes to~~ Actions to change permits.**

A. The general requirements for ~~making~~ actions to make changes to minor NSR permits are as follows:

1. Changes Except as provided in subdivision 3 of this subsection, ~~changes~~ to a minor NSR permit ~~issued under this article~~ shall be made as specified under subsections B and C of this section and 9VAC5-80-1270 through 9VAC5-80-1300.
- Changes to a minor NSR permit ~~issued under this article~~ may be initiated by the permittee as specified in subsection B of this section or by the board as specified in subsection C of this section.
- Changes to a minor NSR permit ~~issued under this article~~ and incorporated into a permit issued under Article 1 (9VAC5-80-50 et seq.) or Article 3 (9VAC5-80-360 et seq.) of this part shall be made as specified in Article 1 (9VAC5-80-50 et seq.) or Article 3 (9VAC5-80-360 et seq.) of this part.
- This section shall not be applicable to general permits.

B. The requirements for changes initiated by the permittee are as follows:

- The permittee may initiate a change to a minor NSR permit by submitting a written request to the board for an administrative permit amendment, a minor permit amendment or a significant permit amendment. The requirements for these permit ~~revisions~~ changes can be found in 9VAC5-80-1270 through 9VAC5-80-1290.
- A request for a change by a permittee shall include a statement of the reason for the proposed change.

C. The board may initiate a change to a minor NSR permit through the use of permit reopenings as specified in 9VAC5-80-1300.

**9VAC5-80-1270. Administrative permit amendments.**

A. Administrative permit amendments shall be ~~required~~ used for and limited to the following:

- Correction of typographical or any other error, defect or irregularity which does not substantially affect the permit.

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# Regulations

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2. Identification of a change in the name, address, or phone number of any person identified in the permit, or of a similar minor administrative change at the source.

3. Change in ownership or operational control of a source where the board determines that no other change in the permit is necessary, provided that a written agreement containing a specific date for transfer of permit responsibility, coverage, and liability between the current and new permittee has been submitted to the board and the requirements of 9VAC5-80-1240 have been fulfilled.

~~4. The combining of permits under the new source review program as provided in 9VAC5-80-1120 D.~~

B. The administrative permit amendment procedures are as follows:

1. The board will normally take final action on a request for an administrative permit amendment no more than 60 days from receipt of the request.

2. The board will incorporate the changes without providing notice to the public under 9VAC5-80-1170 and designate in the permit amendment that such permit revisions have been made pursuant to this section.

3. The owner may implement the changes addressed in the request for an administrative amendment immediately upon submittal of the request.

## 9VAC5-80-1280. Minor permit amendments.

A. Minor permit amendment procedures shall be used only for those permit amendments that meet all of the following criteria:

1. Do not violate any applicable federal requirement~~s~~.

2. Do not involve significant changes to existing monitoring, reporting, or recordkeeping requirements that would make the permit requirements less stringent, such as a change to the method of monitoring to be used, a change to the method of demonstrating compliance or a relaxation of reporting or recordkeeping requirements~~s~~.

3. Do not require or change a case-by-case determination of an ~~emission~~ emissions limitation or other ~~standard~~ requirement.

4. ~~Do~~ Except as provided in subdivision C 2 of this section, do not seek to establish or change a permit term or condition (i) for which there is no corresponding underlying applicable regulatory requirement and (ii) that the source has assumed to avoid an applicable regulatory requirement to which the source would otherwise be subject. Such terms and conditions include:

a. An emissions cap assumed to avoid classification as a ~~modification under project subject to~~ the new source review program or as a modification under § 112 of the federal Clean Air Act; and

b. An alternative emissions limit approved pursuant to regulations promulgated under § 112(i)(5) of the federal Clean Air Act~~s~~.

5. Are not modifications under the new source review program or under § 112 of the federal Clean Air Act~~, and that would otherwise require a permit under the new source review program.~~

6. Are not required to be processed as a significant amendment under 9VAC5-80-1290 or as an administrative permit amendment under 9VAC5-80-1270.

B. Notwithstanding subsection A of this section, minor permit amendment procedures may be used for permit amendments that meet any of the following criteria:

1. Involve the use of economic incentives, emissions trading, and other similar approaches to the extent that such minor permit amendment procedures are explicitly provided for in a regulation of the board or a federally-approved program.

2. Require new or more frequent monitoring or reporting by the permittee or a reduction in the level of an emissions cap.

3. Designate any minor NSR permit term or ~~permit~~ condition that meets the criteria in 9VAC5-80-1120 F 1 ~~(4)~~ as state-only enforceable as provided in 9VAC5-80-1120 F 2 for any minor NSR permit issued under this article or any repealed or amended regulation from which this article is derived.

4. Apply any minor NSR permit term or condition that is applicable to an existing emissions unit to its replacement emissions unit that otherwise meets the requirements for exemption from the minor new source review permit program requirements under the provisions of 9VAC5-80-1105 A 2 a.

~~C. Notwithstanding subsection A of this section, minor~~ Minor permit amendment procedures may be used for permit amendments involving the rescission of a provision of a minor NSR permit if the board and the owner make a mutual determination that the provision is rescinded because all of the underlying statutory or regulatory requirements (i) upon which the provision is based or (ii) that necessitated inclusion of the provision are no longer applicable.

1. In order for the underlying statutory and regulatory requirements to be considered no longer applicable, the provision of the permit that is being rescinded must not cover a regulated air pollutant.

2. Any emissions cap contained in the permit shall be adjusted downward appropriately so that the emissions unit's potential to emit does not reflect any compound no longer considered a regulated air pollutant.

D. A request for the use of minor permit amendment procedures shall include ~~all of the following~~: 1. A a description of the change, the emissions resulting from the change, and any new applicable regulatory requirements that will apply if the change occurs. 2. ~~A,~~ accompanied by a request that such procedures be used. The applicant may, at

the applicant's discretion, include a suggested proposed permit amendment.

E. The public participation requirements of 9VAC5-80-1170 shall not extend to minor permit amendments.

F. Normally within 90 days of receipt by the board of a complete request under minor permit amendment procedures, the board will do one of the following:

1. Issue the permit amendment as proposed.
2. Deny the permit amendment request.
3. Determine that the requested amendment does not meet the minor permit amendment criteria and should be reviewed under the significant amendment procedures.

G. The requirements for making changes are as follow follows:

1. The owner may make the change proposed in the minor permit amendment request immediately after the request is filed.
2. After the change under subdivision 1 of this subsection is made, and until the board takes any of the actions specified in subsection F of this section, the source shall comply with both the applicable regulatory requirements governing the change and the proposed ~~permit terms and conditions~~ amendment.
3. During the time period specified in subdivision 2 of this subsection, the owner need not comply with the existing permit terms and conditions he seeks to modify if the applicant has submitted a suggested proposed permit amendment pursuant to subsection D of this section. However, if the owner fails to comply with the proposed permit terms and conditions during this time period, the existing permit terms and conditions he seeks to modify may be enforced against him.

**9VAC5-80-1290. Significant amendment procedures.**

A. The criteria for use of significant amendment procedures are as follows:

1. Significant amendment procedures shall be used for requesting permit amendments that do not qualify as minor permit amendments under 9VAC5-80-1280 or as administrative amendments under 9VAC5-80-1270.
2. Significant amendment procedures shall be used for those permit amendments that meet any one of the following criteria:
  - a. Involve significant changes to existing monitoring, reporting, or recordkeeping requirements that would make the permit requirements less stringent, such as a change to the method of monitoring to be used, a change to the method of demonstrating compliance or a relaxation of reporting or recordkeeping requirements.
  - b. Require or change a case-by-case determination of an ~~emission~~ emissions limitation or other ~~standard~~ requirement.

c. Seek to establish or change a minor NSR permit term or condition (i) for which there is no corresponding underlying applicable regulatory requirement and (ii) that the source has assumed to avoid an applicable regulatory requirement to which the source would otherwise be subject. Such terms and conditions include:

- (1) An emissions cap assumed to avoid classification as a ~~modification under project subject to~~ the new source review program or as a modification under § 112 of the federal Clean Air Act; and
- (2) An alternative emissions limit approved pursuant to regulations promulgated under § 112(i)(5) of the federal Clean Air Act.

3. Significant amendment procedures may not be used to bypass the public participation requirements in 9VAC5-80-1170 for an application for a project that would be subject to the minor new source review program.

B. A request for a significant permit amendment shall include a description of the change, the emissions resulting from the change, and any new applicable regulatory requirements that will apply if the change occurs. The applicant may, at the applicant's discretion, include a suggested draft permit amendment.

C. ~~The~~ At the discretion of the board, the provisions of 9VAC5-80-1170 D and E shall apply to requests made under this section if the ~~permit is for a stationary source~~ emissions unit subject to the request under this section was subject to review in any previous permit application that was subject to 9VAC5-80-1170.

D. The board will normally take final action on significant permit amendments within 90 days after receipt of a complete request. If a public hearing is required, processing time for a permit amendment is normally 180 days following receipt of a complete request except in cases where direct consideration of the request by the board is granted pursuant to 9VAC5-80-25. The board may extend this time period if additional information is needed.

E. The owner shall not make the change applied for in the significant amendment request until the amendment is approved by the board under subsection D of this section.

**9VAC5-80-1300. Reopening for cause.**

A. A minor NSR permit may be reopened and ~~amended~~ revised under any of the following situations:

1. Additional regulatory requirements become applicable to the emissions units covered by the permit after a permit is issued but prior to commencement of construction.
2. The board determines that the permit contains a material mistake or that inaccurate statements were made in establishing the ~~emissions standards or other~~ terms or conditions of the permit.
3. The board determines that the permit must be amended to assure compliance with the applicable regulatory



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# Regulations

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requirements or that the terms and conditions of the permit are not sufficient to meet all of the standards and requirements contained in this article.

4. A new emission standard prescribed under 40 CFR Part 60, 61 or 63 becomes applicable after a permit is issued but prior to initial startup.

B. Proceedings to reopen and reissue a minor NSR permit shall follow the same procedures as apply to initial permit issuance and shall affect only those parts of the permit for which cause to reopen exists. Such reopening shall be made as expeditiously as practicable.

C. Reopenings shall not be initiated before a notice of such intent is provided to the source by the board at least 30 days in advance of the date that the permit is to be reopened, except that the board may provide a shorter time period in the case of an emergency.

## **9VAC5-80-1320. Permit exemption levels. (Repealed.)**

A. The general requirements for permit exemption levels are as follows:

~~1. The provisions of this article do not apply to the following stationary sources or emissions units:~~

~~a. The construction, reconstruction, relocation or modification of any stationary source or emissions unit that is exempt under the provisions of subsections B through F of this section.~~

~~b. The reconstruction of any stationary source or emissions unit if the potential to emit resulting from the reconstruction will not increase.~~

~~c. The relocation of a portable emissions unit provided that:~~

~~(1) The new emissions from the portable emissions unit are secondary emissions;~~

~~(2) The portable emissions unit has previously been permitted or is subject to a general permit;~~

~~(3) The unit would not undergo modification or reconstruction;~~

~~(4) The unit is suitable to the area in which it is to be located; and~~

~~(5) Reasonable notice is given to the board prior to the relocation identifying the proposed new location and the probable duration of operation at the new location. Such notice shall be given to the board not less than 15 days in advance of the proposed relocation unless a different time duration is previously approved by the board.~~

~~d. The reactivation of a stationary source unless a determination concerning shutdown has been made pursuant to the provisions of 9VAC5-20-220.~~

~~e. The use by any source of an alternative fuel or raw material, if the following conditions are met:~~

~~(1) The owner demonstrates to the board that, as a result of trial burns at the owner's facility or other facilities or~~

~~other sufficient data, the emissions resulting from the use of the alternative fuel or raw material supply are decreased. No demonstration will be required for the use of processed animal fat, processed fish oil, processed vegetable oil, distillate oil, or any mixture thereof in place of the same quantity of residual oil to fire industrial boilers.~~

~~(2) The use of an alternative fuel or raw material would not be subject to review under this article as a modification.~~

~~2. In determining whether a facility source is exempt from the provisions of this article, the provisions of subsections B through D of this section are independent from the provisions of subsections E and F of this section. A source must be determined to be exempt both under the provisions of subsections B through D taken as a group and under the provisions of subsection E or F to be exempt from this article.~~

~~3. In determining whether a facility is exempt from the provisions of this article under the provisions of subsection B of this section, the definitions in 9VAC5 Chapter 40 (9VAC5-40-10 et seq.) that would cover the facility if it were an existing source shall be used unless deemed inappropriate by the board.~~

~~4. Any owner claiming that a facility is exempt from this article under the provisions of this section shall keep records as may be necessary to demonstrate to the satisfaction of the board that the facility was exempt at the time a permit would have otherwise been required under this article.~~

B. Facilities as specified below shall be exempt from the provisions of this article as they pertain to construction, modification, reconstruction or relocation.

1. Fuel burning equipment units (external combustion units, not engines and turbines) as follows:

a. Using solid fuel with a maximum heat input of less than 1,000,000 Btu per hour.

b. Using liquid fuel with a maximum heat input of less than 10,000,000 Btu per hour.

c. Using liquid and gaseous fuel with a maximum heat input of less than 10,000,000 Btu per hour.

d. Using gaseous fuel with a maximum heat input of less than 50,000,000 Btu per hour.

2. Engines and turbines used for emergency purposes only and which do not exceed 500 hours of operation per year at a single stationary source as follows:

a. Gasoline engines with an aggregate rated brake (output) horsepower of less than 910 hp and gasoline engines powering electrical generators having an aggregate rated electrical power output of less than 611 kilowatts.

b. Diesel engines with an aggregate rated brake (output) horsepower of less than 1,675 hp and diesel engines powering electrical generators having an aggregate rated electrical power output of less than 1125 kilowatts.

e. Combustion gas turbines with an aggregate of less than 10,000,000 Btu per hour heat input (low heating value).

3. Engines that power mobile sources during periods of maintenance, repair or testing.

4. Volatile organic compound storage and transfer operations involving petroleum liquids and other volatile organic compounds with a vapor pressure less than 1.5 pounds per square inch absolute under actual storage conditions or, in the case of loading or processing, under actual loading or processing conditions; and any operation specified below:

a. Volatile organic compound transfer operations involving:

(1) Any tank of 2,000 gallons or less storage capacity; or

(2) Any operation outside the volatile organic compound emissions control areas designated in 9VAC5-20-206.

b. Volatile organic compound storage operations involving any tank of 40,000 gallons or less storage capacity.

5. Vehicle customizing coating operations, if production is less than 20 vehicles per day.

6. Vehicle refinishing operations.

7. Coating operations for the exterior of fully assembled aircraft or marine vessels.

8. Petroleum liquid storage and transfer operations involving petroleum liquids with a vapor pressure less than 1.5 pounds per square inch absolute under actual storage conditions or, in the case of loading or processing, under actual loading or processing conditions (kerosene and fuel oil used for household heating have vapor pressures of less than 1.5 pounds per square inch absolute under actual storage conditions; therefore, kerosene and fuel oil are not subject to the provisions of this article when used or stored at ambient temperatures); and any operation or facility specified below:

a. Gasoline bulk loading operations at bulk terminals located outside volatile organic compound emissions control areas designated in 9VAC5-20-206.

b. Gasoline dispensing facilities.

e. Gasoline bulk loading operations at bulk plants:

(1) With an expected daily throughput of less than 4,000 gallons; or

(2) Located outside volatile organic compound emissions control areas designated in 9VAC5-20-206.

d. Account/tank trucks; however, permits issued for gasoline storage/transfer facilities should include a provision that all associated account/tank trucks meet the

same requirements as those trucks serving existing facilities.

e. Petroleum liquid storage operations involving:

(1) Any tank of 40,000 gallons or less storage capacity;

(2) Any tank of less than 420,000 gallons storage capacity for crude oil or condensate stored, processed or treated at a drilling and production facility prior to custody transfer; or

(3) Any tank storing waxy, heavy pour crude oil.

9. Petroleum dry cleaning plants with a total manufacturers' rated solvent dryer capacity less than 84 pounds as determined by the applicable new source performance standard in 9VAC5-50-410.

10. Any addition of, relocation of or change to a woodworking machine within a wood product manufacturing plant provided the system air movement capacity, expressed as the cubic feet per minute of air, is not increased and maximum control efficiency of the control system is not decreased.

11. Wood sawmills and planing mills primarily engaged in sawing rough lumber and timber from logs and bolts, or resawing cants and flitches into lumber, including box lumber and softwood cut stock; planing mills combined with sawmills; and separately operated planing mills that are engaged primarily in producing surfaced lumber and standard workings or patterns of lumber. This also includes facilities primarily engaged in sawing lath and railroad ties and in producing tobacco hogshead stock, wood chips, and snow fence lath. This exemption does not include any facility that engages in the kiln drying of lumber.

12. Exhaust flares at natural gas and coalbed methane extraction wells.

C. The exemption of new and relocated sources shall be determined as specified below:

1. Stationary sources with a potential to emit at rates less than all of the emission rates specified below shall be exempt from the provisions of this article pertaining to construction or relocation.

Pollutant	Emissions Rate
Carbon Monoxide	100 tons per year (tpy)
Nitrogen Oxides	40 tpy
Sulfur Dioxide	40 tpy
Particulate Matter	25 tpy
Particulate Matter (PM <sub>10</sub> )	15 tpy
Volatile organic compounds	25 tpy
Lead	0.6 tpy
Fluorides	3 tpy

# Regulations

Sulfuric Acid Mist	6 tpy
Hydrogen Sulfide (H <sub>2</sub> S)	9 tpy
Total Reduced Sulfur (including H <sub>2</sub> S)	9 tpy
Reduced Sulfur Compounds (including H <sub>2</sub> S)	9 tpy
Municipal waste combustor organics (measured as total tetra through octa chlorinated dibenzo p dioxins and dibenzofurans)	3.5 x 10 <sup>-6</sup> tpy
Municipal waste combustor metals (measured as particulate matter)	13 tpy
Municipal waste combustor acid gases (measured as the sum of SO <sub>2</sub> and HCl)	35 tpy
Municipal solid waste landfill emissions (measured as nonmethane organic compounds)	22 tpy

2. Facilities exempted by subsection B of this section shall not be included in the determination of potential to emit of a stationary source for purposes of exempting sources under this subsection.

3. If the particulate matter (PM<sub>10</sub>) emissions for a stationary source can be determined in a manner acceptable to the board and the stationary source is deemed exempt using the emission rate for particulate matter (PM<sub>10</sub>), the stationary source shall be considered to be exempt for particulate matter. If the emissions of particulate matter (PM<sub>10</sub>) cannot be determined in a manner acceptable to the board, the emission rate for particulate matter shall be used to determine the exemption status.

D. The exemption of modified and reconstructed sources shall be determined as specified below:

1. Stationary sources with net emissions increases less than all of the emission rates specified below shall be exempt from the provisions of this article pertaining to modification or reconstruction.

Pollutant	Emissions Rate
Carbon Monoxide	100 tons per year (tpy)
Nitrogen Oxides	10 tpy
Sulfur Dioxide	10 tpy
Particulate Matter	15 tpy

Particulate Matter (PM <sub>10</sub> )	10 tpy
Volatile organic compounds	10 tpy
Lead	0.6 tpy
Fluorides	3 tpy
Sulfuric Acid Mist	6 tpy
Hydrogen Sulfide (H <sub>2</sub> S)	9 tpy
Total Reduced Sulfur (including H <sub>2</sub> S)	9 tpy
Reduced Sulfur Compounds (including H <sub>2</sub> S)	9 tpy
Municipal waste combustor organics (measured as total tetra through octa chlorinated dibenzo p dioxins and dibenzofurans)	3.5 x 10 <sup>-6</sup> tpy
Municipal waste combustor metals (measured as particulate matter)	13 tpy
Municipal waste combustor acid gases (measured as the sum of SO <sub>2</sub> and HCl)	35 tpy
Municipal solid waste landfill emissions (measured as nonmethane organic compounds)	22 tpy

2. Facilities exempted by subsection B of this section shall not be included in the determination of net emissions increase of a stationary source for purposes of exempting sources under this subsection. However, any other increases and decreases in the uncontrolled emission rate at the source that are concurrent with a particular change shall be included in the determination of net emissions increase of a stationary source for purposes of exempting sources under this subsection, and if the change is not exempt, the other increases shall be subject to 9VAC5-50-260 C.

3. If the particulate matter (PM<sub>10</sub>) emissions for a stationary source can be determined in a manner acceptable to the board and the stationary source is deemed exempt using the emission rate for particulate matter (PM<sub>10</sub>), the stationary source shall be considered to be exempt for particulate matter. If the emissions of particulate matter (PM<sub>10</sub>) cannot be determined in a manner acceptable to the board, the emission rate for particulate matter shall be used to determine the exemption status.

E. Exemptions for stationary sources of toxic pollutants not subject to the federal hazardous air pollutant new source review program shall be as follows:

~~1. Stationary sources exempt from the requirements of Article 5 (9VAC5-60-300 et seq.) of 9VAC5 Chapter 60 as provided in 9VAC5-60-300 C 1, C 2, D or E shall be exempt from the provisions of this article.~~

~~2. Facilities as specified below shall not be exempt, regardless of size or emission rate, from the provisions of this article.~~

~~a. Incinerators, unless the incinerator is used exclusively as air pollution control equipment.~~

~~b. Ethylene oxide sterilizers.~~

~~c. Boilers, incinerators, or industrial furnaces as defined in 40 CFR 260.10 and subject to 9VAC20 Chapter 60 (9VAC20-60).~~

~~F. Any source category or portion of a source category subject to the federal hazardous air pollutant new source review program shall be exempt from the provisions of this article if specifically exempted from that program by 40 CFR Part 61 or 63.~~

VA.R. Doc. No. R06-106; Filed September 12, 2012; 11:29 a.m.

## DEPARTMENT OF ENVIRONMENTAL QUALITY

### Proposed Regulation

**Title of Regulation:** 9VAC15-70. Small Renewable Energy Projects (Combustion) Permit by Rule (adding 9VAC15-70-10 through 9VAC15-70-140).

**Statutory Authority:** § 10.1-1197.6 of the Code of Virginia.

**Public Hearing Information:** No public hearings are scheduled.

**Public Comment Deadline:** December 10, 2012.

**Agency Contact:** Carol C. Wampler, Department of Environmental Quality, 629 East Main Street, P.O. Box 1105, Richmond, VA 23218, telephone (804) 698-4579, FAX (804) 698-4346, TTY (804) 698-4021, or email carol.wampler@deq.virginia.gov.

**Basis:** This regulatory action is undertaken by the Department of Environmental Quality (DEQ) pursuant to §§ 10.1-1197.5 through 10.1-1197.11 of the Code of Virginia (Chapters 808 and 854 of the 2009 Acts of Assembly). The legislation mandates that DEQ develop one or more permits by rule for small renewable energy projects.

**Purpose:** The purpose of this regulatory action is to implement 2009 state legislation requiring DEQ to develop one or more permits by rule for certain renewable energy projects with rated capacity not exceeding 20 megawatts. By means of this legislation, the General Assembly moved permitting authority for these projects from the State Corporation Commission (SCC) to DEQ. By requiring a permit by rule, the legislature is mandating that permit requirements be set forth up front within this regulation, rather than being developed on a case-by-case basis. The legislation mandates that the permit by rule include conditions and standards necessary to protect the

Commonwealth's natural resources. The proposal establishes requirements for potential environmental impacts analyses, mitigation plans, public participation, permit fees, inter-agency consultations, compliance, and enforcement. The legislation requires DEQ to determine if multiple permits by rule are necessary to address all the renewable energy media. DEQ determined that multiple permits by rule are necessary. This proposal constitutes DEQ's permit by rule for combustion energy projects; i.e., those projects that generate electricity from biomass, energy from waste, and municipal solid waste.

This regulatory action is necessary for DEQ to carry out the requirements of Chapters 808 and 854 of the 2009 Acts of Assembly (hereinafter "2009 statute"). The regulatory action is essential to protect the health, safety, and welfare of Virginia citizens because it will establish necessary requirements, other than those established in applicable environmental permits, to protect Virginia's natural resources that may be affected by the construction and operation of small renewable energy projects.

**Substance:** This regulatory action addresses the need for a reasonable degree of certainty and timeliness in the natural-resource protections required of small combustion energy projects by setting forth, as fully as practicable, these required protections "up front" in this new permit by rule for combustion energy projects. The regulatory action describes how DEQ will address analysis of potential environmental impacts, mitigation plans, public participation, permit fees, inter-agency consultations, compliance, enforcement, and other topics that may be brought up during the public comment period.

**Issues:** The primary advantages of the proposed regulation to the public include the following:

For any individual or company wishing to develop a small combustion energy project, the proposed regulation provides certain, consistent and, DEQ believes, reasonable standards for obtaining a permit to construct and operate. Furthermore, the proposal mandates that DEQ process permit applications in no more than 90 days; a timeframe that should help developers in their planning. Provision of certain and timely regulatory requirements may assist developers in obtaining project financing.

For individuals or companies wishing to develop very small projects (e.g., 5 MW and below) or projects falling into certain categories (e.g., smaller than 10 acres or utilizing existing buildings or parking lots), the proposed 9VAC15-70-130 allows the applicant to perform a greatly reduced number of regulatory requirements. This provision should make it less costly to develop residential-scale and community-scale projects.

Another advantage to the regulated community, government officials, and the public is that this proposal creates a clear and, DEQ believes, an efficient path for development of combustion-related energy in Virginia. Developing and

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# Regulations

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expanding new, energy-related industry in Virginia is also a boost for our economy and a significant step in creating energy independence from foreign oil interests.

Of interest is the agreement of the regulatory advisory panel (RAP) a group comprised of representatives from environmental advocacy groups, industry, local government, academia, industry, and state agencies on all issues presented in the proposal. In a number of states, interested parties and government agencies are debating what natural-resource protections are appropriate for renewable energy projects. RAP members who have experience with such projects and regulations across the country expressed the view that Virginia's proposed permits by rule are fair, balanced, and appropriately protective of natural resources, while not overburdening business interests. The fact that the RAP was able to agree on all issues was a significant milestone in creating a constructive and productive process for approving proposed renewable energy projects in Virginia.

The proposal poses no known disadvantages to the public or the Commonwealth.

## Department of Planning and Budget's Economic Impact Analysis:

Summary of the Proposed Amendments to Regulation. Pursuant to 2009 Acts of Assembly, Chapters 808 and 854, the Department of Environmental Quality (DEQ) proposes to establish requirements for permits by rule for "combustion energy projects" with rated capacity not exceeding 20 megawatts. The proposed regulations define combustion energy project as a small renewable energy project that: 1) is an electrical generation facility with a rated capacity not exceeding 20 megawatts that generates electricity only from biomass, energy from waste, or municipal solid waste; and 2) utilizes a fuel or feedstock which is addressed as a regulated solid waste by 9VAC20-81, 9VAC20-60, or 9VAC20-120; is defined as biomass pursuant to § 10.1-1308.1 of the Code of Virginia; or both. By means of the 2009 legislation, the General Assembly moved permitting authority for these projects from the State Corporation Commission (SCC) to DEQ. By requiring a "permit by rule," the legislature is mandating that permit requirements be set forth "up front" within this regulation, rather than being developed on a case-by-case basis.

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

Estimated Economic Impact. Prior to the 2009 legislation small renewable energy projects were to be permitted on a case-by-case basis by the SCC. For those considering small combustion energy projects there was large uncertainty concerning the requirements and potential costs of completing a project, as well as how long the permitting process would take. The permit by rule framework eliminates much of that uncertainty. Applicants need to meet the 14 criteria set forth by § 10.1-1197.6 B of the Code of Virginia to obtain permit by rule. Further, the proposed regulations specify that DEQ

must render a decision concerning the permit application within 90 days. This significant reduction in uncertainty is in itself beneficial and will increase the likelihood that net beneficial projects will go forward.

According to the Union of Concerned Scientists, most scientists believe that a wide range of biomass resources are "beneficial" because their use will reduce overall carbon emissions. Among other resources, beneficial biomass includes

1. energy crops that don't compete with food crops for land,
2. portions of crop residues such as wheat straw or corn stover,
3. wood and forest residues, and
4. clean municipal and industrial wastes.

Beneficial biomass use can be considered part of the terrestrial carbon cycle the balanced cycling of carbon from the atmosphere into plants and then into soils and the atmosphere during plant decay. When biopower is developed properly, emissions of biomass carbon are taken up or recycled by subsequent plant growth within a relatively short time, resulting in low net carbon emissions.<sup>1</sup> Biomass, even though it releases CO<sub>2</sub> when burned, overall produces less carbon dioxide than do fossil fuels because plants grown to replenish the resource are assumed to reabsorb those emissions.<sup>2</sup> Thus, to the degree that the likely increase in generation of combustion energy replaces more polluting forms of energy, there will likely be some benefit to the environment.

DEQ staff is currently aware of three proposed projects that could be subject to the new regulation, if the current SCC process is not completed prior to these regulations becoming final and effective. Prior to these three projects, there was no known small combustion-energy project that went forward when permitting authority was vested with the SCC. Since projects were to be permitted on a case-by-case basis, a precise comparison of the costs for establishing small combustion energy projects under the prior system with the costs under the proposed permit by rule system cannot be made. Given both the significant benefit for reduced risk, reduced time cost, and reduced administrative costs for both applicants and the state inherent in the permit by rule system, total application costs will likely be reduced under the proposed regulation.

Businesses and Entities Affected. The proposed amendments affect individuals, businesses, or other entities wishing to develop a small combustion energy project with rated capacity less than or equal to 20 megawatts, but greater than 5 megawatts. DEQ staff is currently aware of three proposed projects that would be affected by the proposed regulations.

Localities Particularly Affected. The proposed regulation applies statewide and is not designed to have a disproportionate material impact on any particular locality.

Projected Impact on Employment. The statutes and proposed regulation will increase the likelihood that small combustion energy projects will go forward. Consequently, the proposed regulation may have a small positive impact on employment.

Effects on the Use and Value of Private Property. The statutes and proposed regulation will increase the likelihood that small combustion energy projects will go forward. Consequently, the proposed regulation may have a small positive impact on the value of land appropriate for such projects and entities that may be considering generating combustion energy.

Small Businesses: Costs and Other Effects. The statutes and proposed regulation will reduce risk, time costs, and administrative costs for small firms wishing to develop a small combustion energy project.

Small Businesses: Alternative Method that Minimizes Adverse Impact. The proposed amendments will not produce an adverse impact on small businesses.

Real Estate Development Costs. The statutes and proposed regulation will reduce the cost of developing property for combustion energy projects.

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

<sup>1</sup> Source: Union of Concerned Scientists website (<http://www.ucsusa.org/>), December 15, 2011.

<sup>2</sup> Source: Hamilton, Tyler, Biofuels vs. Biomass Electricity, Technology Review, Massachusetts Institute of Technology, May 8, 2009.

Agency's Response to Economic Impact Analysis: The Department of Environmental Quality has reviewed the

economic impact analysis prepared by the Department of Planning and Budget and has no comment.

Summary:

*The proposed regulations establish requirements for permits by rule for combustion energy projects with rated capacity not exceeding 20 megawatts. The proposal establishes requirements for potential environmental impacts analyses, mitigation plans, public participation, permit fees, interagency consultations, compliance, and enforcement.*

**CHAPTER 70**  
**SMALL RENEWABLE ENERGY PROJECTS**  
**(COMBUSTION) PERMIT BY RULE**

**9VAC15-70-10. Definitions.**

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

"Applicant" means the owner or operator who submits an application to the department for a permit by rule pursuant to this chapter.

"Archive search" means a search of DHR's cultural resource inventory for the presence of previously recorded archaeological sites and for architectural structures and districts.

"Coastal Avian Protection Zones" or "CAPZ" means the areas designated on the map of "Coastal Avian Protection Zones" generated on the department's Coastal GEMS geospatial data system (9VAC15-70-120 C 1).

"Combustion energy project," or "project" means a small renewable energy project that:

1. Is an electrical generation facility with a rated capacity not exceeding 20 megawatts that generates electricity only from biomass, energy from waste, or municipal solid waste; and

2. Utilizes a fuel or feedstock that is addressed as a regulated solid waste by 9VAC20-81, 9VAC20-60, or 9VAC20-120; is defined as biomass pursuant to § 10.1-1308.1 of the Code of Virginia; or both.

"Department" means the Department of Environmental Quality, its director, or the director's designee.

"DCR" means the Department of Conservation and Recreation.

"DGIF" means the Department of Game and Inland Fisheries.

"DHR" means the Department of Historic Resources.

"Disturbance zone" means the area within the site directly impacted by construction and operation of the combustion energy project.

"Historic resource" means any prehistoric or historic district, site, building, structure, object, or cultural landscape that is included or meets the criteria necessary for inclusion in the

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# Regulations

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Virginia Landmarks Register pursuant to the authorities of § 10.1-2205 of the Code of Virginia and in accordance with 17VAC5-30-40 through 17VAC5-30-70.

"Interconnection point" means the point or points where the combustion energy project connects to a project substation for transmission to the electrical grid.

"Natural heritage resource" means the habitat of rare, threatened, or endangered plant and animal species, rare or state significant natural communities or geologic sites, and similar features of scientific interest benefiting the welfare of the citizens of the Commonwealth.

"Operator" means the person responsible for the overall operation and management of a combustion energy project.

"Owner" means the person who owns all or a portion of a combustion energy project.

"Parasitic load" means the maximum amount of electricity (in megawatts or kilowatts) a combustion energy project uses to run its electricity-producing processes while operating at the rated capacity.

"Parking lot" means an improved area, usually divided into individual spaces and covered with pavement or gravel, intended for the parking of motor vehicles.

"Permit by rule" means provisions of this chapter stating that a project or activity is deemed to have a permit if it meets the requirements of the provision.

"Person" means any individual, partnership, firm, association, joint venture, public or private corporation, trust, estate, commission, board, public or private institution, utility, cooperative, county, city, town, or other political subdivision of the Commonwealth, any interstate body, or any other legal entity.

"Preconstruction" means any time prior to commencing land-clearing operations necessary for the installation of energy-generating structures at the combustion energy project.

"Rated capacity" means the maximum designed electrical generation capacity (in megawatts or kilowatts) of a combustion energy project, minus the parasitic load; sometimes known as "net capacity."

"Site" means the area encompassed by the combustion energy project, plus appurtenant structures and facilities such as fuel processing, delivery, storage, and associated conveyance equipment areas if they (i) are contiguous and (ii) primarily exist to supply fuel for the generation of electricity at that project, to the extent that these areas are under common ownership or operating control by the owner or operator of the combustion energy project.

"Small renewable energy project" means (i) an electrical generation facility with a rated capacity not exceeding 100 megawatts that generates electricity only from sunlight, wind, falling water, wave motion, tides, or geothermal power, or (ii) an electrical generation facility with a rated capacity not

exceeding 20 megawatts that generates electricity only from biomass, energy from waste, or municipal solid waste.

"T&E," "state threatened or endangered species," or "state-listed species" means any wildlife species designated as a Virginia endangered or threatened species by DGIF pursuant to § 29.1-563-570 of the Code of Virginia and 4VAC15-20-130.

"VLR" means the Virginia Landmarks Register (9VAC15-70-120 B 1).

"VLR-eligible" means those historic resources that meet the criteria necessary for inclusion on the VLR pursuant to 17VAC5-30-40 through 17VAC5-30-70 but are not listed in the VLR.

"VLR-listed" means those historic resources that have been listed in the VLR in accordance with the criteria of 17VAC5-30-40 through 17VAC5-30-70.

"Wildlife" means wild animals; except, however, that T&E insect species shall only be addressed as part of natural heritage resources and shall not be considered T&E wildlife.

## **9VAC15-70-20. Authority and applicability.**

A. This chapter is issued under authority of Article 5 (§ 10.1-1197.5 et seq.) of Chapter 11.1 of Title 10.1 of the Code of Virginia. The chapter contains requirements for combustion energy projects that are designed for, or capable of, operation at a rated capacity equal to or less than 20 megawatts.

B. The department has determined that a permit by rule is required for combustion energy projects with a rated capacity greater than five megawatts, provided that the projects do not otherwise meet the criteria for Part III (9VAC15-70-130 et seq.) of this chapter; and this regulation contains the permit by rule provisions for these projects in Part II (9VAC15-70-30 et seq.) of this chapter.

C. The department has determined that different provisions should apply to projects that meet the criteria as set forth in Part III (9VAC15-70-130) of this chapter, and this regulation contains the requirements, if any, for these projects in Part III (9VAC15-70-130) of this chapter. Projects that meet the criteria for Part III of this chapter are deemed to be covered by the permit by rule.

### Part II

#### Permit by Rule Provisions for Combustion Energy Projects with Rated Capacity Greater Than Five Megawatts and Not Otherwise Meeting Criteria for Part III

### **9VAC15-70-30. Application.**

A. The owner or operator of a combustion energy project with a rated capacity greater than five megawatts, provided that the project does not otherwise meet the criteria for Part III (9VAC15-70-130) of this chapter, shall submit to the department a complete application in which he satisfactorily accomplishes all of the following:

1. In accordance with § 10.1-1197.6 B 1 of the Code of Virginia, and as early in the project development process as practicable, furnishes to the department a notice of intent, to be published in the Virginia Register of Regulations, that he intends to submit the necessary documentation for a permit by rule for a small renewable energy project;

2. In accordance with § 10.1-1197.6 B 2 of the Code of Virginia, furnishes to the department a certification by the governing body of the locality or localities wherein the small renewable energy project will be located that the project complies with all applicable land use ordinances;

3. In accordance with § 10.1-1197.6 B 3 of the Code of Virginia, furnishes to the department copies of all interconnection studies undertaken by the regional transmission organization or transmission owner, or both, on behalf of the small renewable energy project;

4. In accordance with § 10.1-1197.6 B 4 of the Code of Virginia, furnishes to the department a copy of the final interconnection agreement between the small renewable energy project and the regional transmission organization or transmission owner indicating that the connection of the small renewable energy project will not cause a reliability problem for the system. If the final agreement is not available, the most recent interconnection study shall be sufficient for the purposes of this section. When a final interconnection agreement is complete, it shall be provided to the department. The department shall forward a copy of the agreement or study to the State Corporation Commission;

5. In accordance with § 10.1-1197.6 B 5 of the Code of Virginia, furnishes to the department a certification signed by a professional engineer licensed in Virginia that the maximum generation capacity of the combustion energy project, as designed, does not exceed 20 megawatts;

6. In accordance with § 10.1-1197.6 B 6 of the Code of Virginia, furnishes to the department an analysis of potential environmental impacts of the small renewable energy project's operations on attainment of national ambient air quality standards;

7. In accordance with § 10.1-1197.6 B 7 of the Code of Virginia, furnishes to the department, where relevant, an analysis of the beneficial and adverse impacts of the proposed project on natural resources. The owner or operator shall perform the analyses prescribed in 9VAC15-70-40. For wildlife, that analysis shall be based on information on the presence, activity, and migratory behavior of wildlife to be collected at the site for a period of time dictated by the site conditions and biology of the wildlife being studied, not exceeding 12 months;

8. In accordance with § 10.1-1197.6 B 8 of the Code of Virginia, furnishes to the department a mitigation plan pursuant to 9VAC15-70-70 that details reasonable actions to be taken by the owner or operator to avoid, minimize, or

otherwise mitigate such impacts, and to measure the efficacy of those actions; provided, however, that the provisions of subdivision A 8 of this section shall only be required if the department determines pursuant to 9VAC15-70-50 that the information collected pursuant to § 10.1-1197.6 B 7 of the Code of Virginia and 9VAC15-70-40 indicates that significant adverse impacts to wildlife or historic resources are likely;

9. In accordance with § 10.1-1197.6 B 9 of the Code of Virginia, furnishes to the department a certification signed by a professional engineer licensed in Virginia that the project is designed in accordance with 9VAC15-70-80;

10. In accordance with § 10.1-1197.6 B 10 of the Code of Virginia, furnishes to the department an operating plan describing how any standards established in this chapter applicable to the permit by rule will be achieved;

11. In accordance with § 10.1-1197.6 B 11 of the Code of Virginia, furnishes to the department a detailed site plan meeting the requirements of 9VAC15-70-70;

12. In accordance with § 10.1-1197.6 B 12 of the Code of Virginia, furnishes to the department a certification signed by the applicant that the combustion energy project has applied for or obtained all necessary environmental permits;

13. Prior to authorization of the project and in accordance with §§ 10.1-1197.6 B 13 and 10.1-1197.6 B 14 of the Code of Virginia, conducts a 30-day public review and comment period and holds a public meeting pursuant to 9VAC15-70-90. The public meeting shall be held in the locality or, if the project is located in more than one locality, in a place proximate to the location of the proposed project. Following the public meeting and public comment period, the applicant shall prepare a report summarizing the issues raised by the public and include any written comments received and the applicant's response to those comments. The report shall be provided to the department as part of this application; and

14. In accordance with 9VAC15-70-110, furnishes to the department the appropriate fee.

B. Within 90 days of receiving all of the required documents and fees listed in subsection A of this section, the department shall determine, after consultation with other agencies in the Secretariat of Natural Resources, whether the application is complete and whether it adequately meets the requirements of this chapter, pursuant to § 10.1-1197.7 A of the Code of Virginia.

1. If the department determines that the application meets the requirements of this chapter, then the department shall notify the applicant in writing that he is authorized to construct and operate a combustion energy project pursuant to this chapter.

2. If the department determines that the application does not meet the requirements of this chapter, then the



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# Regulations

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department shall notify the applicant in writing and specify the deficiencies.

3. If the applicant chooses to correct deficiencies in a previously submitted application, the department shall follow the procedures of this subsection and notify the applicant whether the revised application meets the requirements of this chapter within 60 days of receiving the revised application.

4. Any case decision by the department pursuant to this subsection shall be subject to the process and appeal provisions of the Administrative Process Act (§ 2.2-4000 et seq. of the Code of Virginia).

## **9VAC15-70-40. Analysis of the beneficial and adverse impacts on natural resources.**

A. Analyses of wildlife. To fulfill the requirements of § 10.1-1197.6 B 7 of the Code of Virginia, the applicant shall conduct preconstruction wildlife analyses. The analyses of wildlife shall include the following if the disturbance zone exceeds 10 acres and the project does not meet the criteria of 9VAC15-70-130 B 2 a (2):

1. The applicant shall obtain a wildlife report and map generated from DGIF's Virginia Fish and Wildlife Information Service web-based application (9VAC15-70-120 C 3) or from a data and mapping system including the most recent data available from DGIF's subscriber-based Wildlife Environmental Review Map Service of the following: (i) T&E species within the project's disturbance zone; (ii) known wildlife species and habitat features within the project's disturbance zone and within two miles of the boundary of the project's disturbance zone; and (iii) known or potential sea turtle nesting beaches located within one-half mile of the disturbance zone.

2. If the height of the tallest point of the built structures exceeds 200 feet, the applicant shall consult the "Coastal Avian Protection Zones (CAPZ)" map generated on the department's Coastal GEMS geospatial data system (9VAC15-70-120 C 1) and determine whether the proposed combustion energy project disturbance zone will be located in part or in whole within one or more CAPZ.

B. Analyses of historic resources. To fulfill the requirements of § 10.1-1197.6 B 7 of the Code of Virginia, the applicant shall also conduct a preconstruction historic resources analysis.

1. Desktop survey for projects with rated capacity exceeding five megawatts. The applicant shall perform a desktop survey of known VLR-listed and VLR-eligible historic resources within the project's disturbance zone and within one-half mile of the disturbance zone boundary by means of an archives search of DHR's cultural resource inventory and report in writing the results of the archives search to the department.

2. Architectural (direct impacts) and archaeological surveys if disturbance zone exceeds 10 acres. If the

project's disturbance zone exceeds 10 acres and the project does not meet the criteria for 9VAC15-70-130 B 2 a (2), the applicant shall also meet the requirements of this subsection and the prescribed analysis shall be conducted by a qualified professional meeting the professional qualification standards of the Secretary of the Interior's Standards for Archaeology and Historic Preservation (9VAC15-70-120 B 2) in the appropriate discipline. The analysis for this subsection shall include each of the following:

a. Architectural survey (direct impacts). The applicant shall conduct a field survey of all architectural resources, including cultural landscapes, 50 years of age or older, within the disturbance zone and evaluate the eligibility of any identified resource for listing in the VLR.

b. Archaeological survey. The applicant shall conduct an archaeological field survey of the disturbance zone and evaluate the eligibility of any identified archaeological site for listing in the VLR. As an alternative to performing this archaeological survey, the applicant may make a demonstration to the department that the project will not penetrate the subsurface in a manner that would threaten archaeological resources and that any necessary grading of the site prior to construction does not have the potential to adversely impact any archaeological resource.

3. Architectural survey (indirect impacts) if the tallest point of the built structures exceeds 200 feet. If the tallest point of the built structures exceeds 200 feet, the applicant shall also conduct a field survey of all architectural resources, including cultural landscapes, 50 years of age or older, within the one-half mile of the disturbance zone boundary and evaluate the eligibility of any identified resource for listing in the VLR. The prescribed analysis shall be conducted by a qualified professional meeting the professional qualification standards of the Secretary of the Interior's Standards for Archeology and Historic Preservation (9VAC15-70-120 B 2) in the appropriate discipline.

4. Architectural survey (direct impacts) of structures 50 years of age or older. If the project will utilize or demolish existing buildings 50 years of age or older and the project does not meet the criteria for 9VAC15-70-130 B 2 c (2), the applicant shall evaluate the eligibility of any such buildings for listing in the VLR. The prescribed analysis shall be conducted by a qualified professional meeting the professional qualification standards of the Secretary of the Interior's Standards for Archaeology and Historic Preservation (9VAC15-70-120 B 2) in the appropriate discipline.

C. Analyses of other natural resources. To fulfill the requirements of § 10.1-1197.6 B 7 of the Code of Virginia, and if the project's disturbance zone exceeds 10 acres, the

applicant shall also conduct a pre-construction desktop survey of natural heritage resources within the disturbance zone.

D. Summary report. The applicant shall provide to the department a report presenting the findings of the applicable studies and analyses conducted pursuant to subsections A, B, and C of this section, along with all data and supporting documents. The applicant shall assess and describe the expected beneficial and adverse impacts, if any, of the proposed project on wildlife and historic resources identified by these studies and analyses.

**9VAC15-70-50. Determination of likely significant adverse impacts for combustion energy projects with rated capacity greater than five megawatts.**

A. The department shall find that significant adverse impacts to wildlife are likely whenever the wildlife analyses prescribed in 9VAC15-70-40 A document that any of the following conditions exists:

1. State-listed T&E wildlife are found to occur within the disturbance zone;
2. The disturbance zone is located on or within one-half mile of a known or potential sea turtle nesting beach; or
3. The disturbance zone is located in part or in whole within zones 1, 2, 3, 4, 5, 10, 11, 12, or 14 on the Coastal Avian Protection Zones (CAPZ) map and the height of the tallest point of the built structures exceeds 200 feet.

B. The department shall find that significant adverse impacts to historic resources are likely whenever the historic resources analyses prescribed by 9VAC15-70-40 B indicate that the proposed project is likely to diminish significantly any aspect of a historic resource's integrity.

**9VAC15-70-60. Mitigation plan.**

A. If the department determines that significant adverse impacts to wildlife or historic resources or both are likely, then the applicant shall prepare a mitigation plan. The mitigation plan shall include a description of the affected wildlife or historic resources, or both, and the impact to be mitigated; a description of actions that will be taken to avoid the stated impact; and a plan for implementation. If the impact cannot reasonably be avoided, the plan shall include a description of actions that will be taken to minimize the stated impact and a plan for implementation. If neither avoidance nor minimization is reasonably practicable, the plan shall include a description of other measures that may be taken to offset the stated impact and a plan for implementation.

B. Mitigation measures for significant adverse impacts to wildlife shall include:

1. For state-listed T&E wildlife, the applicant shall take all reasonable measures to avoid significant adverse impacts or shall demonstrate in the mitigation plan what significant adverse impacts cannot practicably be avoided and why additional proposed actions are reasonable. These additional proposed actions may include best practices to

avoid, minimize, or offset adverse impacts to resources analyzed pursuant to 9VAC15-70-40 A or C.

2. For proposed projects where the disturbance zone is located on or within one-half mile of a known or potential sea turtle nesting beach, the applicant shall take all reasonable measures to avoid significant adverse impacts or shall demonstrate in the mitigation plan what significant adverse impacts cannot practicably be avoided and why additional proposed mitigation actions are reasonable. Mitigation measures shall include the following:

- a. Avoiding construction within likely sea turtle crawl or nesting habitats during the turtle nesting and hatching season (May 20 - October 31). If avoiding construction during this period is not possible, then conducting daily crawl surveys of the disturbance zone (May 20 - August 31) and one mile beyond the northern and southern reaches of the disturbance zone (hereinafter "sea turtle nest survey zone") between sunrise and 9 a.m. by qualified individuals who have the ability to distinguish accurately between nesting and non-nesting emergences.
- b. If construction is scheduled during the nesting season, then including measures to protect nests and hatchlings found within the sea turtle nest survey zone.
- c. Minimizing nighttime construction during the nesting season and designing project lighting during the construction and operational phases to minimize impacts on nesting sea turtles and hatchlings.

3. For projects located in part or in whole within zones 1, 2, 3, 4, 5, 10, 11, 12, or 14 on the Coastal Avian Protection Zones (CAPZ) map for which the tallest point of the built structures exceeds 200 feet, contribute \$1,000.00 per megawatt of rated capacity, or partial megawatt thereof, to a fund designated by the department in support of scientific research investigating the impacts of projects in CAPZ on avian resources.

C. Mitigation measures for significant adverse impacts to historic resources shall include:

1. Significant adverse impacts to VLR-eligible or VLR-listed architectural resources shall be minimized, to the extent practicable, through design of the combustion energy project or the installation of vegetative or other screening.
2. If significant adverse impacts to VLR-eligible or VLR-listed architectural resources cannot be avoided or minimized such that impacts are no longer significantly adverse, then the applicant shall develop a reasonable and proportionate mitigation plan that offsets the significantly adverse impacts and has a demonstrable public benefit and benefit for the affected or similar resource.
3. If any identified VLR-eligible or VLR-listed archaeological site cannot be avoided or minimized to such a degree as to avoid a significant adverse impact,

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# Regulations

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significant adverse impacts of the project will be mitigated through archaeological data recovery.

## **9VAC15-70-70. Site plan and context map requirements.**

A. The applicant shall submit a site plan that includes maps showing the physical features, topography, and land cover of the area within the site, both before and after construction of the proposed project. The site plan shall be submitted at a scale sufficient to show and shall include the following: (i) the boundaries of the site; (ii) the location, height, and approximate dimensions of all existing and proposed infrastructure; (iii) the location, grades, and dimensions of all temporary and permanent on-site and access roads from the nearest county or state maintained road; and (iv) water bodies, waterways, wetlands, and drainage channels.

B. If the project's disturbance zone exceeds 10 acres, the applicant shall submit a context map including the area encompassed by the site and within two miles of the site boundary. The context map shall show known state and federal resource lands and other protected areas, Coastal Avian Protection Zones, state roads, waterways, locality boundaries, forests, and open spaces.

## **9VAC15-70-80. Combustion energy project design standards.**

The design and installation of the combustion energy project shall incorporate any requirements of the mitigation plan that pertain to design and installation, if a mitigation plan is required pursuant to 9VAC15-70-50.

## **9VAC15-70-90. Public participation.**

A. Before the initiation of any construction at the combustion energy project, the applicant shall comply with this section. The owner or operator shall first publish a notice once a week for two consecutive weeks in a major local newspaper of general circulation informing the public that he intends to construct and operate a project eligible for a permit by rule. No later than the date of newspaper publication of the initial notice, the owner or operator shall submit to the department a copy of the notice along with electronic copies of all documents that the applicant plans to submit in support of the application. The notice shall include:

1. A brief description of the proposed project and its location, including the approximate dimensions of the site, approximate number and configuration of systems, and approximate maximum height of systems;

2. A statement that the purpose of the public participation is to acquaint the public with the technical aspects of the proposed project and how the standards and the requirements of this chapter will be met, to identify issues of concern, to facilitate communication, and to establish a dialogue between the owner or operator and persons who may be affected by the project;

3. Announcement of a 30-day comment period in accordance with subsection C of this section and the name, telephone number, address, and email address of the

applicant who can be contacted by the interested persons to answer questions or to whom comments shall be sent;

4. Announcement of the date, time, and place for a public meeting held in accordance with subsection D of this section; and

5. Location where copies of the documentation to be submitted to the department in support of the permit by rule application will be available for inspection.

B. The owner or operator shall place a copy of the documentation in a location accessible to the public during business hours for the duration of the 30-day comment period in the vicinity of the proposed project.

C. The public shall be provided at least 30 days to comment on the technical and the regulatory aspects of the proposal. The comment period shall begin no sooner than 15 days after the applicant initially publishes the notice in the local newspaper.

D. The applicant shall hold a public meeting not earlier than 15 days after the beginning of the 30-day public comment period and no later than seven days before the close of the 30-day comment period. The meeting shall be held in the locality or, if the project is located in more than one locality, in a place proximate to the location of the proposed project.

E. For purposes of this chapter, the applicant and any interested party who submits written comments on the proposal to the applicant during the public comment period or who signs in and provides oral comments at the public meeting shall be deemed to have participated in the proceeding for a permit by rule under this chapter and pursuant to § 10.1-1197.7 B of the Code of Virginia.

## **9VAC15-70-100. Change of ownership, project modifications, termination.**

A. Change of ownership. A permit by rule may be transferred to a new owner or operator if:

1. The department receives notification of the change of ownership within 30 days of the transfer; and

2. The notice includes written agreement by the new owner or operator to comply with all requirements of the existing permit by rule and the date on which permit responsibility is transferred to the new owner or operator.

B. Project modifications. Projects subject to Part II of this chapter may be modified as follows:

1. Project modifications that do not increase the project's disturbance zone by more than an additional 10 acres, cause the tallest point of the built structures to exceed 200 feet, or newly involve utilizing or demolishing a building over 50 years of age may occur without notice to the department. No fee will be levied for these modifications.

2. If, however, the project modification involves increasing the disturbance zone by more than 10 additional acres, increasing the height of the tallest point of the built structures so that it now exceeds 200 feet, or newly

utilizing or demolishing a building over 50 years of age, the owner or operator shall furnish to the department new certificates prepared by a professional engineer, new documentation required under 9VAC15-70-30, and the appropriate fee in accordance with 9VAC15-70-110. The department shall review the received modification submittal pursuant to this subsection in accordance with the provisions of subsection B of 9VAC15-70-30.

C. Permit by rule termination. The department may terminate the permit by rule whenever the department finds that:

1. The applicant has knowingly or willfully misrepresented or failed to disclose a material fact in any report or certification required under this chapter; or
2. After the department has taken enforcement actions pursuant to 9VAC15-70-140, the owner or operator persistently operates the project in significant violation of the project's mitigation plan.

Prior to terminating a permit by rule pursuant to subdivision 1 or 2 of this subsection, the department shall hold an informal fact-finding proceeding pursuant to § 2.2-4019 of the Virginia Administrative Process Act in order to assess whether to continue with termination of the permit by rule or to issue any other appropriate order. If the department determines that it should continue with the termination of the permit by rule, the department shall hold a formal hearing pursuant to § 2.2-4020 of the Virginia Administrative Process Act. Notice of the formal hearing shall be delivered to the owner or operator. Any owner or operator whose permit by rule is terminated by the department shall cease operating his combustion energy project.

**9VAC15-70-110. Fees for projects subject to Part II of this chapter.**

A. Purpose. The purpose of this section is to establish schedules and procedures pertaining to the payment and collection of fees from any applicant seeking a new permit by rule or a modification to an existing permit by rule for a combustion energy project subject to Part II (9VAC15-70-30 et seq.) of this chapter.

B. Permit fee payment and deposit. Fees for permit by rule applications or modifications shall be paid by the applicant as follows:

1. Due date. All permit application fees or modification fees are due on submittal day of the application or modification package.
2. Method of payment. Fees shall be paid by check, draft, or postal money order made payable to "Treasurer of Virginia/DEQ" and shall be sent to the Department of Environmental Quality, Receipts Control, P.O. Box 1104, Richmond, VA 23218.
3. Incomplete payments. All incomplete payments shall be deemed nonpayments.

4. Late payment. No application or modification submittal will be deemed complete until the department receives proper payment.

C. Fee schedules. Each application for a permit by rule and each application for a modification of a permit by rule is a separate action and shall be assessed a separate fee, except as noted in 9VAC15-70-100 B 1. The amount of the permit application fee is based on the costs associated with the permitting program required by this chapter. The fee schedules are shown in the following table:

<u>Type of Action</u>	<u>Fee</u>
<u>Permit by rule application</u>	<u>\$8,000</u>
<u>Permit by rule modification</u>	<u>\$4,000</u>

D. Use of fees. Fees are assessed for the purpose of defraying the department's costs of administering and enforcing the provisions of this chapter including, but not limited to, permit by rule processing, permit by rule modification processing, and inspection and monitoring of combustion energy projects to ensure compliance with this chapter. Fees collected pursuant to this section shall be used for the administrative and enforcement purposes specified in this section and in § 10.1-1197.6 E of the Code of Virginia.

E. Fund. The fees received by the department in accordance with this chapter shall be deposited in the Small Renewable Energy Project Fee Fund.

F. Periodic review of fees. Beginning July 1, 2014, and periodically thereafter, the department shall review the schedule of fees established pursuant to this section to ensure that the total fees collected are sufficient to cover 100% of the department's direct costs associated with use of the fees.

**9VAC15-70-120. Internet accessible resources.**

A. This chapter refers to resources to be used by applicants in gathering information to be submitted to the department. These resources are available through the Internet; therefore, in order to assist applicants, the uniform resource locator or Internet address is provided for each of the references listed in this section.

**B. Internet available resources.**

1. The Virginia Landmarks Register, Virginia Department of Historic Resources, 2801 Kensington Avenue, Richmond, Virginia. Available at the following Internet address: <http://www.dhr.virginia.gov/registers/register.htm>.
2. Professional Qualifications Standards, the Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation, as amended and annotated (48 FR 44716-740, September 29, 1983), National Parks Service, Washington, DC. Available at the following Internet address: [http://www.nps.gov/history/local-law/arch\\_stnds\\_9.htm](http://www.nps.gov/history/local-law/arch_stnds_9.htm).
3. The Natural Communities of Virginia, Classification of Ecological Community Groups, Second Approximation,

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# Regulations

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Version 2.3, Virginia Department of Conservation and Recreation, Division of Natural Heritage, Richmond, VA. Available at the following Internet address: [http://www.dcr.virginia.gov/natural\\_heritage/ncintro.shtml](http://www.dcr.virginia.gov/natural_heritage/ncintro.shtml).

4. Virginia's Comprehensive Wildlife Conservation Strategy, 2005 (referred to as the Virginia Wildlife Action Plan), Virginia Department of Game and Inland Fisheries, 4010 West Broad Street, Richmond, Virginia. Available at the following Internet address: <http://www.bewildvirginia.org/wildlifeplan/>.

## C. Internet applications.

1. Coastal GEMS application, 2010, Virginia Department of Environmental Quality. Available at the following Internet address: <http://www.deq.virginia.gov/coastal/coastalgems.html>.

NOTE: This website is maintained by the department. Assistance and information may be obtained by contacting Virginia Coastal Zone Management Program, Virginia Department of Environmental Quality, 629 E. Main Street, Richmond, Virginia 23219, (804) 698-4000.

2. Natural Landscape Assessment, 2010, Virginia Department of Conservation and Recreation. Available at the following Internet address: for detailed information on ecological cores go to [http://www.dcr.virginia.gov/natural\\_heritage/vclnavnla.shtml](http://www.dcr.virginia.gov/natural_heritage/vclnavnla.shtml). Land maps may be viewed at DCR's Land Conservation Data Explorer Geographic Information System website at <http://www.vaconservedlands.org/gis.aspx>.

NOTE: The website is maintained by DCR. Actual shapefiles and metadata are available for free by contacting a DCR staff person at [vaconslands@dcr.virginia.gov](mailto:vaconslands@dcr.virginia.gov) or DCR, Division of Natural Heritage, 217 Governor Street, Richmond, Virginia 23219, (804) 786-7951.

3. Virginia Fish and Wildlife Information Service 2010, Virginia Department of Game and Inland Fisheries. Available at the following Internet address: <http://www.vafwis.org/fwis/>.

NOTE: This website is maintained by DGIF and is accessible to the public as "visitors", or to registered subscribers. Registration, however, is required for access to resource- or species-specific locational data and records. Assistance and information may be obtained by contacting DGIF, Fish and Wildlife Information Service, 4010 West Broad Street, Richmond, Virginia 23230, (804) 367-6913.

### Part III

Provisions for Projects with Rated Capacity Less Than or Equal to Five Megawatts or Meeting Other Specified Criteria

## **9VAC15-70-130. Combustion energy projects with rated capacity less than or equal to five megawatts or meeting other specified criteria.**

A. The owner or operator of a combustion energy project is not required to submit any notification or certification to the

department if the combustion energy project has a rated capacity equal to or less than 500 kilowatts.

B. The owner or operator of a combustion energy project shall notify the department by submitting a certification by the governing body of the locality or localities wherein the project will be located that the project complies with all applicable land use ordinances, if the project meets either of the following criteria:

1. The combustion energy project has a rated capacity greater than 500 kilowatts and less than or equal to five megawatts; or

2. The combustion energy project has a rated capacity greater than five megawatts and meets all of the criteria specified in this subdivision.

a. The combustion energy project has a disturbance zone:

(1) Less than or equal to 10 acres; or

(2) Greater than 10 acres but utilizes existing parking lots, existing roads, or other previously disturbed areas and any impacts to undisturbed areas do not exceed an additional 10 acres;

b. The tallest point of the built structures does not exceed 200 feet; and

c. If utilizing or demolishing existing buildings, utilizes or demolishes existing buildings:

(1) Less than 50 years of age; or

(2) 50 years of age or older that have been evaluated and determined by DHR within the preceding seven years to be not VLR-eligible.

### Part IV

#### Enforcement

## **9VAC15-70-140. Enforcement.**

The department may enforce the provisions of this chapter and any permits by rule authorized under this chapter in accordance with §§ 10.1-1197.9, 10.1-1197.10, and 10.1-1197.11 of the Code of Virginia. In so doing, the department may:

1. Issue directives in accordance with the law;

2. Issue special orders in accordance with the law;

3. Issue emergency special orders in accordance with the law;

4. Seek injunction, mandamus or other appropriate remedy as authorized by the law;

5. Seek civil penalties under the law; or

6. Seek remedies under the law, or under other laws including the common law.

## **DOCUMENTS INCORPORATED BY REFERENCE (9VAC15-70)**

The Natural Communities of Virginia, Classification of Ecological Community Groups, Second Approximation

(Version 2.3), 2010, Virginia Department of Conservation and Recreation, Division of Natural Heritage, Richmond, VA.

[Virginia's Comprehensive Wildlife Conservation Strategy, 2005, Virginia Department of Game and Inland Fisheries, Richmond, Virginia.](#)

[Chapter 1: Introduction.](#)

[Chapter 2: Methods.](#)

[Chapter 3: Statewide Overview.](#)

[Chapter 4: Virginia's Mid-Atlantic Coastal Plain.](#)

[Chapter 5: Virginia's Southern Appalachian Piedmont.](#)

[Chapter 6: Virginia's Blue Ridge Mountains.](#)

[Chapter 7: Virginia's Northern Ridge and Valley.](#)

[Chapter 8: Virginia's Northern Cumberland Mountains.](#)

[Chapter 9: Virginia's Southern Cumberland Mountains.](#)

[Chapter 10: Conclusions.](#)

[Glossary.](#)

[Appendix A: The Species of Greatest Conservation Need.](#)

[Appendix B: Species of Greatest Conservation Need with No Known Ecoregional Associations.](#)

[Appendix C: Terrestrial Species with No Landcover Associations.](#)

[Appendix D: Potential Habitat Mapping for Terrestrial & Aquatic Tier I Species.](#)

[Appendix E: List of Tier I Species and Reviewers.](#)

[Appendix F: Complete list of Stress/Source Combinations Identified by the Taxonomic Advisory Committees.](#)

[Appendix G: Habitat Grouping Used by TACs in Assessment of Threats, Conservation Actions, and Research/Monitoring Needs.](#)

[Appendix H: Threats to Virginia's Species of Greatest Conservation Need.](#)

[Appendix I: Conservation Actions Identified by the Taxonomic Advisory Committees.](#)

[Appendix J: Research and Monitoring Needs Identified by the Taxonomic Advisory Committees.](#)

[Appendix K: Landcover Classes.](#)

[Appendix L: Summaries of Community Meetings Facilitated by VCU's Center for Public Policy.](#)

[Appendix M: Recommendations for Education and Outreach Actions.](#)

[Appendix N: DEQ Impaired Waters Map.](#)

[Appendix O: Reference Maps.](#)

[Appendix P: Public Comments.](#)

VA.R. Doc. No. R11-2707; Filed September 10, 2012; 2:25 p.m.

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## TITLE 11. GAMING

### CHARITABLE GAMING BOARD

#### Final Regulation

**Titles of Regulations:** 11VAC15-22. Charitable Gaming Rules and Regulations (repealing 11VAC15-22-10 through 11VAC15-22-120).

**11VAC15-31. Supplier Regulations (repealing 11VAC15-31-10 through 11VAC15-31-60).**

**11VAC15-40. Charitable Gaming Regulations (adding 11VAC15-40-10 through 11VAC15-40-430).**

**Statutory Authority:** § 18.2-340.15 of the Code of Virginia.

**Effective Date:** November 7, 2012.

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

**Summary:**

*The amendments to this regulation (i) replace specific dollar amounts prescribed by the Code of Virginia (Code) or the Internal Revenue Service (IRS) by references to the sections of the Code or the IRS publication that establishes these amounts; (ii) revise the use of remedial business plans to assist organizations in achieving compliance to reflect the department's implementation (iii) eliminate the fee for a permit amendment; (iv) permit nonmembers to participate in the conduct of bingo; (v) permit the full automatic daubing of bingo numbers; (vi) authorize the conduct of progressive bingo games; (vii) allow bingo event games; (viii) reduce the required break between gaming sessions from one hour to 30 minutes; and (ix) modify the reporting requirements for electronic bingo devices to permit electronic bingo device systems that do not identify at the point of sale the number of the electronic bingo device issued to a player.*

*Changes made since publication of the proposed regulation include (i) amending certain definitions, including replacing "electronic game" with "electronic pull-tab" and replacing "player device" with "electronic pull-tab device"; (ii) eliminating the requirement that*

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# Regulations

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*paper pull-tab dispensers be certified by a testing facility; (iii) adding technical requirements for electronic random number generators used in bingo; (iv) including a grandfather clause for electronic random number generators that are currently being used in bingo; (v) adding a requirement for a firewall to both the requirements for electronic bingo systems for distributed pull-tab systems; (vi) establishing permitting requirements for manufacturers of electronic games of chance systems; (vii) mirroring the charitable gaming statute by prohibiting sounds or music solely intended to entice a player to play; and (viii) establishing limits on the number of devices a premises may have depending upon whether the premises is open to the public for charitable gaming or is only open to members of an organization and their guests.*

**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 40

### CHARITABLE GAMING REGULATIONS

#### Part [ 1 ]

#### Definitions

#### **11VAC15-40-10. Definitions.**

In addition to the definitions contained in § 18.2-340.16 of the Code of Virginia, the words and terms below when used in this regulation shall have the following meanings unless the context clearly indicates otherwise:

"Agent" means any person authorized by a supplier to act for or in place of such supplier.

"Board" means the Virginia Charitable Gaming Board.

"Board of directors" means the board of directors, managing committee, or other supervisory body of a qualified organization.

"Calendar day" means the period of 24 consecutive hours commencing at [ ~~12:01 a.m.~~ 12:00:01 a.m. ] and concluding at midnight.

"Calendar week" means the period of seven consecutive calendar days commencing at [ ~~12:01 a.m.~~ 12:00:01 a.m. ] on Sunday and ending at midnight the following Saturday.

"Cash" means United States currency or coinage.

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

"Concealed face bingo card" means a nonreusable bingo card constructed to conceal the card face.

"Conduct" means the actions associated with the provision of a gaming operation during and immediately before or after the permitted activity, which may include, but not be limited to (i) selling bingo cards or packs, electronic [ bingo ] devices, instant bingo or pull-tab cards, [ electronic pull-tab devices, electronic pull-tabs, ] or raffle tickets; (ii) calling

bingo games; (iii) distributing prizes; and (iv) any other services provided by [ ~~volunteer~~ game ] workers.

"Control program" means software involved in any critical game function.

"Daubing" means covering a square containing a number called with indelible ink or otherwise marking a number called on a card or an electronic facsimile of a card.

"Deal" means each separate package or series of packages consisting of one game of instant bingo, pull-tabs, or seal cards with the same serial number.

"Decision bingo" means a bingo game where the cost to a player to play is dependent on the number of bingo numbers called and the prize payout is in direct relationship to the number of participants and the number of bingo numbers called, but shall not exceed statutory prize limits for a regular bingo game.

"Department" means the Virginia Department of Agriculture and Consumer Services, Division of Consumer Protection, Office of Charitable Gaming.

"Designator" means an object used in the [ bingo ] number selection process, such as a ping-pong ball, upon which bingo letters and numbers are imprinted.

"Discount" means any reduction in cost of admission or game packs or any other purchases through use of coupons, free packs, or other similar methods.

"Disinterested player" means a player who is unbiased.

"Disposable paper card" means a nonreusable, paper bingo card manufactured with preprinted numbers.

"Distributed pull-tab system" means a computer system consisting of a computer or computers and associated equipment for the use of distributing a finite number of [ ~~electronic instant bingo and/or pull-tab outcomes (i.e., electronic game cards)~~ electronic pull-tabs ], a certain number of which entitle a player to prize awards at various levels.

"Door prize" means any prize awarded by the random drawing or random selection of a name or number based solely on attendance at a [ charitable ] gaming [ ~~session~~ activity ].

"Electronic bingo device" means an electronic [ ~~device~~ unit ] that uses proprietary software or hardware or, in conjunction with commonly available software and computers, displays facsimiles of bingo cards and allows a player to daub such cards or allows for the automatic daubing of such cards.

[ "Electronic games of chance system" means a distributed pull-tab system. ]

"Electronic [ ~~game-card~~ pull-tabs ]" means an electronic version of a single instant bingo card or pull-tab. An electronic [ ~~game-card~~ pull-tab ] is a predetermined game outcome in electronic form, distributed on-demand from a finite number of game outcomes by a distributed pull-tab system.

[ "Electronic pull-tab device" means an electronic unit used to facilitate the play of an electronic pull-tab. An electronic pull-tab device may take the form of an upright cabinet or a handheld device or may be of any other composition as approved by the department. ]

"Equipment and video systems" means equipment that facilitates the conduct of charitable gaming such as ball blowers, flashboards, electronic verifiers, and replacement parts for such equipment. [ Equipment and video systems shall not include dispensing devices, electronic bingo devices, and electronic pull-tab devices. ]

"Event game" means a bingo game that is played using instant bingo cards or pull-tabs in which the winners include both instant winners and winners who are determined by the random draw of a bingo ball, the random call of a bingo number, or the use of a seal card, and that is sold [ in its entirety ] and played to completion during a single bingo session.

"Fiscal year" or "annual reporting period" means the 12-month period beginning January 1 and ending December 31 of any given year.

"Flare" means [ ~~a piece of paper, cardboard, or similar material~~ a printed or electronic display ] that bears [ printed ] information relating to the name of the manufacturer or logo, name of the game, card count, cost per play, serial number, [ ~~the~~ ] number of prizes to be awarded, and [ ~~the~~ ] specific prize amounts in a deal of instant bingo, pull-tab, [ ~~or~~ ] seal cards [ , or electronic pull-tabs ].

"Free space number," "perm number," "center number," "card number," or "face number" means the number generally printed in the center space of a bingo card that identifies the unique pattern of numbers printed on that card.

"Game program" means a written list of all games to be played including, but not limited to, the sales price of all bingo paper and electronic bingo devices, pack configuration, prize amounts to be paid during a session for each game, and an indication whether prize amounts are fixed or are based on attendance.

"Game set" means the entire pool of electronic [ ~~game cards~~ pull-tabs ] that contains predefined and randomized game results assigned under a unique serial number. This term is equivalent to "deal" or "deck."

"Game subset" means a division of a game set into equal sizes.

[ "~~Gaming activity" means one bingo session and the sale and redemption of instant bingo, pull tabs, seal cards, or electronic game cards done in conjunction with that bingo session and in accordance with the provisions of this chapter.~~ ]

"Immediate family" means one's spouse, parent, child, sibling, grandchild, grandparent, mother or father-in-law, or stepchild.

"Interested persons" means the president, an officer, or a bingo manager of any qualified organization that is exempt or is a permit applicant or holds a permit to conduct charitable gaming; or the owner, director, officer [ , ] or partner of an entity engaged in supplying charitable gaming supplies to organizations [ , or engaged in manufacturing any component of a distributed pull-tab system that is distributed in the Commonwealth ].

"IRS" means the United States Internal Revenue Service.

"Management" means the provision of oversight of a gaming operation, which may include, but is not limited to, the responsibilities of applying for and maintaining a permit or authorization; compiling, submitting, and maintaining required records and financial reports; and ensuring that all aspects of the operation are in compliance with all applicable statutes and regulations.

"Manufacturer" means a person who or entity that assembles from raw materials or subparts a completed piece of bingo [ equipment or supplies, a distributed pull-tab system, ] or other charitable gaming equipment or supplies. "Manufacturer" also means a person who or entity that modifies, converts, adds, or removes parts to or from bingo [ equipment or supplies, a distributed pull-tab system, ] or other charitable gaming equipment or supplies to further their promotion or sale for the conduct of charitable gaming.

"OCG number" means a unique identification number issued by the department.

"Operation" means the activities associated with production of a charitable gaming activity, which may include, but is not limited to, (i) the direct on-site supervision of the conduct of charitable gaming; (ii) coordination of [ ~~volunteers~~ game workers ]; and (iii) all responsibilities of charitable gaming designated by the organization's management.

"Owner" means any individual with financial interest of 10% or more in a supplier [ or a manufacturer of a distributed pull-tab system distributed in the Commonwealth ].

"Pack" means sheets of bingo paper or electronic facsimiles assembled in the order of games to be played. This shall not include any raffle.

[ "~~Player device" means an electronic unit that may take the form of an upright cabinet or a handheld device or may be of any other composition as approved by the department used to facilitate the play of electronic instant bingo or pull tab games.~~ ]

"Prize" means cash, merchandise, certificate, or other item of value awarded to a winning player.

"Progressive bingo" means a bingo game in which the prize is carried forward to the next game if a predetermined pattern is not completed within a specified number of bingo numbers called.

"Progressive seal card" means a seal card game in which a prize is carried forward to the next deal if not won when a deal is completed.



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# Regulations

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"Remuneration" means payment in cash or the provision of anything of value for goods provided or services rendered.

"Seal card" means a board or placard used in conjunction with a deal of the same serial number that contains one or more concealed areas that, when removed or opened, reveal a predesignated winning number, letter, or symbol located on that board or placard.

"Selection device" means a manually or mechanically operated device [ used ] to randomly select bingo numbers.

"Serial number" means a unique number [ ~~printed~~ assigned ] by the manufacturer [ ~~on~~ to ] each [ set of ] bingo [ ~~card in a set cards~~ ]; each instant bingo, pull-tab, or seal card in a deal; each electronic bingo device; [ ~~or~~ ] each door prize ticket [ ; each game set and game subset of electronic pull-tabs; and each electronic pull-tab device ].

"Series number" means the number of unique card faces contained in a set of disposable bingo paper cards or bingo hard cards. A 9000 series, for example, has 9000 unique faces.

"Session" means a period of time during which one or more bingo games are conducted [ ~~that begins with the selection of the first ball for the first game and ends with the selection of the last ball for the last game.~~, and during which instant bingo, pull-tabs, seal cards, or electronic pull-tabs may be sold and redeemed. A session begins with the sale of instant bingo, pull-tabs, seal cards, electronic pull-tabs, or bingo cards or packs. ]

"Treasure chest" means a raffle including a locked treasure chest containing a prize that a participant, selected through some other authorized charitable game, is afforded the chance to select from a series of keys a predetermined key that will open the locked treasure chest to win a prize.

"Use of proceeds" means the use of funds derived by an organization from its charitable gaming activities, which are disbursed for those lawful religious, charitable, community, or educational purposes. This includes expenses relating to the acquisition, construction, maintenance, or repair of any interest in the real property involved in the operation of the organization and used for lawful religious, charitable, community, or educational purposes.

"Voucher" means a printed ticket tendered to the player, upon request, for any unused game plays and/or winnings that remain on the [ ~~player~~ electronic pull-tab ] device.

"WINGO" means a variation of a traditional bingo game that uses visual devices rather than a verbal caller and is intended for play by hearing impaired persons.

## Part II Charitable Gaming Organizations

### Article 1 Permits

#### **11VAC15-40-20. Eligibility for permit to conduct charitable gaming; when valid; permit requirements.**

A. The conduct of charitable gaming is a privilege that may be granted or denied by the department. Except as provided in § 18.2-340.23 of the Code of Virginia, every eligible organization, volunteer fire department, and rescue squad with anticipated gross gaming receipts that exceed the amount set forth in § 18.2-340.23 of the Code of Virginia in any 12-month period shall obtain a permit from the department prior to the commencement of charitable gaming activities. To be eligible for a permit an organization must meet all of the requirements of § 18.2-340.24 of the Code of Virginia.

B. Pursuant to § 18.2-340.24 B of the Code of Virginia, the department shall review a tax exempt request submitted to the IRS for a tax exempt status determination and may issue an interim certification of tax-exempt status solely for the purpose of charitable gaming, conditioned upon a determination by the IRS. The department shall charge the fee set forth in § 18.2-340.24 B of the Code of Virginia for this review. The fee shall be payable to the Treasurer of Virginia.

C. A permit shall be valid only for activities, locations, days, dates, and times as listed on the permit.

D. In accordance with § 18.2-340.19 A 1 of the Code of Virginia, as a condition of receiving a permit, a minimum of 10% of charitable gaming gross receipts shall be used for (i) those lawful religious, charitable, community, or educational purposes for which the organization is specifically chartered or organized or (ii) those expenses relating to the acquisition, construction, maintenance, or repair of any interest in real property involved in the operation of the organization and used for lawful religious, charitable, community, or educational purposes.

E. If an organization fails to meet the minimum use of proceeds requirement, its permit may be suspended or revoked. However, the department shall not suspend or revoke the permit of any organization solely because of its failure to meet the required percentage without having first provided the organization with an opportunity to implement a [ ~~corrective action~~ remedial business ] plan.

F. An organization may request a temporary reduction in the predetermined percentage specified in subsection D of this section from the department. In reviewing such a request, the department shall consider such factors appropriate to and consistent with the purpose of charitable gaming, which may include, but not be limited to, (i) the organization's overall financial condition; (ii) the length of time the organization has been involved in charitable gaming; (iii) the extent of the deficiency; and (iv) the progress that the organization has made in attaining the minimum percentage in accordance

with a [ ~~corrective action~~ remedial business ] plan pursuant to subsection E of this section.

G. An organization whose permit is revoked for failure to comply with provisions set forth in subsection D of this section shall be eligible to reapply for a permit at the end of one year from the date of revocation. The department, at its discretion, may issue the permit if it is satisfied that the organization has made substantial efforts towards meeting its [ ~~corrective action~~ remedial business ] plan.

**11VAC15-40-30. Permit application process.**

A. Any organization anticipating gross gaming receipts that exceed the amount set forth in § 18.2-340.23 of the Code of Virginia shall complete a department-prescribed application to request issuance or renewal of an annual permit to conduct charitable gaming. Organizations shall submit a nonrefundable fee payable to the Treasurer of Virginia in the amount of \$200 with the application, unless the organization is exempt from such fee pursuant to § 18.2-340.23 of the Code of Virginia.

B. The department may initiate action against any organization exempt from permit requirements when it reasonably believes the organization is not in compliance with the provisions of charitable gaming laws or [ ~~applicable regulations, or both, of the board this chapter~~ ].

C. Permit holders requiring a special permit pursuant to § 18.2-340.27 E of the Code of Virginia shall convey their request on a form prescribed by the department. Organizations shall submit a fee payable to the Treasurer of Virginia in the amount of \$50 with the request for a special permit, unless the organization is exempt from such fee pursuant to § 18.2-340.23 of the Code of Virginia.

D. Permits shall be valid for a period of one year from the date of issuance or for a period specified on the permit. The department may issue permits for periods of less than one year.

E. Permits shall be granted only after a background investigation of an organization or interested persons, or both, to ensure public safety and welfare as required by § 18.2-340.25 of the Code of Virginia. Investigations shall consider the nature, the age and severity, and the potential harm to public safety and welfare of any criminal offenses. The investigation may include, but shall not be limited to, the following:

1. A search of [ ~~Virginia~~ ] criminal history records for the chief executive officer and chief financial officer of the organization. Information and authorization to conduct these records checks shall be provided in the permit application. In addition, the department shall require that the organization provides assurances that all other members involved in the management, operation, or conduct of charitable gaming meet the requirements of subdivision 13 of § 18.2-340.33 of the Code of Virginia. Applications may be denied if:

a. Any person participating in the management of any charitable gaming has ever been:

- (1) Convicted of a felony; or
- (2) Convicted of any misdemeanor involving fraud, theft, or financial crimes within the preceding five years.

b. Any person participating in the conduct of charitable gaming has been:

- (1) Convicted of any felony in the preceding 10 years; or
- (2) Convicted of any misdemeanor involving fraud, theft, or financial crimes within the preceding five years;

2. An inquiry as to whether the organization has been granted tax-exempt status pursuant to § 501(c) by the Internal Revenue Service and is in compliance with IRS annual filing requirements;

3. An inquiry as to whether the organization has entered into any contract with, or has otherwise employed for compensation, any persons for the purpose of organizing or managing, operating, or conducting any charitable gaming activity;

4. Inquiries into the finances and activities of the organization and the sources and uses of funds; and

5. Inquiries into the level of community or financial support to the organization and the level of community involvement in the membership and management of the organization.

F. The permit application for an organization that has not previously held a permit shall include:

[ ~~1. A list of members participating in the management or operation of charitable gaming. For any organization that is not composed of members, a person who is not a bona fide member may volunteer in the conduct of a charitable game as long as that person is directly supervised by a bona fide official member of the organization;~~

~~2.~~ 1. ] A copy of the articles of incorporation, bylaws, charter, constitution, or other appropriate organizing document;

[ ~~3.~~ 2. ] A copy of the determination letter issued by the IRS under § 501(c) of the Internal Revenue Code, if appropriate, or a letter from the national office of an organization indicating the applicant organization is in good standing and is currently covered by a group exemption ruling. A letter of good standing is not required if the applicable national or state office has furnished the department with a listing of member organizations in good standing in the Commonwealth as of January 1 of each year and has agreed to promptly provide the department any changes to the listing as they occur;

[ ~~4. A copy of the organization's most recent annual financial statement and balance sheet or most recent Form 990 that has been filed with the IRS;~~

~~5.~~ 3. ] A copy of the written lease or proposed written lease agreement and all other agreements if the organization

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# Regulations

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rents or intends to rent a facility where bingo is or will be conducted. Information on the lease shall include name, address, and phone number of the landlord; maximum occupancy of the building; and the rental amount per session; and

[ ~~6.4.~~ ] An authorization by an officer or other appropriate official of the organization to permit the department to determine whether the organization has been investigated or examined by the IRS in connection with charitable gaming activities during the previous three years.

G. Copies of minutes of meetings of the organization and any contracts with landlords or suppliers to which the organization is or may be a party may be requested by the department prior to rendering a permitting decision.

H. Organizations applying to renew a permit previously issued by the department shall submit articles of incorporation, bylaws, charter, constitution, or other organizing document, and IRS determination letter only if there are any amendments or changes to these documents that are directly related to the management, operation, or conduct of charitable gaming.

I. Organizations may request permits to conduct joint bingo games as provided in § 18.2-340.29 of the Code of Virginia.

1. In the case of a joint game, [ ~~all the organizations each organization~~ ] shall file a permit application.

2. The nonrefundable permit fee for joint games shall be a total of \$200. [ ~~Volunteer fire departments or rescue squads or auxiliary units thereof that have been recognized in accordance with § 15.2-955 of the Code of Virginia shall be exempt from the payment of applications fees~~ However, no permit application fee is due if each of the organizations is exempt from the application fee pursuant to § 18.2-340.23 of the Code of Virginia ].

3. A single permit shall be issued in the names of all the organizations conducting a joint game. All restrictions and prohibitions applying to single organizations shall apply to qualified organizations jointly conducting bingo games pursuant to § 18.2-340.29 of the Code of Virginia.

4. No charitable gaming shall be conducted prior to the issuance of a joint permit.

5. Applications for joint games shall include an explanation of the division of manpower, costs, and proceeds for the joint game.

J. An organization wishing to change dates, times, or locations of its charitable gaming shall request [ ~~a change in the~~ an amendment to its ] permit. [ ~~Change Amendment~~ ] requests shall be made in writing on a form prescribed by the department [ ~~at least 30 days~~ ] in advance of the proposed effective date.

K. [ ~~Changes in dates, times, or locations~~ An organization may cancel its charitable gaming ] due to inclement weather, disasters, or other circumstances outside the organization's control [ ~~may be made~~ ] without [ ~~a change in the an~~

amendment to its ] permit. [ ~~The organization shall request such a change on a form prescribed by the department as soon as the necessity for the change is known.~~ ]

L. An organization may sell raffle tickets for a drawing to be held outside of the Commonwealth of Virginia in the United States provided:

1. The raffle is conducted by the organization in conjunction with a meeting outside the Commonwealth of Virginia or with another organization that is licensed to conduct raffles outside the Commonwealth of Virginia;

2. The raffle is conducted in accordance with these regulations and the laws and regulations of the state where the drawing is to be held; and

3. The portion of the proceeds derived from the sale of raffle tickets in the Commonwealth is reported to the department.

M. Any permitted organization that ceases to conduct charitable gaming shall immediately notify the department in writing and provide the department a report as to the disposition of all unused gaming supplies on a form prescribed by the department.

## **11VAC15-40-40. Suspension, revocation, or denial of permit.**

A. Pursuant to § 18.2-340.20 of the Code of Virginia, the department may suspend, revoke, or deny the permit to conduct charitable gaming of any organization for cause including, but not limited to, any of the following reasons:

1. The organization is found to be in violation of or has failed to meet any of the requirements of the statutes or regulations governing the operation, management, and conduct of charitable gaming in the Commonwealth.

2. The organization is found to be not in good standing with its state or national organization.

3. The IRS revokes or suspends the organization's tax-exempt status.

4. The organization willfully and knowingly provides false information in its application for a permit to conduct charitable gaming.

5. The organization is found to have a member involved in the management, operation, or conduct of its charitable gaming who has been convicted of any felony or any misdemeanor as follows:

a. For any person participating in the management or operation of any charitable gaming:

(1) Convicted of a felony; or

(2) Convicted of any misdemeanor involving fraud, theft, or financial crimes within the preceding five years.

b. For any person participating in the conduct of charitable gaming:

(1) Convicted of any felony within the preceding 10 years; or

(2) Convicted of any misdemeanor involving fraud, theft, or financial crimes within the preceding five years.

B. The failure to meet any of the requirements of § 18.2-340.24 of the Code of Virginia shall cause the denial of the permit, and no organization shall conduct any charitable gaming until the requirements are met and a permit is obtained.

C. Except when an organization fails to meet any of the requirements of § 18.2-340.24 of the Code of Virginia, in lieu of suspending, revoking, or denying a permit to conduct charitable gaming, the department may afford an organization an opportunity to enter into a compliance agreement specifying additional conditions or requirements as it may deem necessary to ensure an organization's compliance with the statute and regulations governing the conduct of charitable gaming activities and may require that an organization participates in such training as is offered by the department.

D. If a permit is suspended, the department shall set the terms of the suspension, which shall include the length of the suspension and a requirement that, prior to reinstatement of the permit, the organization shall submit a remedial business plan to address the conditions that resulted in the suspension.

Article 2

Conduct of Games, Rules of Play, Electronic Bingo

**11VAC15-40-50. Conduct of bingo, instant bingo, pull-tabs, seal cards, event games, and raffles.**

A. Organizations subject to this chapter shall post their permit at all times on the premises where charitable gaming is conducted.

B. No individual shall provide any information or engage in any conduct that alters or is intended to alter the outcome of any charitable game.

C. Individuals under 18 years of age may play bingo provided such persons are accompanied by a parent or legal guardian. It shall be the responsibility of the organization to ensure that such individuals are eligible to play. An organization's house rules may further limit the play of bingo or purchase [ of ] raffle tickets by minors.

D. Individuals under the age of 18 may sell raffle tickets for a qualified organization raising funds for activities in which they are active participants.

E. No individual under the age of 18 may participate in the management or operation of bingo games. Individuals 14 through 17 years of age may participate in the conduct of a bingo game provided the organization permitted for charitable gaming obtains and keeps on file written parental consent from the parent or legal guardian and verifies the date of birth of [ ~~such youth~~ the minor ]. An organization's house rules may further limit the involvement of minors in the conduct of bingo games.

F. No qualified organization shall sell any instant bingo, pull-tab, seal card, [ ~~event game card,~~ ] or electronic [ ~~game~~

~~card~~ pull-tab ] to any individual under 18 years of age. No individual under 18 years of age shall play or redeem any instant bingo, pull-tab, seal card, [ ~~event game card,~~ ] or electronic [ ~~game card~~ pull-tab ].

G. Unless otherwise prohibited by the Code of Virginia or this chapter, nonmembers who are under the direct supervision of a bona fide member may participate in the conduct of bingo.

H. All [ ~~volunteer~~ ] game workers shall have in their possession a picture identification, such as a driver's license or other government-issued identification, and shall make the picture identification available for inspection upon request by a department agent while participating in the management, operation, or conduct of a bingo game.

I. A game manager who is a bona fide member of the organization and is designated by the organization's management as the person responsible for the operation of the bingo game during a particular session shall be present any time a bingo game is conducted.

J. Organizations shall ensure that all charitable gaming equipment is in working order before charitable gaming activities commence.

K. Any organization selling bingo, instant bingo, pull-tabs, seal cards, [ ~~event game cards,~~ ] or electronic [ ~~game cards~~ pull-tabs ] shall:

1. Maintain a supplier's invoice or a legible copy thereof at the location where the gaming is taking place and cards are sold. The original invoice or legible copy shall be stored in the same storage space as the gaming supplies. All gaming supplies shall be stored in a secure area that has access limited only to bona fide members of the organization; and
2. Pay for all gaming supplies only by a check drawn on the charitable gaming account of the organization.

A complete inventory of all such gaming supplies shall be maintained by the organization on the premises where the gaming is being conducted.

L. A [ ~~volunteer working a~~ ] bingo session [ ~~game worker~~ ] may receive complimentary food and nonalcoholic beverages provided on premises, as long as the retail value of such food and beverages does not exceed \$15 for each session.

M. Permitted organizations shall not commingle records, supplies, or funds from permitted activities with those from instant bingo, pull-tabs, seal cards, [ ~~event game cards,~~ ] or electronic [ ~~game cards~~ pull-tabs ] sold in social quarters in accordance with § 18.2-340.26:1 of the Code of Virginia.

N. Individuals who are not members of an organization or are members who do not participate in any charitable gaming activities may be paid reasonable fees for preparation of quarterly and annual financial reports.

O. [ ~~No~~ Except as allowed pursuant to § 18.2-340.34:1 of the Code of Virginia, no ] free packs, free electronic bingo devices, discounts, or remuneration in any other form shall be

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# Regulations

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provided directly or indirectly to ~~[ volunteers game workers, ]~~ members of their family, or individuals residing in their household. The reduction of tuition, dues, or any fees or payments due as a result of a member or shareholder, or anyone in their household, working bingo games or raffles is prohibited.

P. Individuals providing security for an organization's charitable gaming activity shall not participate in the charitable gaming activity and shall not be compensated with charitable gaming supplies or with rentals of electronic bingo devices ~~[ or electronic pull-tab devices ]~~.

Q. No organization shall award any prize money or any merchandise valued in excess of the amounts specified by the Code of Virginia.

R. Multiple bingo sessions shall be permitted in a single ~~[ premise premises ]~~ as long as the sessions are distinct from one another and are not used to advertise or do not result in the awarding of more in prizes than is permitted for a single qualified organization. All leases for organizations to conduct charitable gaming in a single ~~[ premise premises ]~~ shall ensure ~~[ gaming activity each session ]~~ is separated by an interval of at least 30 minutes. Bingo sales for the subsequent session may take place during the 30-minute break once the building is cleared of all patrons and workers from the previous session.

S. All bingo and instant bingo, pull-tabs, seal card, ~~[ event game card, ]~~ or electronic ~~[ game card pull-tab ]~~ sales, play, and redemption must occur within the time specified on the charitable gaming permit.

T. Instant bingo, pull-tabs, seal cards, ~~[ event game cards, ]~~ or electronic ~~[ game cards pull-tabs ]~~ shall only be sold in conjunction with a bingo session, except as authorized by ~~[ § 18.2-340.26:2 § 18.2-340.26:1 or 18.2-340.26:2 ]~~ of the Code of Virginia. No instant bingo, pull-tabs, seal card, ~~[ event game card, ]~~ or electronic ~~[ game card pull-tab ]~~ sales shall take place more than two hours before ~~[ the selection of the first ball for the first bingo game ]~~ or ~~[ more than two hours ]~~ after ~~[ a session the selection of the last ball for the last bingo game ]~~. If multiple sessions are held at the same location, no instant bingo, pull-tab, seal card, ~~[ event game card, ]~~ or electronic ~~[ game card pull-tab ]~~ sales shall be conducted during the required 30-minute break between ~~[ gaming activities sessions ]~~. The department may take action if it believes that a bingo session is not legitimate or is being conducted in a manner such that instant bingo, pull-tabs, seal cards, ~~[ event game cards, ]~~ or electronic ~~[ game cards pull-tabs ]~~ are not being sold in conjunction with a bingo session.

U. Only a ~~[ volunteer ]~~ game worker ~~[ of for a ]~~ qualified ~~[ organizations organization ]~~ may rent, exchange, or otherwise provide electronic bingo devices ~~[ or electronic pull-tab devices ]~~ to players.

V. A qualified organization shall conduct only bingo games and raffles listed on a game program for that session. The

program shall list all prize amounts. If the prize amounts are determined by attendance or at the end of a game, the game program shall list the attendance required for the prize amount or disclose that prizes shall be determined at the end of a game and the method for determining the prize amount. In such case, the organization shall announce the prize amount at the end of the game.

W. A qualified organization selling instant bingo, pull-tabs, seal cards, or electronic ~~[ game cards pull-tabs ]~~ shall post a flare provided by the manufacturer at the location where such cards are sold. All such sales and prize payouts shall be in accordance with the flare for that deal.

X. Only qualified organizations, facilities in which qualified organizations play bingo, and suppliers permitted by the department shall advertise a bingo game. Providing players with information about bingo games through printed advertising is permitted, provided the name of the qualified organization shall be in a type size equal to or larger than the name of the premises, the hall, or the word "bingo." Printed advertisements shall identify the use of proceeds percentage reported in the past quarter or fiscal year.

Y. Raffles that award prizes based on a percentage of gross receipts shall use prenumbered tickets.

Z. The following rules shall apply to instant bingo, pull-tab, ~~[ seal card, or event game card or seal card ]~~ dispensing devices:

1. A dispensing device shall only be used at a location and time during which a qualified organization holds a permit to conduct charitable gaming. Only cards purchased by an organization to be used during the organization's charitable gaming activity shall be in the dispensing device.

2. Keys to the dispensing area and coin/cash box shall be in the possession and control of the game manager or designee of the organization's board of directors at all times. Keys shall at all times be available at the location where the dispensing device is being used.

3. The game manager or designee shall provide access to the dispensing device to a department agent for inspection upon request.

4. Only a ~~[ volunteer ]~~ game worker of an organization may stock the dispensing device, remove cash, or pay winners' prizes.

AA. Organizations shall only purchase gaming supplies from a supplier who has a current permit issued by the department.

BB. An organization shall not tamper with bingo paper received from a supplier.

CC. The total amount of all discounts given by any organization during any fiscal year shall not exceed 1.0% of the organization's gross receipts.

## 11VAC15-40-60. Rules of play.

A. Each organization shall adopt "house rules" regarding conduct of the game. Such rules shall be consistent with the provisions of the law and this chapter. "House rules" shall be conspicuously posted or [ , at an organization's option, ] printed on the game program.

B. All players shall be physically present at the location where the bingo numbers for a bingo game are drawn to play the game or to claim a prize. Seal card prizes that can only be determined after a seal is removed or opened must be claimed within 30 days of the close of a deal. All other prizes must be claimed on the game date.

C. The following rules of play shall govern the sale of instant bingo, pull-tabs, and seal cards:

1. No cards that have been marked, defaced, altered, tampered with, or otherwise constructed in a manner that tends to deceive the public or affect the chances of winning or losing shall be placed into play.

2. Winning cards shall have the winning symbol or number defaced or punched immediately after redemption by the organization's authorized representative.

3. An organization may commingle unsold instant bingo cards and pull-tabs with no more than one additional deal. The practice of commingling deals shall be disclosed to the public via house rules or in a similar manner. Seal card deals shall not be commingled.

4. If a deal is not played to completion and unsold cards remain, the remaining cards shall be sold at the next session the same type of ticket is scheduled to be sold. If no future date is anticipated, the organization shall, after making diligent efforts to sell the entire deal, consider the deal closed or completed. The unsold cards shall be retained for [ a minimum of ] three years following the close of the fiscal year and shall not be opened.

5. All seal card games purchased shall contain the sign-up sheet, the seals, and the cards packaged together in each deal.

6. Progressive seal card prizes not claimed within 30 days shall be carried forward to the next progressive [ seal card ] game in progress and paid to the next progressive [ seal card ] game prize winner.

D. No one involved in the conduct of bingo may play bingo at any session they have worked or intend to work. No one involved in the sale or redemption of any instant bingo, pull-tabs, seal cards, or electronic [ ~~game cards~~ pull-tabs ] may purchase directly or through others instant bingo, pull-tab, seal card, or electronic [ ~~game card~~ pull-tab ] products from organizations they assist on the day they have worked or from any deal they have helped sell or redeem, whichever occurs later.

E. Electronic bingo.

1. Electronic bingo devices may be used by bingo players in the following manner:

a. Players may input into the device each number called or the device may automatically daub each number as the number is called;

b. Players must notify the game operator or caller of a winning pattern of bingo by a means other than use of the electronic [ bingo ] device;

c. Players are limited to playing a maximum of 54 card faces per device per game;

d. Electronic bingo devices shall not be reserved for players. Each player shall have an equal opportunity to use the available [ electronic bingo ] devices on a first come, first served basis;

e. Each electronic bingo device shall produce a player receipt with the organization name, date, time, location, sequential transaction or receipt number, number of electronic bingo cards loaded, cost of electronic bingo cards loaded, and date and time of the transaction. Images of cards or faces stored in an electronic [ bingo ] device must be exact duplicates of the printed faces if faces are printed;

f. Department agents may examine and inspect any electronic bingo device and related system. Such examination and inspection shall include immediate access to the [ electronic bingo ] device and unlimited inspection of all parts and associated systems and may involve the removal of equipment from the game premises for further testing;

g. All electronic bingo devices must be loaded or enabled for play on the premises where the game will be played;

h. All electronic bingo devices shall be rented or otherwise provided to a player only by an organization and no part of the proceeds of the rental of such devices shall be paid to a landlord, or his employee, agent, or member of his immediate family; and

i. If a player's call of a bingo is disputed by another player, or if a department agent makes a request, one or more cards stored on an electronic bingo device shall be printed by the organization.

2. Players may exchange a defective electronic bingo device for another [ electronic bingo ] device provided a disinterested player verifies that the device is not functioning. A disinterested player shall also verify that no numbers called for the game in progress have been keyed into the replacement [ electronic bingo ] device prior to the exchange.

F. The following rules of play shall govern the conduct of raffles:

1. Before a prize drawing, each stub or other detachable section of each ticket sold shall be placed into a receptacle from which the winning tickets shall be drawn. The

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# Regulations

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receptacle shall be designed so that each ticket placed in it has an equal chance to be drawn.

2. All prizes shall be valued at fair market value.

G. The following rules shall apply to "decision bingo" games:

1. Decision bingo shall be played on bingo cards in the conventional manner.

2. Players shall enter a game by paying a predetermined amount for each card face in play.

3. Players shall pay a predetermined fee for each set of three bingo numbers called for each card in play.

4. The prize amount shall be the total of all fees not to exceed the prize limit set forth for regular bingo in § 18.2-340.33 of the Code of Virginia. Any excess funds shall be retained by the organization.

5. The predetermined amounts in subdivisions 2 and 3 of this subsection shall be printed in the game program. The prize amount for a game shall be announced before the prize is paid to the winner.

H. The following rules shall apply to "treasure chest" games:

1. The organization shall list the treasure chest game on the bingo game program as a "Treasure Chest Raffle."

2. The organization shall have house rules posted that describe how the game is to be played.

3. The treasure chest participant shall only be selected through some other authorized charitable game at the same bingo session.

4. The organization shall account for all funds as treasure chest/raffle sales on the session reconciliation form.

5. If the player does not open the lock on the treasure chest, the game manager or his designee shall proceed to try every key until the correct key opens the treasure chest lock to show all players that one of the keys will open the lock.

I. The following rules shall apply to progressive bingo games:

1. Bingo paper sold for use in progressive bingo games shall conform to the standards set forth in 11VAC15-40-130.

2. Organizations shall not include in admission packs the bingo paper intended for use in progressive bingo games.

3. Any progressive bingo game, its prize, and the number of bingo numbers to be called shall be clearly announced before the progressive bingo game is played and shall be posted on the premises where the progressive bingo game is played during each session that a progressive bingo game is played.

4. Pricing for a progressive bingo game card or sheet shall be listed on the game program.

5. If the predetermined pattern is not covered within the predetermined number of bingo numbers to be called, then

the number of bingo numbers called will increase by one number for each subsequent session the progressive [ bingo ] game is played.

6. If the predetermined pattern is not covered within the predetermined number of bingo numbers to be called for that progressive bingo game, then the game will continue as a regular bingo game until the predetermined pattern is covered and a regular bingo prize is awarded.

7. The prize for any progressive bingo game shall be in accordance with the provisions of [ subdivision 10 of ] § 18.2-340.33 of the Code of Virginia.

J. The following rules shall apply to "WINGO":

1. "WINGO" shall be played only for the hearing-impaired players.

2. "WINGO" shall utilize a visual device such as an oversized deck of cards in place of balls selected from a blower.

3. A caller must be in an area visible to all players and shall randomly select cards or other visual devices one at a time and display them so that all players can see them.

4. The organization must have house rules for "WINGO" and the rules shall identify how players indicate that they have won.

5. All financial reporting shall be consistent with reporting for a traditional bingo game.

K. The following rules of play shall apply to event games:

1. No instant bingo cards or pull-tabs that have been marked, defaced, altered, tampered with, or otherwise constructed in a manner that tends to deceive the public or affect the chances of winning or losing shall be placed into play.

2. Instant bingo cards and pull-tabs used in an event game shall not be offered for sale or sold at a purchase price other than the purchase price indicated on the flare for that particular deal.

3. The maximum prize amount for event games shall not exceed the amount set forth in [ subdivision 9 of ] § 18.2-340.33 [ (9) ] of the Code of Virginia for instant bingo, pull-tab, or seal card.

4. A sign-up sheet is not required for event games in which the winner or winners are determined using a seal card.

5. Organizations shall determine the winner or winners of event games during the same bingo session in which the instant bingo cards or pull-tabs are sold.

6. An authorized representative of the organization shall deface or punch the winning instant bingo cards or winning pull-tabs immediately after redemption.

7. If unsold bingo cards or unsold pull-tabs remain, the unsold cards shall be retained for [ a minimum of ] three years following the close of the fiscal year and shall not be opened.

Article 3

Bank Accounts, Recordkeeping, Financial Reporting, Audits,  
Fees

**11VAC15-40-70. Bank accounts.**

A. A qualified organization shall maintain a charitable gaming bank account that is separate from any other bank account and all gaming receipts shall be deposited into the charitable gaming bank account.

B. Disbursements for expenses other than prizes and reimbursement of meal expenses shall be made by check directly from a charitable gaming account.

C. All charitable gaming bank account records, including but not limited to monthly bank statements, canceled checks or facsimiles thereof, and reconciliations, shall be maintained for [ a minimum of ] three years following the close of a fiscal year.

D. All receipts from each session of bingo games and instant bingo, pull-tabs, [ ~~or~~ ] seal cards, [ or electronic pull-tabs ] shall be deposited by the second business day following the session at which they were received.

E. Raffle proceeds shall be deposited into the qualified organization's charitable gaming bank account no later than the end of the calendar week following the week during which the organization received the proceeds.

**11VAC15-40-80. Recordkeeping.**

A. In addition to the records required by § 18.2-340.30 D of the Code of Virginia, qualified organizations conducting bingo shall maintain a system of records for a minimum of three years [ from the close of the fiscal year ], unless otherwise specified [ , ] for each gaming session on forms prescribed by the department, or reasonable facsimiles of those forms approved by the department, that include:

1. Charitable gaming supplies purchased and used;
2. A session reconciliation form [ ~~and~~ , ] an instant bingo, pull-tab, [ or ] seal card [ reconciliation form ], [ ~~or~~ and an ] electronic [ ~~game card~~ pull-tab ] reconciliation form completed and signed within 48 hours of the end of the session by the bingo manager;
3. All discounts provided;
4. A reconciliation to account for cash received from floor workers for the sale of extra bingo sheets for any game;
5. [ ~~Number of electronic bingo devices rented, unique serial numbers of such devices, number of faces sold by each unit, and a summary report for each session to include date, time, location, and detailed information on income and expenses~~ The summary report that electronic bingo systems are required to maintain pursuant to 11VAC15-40-130 D 11 ];
6. An admissions control system that provides a cross-check on the number of players in attendance and admission sales. This may include a ticket control system, cash register, or any similar system;

7. All operating expenses including rent, advertising, and security. Copies of invoices for all such expenses shall also be maintained;

8. Expected and actual receipts from games played on hard cards and number of games played on hard cards;

9. A record of the name and address of each winner for all seal cards; in addition, the winning ticket and seal card shall be maintained for a minimum of 90 days after the session;

10. A record of all door prizes awarded; and

11. For any prize or jackpot of a value that meets or exceeds the reporting requirements in the Internal Revenue Service's Publication 3079, the name and address of each individual to whom any such prize or jackpot is awarded and the amount of the award.

B. Qualified organizations conducting raffles shall have a recordkeeping system to account for cash receipts, cash disbursements, raffle tickets purchased or sold, and prizes awarded. All records shall be maintained for [ a minimum of ] three years from the close of the fiscal year. The recordkeeping system shall include:

1. Invoices for the purchase of raffle tickets, which shall reflect the following information:
  - a. Name and address of supplier;
  - b. Name of purchaser;
  - c. Date of purchase;
  - d. Number of tickets printed;
  - e. Ticket number sequence for tickets printed; and
  - f. Sales price of individual ticket;
2. A record of cash receipts from raffle ticket sales by tracking the total number of tickets available for sale, the number issued to sellers, the number returned, the number sold, and reconciliation of all raffle sales to receipts;
3. Serial numbers of tickets for raffle sales initiated and concluded at a bingo game or sequentially numbered tickets, which shall state the name, address, and telephone number of the organization, the prize or prizes to be awarded, the date of the prize drawing or selection, the selling price of the raffle ticket, and the charitable gaming permit number;
4. For any raffle prize of a value that meets or exceeds the reporting requirements in the Internal Revenue Service's Publication 3079, receipts on which prize winners must provide printed name, residence address, and the amount and description of the prize received; and
5. Deposit records of the required weekly deposits of raffle receipts.

C. All raffle tickets shall have a detachable section; be consecutively numbered with the detachable section having the same number; provide space for the purchaser's name, complete address, and telephone number; and state (i) the



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# Regulations

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name and address of the organization; (ii) the prize or prizes to be awarded; (iii) the date, time and location of the prize drawing; (iv) the selling price of the ticket; and (v) the charitable gaming permit number. Winning tickets and unsold tickets shall be maintained for [ a minimum of ] three years from the close of the fiscal year.

D. All unused charitable gaming supplies shall either be returned for refund to the original supplier in unopened original packaging in resalable condition as determined by the supplier or [ ~~turned in to the department for destruction~~ destroyed following notification to the department on a form prescribed by the department ]. The organization shall maintain a receipt for all such supplies returned to the supplier or [ ~~turned in to the department~~ destroyed ].

## **11VAC15-40-90. Financial reporting, penalties, inspections, and audits.**

A. Each charitable gaming permit holder shall file an annual report of receipts and disbursements by March 15 of each year on a form prescribed by the department. The annual report shall cover the activity for the fiscal year.

B. The annual report shall be accompanied by the audit and administration fee as established by the department for the fiscal year unless the fee has been remitted with quarterly reports or the organization is exempt from payment of the fee pursuant to § 18.2-340.23 of the Code of Virginia.

C. An organization desiring an extension to file its annual report for good cause shall request the extension in writing on a form prescribed by the department and shall pay the projected audit and administration fee, unless exempt from payment of the fee pursuant to § 18.2-340.23 of the Code of Virginia. The extension request and payment of projected fees shall be made in accordance with the provisions of § 18.2-340.30 of the Code of Virginia.

D. Unless exempted by § 18.2-340.23 of the Code of Virginia, qualified organizations realizing any gross gaming receipts in any calendar quarter shall file a quarterly report of receipts and disbursements on a form prescribed by the department as follows:

<u>Quarter Ending</u>	<u>Date Due</u>
<u>March 31</u>	<u>June 1</u>
<u>June 30</u>	<u>September 1</u>
<u>September 30</u>	<u>December 1</u>
<u>December 31</u>	<u>March 1</u>

Qualified organizations shall submit quarterly reports with the appropriate audit and administration fee unless the organization is exempt from payment of the fee pursuant to § 18.2-340.23 of the Code of Virginia. An annual financial report may substitute for a quarterly report if the organization has no further charitable gaming income during the remainder of the reporting period and the annual report is filed by the due date for the applicable calendar quarter.

E. An organization desiring an extension to file its quarterly report for good cause shall request the extension in writing on a form prescribed by the department and shall pay the projected audit and administration fee unless exempt from payment of the fee pursuant to § 18.2-340.23 of the Code of Virginia. The extension request and payment of projected fees shall be made in accordance with the provisions of § 18.2-340.30 of the Code of Virginia.

F. Organizations failing to file required reports, request an extension, or make fee payments when due shall be charged a penalty of \$25 per day from the due date until such time as the required report is filed.

G. Any qualified organization in possession of funds derived from charitable gaming (including those who have ceased operations), regardless of when such funds may have been received or whether it has a valid permit from the department, shall file an annual financial report on a form prescribed by the department on or before March 15 of each year until such funds are depleted. If an organization ceases the conduct of charitable gaming, it shall provide the department with the name of an individual who shall be responsible for filing financial reports. If no such information is provided, the president of an organization shall be responsible for filing reports until all charitable gaming proceeds are depleted.

H. If an organization has been identified through inspection, audit, or other means as having deficiencies in complying with statutory or regulatory requirements or having ineffective internal controls, the department may impose restrictions or additional recordkeeping and financial reporting requirements.

I. Any records deemed necessary to complete an inspection, audit, or investigation may be collected by the department, its employees, or its agents from the premises of an organization or any location where charitable gaming is conducted. The department shall provide a written receipt of such records at the time of collection.

## **11VAC15-40-100. Use of proceeds.**

A. All payments by an organization intended as use of proceeds must be made by check written from the organization's charitable gaming account.

B. Use of proceeds payments may be made for scholarship funds or the future acquisition, construction, remodeling, or improvement of real property or the acquisition of other equipment or vehicles to be used for religious, charitable, educational, or community purposes. In addition, an organization may obtain department approval to establish a special fund account or an irrevocable trust fund for special circumstances. Transfers to such an account or an irrevocable trust fund from the organization's charitable gaming account may be included as a use of proceeds if the payment is authorized by [ ~~an~~ the ] organization's board of directors.

No payments made to such a special fund account shall be withdrawn for other than the specified purpose unless prior notification is made to the department.

C. Expenditures of charitable gaming funds for social or recreational activities or for events, activities, or programs that are open primarily to an organization's members and their families shall not qualify as use of proceeds unless substantial benefit to the community is demonstrated.

D. Payments made to or on behalf of indigent, sick, or deceased members or their immediate families shall be allowed as use of proceeds provided they are approved by the organization's board of directors and the need is documented.

E. Payments made directly for the benefit of an individual member, member of his family, or person residing in his household shall not be allowed as a use of proceeds unless authorized by law or elsewhere in this chapter.

F. Use of proceeds payments by an organization shall not be made for any activity that is not permitted by federal, state, or local laws or for any activity that attempts to influence or finance directly or indirectly political persons or committees or the election or reelection of any person who is or has been a candidate for public office.

G. Organizations shall maintain details of all use of proceeds disbursements for a minimum of three years [ from the close of the fiscal year ] and shall make this information available to the department upon request.

H. The department may disallow a use of proceeds payment to be counted against the minimum percentage referred to in 11VAC15-40-20 D. If any payment claimed as use of proceeds is subsequently disallowed, an organization may be allowed additional time as specified by the department to meet minimum use of proceeds requirements.

#### Article 4 Rent

#### **11VAC15-40-110. Requirements regarding renting premises, agreements, and landlord participation.**

A. No organization shall rent or use any leased premises to conduct charitable gaming unless all terms for rental or use are set forth in a written agreement and signed by the parties thereto prior to the issuance of a permit to conduct charitable gaming. A qualified organization that leases a building or other premises that is utilized in whole or in part for the purpose of conducting charitable gaming more frequently than two calendar days in one calendar week shall only lease such premises directly from (i) a qualified organization that is exempt from taxation pursuant to § 501 (c) of the Internal Revenue Code or (ii) any county, city, or town.

B. Organizations shall not make payments to a landlord except by check drawn on the organization's charitable gaming account.

C. No landlord, his agent or employee, member of his immediate family, or person residing in his household shall make directly or indirectly a loan to any officer, director,

game manager, or entity involved in the management, operation, or conduct of charitable gaming of an organization in Virginia that leases its charitable gaming facility from the landlord.

D. No landlord, his agent or employee, member of his immediate family, or person residing in his household shall make any direct or indirect payment to any officer, director, game manager, or entity involved in the management, operation, or conduct of charitable gaming conducted at a facility rented from the landlord in Virginia unless the payment is authorized by the lease agreement and is in accordance with the law.

E. No landlord, his agent or employee, member of his immediate family, or person residing in the same household shall at charitable games conducted on the landlord's premises:

1. Participate in the management, operation, or conduct of any charitable games;
2. Sell, lease, or otherwise provide any bingo supplies including, but not limited to, bingo cards, pull-tab cards, electronic [ ~~game cards~~ pull-tabs ], or other game pieces; or
3. Require as a condition of the lease or contract that a particular manufacturer, distributor, or supplier of bingo supplies is used by the organization.

"Bingo supplies" as used in this chapter shall not include glue, markers, or tape sold from concession stands or from a location physically separated from the location where bingo supplies are normally sold.

F. No member of an organization involved in the management, operation, or conduct of charitable gaming shall provide any services to a landlord or be remunerated in any manner by the landlord of the facility where an organization is conducting its charitable gaming.

#### Part III Suppliers

#### **11VAC15-40-120. Suppliers of charitable gaming supplies: application, qualifications, suspension, revocation or refusal to renew permit, maintenance, and production of records.**

A. Prior to providing any charitable gaming supplies, a supplier shall submit an application on a form prescribed by the department and receive a permit. A \$1,000 application fee payable to the Treasurer of Virginia is required. In addition, a supplier must be authorized to conduct business in the Commonwealth of Virginia, which may include, but not be limited to, registration with the State Corporation Commission, the Department of Taxation, and the Virginia Employment Commission. The actual cost of background investigations for a permit may be billed by the department to an applicant. [ ~~The department shall act on an application within 90 days of receipt of the application.~~ ]

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# Regulations

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B. The department may refuse to issue a permit or may suspend or revoke a permit if an officer, director, employee, agent, or owner:

1. Is operating without a valid license, permit, or certificate as a supplier or manufacturer in any state in the United States;

2. Fails or refuses to recall a product as directed by the department;

3. Conducts business with unauthorized entities or is not authorized to conduct business in the Commonwealth of Virginia;

4. Has been convicted of or pleaded nolo contendere to any crime as specified by § 18.2-340.34 B of the Code of Virginia; has had any license, permit, certificate, or other authority related to activities defined as charitable gaming in the Commonwealth suspended or revoked in the Commonwealth or in any other jurisdiction; has failed to file or has been delinquent in excess of one year in the filing of any tax returns or the payment of any taxes due the Commonwealth; or has failed to establish a registered office or registered agent in the Commonwealth if so required by § 13.1-634 or 13.1-763 of the Code of Virginia. As this provision relates to employees or agents, it shall only apply to individuals involved in sales to or solicitations of customers in the Commonwealth of Virginia;

5. Fails to notify the department within 20 days of the occurrence, knowledge, or receipt of the filing of any administrative or legal action relating to charitable gaming or the distribution of charitable gaming supplies involving or concerning the supplier, any officers or directors, employees, agent, or owner during the term of its permit;

6. Fails to provide to the department upon request a current Letter for Company Registration on file with the U.S. Department of Justice-Gambling Devices Registration Unit, if required in accordance with [ ~~The~~ the ] Gambling Devices Act of 1962 [ ~~15 USC §§ 1171-1178~~, (15 USC 1171-1178) ] for any device that it sells, distributes, services, or maintains in the Commonwealth of Virginia;

or  
7. Has been engaged in conduct that would compromise the department's objective of maintaining the highest level of integrity in charitable gaming.

C. A supplier shall not sell, offer to sell, or otherwise provide charitable gaming supplies for use by anyone in the Commonwealth of Virginia other than to an organization with a permit from the department or another permitted supplier. However, a supplier may:

1. Sell charitable gaming supplies to an organization that expects to gross the amount set forth in § 18.2-340.23 of the Code of Virginia or less in any 12-month period, providing that the amount of such purchase would not be reasonably expected to produce more than the amount set

forth in § 18.2-340.23 of the Code of Virginia in gross sales. For each such organization, the supplier shall maintain the name, address, and telephone number. The supplier shall also obtain a written and signed statement from an officer or game manager of such organization confirming that gross receipts are expected to be the amount set forth in § 18.2-340.23 of the Code of Virginia or less. Such statement shall be dated and kept on file for [ a minimum of ] three years from the [ ~~end~~ close ] of a fiscal year.

2. Sell bingo cards and paper to persons or entities other than qualified organizations provided such supplies shall not be sold or otherwise provided for use in charitable gaming activities regulated by the department or in unlawful gambling activities. For each such sale, the supplier shall maintain the name, address, and telephone number of the purchaser. The supplier shall also obtain a written statement from the purchaser verifying that such supplies will not be used in charitable gaming or any unlawful gambling activity. Such statement shall be dated and kept on file for [ a minimum of ] three years from the [ ~~end~~ close ] of a fiscal year. Payment for such sales in excess of \$50 shall be accepted in the form of a check.

3. Sell pull-tabs, seal cards, [ ~~event game cards~~, ] and electronic [ ~~game cards~~ pull-tabs ] to organizations for use only upon the premises owned or exclusively leased by the organization and at such times as the portion of the premises in which the pull-tabs, seal cards, [ ~~event game cards~~, ] or electronic [ ~~game cards~~ pull-tabs ] are sold is open only to members and their guests as authorized by § 18.2-340.26:1 of the Code of Virginia. Each such sale shall be accounted for separately and the accompanying invoice shall be clearly marked: "For Use in Social Quarters Only."

All such sales shall be documented pursuant to subsection H of this section and reported to the department pursuant to subsection J of this section. This provision shall not apply to the sale to landlords of equipment and video systems as defined in this chapter. [ ~~Equipment and video systems shall not include dispensing devices, electronic bingo devices, and player devices.~~ ]

D. A supplier shall not sell, offer to sell, or otherwise provide charitable gaming supplies to any individual or organization in the Commonwealth of Virginia unless the charitable gaming supplies are purchased or obtained from a manufacturer or another permitted supplier. Suppliers may take back for credit and resell supplies received from an organization with a permit that has ceased charitable gaming or is returning supplies not needed.

E. No supplier, supplier's agent, or employee may be involved in the management, operation, or conduct of charitable gaming in the Commonwealth of Virginia. No member of a supplier's immediate family or person residing in the same household as a supplier may be involved in the

management, operation, or conduct of charitable gaming of any customer of the supplier in the Commonwealth of Virginia. No supplier, supplier's agent, or employee may participate in any charitable gaming of any customer of the supplier in the Commonwealth of Virginia. For the purposes of this regulation, servicing of electronic [ bingo ] devices [ or electronic pull-tab devices ] shall not be considered conduct or participation.

F. The department shall conduct a background investigation prior to the issuance of a permit to any supplier. The investigation may include, but shall not be limited to, the following:

1. A search of [ ~~the Virginia Central Criminal Records Exchange (CCRE)~~ criminal history ] on all officers, directors, and owners; and
2. Verification of current compliance with Commonwealth of Virginia tax laws.

If the officers, directors, or owners are domiciled outside of the Commonwealth of Virginia, or have resided in the Commonwealth of Virginia for fewer than five years, a criminal history search conducted by the appropriate authority in any state in which they have resided during the previous five years shall be provided by the applicant.

G. Appropriate information and authorizations shall be provided to the department to verify information cited in subsection F of this section.

H. Suppliers shall document each sale or rental of charitable gaming supplies to an organization in the Commonwealth of Virginia on an invoice, which reflects the following:

1. Name, address, and OCG number of the organization;
2. Date of sale or rental and location where bingo supplies are shipped if different from the billing address;
3. Name, form number, and serial number of each deal of instant bingo, pull-tabs, seal cards, electronic [ ~~game cards~~ pull-tabs ], or bundles and the [ ~~number~~ quantity ] of cards in each deal;
4. Quantity of deals sold, the cost per deal, the selling price per card, the cash take-in per deal, and the cash payout per deal;
5. Serial number of the top sheet in each pack of disposable bingo paper, the [ ~~number~~ quantity ] of sheets in each pack or pad, the cut and color, and the [ ~~number~~ quantity ] of packs or pads sold;
6. Serial number for each series of uncollated bingo paper and the number of sheets sold;
7. Detailed information concerning the type, quantity, and individual price of any other charitable gaming supplies or related items including, but not limited to, concealed face bingo cards, hard cards, markers or daubers and refills, or any other merchandise. For concealed face bingo cards, the [ ~~number~~ quantity ] of sets, price per set, and the serial number of each set shall be included;

8. Serial number of each [ ~~player~~ electronic pull-tab ] device, [ ~~the form~~ a description of the physical attributes ] of the [ ~~player~~ electronic pull-tab ] device, the [ ~~number~~ quantity ] of [ ~~player~~ electronic pull-tab ] devices sold or rented, and the physical address to which each [ ~~player~~ electronic pull-tab ] device is shipped [ or delivered ];

9. Serial number and description of any other equipment sold or rented that is used to facilitate the distribution, play, and redemption of electronic [ ~~game cards~~ pull-tabs ] and the physical address to which the equipment is shipped [ or delivered ]; and

10. Any type of equipment, device, or product manufactured for or intended to be used in the conduct of charitable games including, but not limited to, designators, designator receptacles, number display boards, selection devices, dispensing machines, and verification devices.

I. Suppliers shall ensure that two copies of the detailed invoice are provided to the customer for each sale of charitable gaming supplies.

J. Each supplier shall provide a report to the department by March 1 of each year on sales of charitable gaming supplies for the fiscal year ending December 31 of the previous year to each organization in the Commonwealth of Virginia. This report shall be provided to the department [ ~~on computer disk or other department approved media~~ via a department-approved electronic medium ]. The report shall include the name and address of each organization and the following information for each sale or transaction:

1. Bingo paper sales including purchase price, description of paper to include [ ~~number~~ quantity ] of sheets in pack and [ ~~number~~ quantity ] of faces on sheet, and quantity of single sheets or packs shipped;
2. Deals of instant bingo, pull-tabs, seal cards, electronic [ ~~game cards~~ pull-tabs ], or any other raffle sales including purchase price, deal name, deal form number, [ ~~number~~ quantity ] of tickets in deal, ticket price, cash take-in per deal, cash payout per deal, and [ ~~number~~ quantity ] of deals;
3. Electronic bingo device sales including purchase or rental price and [ ~~number~~ quantity ] of units;
4. Equipment used to facilitate the distribution, play, and redemption of electronic [ ~~game cards~~ pull-tabs ] including purchase or rental price, description of equipment, [ ~~number~~ quantity ] of units of each type of equipment, and the physical address to which the equipment is shipped [ or delivered ]; and
5. Sales of miscellaneous items such as daubers, markers, and other merchandise including purchase price, description of product, and [ ~~number~~ quantity ] of units.

K. The department shall set manufacturing and testing criteria for all electronic bingo devices and other equipment used in the conduct of charitable gaming. An electronic bingo device shall not be sold, leased, or otherwise furnished to any

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# Regulations

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person in the Commonwealth of Virginia for use in the conduct of charitable gaming until an identical sample device containing identical proprietary software has been certified by a testing facility that has been formally recognized by the department as a testing facility that upholds the standards of integrity established by the department. The testing facility must certify that the device conforms, at a minimum, to the restrictions and conditions set forth in these regulations. Once the testing facility reports the test results to the department, the department will either approve or disapprove the submission and inform the manufacturer of the results within 10 business days. If any such equipment does not meet the department's criteria, it shall be recalled and shall not be distributed in the Commonwealth of Virginia. The cost of testing shall be borne by the manufacturer of such equipment.

L. Department employees shall have the right to inspect all electronic and mechanical equipment used in the conduct of charitable gaming.

M. Suppliers, their agents and employees, members of the supplier's immediate family, or persons residing in their household shall not make any loan directly or indirectly to any organization or officer, director, game manager, or entity involved in the management, operation, or conduct of charitable gaming of a supplier's customer located in the Commonwealth of Virginia.

N. No supplier, supplier's agent, or employee shall directly or indirectly provide a rebate, discount, or refund to any person other than an organization that purchases supplies or leases or purchases equipment from the supplier. All such transactions shall be recorded on the supplier's account books.

O. A supplier shall not rent, sell, or otherwise provide electronic bingo devices or equipment used to distribute, play, or redeem electronic [~~game cards~~ pull-tabs ] unless the supplier possesses a valid permit in the Commonwealth of Virginia.

P. A written agreement specifying the terms of lease or rental shall be required for any electronic bingo devices or equipment used to distribute, play, or redeem electronic [~~game cards~~ pull-tabs ] provided to an organization.

**11VAC15-40-130. Construction and other standards for bingo, instant bingo, pull-tabs, seal cards, [~~event games,~~ ] raffles, electronic bingo devices, and instant bingo, pull-tab, and seal card dispensers.**

A. No supplier shall knowingly sell or otherwise provide to an organization and no organization shall knowingly use bingo supplies unless they conform to the following construction standards:

1. Disposable paper sold shall be of sufficient weight and quality to allow for clearly readable numbers and to prevent ink from spreading, bleeding, or otherwise obscuring other numbers or cards.
2. Each sheet of disposable bingo paper shall be comprised of cards bearing a serial number. No serial number shall be

repeated on or in the same style, series, and color of cards within a three-year period.

3. Disposable bingo paper assembled in books or packs shall not be separated except for single-sheet specials. This provision does not apply to two-part cards on which numbers are filled by players and one part is separated and provided to an organization for verification purposes.

4. Each unit of disposable bingo paper shall have an exterior label listing the following information:

- a. Description of product;
- b. Number of packs or loose sheets;
- c. Series numbers;
- d. Serial number of the top sheet;
- e. Number of cases;
- f. Cut of paper; and
- g. Color of paper.

5. "Lucky Seven" bingo cards or electronic facsimiles thereof shall have a single face where seven numbers shall be chosen. "Lucky Seven" sheets or electronic facsimiles thereof shall have multiple faces where seven numbers shall be chosen per face.

B. No supplier shall knowingly sell or otherwise provide to an organization and no organization shall knowingly use instant bingo, pull-tab, [ or ] seal cards [~~or event game cards~~ ] unless they conform to the following construction standards:

1. Cards shall be constructed so that concealed numbers, symbols, or winner protection features cannot be viewed or determined from the outside of the card by using a high intensity lamp of 500 watts, with or without utilizing a focusing lens.
2. Deals shall be designed, constructed, glued, and assembled in a manner to prevent determination of a winning or losing ticket without removing the tabs or otherwise uncovering the symbols or numbers as intended.
3. Each card in a deal shall bear the same serial number. Only one serial number shall be used in a deal. No serial number used in a deal shall be repeated by the same manufacturer on that same manufacturer's form within a three-year period. The flare of each deal shall accompany the deal and shall have affixed to it the same serial number as the tickets in such deal.
4. Numbers or symbols on cards shall be fully visible in the window and shall be placed so that no part of a number or symbol remains covered when the tab is removed.
5. Cards shall be glued on all edges and around each window. Glue shall be of sufficient strength and type to prevent the undetectable separation or delamination of the card. For banded tickets, the glue must be of sufficient strength and quality to prevent the separation of the band from the ticket.

6. The following minimum information shall be printed on a card:

a. Break open pull-tab [ ~~7~~ and ] instant bingo cards [ ~~and event game cards~~ ]:

(1) Name of the manufacturer or its distinctive logo;

(2) Name of the game;

(3) Manufacturer's form number;

(4) Price per individual card or bundle;

(5) Unique minimum five-digit game serial number printed on the game information side of the card; and

(6) Number of winners and respective winning number or symbols and specific prize amounts unless accompanied by a manufacturer's preprinted publicly posted flare with that information.

b. Banded pull-tabs:

(1) Manufacturer;

(2) Serial number;

(3) Price per individual card or bundle unless accompanied by a manufacturer's preprinted publicly posted flare with that information; and

(4) Number of winners and respective winning numbers or symbols and prize amounts or a manufacturer's preprinted publicly posted flare giving that information.

7. All seal card games sold to organizations shall contain the sign-up sheet, seals, and cards packaged together in each deal.

C. Raffle tickets used independent of a bingo game must conform to the following construction standards:

1. Each ticket shall have a detachable section and shall be consecutively numbered.

2. Each section of a ticket shall bear the same number. The section retained by the organization shall provide space for the purchaser's name, complete address, and telephone number.

3. The following information shall be printed on the purchaser's section of each ticket:

a. Dates and times of drawings;

b. Locations of the drawings;

c. Name of the charitable organization conducting the raffle;

d. Price of the ticket;

e. Charitable gaming permit number; and

f. Prizes.

Exceptions to these construction standards are allowed only with prior written approval from the department.

D. Electronic bingo.

1. The department, at its discretion, may require additional testing of electronic bingo devices at any time. Such additional testing shall be at the manufacturer's expense

and shall be a condition of the continued use of such device.

2. All electronic bingo devices shall use proprietary software and hardware or commonly available software and [ ~~computers hardware~~ ] and shall be enabled for play on the premises where the game is to be played.

3. Each electronic bingo device shall have a unique identification number [ ~~permanently-coded~~ securely encoded ] into the software of [ ~~such the~~ ] device. [ The unique identification number shall not be alterable by anyone other than the manufacturer of the electronic bingo device. ] Manufacturers of electronic bingo devices shall employ sufficient security safeguards in designing and manufacturing the devices such that it may be verified that all proprietary software components are authentic copies of the approved software components and all functioning components of the device are operating with identical copies of approved software programs. The [ electronic bingo ] device must also have sufficient security safeguards so that any restrictions or requirements authorized by the department or any approved proprietary software are protected from alteration by unauthorized personnel. The [ electronic bingo ] device shall not contain hard-coded or unchangeable passwords. Security measures that may be employed to comply with these provisions include, but are not limited to, the use of dongles, digital signature comparison hardware and software, secure boot loaders, encryption, and key and callback password systems.

[ 4. A firewall or equivalent hardware device configured to block all inbound and outbound traffic that has not been expressly permitted and is not required for the continued use of the electronic bingo system must exist between the electronic bingo system and any external point of access. ]

[ 4. 5. ] Electronic bingo devices shall not allow a player to create a card by the input of specific numbers on each card. Manufacturers shall ensure that an electronic bingo device does not allow for the play of any bingo card faces other than those verifiably purchased by the patron.

[ 5. 6. ] Electronic bingo devices shall not accept cash, currency, or tokens for play.

[ 6. 7. ] Electronic bingo devices shall require the manual entry of numbers as they are called, the manual verification of numbers as they have been electronically transmitted to the device, or the full automatic daubing of numbers as each number is called. During the play of a bingo game, the transmission of data to electronic bingo devices shall be limited to one-way communication to the [ electronic bingo ] device and shall consist only of [ ~~the number called~~ publicly available information regarding the current game ].

[ 7. 8. ] A device shall not allow the play of more than 54 cards per device per game.

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# Regulations

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[ ~~8-9.~~ ] The electronic bingo device system shall record a sequential transaction number or audit tracking number for each transaction. The system shall not allow the manual resetting or changing of this number.

[ ~~9-10.~~ ] The system shall produce a receipt [ ~~and a transaction log~~ for each electronic bingo device rented or otherwise provided ] containing the following:

- a. Organization name;
- b. Location of bingo game;
- [ c. Date and time of the transaction; ]
- [ e. d. ] Sequential transaction or receipt number;
- [ d. Number of electronic bingo cards loaded;
- e. Cost of electronic bingo cards loaded; and
- f. Date and time of each transaction.
- e. Description of each electronic bingo product loaded. The description must include the quantity of bingo card faces that appear on each electronic bingo product (i.e., 9 Jackpot) and the sales price of each electronic bingo product;
- f. Quantity of each electronic bingo product loaded; and
- g. Total sales price of the transaction. ]

[ ~~10-11.~~ ] The system shall maintain and make available on demand a summary report for each session that includes the following:

- a. Organization name;
- b. [ ~~Physical location~~ Location ] of bingo game;
- c. Date and time of each transaction;
- d. Sequential transaction or receipt number [ of each transaction ];
- [ e. Number of electronic bingo cards loaded;
- f. Cost of electronic bingo cards loaded;
- e. Description of each electronic bingo product loaded each session. The description must include the quantity of bingo card faces that appear on each electronic bingo product and the sales price of each electronic bingo product;
- f. Quantity of each electronic bingo product loaded;
- g. Total sales price of each electronic bingo product loaded; and
- h. Total sales price for each transaction; ]

[ ~~g. i.~~ ] A transaction history correlating [ the sequential transaction number of ] each electronic [ bingo device ] sale to the [ ~~device~~ unique ] identification number of the [ electronic bingo ] device on which the sale was played;

[ ~~h. j.~~ ] Sufficient information to identify voids [ and returns ], including the date and time of each voided transaction [ and return, the sequential transaction number, and the cost of voided transactions and returns ]; [ and ]

[ ~~i.~~ Sufficient information to identify device returns; and

[ ~~j. k.~~ ] Total gross receipts for each session.

[ ~~11-12.~~ ] Each [ electronic bingo ] device shall be programmed to automatically erase all stored electronic [ bingo ] cards at the end of the last game of a session, within a set time from their rental to a player, or by some other clearance method approved by the department.

[ ~~12-13.~~ ] All [ electronic bingo ] devices shall be reloaded with another set of [ electronic bingo ] cards at the beginning of each session if the devices are to be reused at the same location.

E. In instances where a defect in packaging or in the construction of deals or electronic [ bingo ] devices is discovered by or reported to the department, the department shall notify the manufacturer of the deals or [ electronic bingo ] devices containing the alleged defect. Should the department, in consultation with the manufacturer, determine that a defect exists, and should the department determine the defect affects game security or otherwise threatens public confidence in the game, the department may, with respect to deals or electronic [ bingo ] devices for use still located within the Commonwealth of Virginia, require the supplier to:

1. Recall the deals or electronic [ bingo ] devices affected that have not been sold or otherwise provided; or
2. Issue a total recall of all affected deals or electronic [ bingo ] devices.

[ ~~F. No instant bingo, pull-tab, or seal card dispenser may be sold, leased, or otherwise furnished to any person or organization in the Commonwealth of Virginia or used in the conduct of charitable gaming until an identical sample device containing identical proprietary software, if applicable, has been certified by a testing facility that has been formally recognized by the department as a testing facility that upholds the standards of integrity established by the department. The cost of testing shall be borne by the manufacturer of such equipment. In addition, suppliers and manufacturers of such dispensers shall comply with the requirements of The Gambling Devices Act of 1962 (15 USC §§ 1171-1178).~~

G. All instant bingo, pull tab, or seal card dispensing devices must meet the following standards F. No supplier shall knowingly sell or otherwise provide to an organization and no organization shall knowingly use an instant bingo, pull-tab, or seal card dispenser unless the dispenser conforms to the following standards ]:

1. Each dispenser shall be manufactured in a manner that ensures a pull-tab ticket is dispensed only after insertion of United States currency or coinage into the dispenser. Such ticket and any change due shall be the only items dispensed from the machine.
2. Each dispenser shall be manufactured in a manner that ensures the [ ~~device~~ dispenser ] neither displays nor has the

capability of displaying or otherwise identifying an instant bingo, pull-tab, or seal card winning or nonwinning ticket.

3. Each dispenser shall be manufactured in such a manner that any visual animation does not simulate or display rolling or spinning reels or produce audible music or enhanced sound effects.

4. Each dispenser shall be equipped with separate locks for the instant bingo, pull-tab, or seal card supply modules and money boxes. Locks shall be configured so that no one key will operate both the supply modules and money boxes.

[ H. G. ] The department may require [ additional ] testing of a dispensing device at any time to ensure that it meets construction standards and allows for fair play. Such tests shall be conducted at the cost of the manufacturer of such [ dispensing ] devices.

[ F. H. ] The face value of [ cards the instant bingo, pull-tab, or seal cards ] being dispensed shall match the amount deposited in the currency/coin acceptor less change provided.

[ I. A dispensing device shall only dispense instant bingo, pull-tab, or seal cards that conform to the construction standards established in subsection B of this section and the randomization standards established in 11VAC15-40-140.

J. Suppliers and manufacturers of instant bingo, pull-tab, or seal card dispensers shall comply with the requirements of the Gambling Devices Act of 1962 (15 USC §§ 1171-1178). ]

**11VAC15-40-140. Instant bingo, pull-tabs, [ or ] seal cards [ , or event game cards ] randomization standards.**

All instant bingo, pull-tabs, [ or ] seal cards [ ~~, or event game cards~~ ] shall meet the following randomization standards:

1. Deals shall be assembled so that winning tickets are placed throughout each deal.
2. Deals shall be assembled and packaged in a manner that prevents isolation of winning cards due to variations in printing, graphics, colors, sizes, appearances of cut edges, or other markings of cards.
3. Winning cards shall be distributed and mixed among all other cards in a deal so as to eliminate any pattern between deals or portions of deals from which the location or approximate location of any winning card may be determined.

**[ 11VAC15-40-143. Electronic random number generator standards.**

A. Electronic random number generators shall not be sold, leased, or otherwise furnished to an organization for use in the conduct of bingo until an identical sample device containing identical proprietary software has been certified by a testing facility that has been formally recognized by the department as a testing facility that upholds the standards of integrity established by the department. The cost of testing shall be borne by the manufacturer of such equipment.

B. An electronic random number generator used in the conduct of bingo shall produce output that is statistically random.

1. Numbers produced by an electronic random number generator used in the conduct of bingo shall be statistically random individually and in the permutations and combinations used in the application under the rules of the game.
2. Numbers produced by an electronic random number generator used in the conduct of bingo shall pass the statistical tests for randomness to a 99% confidence level. Statistical tests for randomness may include:
  - a. Chi-square test;
  - b. Equi-distribution (frequency) test;
  - c. Gap test;
  - d. Poker test;
  - e. Coupon collector's test;
  - f. Permutation test;
  - g. Run test (patterns of occurrences shall not be recurrent);
  - h. Spectral test;
  - i. Serial correlation test potency and degree of serial correlation (outcomes shall be independent from the previous game); and
  - j. Test on subsequences.

C. An electronic random number generator used in the conduct of bingo shall produce output that is unpredictable.

1. It shall not be feasible to predict future outputs of a random number generator even if the algorithm and the past sequence of outputs are known.
2. Unpredictability shall be ensured by reseeding or by continuously cycling the random number generator and by a sufficient number of random number generator states for the applications supported.
3. Reseeding may be used where the reseeding input is at least as statistically random as, and independent of, the output of the random number generator being reseeded.

D. An electronic random number generator used in the conduct of bingo shall produce output that is nonrepeating. A random number generator shall not be initialized to reproduce the same output stream that it has produced before, nor shall any two instances of a random number generator produce the same stream as each other.

E. Software that calls an electronic random number generator used in the conduct of bingo to derive game outcome events shall immediately use the output returned in accordance with the game rules.

F. The outputs of an electronic random number generator used in the conduct of bingo shall not be arbitrarily discarded or selected.



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# Regulations

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G. Where a sequence of outputs is required, the whole of the sequence in the order generated shall be used in accordance with the game rules.

H. An electronic random number generator used in the conduct of bingo that provides output scaled to given ranges shall:

1. Be independent and uniform over the range;
2. Provide numbers scaled to the ranges required by game rules, and notwithstanding the requirements of subdivision 3 of this subsection, may discard numbers that do not map uniformly onto the required range, but shall use the first number in sequence that does map correctly to the range; and
3. Be capable of producing every possible outcome of a game according to its rules, and use an unbiased algorithm. A scaling algorithm is considered to be unbiased if the measured bias is no greater than 1 in 100 million.

I. An electronic random number generator that an organization is using to conduct bingo prior to November 7, 2012, is not required to be certified.

## Part IV

### Electronic Games of Chance Systems

#### Article 1

#### Manufacturers

#### **11VAC15-40-147. Manufacturers of electronic games of chance systems: application, qualifications, suspension, revocation or refusal to renew permit, maintenance, and production of records.**

A. As used in this section, "manufacturer" means a person or entity that assembles from raw materials or subparts an electronic games of chance system.

B. Prior to providing any electronic games of chance system, a manufacturer shall submit an application on a form prescribed by the department and receive a permit. A \$1,000 application fee payable to the Treasurer of Virginia is required. In addition, a manufacturer must be authorized to conduct business in the Commonwealth of Virginia, which may include, but not be limited to, registration with the State Corporation Commission, the Department of Taxation, and the Virginia Employment Commission. The actual cost of background investigations for a permit may be billed by the department to an applicant.

C. The department may refuse to issue a permit or may suspend or revoke a permit if an officer, director, employee, agent, or owner:

1. Is operating without a valid license, permit, or certificate as a supplier or manufacturer in any state in the United States;
2. Fails or refuses to recall a product as directed by the department;

3. Conducts business with unauthorized entities or is not authorized to conduct business in the Commonwealth of Virginia;

4. Has been convicted of or pleaded nolo contendere to any crime as specified by § 18.2-340.34 B of the Code of Virginia; has had any license, permit, certificate, or other authority related to activities defined as charitable gaming in the Commonwealth suspended or revoked in the Commonwealth or in any other jurisdiction; has failed to file or has been delinquent in excess of one year in the filing of any tax returns or the payment of any taxes due the Commonwealth; or has failed to establish a registered office or registered agent in the Commonwealth if so required by § 13.1-634 or 13.1-763 of the Code of Virginia. As this provision relates to employees or agents, it shall only apply to individuals involved in sales to or solicitations of customers in the Commonwealth of Virginia;

5. Fails to notify the department within 20 days of the occurrence, knowledge, or receipt of the filing of any administrative or legal action relating to charitable gaming or the distribution of electronic games of chance systems involving or concerning the manufacturer, any officers or directors, employees, agent, or owner during the term of its permit;

6. Fails to provide to the department upon request a current Letter for Company Registration on file with the U.S. Department of Justice - Gambling Devices Registration Unit, if required in accordance with the Gambling Devices Act of 1962 (15 USC §§ 1171-1178) for any device that it distributes in the Commonwealth of Virginia; or

7. Has been engaged in conduct that would compromise the department's objective of maintaining the highest level of integrity in charitable gaming.

D. A manufacturer shall not distribute electronic games of chance systems for use by anyone in the Commonwealth of Virginia other than to a permitted charitable gaming organization or a permitted supplier. However, a manufacturer may:

1. Distribute an electronic games of chance system to an organization that expects to gross the amount set forth in § 18.2-340.23 of the Code of Virginia or less in any 12-month period, providing that the amount of such purchase would not be reasonably expected to produce more than the amount set forth in § 18.2-340.23 of the Code of Virginia in gross sales. For each such organization, the manufacturer shall maintain the name, address, and telephone number. The manufacturer shall also obtain a written and signed statement from an officer or game manager of such organization confirming that gross receipts are expected to be the amount set forth in § 18.2-340.23 of the Code of Virginia or less. Such statement shall be dated and kept on file for a minimum of three years from the close of a fiscal year.

2. Distribute electronic games of chance systems to an organization for use only upon the premises owned or exclusively leased by the organization and at such times as the portion of the premises in which electronic pull-tabs are sold is open only to members and their guests as authorized by § 18.2-340.26:1 of the Code of Virginia. Each such distribution shall be accounted for separately and the accompanying invoice shall be clearly marked: "For Use in Social Quarters Only."

All such distributions shall be documented pursuant to subsection H of this section and reported to the department pursuant to subsection J of this section.

E. No manufacturer of electronic games of chance systems, the manufacturer's agent, or the manufacturer's employee may be involved in the management, operation, or conduct of charitable gaming in the Commonwealth of Virginia. No member of a manufacturer's immediate family or person residing in the same household as a manufacturer may be involved in the management, operation, or conduct of charitable gaming of any customer of the manufacturer in the Commonwealth of Virginia. No manufacturer of electronic games of chance systems, the manufacturer's agent, or the manufacturer's employee may participate in any charitable gaming of any customer of the manufacturer in the Commonwealth of Virginia. For the purposes of this regulation, servicing of electronic games of chance systems shall not be considered conduct or participation.

F. The department shall conduct a background investigation prior to the issuance of a permit to any manufacturer. The investigation may include, but shall not be limited to, the following:

1. A search of criminal history records on all officers, directors, and owners; and
2. Verification of current compliance with Commonwealth of Virginia tax laws.

If the officers, directors, or owners are domiciled outside of the Commonwealth of Virginia, or have resided in the Commonwealth of Virginia for fewer than five years, a criminal history search conducted by the appropriate authority in any state in which they have resided during the previous five years shall be provided by the applicant.

G. Appropriate information and authorizations shall be provided to the department to verify information cited in subsection F of this section.

H. Manufacturers shall document each distribution an electronic games of chance system to any person for use in the Commonwealth of Virginia on an invoice, which reflects the following:

1. Name, address, and OCG number of the organization or supplier;
2. Date of sale or rental and location where the electronic games of chance system is shipped or delivered, if different from the billing address;

3. Name, form number, and serial number of each deal of electronic pull-tabs;

4. Quantity of deals sold, the cost per deal, the selling price per card, the cash take-in per deal, and the cash payout per deal;

5. Serial number of each electronic pull-tab device, a description of the physical attributes of the electronic pull-tab device, the quantity of electronic pull-tab devices sold or rented, and the physical address to which each electronic pull-tab device is shipped or delivered; and

6. Serial number and description of any other equipment sold or rented that is used to facilitate the distribution, play, and redemption of electronic pull-tabs and the physical address to which the equipment is shipped or delivered.

I. Manufacturers shall ensure that two copies of the detailed invoice are provided to the customer for each distribution of electronic games of chance systems.

J. Each manufacturer shall provide a report to the department by March 1 of each year on distribution of electronic games of chance systems for the fiscal year ending December 31 of the previous year to each organization and permitted supplier in the Commonwealth of Virginia. This report shall be provided to the department via a department-approved electronic medium. The report shall include the name and address of each organization and permitted supplier and the following information for each sale or transaction:

1. Deals of electronic pull-tabs including purchase price, deal name, deal form number, quantity of electronic pull-tabs in deal, electronic pull-tab price, cash take-in per deal, cash payout per deal, and quantity of deals; and
2. Equipment used to facilitate the distribution, play, and redemption of electronic pull-tabs including purchase or rental price, description of equipment, quantity of units of each type of equipment, and the physical address to which the equipment is shipped or delivered.

K. A manufacturer, its agents and employees, members of a manufacturer's immediate family, or persons residing in a manufacturer's household shall not make any loan directly or indirectly to any organization or officer, director, game manager, or entity involved in the management, operation, or conduct of charitable gaming of the manufacturer's customer located in the Commonwealth of Virginia.

L. A manufacturer, its agent, or its employee shall not directly or indirectly provide a rebate, discount, or refund to any person other than an organization that purchases or leases an electronic games of chance system from the manufacturer. All such transactions shall be recorded on the manufacturer's account books.

M. A written agreement specifying the terms of lease or rental shall be required for any equipment used to distribute, play, or redeem electronic pull-tabs provided to an organization or permitted supplier. ]

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# Regulations

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[ Part IV  
Electronic Games of Chance Systems ]

Article [ 42 ]  
General Requirements

**11VAC15-40-150. Approval of distributed pull-tab systems, validation systems, point-of-sale stations, and redemption terminals [ ; approval of game themes and sounds ].**

A. The department shall set manufacturing and testing criteria for all distributed pull-tab systems, validation systems, point-of-sale stations, redemption terminals, and other equipment used in the conduct of charitable gaming. A distributed pull-tab system, validation system, point-of-sale station, redemption terminal, or other equipment shall not be sold, leased, or otherwise furnished to any person in the Commonwealth of Virginia for use in the conduct of charitable gaming until an identical sample system or equipment containing identical software has been certified by a testing facility that has been formally recognized by the department as a testing facility that upholds the standards of integrity established by the department. The testing facility must certify that the distributed pull-tab system and associated hardware and software conform, at a minimum, to the requirements set forth in this chapter. Once the testing facility reports the test results to the department, the department will either approve or disapprove the distributed pull-tab system or system components and inform the manufacturer of the results within 10 business days. If any such system or equipment does not meet the department's criteria, it shall be recalled and shall not be distributed in the Commonwealth of Virginia. The cost of testing shall be borne by the manufacturer of such equipment.

B. No supplier [ or manufacturer ] shall knowingly sell or otherwise provide to an organization and no organization shall knowingly use a distributed pull-tab system, validation system, point-of-sale station, redemption terminal, or other equipment used to conduct charitable gaming unless it conforms to the requirements set forth in this regulation.

C. If a defect in a distributed pull-tab system, validation system, point-of-sale station, redemption terminal, or other equipment used to conduct charitable gaming is discovered by or reported to the department, the department shall notify the manufacturer of the system or equipment containing the alleged defect. Should the department, in consultation with the manufacturer, determine that a defect exists and should the department determine the defect affects game security or otherwise threatens public confidence in the game, the department may, with respect to any distributed pull-tab system, validation system, point of sale station, redemption terminal, or other equipment used to conduct charitable gaming still located within the Commonwealth of Virginia, require the supplier [ or manufacturer ] to issue a recall of all affected distributed pull-tab systems, validation systems,

point-of-sale stations, redemption terminals, or other equipment.

[ D. All game themes, sounds, and music shall be approved by the department prior to being available for play on an electronic pull-tab device in the Commonwealth of Virginia. ]

Article [ 23 ]

System Requirements

**11VAC15-40-160. Distributed pull-tab system.**

A distributed pull-tab system shall be dedicated primarily to electronic accounting, reporting, and the presentation, randomization, and transmission of electronic [ ~~game cards~~ pull-tabs ] to the [ ~~player~~ electronic pull-tab ] devices. It shall also be capable of generating the data necessary to provide the reports required within this article or otherwise specified by the department.

**11VAC15-40-170. Dispensing of electronic [ ~~game cards~~ pull-tabs ]:**

A distributed pull-tab system shall dispense, upon request, an electronic [ ~~game card or cards~~ pull-tab ]. All games must be played without replacement, drawing from a single finite game set.

**11VAC15-40-180. Game set requirements.**

Each game set shall meet the following minimum requirements:

1. Each game set shall be made up of a finite number of electronic [ ~~game cards~~ pull-tabs ];
2. The game set shall consist of a maximum of 25,000 electronic [ ~~game cards~~ pull-tabs ];
3. All electronic [ ~~game cards~~ pull-tabs ] in a particular game set shall be of the same purchase price;
4. The maximum win amount awarded per any one electronic [ ~~game cards~~ pull-tab ] shall not exceed the value set forth for pull-tabs by § 18.2-340.33 of the Code of Virginia;
5. Each game set shall be assigned a unique serial number; [ ~~and~~ ]
6. After randomization, game sets may be broken into subsets of equal size. If game subsets are used, they shall each be assigned a unique serial number and be traceable to a parent game set [ ; and
7. Game sets shall not be commingled. ]

**11VAC15-40-190. Game set definition.**

If the system has the capability to create a game set from a predefined set of criteria, the criteria must contain the following information:

1. Game ID;
2. Game set version;
3. Manufacturer;
4. Game name;
5. Paytable ID;

6. Purchase price per electronic [ ~~game card~~ pull-tab ];
7. Subset size;
8. Total number of subsets; and
9. Prize values with an associated index and frequency.

**11VAC15-40-200. Data required to be available for each game set.**

A. The following data shall be available prior to the opening of a game set for distribution and shall be maintained and be viewable both electronically and, if requested, by printed report, upon demand:

1. A unique serial number identifying each game set and/or subset;
2. A description of the game set sufficient to categorize the game set or subset relative to other game sets;
3. The total number of electronic [ ~~game cards~~ pull-tabs ] in the game set;
4. The number of game subsets to be created from the game set and the number of electronic [ ~~game cards~~ pull-tabs ] in each subset when applicable;
5. The payout percentage of the entire game set;
6. The purchase price per electronic [ ~~game cards~~ pull-tab ] assigned to the game set; and
7. Prize values with an associated index and frequency.

B. The following data shall be available subsequent to the completion of a game set and shall be maintained and viewable both electronically and, if requested, by printed report, upon demand:

1. A unique serial number identifying each game set and/or subset;
2. Description of the game set sufficient to categorize the game set relative to other game sets;
3. The total number of electronic [ ~~game cards~~ pull-tabs ] unsold;
4. The total number of electronic [ ~~game cards~~ pull-tabs ] purchased;
5. The time and date that the game set and/or each game subset became available for play;
6. The time and date that the game set and/or each game subset was completed or removed from play;
7. Location where game set and/or subset was played;
8. The final payout percentage of the game set when removed from play; and
9. The purchase price per electronic [ ~~game cards~~ pull-tab ] assigned to the game set.

C. In order to provide maximum game integrity, no audit or other determination of the status of any game set or any subset, including, but not limited to, a determination of the prizes won or prizes remaining to be won, shall be conducted by anyone while a game set or subset is in play without causing termination of the entire game set or subset. Only

upon game set termination shall the details of the associated game set and subsets be revealed to the individual or individuals performing the audit.

D. Once terminated, a game set shall not be able to be reopened.

**11VAC15-40-210. Security requirements.**

A. A distributed pull-tab system computer must be in a locked, secure enclosure with key controls in place.

B. A distributed pull-tab system shall provide a means for terminating the game set if information about electronic [ ~~game cards~~ pull-tabs ] in an open game set has been accessed or at the discretion of the department. In such cases, traceability of unauthorized access including time and date, users involved, and any other relevant information shall be available.

C. A distributed pull-tab system shall not permit the alteration of any accounting or significant event information that was communicated from the [ ~~player~~ electronic pull-tab ] device without supervised access controls. In the event financial data is changed, an automated audit log must be capable of being produced to document the following:

1. Data element altered;
2. Data element value prior to alteration;
3. Data element value after alteration;
4. Time and date of alteration; and
5. Personnel that performed alteration.

D. A distributed pull-tab system must provide password security or other secure means of ensuring data integrity and enforcing user permissions for all system components through the following means:

1. All programs and data files must only be accessible via the entry of a password that will be known only to authorized personnel;
2. The distributed pull-tab system must have multiple security access levels to control and restrict different classes;
3. The distributed pull-tab system access accounts must be unique when assigned to the authorized personnel and shared accounts amongst authorized personnel must not be allowed;
4. The storage of passwords and PINs must be in an encrypted, nonreversible form; and
5. A program or report must be available that will list all registered users on the distributed pull-tab system including their privilege level.

E. All components of a distributed pull-tab system [ that allow access to users, other than end-users for game play, ] must have a password sign-on with two-level codes comprising the personal identification code and a personal password.

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# Regulations

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1. The personal identification code must have a length of at least six ASCII characters; and

2. The personal password must have a minimum length of six alphanumeric characters, which should include at least one nonalphabetic character.

F. A distributed pull-tab system must have the capability to control potential data corruption that can be created by multiple simultaneous log-ons by system management personnel.

1. A distributed pull-tab system shall specify which of the access levels allow for multiple simultaneous sign-ons by different users and which of the access levels do not allow for multiple sign-ons, and, if multiple sign-ons are possible, what restrictions, if any, exist; or

2. If a distributed pull-tab system does not provide adequate control, a comprehensive procedural control document must be drafted for the department's review and approval.

G. Distributed pull-tab system software components/modules shall be verifiable by a secure means at the system level. A distributed pull-tab system shall have the ability to allow for an independent integrity check of the components/modules from an outside source and is required for all control programs that may affect the integrity of the distributed pull-tab system. This must be accomplished by being authenticated by a third-party device, which may be embedded within the distributed pull-tab system software or having an interface or procedure for a third-party application to authenticate the component. This integrity check will provide a means for field verification of the distributed pull-tab system components.

H. A distributed pull-tab system may be used to configure and perform security checks on [ ~~player~~ electronic pull-tab ] devices, provided such functions do not affect the security, integrity, or outcome of any game and meets the requirements set forth in this regulation regarding program storage devices.

## **11VAC15-40-220. Backup and recovery.**

A. A distributed pull-tab system computer shall have a separate physical medium for securely storing game sets or subsets on the computer, which shall be mirrored in real time by a backup medium.

B. All data required to be available or reported by this chapter must be retained for a period of not less than three years [ from the close of the fiscal year ].

C. All storage of critical data shall utilize error checking and be stored on a nonvolatile physical medium.

D. The database shall be stored on redundant media so that no single failure of any portion of the system would result in the loss or corruption of data.

E. In the event of a catastrophic failure when the distributed pull-tab system cannot be restarted in any other way, it shall be possible to reload the distributed pull-tab system from the

last viable backup point and fully recover the contents of that backup, to consist of at least the following information:

1. All significant events;

2. All accounting information;

3. Auditing information, including all open game sets and the summary of completed game sets; and

4. Employee files with access levels.

## **11VAC15-40-230. Electronic accounting and reporting.**

A. One or more electronic accounting systems shall be required to perform reporting and other functions in support of distributed pull-tab system. The electronic accounting system shall not interfere with the outcome of any gaming function.

B. The following reporting capabilities must be provided by the electronic accounting system:

1. Electronic [ ~~game card~~ pull-tab ] game set report – game sets in play. An electronic [ ~~game card~~ pull-tab ] game set report must be available on demand for each game set currently in play. Game cards, outcomes, or prizes must not be revealed. The report must contain the following information:

a. A unique serial number identifying each game set and/or subsets;

b. A description of the game set sufficient to categorize the game set or subset relative to other game sets;

c. The total number of electronic [ ~~game card~~ pull-tabs ] in the game set;

d. The number of game subsets to be created from the game set and the number of electronic [ ~~game cards~~ pull-tabs ] in each subset when applicable;

e. The theoretical payout percentage of the entire game set;

f. The purchase price per electronic [ ~~game card~~ pull-tab ] assigned to the game set;

g. The time and date that the game set and/or each game subset became available for play; and

h. Location where the game set and/or subset is being played.

2. Electronic [ ~~game card~~ pull-tab ] game set report – completed game set. An electronic [ ~~game card~~ pull-tab ] game set report must be available on demand, for each completed game set. The report must contain the following information:

a. A unique serial number identifying each game set and/or subset;

b. Description of the game set sufficient to categorize the game set relative to other game sets;

c. The total number of electronic [ ~~game card~~ pull-tabs ] unsold;

- d. The total number of electronic [ ~~game card~~ pull-tabs ] purchased;
- e. The time and date that the game set and/or each game subset became available for play;
- f. The time and date that the game set and/or each game subset was completed or removed from play;
- g. Location where game set and/or subset was played;
- h. The final payout percentage of the game set when removed from play; and
- i. The purchase price per electronic [ ~~game card~~ pull-tab ] assigned to the game set.

3. A report that shall indicate all prizes that exceed the threshold that triggers additional procedures to be followed for the purpose of compliance with federal tax reporting requirements. At a minimum, on a daily and monthly basis, the report shall provide the following information per [ ~~player~~ electronic pull-tab ] device:

- a. The date and time won;
- b. Location of prize award; and
- c. Amount of each prize occurrence.

4. Liability report. A liability report shall provide a summary of the outstanding funds that carry from business day to business day. At a minimum, this report shall include:

- a. Amount of prizes and/or vouchers that were awarded in dollars and cents, but have not yet been claimed that have not yet expired; and
- b. Summary of all outstanding accounts.

~~[ 5. Master reconciliation report. A master reconciliation report must be available on a per session basis, monthly basis, and quarterly basis at a minimum. A master reconciliation report shall include the following:~~

- ~~a. Total of all moneys used to purchase electronic game cards;~~
- ~~b. Total of all prizes, in dollars and cents, awarded from electronic game cards;~~
- ~~e. Total of all moneys inserted into a player device or provided to a cashier for the purchase of electronic game cards; and~~
- ~~d. Total of all moneys removed from a player device. ]~~

C. A distributed pull-tab system shall be capable of providing an electronic file in a format specified by the department on a periodic basis to a location specified by the department. The data to be reported will contain, at a minimum, the following items per session:

- 1. Organization identification;
- 2. Session date;
- 3. Total cash in;
- 4. Total cash out;
- 5. Total cash played;

- 6. Total cash won;
- 7. For all game sets on the system in play or in inventory:
  - a. Serial number;
  - b. Description;
  - c. Ticket price;
  - d. Number of subsets if applicable;
  - e. Number of tickets or number of tickets per subset;
  - f. Theoretical return percentage; and
  - g. Date game set was opened for play, when applicable; and
- 8. For all game sets completed or closed since the previous reporting date:
  - a. Serial number;
  - b. Description;
  - c. Ticket price;
  - d. Number of subsets, if applicable;
  - e. Number of tickets or number of tickets per subset;
  - f. Theoretical return percentage;
  - g. Date game set was opened;
  - h. Date game set was closed;
  - i. Total tickets sold;
  - j. Total dollars in;
  - k. Total prizes paid; and
  - l. Actual return percentage.

**11VAC15-40-240. Randomization.**

A. As used in this section, unless the context requires a different meaning:

"Card position" means the first card dealt, second card dealt in sequential order.

"Number position" means the first number drawn in sequential order.

B. A distributed pull-tab system shall utilize randomizing procedures in the creation of game sets for electronic [ ~~game cards~~ pull-tabs ] or externally generated randomized game sets that have been created using a method previously approved by the department.

C. Any random number generation, shuffling, or randomization of outcomes used in connection with a distributed pull-tab system must be by use of a random number generation application that has successfully passed standard tests for randomness and unpredictability including but not limited to:

- 1. Each card position or number position satisfies the 99% confidence limit using the standard chi-squared analysis. "Chi-squared analysis" is the sum of the ratio of the square difference between the expected result and the observed result to the expected result.

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# Regulations

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2. Each card position or number position does not produce a significant statistic with regard to producing patterns of occurrences. Each card position or number position will be considered random if it meets the 99% confidence level with regard to the "run test" or any similar pattern testing statistic. The "run test" is a mathematical statistic that determines the existence of recurring patterns within a set of data.

3. Each card position or number position is independently chosen without regard to any other card or number drawn within that game play. This test is the "correlation test." Each pair of card positions or number positions is considered random if it meets the 99% confidence level using standard correlation analysis.

4. Each card position or number position is independently chosen without reference to the same card position or number position in the previous game. This test is the "serial correlation test." Each card position or number position is considered random if it meets the 99% confidence level using standard serial correlation analysis.

## **11VAC15-40-250. Communications and network requirements.**

A. Where the distributed pull-tab system components are linked with one another in a network, communication protocols shall be used that ensure that erroneous data or signals will not adversely affect the operations of any such system components.

B. All data communication shall incorporate an error detection and correction scheme to ensure the data is transmitted and received accurately.

C. Connections between all components of the distributed pull-tab system shall only be through the use of secure communication protocol(s) that are designed to prevent unauthorized access or tampering, employing Advanced Encryption Standard (AES), or equivalent encryption.

[ D. A firewall or equivalent hardware device configured to block all inbound and outbound traffic that has not been expressly permitted and is not required for continued use of the distributed pull-tab system must exist between the distributed pull-tab system and any external point of access. ]

[ ~~D.~~ E. ] The minimum width (size) for encryption keys is 112 bits for symmetric algorithms and 1024 bits for public keys.

[ ~~E.~~ F. ] There must be a secure method implemented for changing the current encryption key set. It is not acceptable to only use the current key set to "encrypt" the next set.

[ ~~F.~~ G. ] There must be a secure method in place for the storage of any encryption keys. Encryption keys must not be stored without being encrypted themselves.

[ ~~G.~~ H. ] If a wireless network is used, wireless products used in conjunction with any gaming system or system component must meet the following minimum standards:

1. Employ a security process that complies with the Federal Information Processing Standard 140-2 (FIPS 140-2); or

2. Employ an alternative method, as approved by the department.

## **11VAC15-40-260. Significant events.**

The following significant events, if applicable, shall be collected from the [ ~~player~~ electronic pull-tab ] device or point of sale and communicated to the system for storage and a report of the occurrence of the significant event must be made available upon request:

1. Power resets or power failure.

2. Communication loss between [ ~~a player~~ an electronic pull-tab ] device and any component of the distributed pull-tab system.

3. [ ~~Player~~ Electronic pull-tab ] device jackpot (any award in excess of the single win limit of the [ ~~player~~ electronic pull-tab ] device).

4. Door openings (any external door that accesses a critical area of the [ ~~player~~ electronic pull-tab ] device).

5. Bill validator errors:

a. Stacker full (if supported); and

b. Bill jam.

6. Printer errors:

a. Printer empty; and

b. Printer disconnect or failure.

7. Corruption of the [ ~~player~~ electronic pull-tab ] device RAM or program storage device.

8. Any other significant events as defined by the protocol employed by the distributed pull-tab system.

## **11VAC15-40-270. Validation system and redemption.**

A distributed pull-tab system may utilize a voucher validation system to facilitate gaming transactions. The validation system may be entirely integrated into a distributed pull-tab system or exist as a separate entity.

[ ~~1. Payment by voucher printer as a method of redeeming unused game plays and/or winnings on a player device is only permissible when the device is linked to an approved validation system or distributed pull tab system that allows validation of the printed voucher. ]~~

[ ~~a. 1. ] A distributed pull-tab system may allow voucher out only; vouchers shall not be inserted, scanned, or used in any way at the [ ~~player~~ electronic pull-tab ] device for redemption.~~

[ ~~b. 2. ] The validation system must process voucher redemption correctly according to the secure communication protocol implemented.~~

[ ~~2. 3. ] The algorithm or method used by the validation system or distributed pull-tab system to generate the~~

voucher validation numbers must guarantee an insignificant percentage of repetitive validation numbers.

[ ~~3~~- 4. ] The validation system must retrieve the voucher information correctly based on the secure communication protocol implemented and store the voucher information in a database. The voucher record on the host system must contain, at a minimum, the following voucher information:

- a. Validation number;
- b. Date and time the [ ~~player~~ electronic pull-tab ] device printed the voucher;
- c. Value of voucher in dollars and cents;
- d. Status of voucher;
- e. Date and time the voucher will expire;
- f. Serial number of [ ~~player~~ electronic pull-tab ] device; and
- g. Location name or site identifier;

[ ~~4~~- 5. ] The validation system or distributed pull-tab system must have the ability to identify the following occurrences and notify the cashier when the following conditions exist:

- a. Voucher cannot be found on file;
- b. Voucher has already been paid; or
- c. Amount of voucher differs from amount on file (requirement may be met by display of voucher amount for confirmation by cashier during the redemption process).

[ ~~5~~- 6. ] If the connection between the validation system and the distributed pull-tab system fails, an alternate method or procedure of payment must be available and shall include the ability to identify duplicate vouchers and prevent fraud by redeeming vouchers that were previously issued by the [ ~~player~~ electronic pull-tab ] device.

[ ~~6~~- 7. ] The following reports related to vouchers shall be generated on demand:

- a. Voucher Issuance Report shall be available from the validation system that shows all vouchers generated by an electronic [ ~~game card~~ pull-tab ] device; and
- b. Voucher Redemption Report shall detail individual vouchers, the sum of the vouchers paid by the validation terminal or point of sale by session, and include the following information:

- (1) The date and time of the transaction;
- (2) The dollar value of the transaction;
- (3) Validation number;
- (4) A transaction number; and
- (5) Point-of-sale identification number or name.

[ ~~7~~- 8. ] The validation system database must be encrypted and password-protected and should possess a nonalterable user audit trail to prevent unauthorized access.

[ ~~8~~- 9. ] The normal operation of any device that holds voucher information shall not have any options or method that may compromise voucher information. Any device that holds voucher information in its memory shall not allow removal of the information unless it has first transferred that information to the ticketing database or other secured component or components of the validation system.

## **11VAC15-40-280. Point of sale; validation terminal.**

A. A distributed pull-tab system may utilize a point-of-sale and/or validation terminal that is capable of facilitating the sale of the organization's pull tab outcomes or used for the redemption of credits from player accounts or vouchers. The point of sale may be entirely integrated into a distributed pull-tab system or exist as a separate entity.

B. Point-of-sale use is only permissible when the device is linked to an approved validation system or distributed pull-tab system.

C. If a distributed pull-tab system utilizes a point of sale, it shall be capable of printing a receipt for each sale, void, or redemption.

1. The receipt shall contain the following information:

- a. Date and time of the transaction;
- b. Dollar value of the transaction;
- c. Validation number, if applicable;
- d. Quantity of associated products, if applicable;
- e. Transaction number;
- f. Account number, if applicable; and
- g. Point-of-sale identification number or name.

D. The following point-of-sale or validation terminal reports shall be generated on demand:

1. Sales Transaction History Report shall show all sales and voids by session and include the following information:

- a. Date and time of the transaction;
- b. Dollar value of the transaction;
- c. Quantity of associated products;
- d. Transaction number; and
- e. Point of sale identification number or name;

2. Voucher Redemption Report shall detail individual voucher redemptions paid by the validation terminal or point of sale by session and include the following information:

- a. Date and time of the transaction;
- b. Dollar value of the transaction;
- c. Validation number;
- d. Transaction number; and
- e. Point of sale identification number or name.



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# Regulations

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## **11VAC15-40-290. Location of equipment.**

All equipment used to facilitate the distribution, play, or redemption of electronic pull-tab ~~[ or instant bingo ]~~ games must be physically located within the boundaries of the Commonwealth of Virginia. This includes but is not limited to the distributed pull-tab system, ~~[ player electronic pull-tab ]~~ devices, redemption terminals, and point-of-sale stations.

Article [ ~~2~~ 4 ]

[ ~~Player Electronic Pull-tab ]~~ Devices

## **11VAC15-40-300. [ ~~Player Electronic pull-tab ]~~ device general requirements.**

A. Each ~~[ player electronic pull-tab ]~~ device shall bear a seal approved by the commissioner and affixed by the department.

B. ~~[ A-player An electronic pull-tab ]~~ device shall not be capable of being used for the purposes of engaging in any game prohibited by the department.

C. In addition to a video monitor or touch screen, each ~~[ player electronic pull-tab ]~~ device may have one or more of the following: a bill acceptor, printer, and electromechanical buttons for activating the game and providing player input, including a means for the player to make selections and choices in games.

D. For each ~~[ player electronic pull-tab ]~~ device, there shall be located anywhere within the distributed pull-tab system, nonvolatile memory or its equivalent. The memory shall be maintained in a secure location for the purpose of storing and preserving a set of critical data that has been error checked in accordance with the critical memory requirements of this regulation.

E. ~~[ A-player An electronic pull-tab ]~~ device shall not have any switches, jumpers, wire posts, or other means of manipulation that could affect the operation or outcome of a game. The ~~[ player electronic pull-tab ]~~ device may not have any functions or parameters adjustable through any separate video display or input codes except for the adjustment of features that are wholly cosmetic.

F. ~~[ A-player An electronic pull-tab ]~~ device shall not have any of the following attributes: spinning or mechanical reels, pull handle, sounds ~~[ other than an audio effect to simulate the opening of a paper pull tab or instant bingo card or music solely intended to entice a player to play ]~~, flashing lights, tower light, top box, coin tray, ticket acceptance, hopper, coin acceptor, enhanced animation, cabinet or payglass artwork, or any other attribute identified by the department.

G. ~~[ A-player An electronic pull-tab ]~~ device shall be robust enough to withstand forced illegal entry that would leave behind physical evidence of the attempted entry or such entry that causes an error code that is displayed and transmitted to the distributed pull-tab system. Any such entry attempt shall inhibit game play until cleared, and shall not affect the subsequent play or any other play, prize, or aspect of the game.

H. ~~[ The~~ Except as provided in subsection I of this section, the ~~] number of [ player electronic pull-tab ] devices, other than those [ player electronic pull-tab ] devices that are handheld, present at any [ premise premises ] at which charitable gaming is conducted shall be limited to [ one device for every 50 permissible occupants under the maximum occupancy as determined pursuant to the Uniform Statewide Building Code 10. Except as provided in subsection I of this section the number of handheld electronic pull-tab devices present at any premises at which charitable gaming is conducted shall be limited to 50. ]~~ The department shall determine whether ~~[ a-player an electronic pull-tab ]~~ device is handheld.

~~[ I. The number of electronic pull-tab devices used to facilitate the play of electronic pull-tabs sold, played, and redeemed at any premises pursuant to § 18.2-340.26:1 of the Code of Virginia shall be limited to five. ]~~

## **11VAC15-40-310. Cabinet wiring.**

A. Proof of UL or equivalent certification shall be required for all submitted electronic devices.

B. ~~[ A-player An electronic pull-tab ]~~ device shall be designed so that power and data cables into and out of the ~~[ player electronic pull-tab ]~~ device can be routed so that the cables are not accessible to the general public.

## **11VAC15-40-320. [ ~~Player Electronic pull-tab ]~~ device identification.**

~~[ A-player An electronic pull-tab ]~~ device shall have a permanently affixed identification badge that cannot be removed without leaving evidence of tampering. This badge shall be affixed to the exterior of the ~~[ player electronic pull-tab ]~~ device and shall include the following information:

1. Manufacturer name;
2. A unique serial number;
3. The ~~[ player electronic pull-tab ]~~ device model number;
4. The date of manufacture; and
5. Any other information required by the department.

## **11VAC15-40-330. Doors; compartments.**

A. If ~~[ a-player an electronic pull-tab ]~~ device possesses an external door that allows access to the interior of the machine the following rules shall apply:

1. Doors and their associated hinges shall be capable of withstanding determined illegal efforts to gain access to the inside of the ~~[ player electronic pull-tab ]~~ device and shall leave evidence of tampering if an illegal entry is made;
2. All external doors shall be locked and monitored by door access sensors that shall detect and report all external door openings by way of an audible alarm, on-screen display, or both;
3. The ~~[ player electronic pull-tab ]~~ device shall cease play when any external door is opened;

4. It shall not be possible to disable a door open sensor when the machine's door is closed without leaving evidence of tampering;

5. The sensor system shall register a door as being open when the door is moved from its fully closed and locked position; and

6. Door open conditions shall be recorded in an electronic log that includes a date/time stamp.

B. [ ~~Player~~ Electronic pull-tab ] devices that contain control programs located within an accessible area shall have a separate internal locked logic compartment, that shall be keyed differently than the front door access lock. The logic compartment shall be a locked cabinet area with its own locked door, that houses critical electronic components that have the potential to significantly influence the operation of the [ ~~player~~ electronic pull-tab ] device. There may be more than one such logic area in [ ~~a player~~ an electronic pull-tab ] device. Electronic component items that are required to be housed in one or more logic areas are:

1. CPUs and other electronic components involved in the operation and calculation or display of game play;

2. Communication controller electronics and components housing the communication program storage media or, the communication board for the on-line system may reside outside the [ ~~player~~ electronic pull-tab ] device; and

3. Logic compartment door open conditions shall be recorded in a log that includes a date/time stamp.

C. [ ~~Player~~ Electronic pull-tab ] devices that do not contain a door shall have adequate security for any panels or entry points that allow access to the interior of the device.

#### **11VAC15-40-340. Memory clear.**

A. Following the initiation of a memory reset procedure utilizing a certified reset method, the program shall execute a routine that initializes the entire contents of memory to the default state. For [ ~~player~~ electronic pull-tab ] devices that allow for partial memory clears, the methodology in doing so must be accurate and the game application must validate the uncleared portions of memory. The [ ~~player~~ electronic pull-tab ] device display after a memory reset shall not be the top award.

B. It shall not be possible to change a configuration setting that causes an alteration or obstruction to the electronic accounting meters without a memory clear.

#### **11VAC15-40-350. Critical memory.**

A. Critical memory shall be used to store all data that is considered vital to the continued operation of the [ ~~player~~ electronic pull-tab ] device. Critical memory storage shall be maintained by a methodology that enables errors to be identified and corrected in most circumstances. This methodology may involve signatures, checksums, partial checksums, multiple copies, timestamps, and/or use of validity codes. This includes, but is not limited to:

1. All electronic meters required in [ ~~11VAC15-40-420 E~~ 11VAC15-40-410 E ];

2. Current unused credits;

3. [ ~~Player~~ Electronic pull-tab ] device or game configuration data;

4. Recall of all wagers and other information necessary to fully reconstruct the game outcome associated with the last 10 plays;

5. Software state, which is the last state the [ ~~player~~ electronic pull-tab ] device software was in before interruption; and

6. Error conditions that may have occurred on the [ ~~player~~ electronic pull-tab ] device that may include:

a. Memory error or control program error;

b. Low memory battery, for batteries external to the memory itself or low power source;

c. Program error or authentication mismatch; and

d. Power reset.

B. Comprehensive checks of critical memory shall be made continually to test for possible corruption. In addition, all critical memory:

1. Shall have the ability to retain data for a minimum of 180 days after power is discontinued from the [ ~~player~~ electronic pull-tab ] device. If the method used is an off-chip battery source, it shall recharge itself to its full potential in a maximum of 24 hours. The shelf life shall be at least five years. Memory that uses an off-chip back-up power source to retain its contents when the main power is switched off shall have a detection system that will provide a method for software to interpret and act upon a low battery condition;

2. Shall only be cleared by a department certified memory clear method; and

3. Shall result in an error if the control program detects an unrecoverable memory error.

#### **11VAC15-40-360. Program storage devices.**

A. All program storage devices (writable/nonwritable), including Erasable Programmable Read Only Memory (EPROM), DVD, CD-ROM, compact flash, and any other type of program storage device shall be clearly marked with sufficient information to identify the software and revision level of the information stored in the devices.

B. Program storage devices shall meet the following requirements:

1. Program storage, including CD-ROM, shall meet the following rules:

a. The control program shall authenticate all critical files by employing a hashing algorithm that produces a "message digest" output of at least 128 bits at minimum, as certified by the recognized independent test laboratory and agreed upon by the department. Any message digest

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# Regulations

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shall be stored on a read-only memory device within the [ ~~player~~ electronic pull-tab ] device. Any message digest that resides on any other medium shall be encrypted, using a public/private key algorithm with a minimum of a 512 bit key, or an equivalent encryption algorithm with similar security certified by the independent test laboratory and agreed upon by the department.

b. The [ ~~player~~ electronic pull-tab ] device shall authenticate all critical files against the stored message digests. In the event of a failed authentication, the [ ~~player~~ electronic pull-tab ] device should immediately enter an error condition with the appropriate indication such as an audible signal, on-screen display, or both. This error shall require operator intervention to clear. The [ ~~player~~ electronic pull-tab ] device shall display specific error information and shall not clear until the file authenticates properly and/or the [ ~~player~~ electronic pull-tab ] device's memory is cleared, the game is restarted, and all files authenticate correctly.

2. CD-ROM specific based program storage shall:

- a. Not be a rewriteable disk; and
- b. The "write session" shall be closed to prevent any further writing to the storage device.

C. [ ~~Player~~ Electronic pull-tab ] devices where the control program is capable of being erased and reprogrammed without being removed from the [ ~~player~~ electronic pull-tab ] device, or other equipment or related peripheral devices shall meet the following requirements:

1. Reprogrammable program storage shall only write to alterable storage media containing data, files, and programs that are not critical to the basic operation of the game.

2. Notwithstanding the foregoing, data may be written to media containing critical data, files, and programs provided that:

- a. A log of all information that is added, deleted, and modified be stored on the media;
- b. The control program verifies the validity of all data, files, and programs that reside on the media using the methods required herein;
- c. The [ ~~player~~ electronic pull-tab ] device's program contains appropriate security to prevent unauthorized modifications; and
- d. The [ ~~player~~ electronic pull-tab ] device's program does not allow game play while the media containing the critical data, files, and programs is being modified.

D. The control program shall ensure the integrity of all critical program components during the execution of said components and the first time the files are loaded for use even if only partially loaded. Space that is not critical to machine security (e.g., video or sound) is not required to be validated, although the department recommends a method be in place

for the files to be tested for corruption. If any of the video or sound files contain payout amounts or other information needed by the player, the files are to be considered critical.

## **11VAC15-40-370. Touch screens.**

Any touch screen must meet the following rules:

1. A touch screen shall be accurate once calibrated;
2. A touch screen shall be able to be recalibrated; and
3. A touch screen shall have no hidden or undocumented buttons or touch points anywhere on the touch screen, except as provided for by the game rules that affect game play.

## **11VAC15-40-380. Bill acceptors.**

A. [ ~~A~~ ~~player~~ An electronic pull-tab ] device may have a mechanism that accepts U.S. currency and provides a method to enable the [ ~~player~~ electronic pull-tab ] device software to interpret and act appropriately upon a valid or invalid input.

B. An acceptance device shall be electronically based and be configured to ensure that it only accept valid bills and rejects all others in a highly accurate manner.

C. A bill input system shall be constructed in a manner that protects against vandalism, abuse, or fraudulent activity. In addition, a bill acceptance device shall only register credits when:

1. The bill has passed the point where it is accepted and stacked; and
2. The bill acceptor has sent the "irrevocably stacked" message to the machine.

D. A bill acceptor shall communicate to the [ ~~player~~ electronic pull-tab ] device using a bidirectional protocol.

E. A bill acceptor shall be designed to prevent the use of cheating methods such as stringing, the insertion of foreign objects, and any other manipulation that may be deemed as a cheating technique.

F. If a bill acceptor is designed to be factory set only, it shall not be possible to access or conduct maintenance or adjustments to that bill acceptor in the field, other than:

1. The selection of bills and their limits;
2. Changing of certified EPROMs or downloading of certified software;
3. The method for adjustment of the tolerance level for accepting bills of varying quality should not be accessible from the exterior of the [ ~~player~~ electronic pull-tab ] device. Adjustments of the tolerance level should only be allowed with adequate levels of security in place. This can be accomplished through lock and key, physical switch settings, or other accepted methods approved on a case-by-case basis;
4. Maintenance, adjustment, and repair per approved factory procedures; and
5. Options that set the direction or orientation of bill acceptance.

G. ~~A player~~ An electronic pull-tab ] device equipped with a bill acceptor shall have the capability of detecting and displaying an error condition for the following events:

1. Stacker full (it is recommended that an explicit "stacker full" error message not be utilized since this may cause a security issue);
2. Bill jams;
3. Bill acceptor door open. If a bill acceptor door is a machine door, a door open signal is sufficient;
4. Stacker door open; and
5. Stacker removed.

H. ~~A player~~ An electronic pull-tab ] device equipped with a bill acceptor shall maintain sufficient electronic metering to be able to report the following:

1. Total monetary value of all bills accepted;
2. Total number of all bills accepted;
3. A breakdown of the bills accepted for each denomination; and
4. The value of the last five items accepted by the bill acceptor.

**11VAC15-40-390. Payment by voucher printers.**

A. If the [ ~~player~~ electronic pull-tab ] device has a printer that is used to issue payment to the player by issuing a printed voucher for any unused game plays and/or winnings, the [ ~~player~~ electronic pull-tab ] device shall meet the following rules:

1. The printer shall be located in a secure area of the [ ~~player~~ electronic pull-tab ] device, but shall not be located in the logic area or any cash storage area. The bill acceptor stacker or logic areas containing critical electronic components shall not be accessed when the printer paper is changed; [ and ]

~~[ 2. The player device, in which the printer is housed, is linked to a voucher validation system, which records the voucher information; and~~

~~3. 2. ] Data printed on a voucher shall [ be provided to the voucher validation system that records include ] the following information [ regarding each voucher printed ]:~~

- a. Value of unused game plays and/or winnings in U.S. currency, in numerical form;
- b. Time the voucher was printed;
- c. Date the voucher was printed;
- d. Location name or site identifier;
- e. Serial number of [ ~~player~~ electronic pull-tab ] device;
- f. Unique validation number or barcode [ if used in conjunction with a validation system ]; and
- g. Expiration date and time.

B. If the [ ~~player~~ electronic pull-tab ] device is capable of printing a duplicate voucher, the duplicate voucher shall clearly state the word "DUPLICATE" on its face.

C. The printer shall use printer paper containing security features such as a watermark as approved by the department.

D. A printer shall have mechanisms to allow the [ ~~player~~ electronic pull-tab ] device to interpret and act upon the following conditions that must disable the game, and produce an error condition that requires attendant intervention to resume play:

1. Out of paper;
2. Printer jam or failure; and
3. Printer disconnect. The [ ~~player~~ electronic pull-tab ] device may detect this error condition when the game tries to print.

E. [ ~~A player~~ An electronic pull-tab ] device that uses a voucher printer shall maintain a minimum of the last 25 transactions in critical memory. All voucher transactions shall be logged with a date and time stamp.

**11VAC15-40-400. Payment by account.**

A. Credit may be added to a player account via a cashier or point of sale station. Credit may also be added by any supporting [ ~~player~~ electronic pull-tab ] device through credits won or bills.

B. Money may be removed from a player account either through downloading of credits to the [ ~~player~~ electronic pull-tab ] device or by cashing out at a cashier's or point-of-sale station.

C. All monetary transactions between a supporting [ ~~player~~ electronic pull-tab ] device and the distributed pull-tab system must be secured by means of a card insertion into a magnetic card reader and PIN entry or by other protected means.

Article [ 35 ]

Game Requirements

**11VAC15-40-410. Game play requirements.**

A. A player receives an electronic [ ~~game card~~ pull-tab ] in return for consideration. A player wins if the player's electronic [ ~~game card~~ pull-tab ] contains a combination of symbols or numbers that was designated in advance of the game as a winning combination. There may be multiple winning combinations in each game. Electronic versions of instant bingo and pull-tabs, as authorized by the department, shall only utilize devices that allow players to play electronic [ ~~game cards~~ pull-tabs ]. [ ~~A player~~ An electronic pull-tab ] device shall meet the following minimum requirements:

1. A player may purchase an opportunity to play an electronic [ ~~game card~~ pull-tab ] by:
  - a. Insertion of U.S. currency (bills only);
  - b. Purchase made at a point of sale terminal; or
  - c. Withdrawing deposits available in a player account.

2. [ ~~In addition to the~~ The ] available games, [ ~~the flare, and~~ ] rules of play shall be displayed on the [ ~~player~~ electronic pull-tab ] device's video screen. Rules of play shall include all winning combinations.

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# Regulations

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3. Any number of game themes may be selectable for play on any given [ ~~player~~ electronic pull-tab ] device. Only one of the game themes shall be playable at any given time.

4. [ ~~A player~~ An electronic pull-tab ] device shall be clearly labeled so as to inform the public that no one under 18 years of age is allowed to play.

5. [ ~~A player~~ An electronic pull-tab ] device shall not be capable of displaying any enticing animation while in an idle state. [ ~~A player~~ An electronic pull-tab ] device may use simple display elements or screen savers to prevent monitor damage.

6. The results of the electronic [ ~~game card~~ pull-tab ] shall be shown to the player using a video display. No rolling, flashing, or spinning animations are permitted. No rotating reels marked into horizontal segments by varying symbols are permitted. [ ~~No entertaining sound or music is permitted other than an audio effect to simulate the opening of a paper pull tab or instant bingo card. Any sounds present used to simulate the opening of a paper pull tab must not be played at a level sufficient to disturb other players or patrons.~~ ]

7. Any sound or music solely intended to entice a player to play is prohibited. Any sound or music emitted by an electronic pull-tab device must not be played at a level sufficient to disturb other players or patrons. ]

[ ~~7- 8.~~ ] The [ ~~player~~ electronic pull-tab ] device shall have one or more buttons, electromechanical or touch screen, to facilitate the following functions:

- a. Viewing of the game "help" screens;
- b. Viewing of the game rules;
- c. Initiating game play;
- d. Cashout or logout; and
- e. One or more buttons designated to reveal the pull-tab or instant bingo windows.

[ ~~8- 9.~~ ] Following play on [ ~~a player~~ an electronic pull-tab ] device, the result shall be clearly shown on the video display along with any prizes that may have been awarded. Prizes may be dispensed in the form of:

- a. Voucher;
- b. Added to the machine balance meter; or
- c. Added to the player's account balance.

[ ~~9- 10.~~ ] An available balance may be collected from the [ ~~player~~ electronic pull-tab ] device by the player pressing the "cashout" button or logging off of the [ ~~player~~ electronic pull-tab ] device at any time other than during:

- a. A game being played;
- b. While in an audit mode or screen;
- c. Any door open;
- d. Test mode;

e. A machine balance meter or win meter incrementation unless the entire amount is placed on the meter when the "cashout" button is pressed; or

f. An error condition.

[ ~~10- 11.~~ ] The default [ ~~player~~ electronic pull-tab ] device display, upon entering game play mode, shall not be the top award.

B. [ ~~A player~~ An electronic pull-tab ] device shall not have hardware or software that determines the outcome of any electronic [ ~~game card~~ pull-tab ], produce its own outcome, or affect the order of electronic [ ~~game cards~~ pull-tabs ] as dispensed from the distributed pull-tab system. The game outcome shall be determined by the distributed pull-tab system as outlined within these rules.

C. Game themes [ ~~may~~ shall ] not contain obscene or offensive graphics, animations, or references. [ ~~All game themes will be subject to approval by the department~~ The department shall determine what constitutes obscene or offensive graphics, animations, or references. ]

D. Prior to approval for use, each [ ~~player~~ electronic pull-tab ] device must meet the following specifications with respect to its operation:

1. After accepting an allowable cash payment from the player, the player shall press a "play" button to initiate a game.

2. The [ ~~player~~ electronic pull-tab ] device shall not display in any manner, the number of electronic [ ~~game cards~~ pull-tabs ] of each finite category, or how many cards remain.

3. Awards of merchandise prizes in lieu of cash are prohibited.

4. The player must interact with the device to initiate a game and reveal a win or loss. This may involve a button press on the console or on the touch screen.

5. The electronic [ ~~game card~~ pull-tab ] must be initially displayed with a cover and require player interaction to reveal the symbols and game outcome.

6. In no event may [ ~~a player~~ an electronic pull-tab ] device simulate play of roulette, poker, keno, lotto or lottery, twenty-one, blackjack, or any other card game, or simulate play of any type of slot machine game, regardless of whether the machine has a payback feature or extra play awards. Card symbols such as ace, king, queen, or heart are acceptable, provided the aforementioned is abided by.

7. Games must not contain any elements of skill.

E. Each [ ~~player~~ electronic pull-tab ] device must meet the following specifications with respect to its metering system:

1. [ ~~A player~~ An electronic pull-tab ] device shall contain electronic metering whereby meters record and display on the video screen the following information at a minimum:

a. Total cash in for the bill acceptor if equipped with a bill acceptor;

- b. Total cash played;
  - c. Total cash won;
  - d. Total cash removed from [ ~~player~~ electronic pull-tab ] device;
  - e. Total count of electronic [ ~~game cards~~ pull-tabs ] played; and
  - f. Total count of electronic [ ~~game cards~~ pull-tabs ] won.
2. An electronic meter shall be capable of maintaining correct totals and be of no less than 10 digits in length.
  3. [ ~~A player~~ An electronic pull-tab ] device shall not be capable of displaying the number of electronic [ ~~game cards~~ pull-tabs ] that remain in the game set or the number of winners or losers that have been drawn or still remain in the game set while the game set is still being played.
  4. An electronic meter shall not be capable of being automatically reset or cleared, whether due to an error in any aspect of the meter's or a game's operation or otherwise.
  5. Currency meters shall be maintained in dollars and cents.

Part V  
Administrative Process

**11VAC15-40-420. Procedural rules for the conduct of fact-finding conferences and hearings.**

[ ~~A.~~ As used in this section, "manufacturer" means a person or entity that assembles from raw materials or subparts an electronic games of chance system. ]

[ ~~A.~~ B. ] Fact-finding conference; notification, appearance, and conduct.

1. Unless automatic revocation or immediate suspension is required by law, no permit to conduct charitable gaming [ , ~~or~~ ] to sell charitable gaming supplies [ , or to distribute electronic games of chance ] shall be denied, suspended, or revoked except after review and approval of such proposed denial, suspension, or revocation action by the board, and upon notice stating the basis for such proposed action and the time and place for a fact-finding conference as set forth in § 2.2-4019 of the Administrative Process Act.
2. If a basis exists for a refusal to renew, suspend, or a revoke a permit, the department shall notify by certified mail or by hand delivery the interested persons at the address of record maintained by the department.
3. Notification shall include the basis for the proposed action and afford interested persons the opportunity to present written and oral information to the department that may have a bearing on the proposed action at a fact-finding conference. If there is no withdrawal, a fact-finding conference shall be scheduled at the earliest mutually agreeable date, but no later than 60 days from the date of the notification. Organizations [ , ~~or~~ ] suppliers [ , or manufacturers ] who wish to waive their right to a

conference shall notify the department at least 14 days before the scheduled conference.

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

[ ~~B.~~ C. ] Hearing; notification, appearance, and conduct.

1. If, after a fact-finding conference, a sufficient basis still exists to deny, suspend, or revoke a permit, interested persons shall be notified by certified or hand-delivered mail of the proposed action and of the opportunity for a hearing on the proposed action. If an organization [ ~~or~~ ] supplier [ , or manufacturer ] desires to request a hearing, it shall notify the department within 14 days of receipt of a report on the conference. Parties may enter into a consent agreement to settle the issues at any time prior to, or subsequent to, an informal fact-finding conference.

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

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

[ ~~C.~~ D. ] Hearing location. Hearings before a hearing officer shall be held, insofar as practicable, in the county or city in which the organization [ ~~or~~ ] supplier [ , or manufacturer ] is located. If the parties agree, hearing officers may conduct hearings at locations convenient to the greatest number of persons or by telephone conference, video conference, or similar technology, in order to expedite the hearing process.

[ ~~D.~~ E. ] Hearing decisions.

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

2. The department shall review the recommendation of the hearing officer and render a decision on the recommendation within 30 days of receipt. The decision shall cite the appropriate rule, relief, or denial thereof as to each issue.

[ ~~E.~~ F. ] Agency representation. The commissioner's designee may represent the department in an informal conference or at a hearing.

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# Regulations

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## **11VAC15-40-430. Reporting violations.**

[ ~~A.~~ B. ] As used in this section, "manufacturer" means a person or entity that assembles from raw materials or subparts an electronic games of chance system. ]

[ ~~A.~~ B. ] Unless otherwise required by law, the identity of any individual who provides information to the department or its agents regarding alleged violations shall be held in strict confidence.

[ ~~B.~~ C. ] Any officer, director, or game manager of a qualified organization or any officer or director of a supplier [ or manufacturer ] shall immediately report to the department any information pertaining to the suspected misappropriation or theft of funds or any other violations of charitable gaming statutes or these regulations.

[ ~~C.~~ D. ] Failure to report the information required by subsection [ ~~B.~~ C ] of this section may result in the denial, suspension, or revocation of a permit.

[ ~~D.~~ E. ] Any officer, director, or game manager of a qualified organization involved in the management, operation, or conduct of charitable gaming shall immediately notify the department upon [ ~~conviction~~ being convicted ] of a felony or a crime involving fraud, theft, or financial crimes.

[ ~~E.~~ F. ] Any officer, director, partner, or owner of a supplier [ or manufacturer ] shall immediately notify the department upon [ ~~conviction~~ being convicted ] or [ ~~plea of pleading~~ ] nolo contendere to a felony or a crime involving gambling or an action against any license or certificate held by the supplier in any state in the United States.

[ ~~F.~~ G. ] Failure to report information required by subsection [ ~~D.~~ or E or F ] of this section by any officer, director, or game manager of a qualified organization or by any supplier [ or manufacturer ] may result in the denial, suspension, or revocation of a permit.

[ ~~G.~~ H. ] Any officer, director, or game manager of a qualified organization involved in charitable gaming shall immediately report to the department any change the Internal Revenue Service makes in the tax status of the organization, or if the organization is a chapter of a national organization covered by a group tax exempt determination, the tax status of the national organization.

[ ~~H.~~ I. ] All organizations regulated by the department shall display prominently a poster advising the public of a phone number where complaints relating to charitable gaming may be made. Such posters shall be [ ~~provided by the department to organizations at no charge~~ in a format prescribed by the department ].

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

General Assembly Building, 2nd Floor, Richmond, Virginia 23219.

FORMS (11VAC15-40)

### **GAME MANAGEMENT FORMS**

[Bingo Session Reconciliation Summary, Form 103 \(rev. 1/11\).](#)

[Admission Sales Reconciliation - Paper, Form 104-A \(rev. 1/11\).](#)

[Floor Sales Reconciliation - Paper, Form 104-B \(rev. 1/11\).](#)

[Decision Bingo Reconciliation, Form 104-C \(rev. 1/11\).](#)

[Raffle/Treasure Chest Sales Reconciliation - Bingo Session, Form 104-D \(rev. 1/11\).](#)

[Instant Bingo/Seal Cards/Pull-Tabs Reconciliation, Form 105 \(rev. 1/11\).](#)

[Storeroom Inventory Issue - Paper, Form 106-A \(rev. 7/08\).](#)

[Storeroom Inventory Issue - Instant Bingo/Seal Cards/Pull-Tabs, Form 106-B \(rev. 7/08\).](#)

[List of Volunteer Workers, Form 107 \(rev. 7/08\).](#)

[Prize Receipt, Form 108 \(rev. 7/08\).](#)

[Storeroom Inventory - Paper, Form 109-A \(rev. 1/11\).](#)

[Storeroom Inventory - Instant Bingo/Seal Cards/Pull-Tabs, Form 109-B \(rev. 1/11\).](#)

### **ORGANIZATION LICENSING FORMS**

[Charitable Gaming Permit Application - New Applicants Only, Form 201 - N \(rev. 1/11\).](#)

[Charitable Gaming Permit Application - Renewal Applicants Only, Form 201 - R \(rev. 1/11\).](#)

[Permit Amendment \(rev. 1/11\).](#)

[Gaming Personnel Information Update \(rev. 7/08\).](#)

[Report of Game Termination \(rev. 7/08\).](#)

### **[ ~~SUPPLIER LICENSING FORMS~~ ]**

[Charitable Gaming Supplier Permit Application, Form 301 \(rev. 1/11\).](#)

[Annual Supplier Sales and Transaction Report, Form 302 \(rev. 7/08\).](#)

### **MANUFACTURER OF ELECTRONIC GAMES OF CHANCE SYSTEMS AND SUPPLIER LICENSING FORMS**

[Manufacturer of Electronic Games of Chance Systems and Charitable Gaming Supplier Permit Application, Form 301 \(rev. 6/12\).](#)

[Annual Supplier/Manufacturer Sales and Transaction Report, Form 302 \(rev. 6/12\). \]](#)

### **BINGO MANAGER AND BINGO CALLER REGISTRATION FORMS**

[Charitable Gaming Bingo Caller Certificate of Registration Application, Form 401 \(rev. 1/11\).](#)



[Charitable Gaming Bingo Manager Certificate of Registration Application, Form 402 \(rev. 1/11\).](#)

[Amendment to Certificate of Registration – Registered Bingo Callers and Bingo Managers \(rev. 1/11\).](#)

[Personal Information Update – Registered Bingo Callers and Registered Bingo Managers, Form 404 \(rev. 7/07\).](#)

[Bona Fide Member Verification, Form 405 \(rev. 5/11\).](#)

DOCUMENTS INCORPORATED BY REFERENCE (11VAC15-40)

[IRS Publication 3079, Tax-Exempt Organizations and Gaming \(rev. 6/10\).](#)

[Security Requirements for Cryptographic Modules, Federal Information Processing Standard, FIPS Pub 140-2 \(rev. 12/02\).](#)

VA.R. Doc. No. R11-2560; Filed September 10, 2012, 11:16 a.m.



## TITLE 12. HEALTH

### BOARD OF HEALTH

#### Fast-Track Regulation

**Title of Regulation: 12VAC5-490. Virginia Radiation Protection Regulations: Fee Schedule (amending 12VAC5-490-40; repealing 12VAC5-490-30).**

**Statutory Authority:** § 32.1-229 of the Code of Virginia.

**Public Hearing Information:** No public hearings are scheduled.

**Public Comment Deadline:** November 7, 2012.

**Effective Date:** November 22, 2012.

**Agency Contact:** Steve Harrison, Acting Director, Division of Radiological Health, Department of Health, 109 Governor Street, Richmond, VA 23219, telephone (804) 864-7001, FAX (804) 864-7022, or email [steve.harrison@vdh.virginia.gov](mailto:steve.harrison@vdh.virginia.gov).

**Basis:** Section 32.1-229 of the Code of Virginia authorizes the Board of Health to establish fee schedules for the licensure of radioactive materials.

**Purpose:** The fee schedule was designed on the premise that all licensees will pay their fair share of the program costs and one fee would be set per category of licensee based on time and effort. In developing the Commonwealth's program, the U.S. Nuclear Regulatory Commission (NRC) fee schedule was referenced and then adjusted for expected time and effort involved in the department's Radioactive Material Program (RMP) staff managing each license category. Unlike the NRC program, the RMP did not include a reduced rate for small business licensees as the size of the business (i.e., licensee) did not correlate with the time and effort required by RMP staff to administer the program.

The NRC delegated responsibility to the Commonwealth for licensure and inspection of radioactive materials. On that date there were 106 licensees designated as an NRC-Small Business (SB). Subsequently, 66 of the 106 SBs were charged a higher licensure fee by the Virginia Department of Health (VDH) than they had previously paid to the NRC. Through attrition, mergers, etc., the group of 66 has dropped to 54.

One licensee submitted a Petition for Rulemaking requesting the radioactive material licensing fees be lowered. By the time the public comment period ended, 18 comments had been received. VDH responded to the petition indicating a regulatory action would be initiated.

The proposed amendment to the regulation changes the fee in 22 licensure categories reducing the fee for some licensees while maintaining equity within each category.

Among the 54 remaining licensees, 35 will pay the same or lower fees to VDH than what they paid the NRC while 19 licensees will pay a higher licensing fee to VDH than they paid to the NRC, ranging from \$250 to \$3,700 more. However, of these 19 licensees, 17 will pay a lower fee to VDH than under the current fee schedule while 2 will continue to pay the same amount to VDH.

18 comments were received via the Town Hall concerning the petition for rulemaking. Based on VDH's analysis, only 4 of the commenters will pay a higher fee to VDH than they previously paid to the NRC. However, all 4 will pay less to VDH as a result of the proposed amendments than they are required to pay under the current regulations.

**Rationale for Using Fast-Track Process:** A fast-track rulemaking process for this amendment is necessary to provide the requested financial relief to the affected licensees as soon as possible.

**Substance:** This amendment repeals 12VAC5-490-30, which was used for the Naturally Occurring and Accelerated Radioactive Material (NARM) licensees prior to the agreement. These licensees are now covered by the fee schedule in 12VAC5-490-40.

The proposal for 12VAC5-490-40 amends the licensing category 7D titled "Medical Institutions Providing Imaging, Diagnostic or Radionuclide Therapy," and lowers the fee to \$2,300, which matches the 2009 NRC small business fee these licensees paid to the NRC. The proposal also creates a new medical licensing category 7E titled "Medical Institutions Using a High Dose Remote Afterloader (HDR) or Emerging Technologies," to be used for medical therapy licensees. It lowers 21 other fee categories.

This amendment removes the fee category 11, which was used for licensing amendments and terminations. This cost can be covered by the annual licensing fee paid.

**Issues:** Primary advantages and disadvantages to the public: The primary advantage to the public is that the radioactive materials licensing and inspection activities will not rely on general funds to support these activities but rather the costs of



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# Regulations

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the regulatory program will be fully borne by the licensees. It is also advantageous to businesses currently using radioactive materials to pay a lesser fee, where possible. There are no disadvantages to the public in promulgating the proposed fee schedule.

Primary advantages and disadvantages to the agency and Commonwealth: Approving the amended fee structure will allow 35 of the 54 active "small business" licensees to pay the same amount or less than what they paid to the NRC prior to March 31, 2009. The amended fee structure will also reduce the annual license fee for 17 of the active small business licensees. There are no disadvantages to the agency and Commonwealth in promulgating the proposed fee schedule. The proposed RMP fee schedule is sufficient to support the program.

Pertinent matters of interest to the regulated community: VDH staff anticipates that the 19 licensees who will still pay a higher licensing fee to VDH than what they paid the NRC may have a negative comment on the fee. The reason they will still pay a higher fee is due to the type of work these businesses perform with the radioactive material, regardless of the size of the business. If this fast-track action receives objections from 10 or more public commenters then the fee amendment would be processed as a standard rulemaking, which would take longer to complete. This would lengthen the period of time during which the licensees would continue to pay a higher fee.

## Department of Planning and Budget's Economic Impact Analysis:

Summary of the Proposed Amendments to Regulation. The Board of Health (Board) proposes to lower several fees for radioactive materials licenses.

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

Estimated Economic Impact. Currently there are 42 different categories of radioactive materials licenses. Under the proposed regulations one of the categories is split so that there would be a total of 43 license types. The Board proposes to lower fees for 22 categories and keep the fees the same for the others. According to the Department of Health, of the 428 active license holders, 364 will have their fees reduced and 64 will not have their fees changed. Also, the proposed fees will raise sufficient revenue to support the program. Since costs for the affected firms will be reduced and there will be sufficient funds to maintain the radioactive materials program (with its associated safety benefits), the proposed amendments will create a net benefit.

Businesses and Entities Affected. The proposed amendments affect 364 of the 428 radioactive materials license holders in the Commonwealth. Most are small businesses.

Localities Particularly Affected. The proposed amendments do not disproportionately affect particular localities.

Projected Impact on Employment. The proposed amendments are unlikely to significantly affect employment.

Effects on the Use and Value of Private Property. The proposed fee reductions will moderately increase the value of affected businesses.

Small Businesses: Costs and Other Effects. The proposed fee reductions will moderately reduce costs for affected small businesses.

Small Businesses: Alternative Method that Minimizes Adverse Impact. The proposed amendments do not adversely affect small businesses.

Real Estate Development Costs. The proposed regulations are unlikely to significantly affect real estate development costs.

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

Agency's Response to Economic Impact Analysis: The Department of Health concurs with the economic impact analysis submitted by the Department of Planning and Budget.

## Summary:

*This regulation supports the department's Radioactive Materials Program (RMP) for those materials the U.S. Nuclear Regulatory Commission (NRC) transferred to the Commonwealth by agreement. The amendments lower several fees for radioactive materials licenses.*

**12VAC5-490-30. Application and licensing fees for naturally occurring and accelerator produced radioactive materials. (Repealed.)**

The application and licensing fees to receive, possess, use, transfer, own or acquire naturally occurring and accelerator produced radioactive materials license pursuant to 12VAC5-481 are listed in 12VAC5-490-40.

**12VAC5-490-40. Application and licensing fees for byproduct, source, and special nuclear radioactive materials licenses.**

The application and licensing fees to receive, possess, use, transfer, own or acquire byproduct materials, source and

special nuclear materials shall not become effective until 30 days after publication in the Virginia Register of a notice of an agreement executed by the Commonwealth of Virginia and the federal government under the provisions of § 274b of the Atomic Energy Act of 1954, as amended (73 Statute 689). ~~Application~~ The application fee for a radioactive materials license and annual fees for persons issued a radioactive materials license pursuant to 12VAC5-481 are listed in the following table:

Category		Specific License Type	Application & Annual Fee
1		Special Nuclear Material (SNM)	
	A.	<del>License for possession</del> <u>Possession</u> and use of SNM in sealed sources contained in devices used in measuring systems	\$1,000
	B.	<del>License for use of</del> SNM to be used as calibration and reference sources	\$500
	C.	SNM - all other, except license authorizing <del>special nuclear material</del> <u>SNM</u> in unsealed form that would constitute a critical mass (fee waived if facility holds additional license category)	\$2,000
2		Source Material	
	A.	Source material processing and distribution	\$3,000
	B.	Source material in shielding (fee waived if facility holds additional license category)	\$200
	C.	Source material - all other, excluding depleted uranium used as shielding or counterweights	\$2,000
3		Byproduct, NARM	
	A.	<del>License of broad</del> <u>Broad</u> scope for processing or manufacturing of items for commercial distribution	<del>\$15,000</del> <u>\$10,000</u>
	B.	<del>License for processing</del> <u>Processing</u> or manufacturing and commercial distribution of radiopharmaceuticals, generators, reagent kits and sources or devices	<del>\$8,000</del> <u>\$6,000</u>
	C.	<del>License for commercial</del> <u>Commercial</u> distribution or redistribution of radiopharmaceuticals, generators, reagent kits and sources or devices	\$4,000
	D.	<del>Other licenses for processing</del> <u>Processing</u> or manufacturing of items for commercial distribution	<del>\$4,000</del> <u>\$2,000</u>
	E.	<del>License for industrial</del> <u>Industrial</u> radiography operations performed only in a shielded radiography installation	\$3,000
	F.	<del>License for industrial</del> <u>Industrial</u> radiography performed only at the address indicated on the license, and at temporary job sites	<del>\$4,000</del> <u>\$3,500</u>
	G.	<del>License for possession</del> <u>Possession</u> and use of less than 370 TBq (10,000 curies) of radioactive material in sealed sources for irradiation of materials where the source is not removed from the shield (fee waived if facility holds additional irradiator license category)	<del>\$3,000</del> <u>\$2,000</u>

# Regulations

	H.	<del>License for possession</del> <u>Possession</u> and use of less than 370 TBq (10,000 curies) of radioactive material in sealed sources for irradiation of materials where the source is exposed for irradiation purposes. The category also includes underwater irradiators for irradiation of materials in which the source is not exposed for irradiation	\$3,000
	I.	<del>License for possession</del> <u>Possession</u> and use of at least 370 TBq (10,000 curies) and less than 3.7 PBq (100,000 curies) of radioactive material in sealed sources for irradiation of materials)	\$5,000 <u>\$3,000</u>
	J.	<del>License for possession</del> <u>Possession</u> and use of 3.7 PBq (100,000 curies) or more of radioactive material in sealed sources for irradiation of materials	\$15,000 <u>\$5,000</u>
	K.	<del>License to distribute</del> <u>Distribute</u> items containing radioactive materials to persons under a general license	\$2,000 <u>\$1,000</u>
	L.	<del>License to possess</del> <u>Possess</u> radioactive materials intended for distribution to persons exempt from licensing	\$1,000
	M.	<del>License of broad</del> <u>Broad</u> scope for research and development that does not authorize commercial distribution	\$7,500 <u>\$6,000</u>
	N.	<del>Other licenses for research</del> <u>Research</u> and development that <del>do</del> <u>does</u> not authorize commercial distribution	\$1,500 <u>\$1,000</u>
	O.	<del>License for installation</del> <u>Installation</u> , repair, maintenance or other service of devices or items containing radioactive material, excluding waste transportation or broker services	\$1,500 <u>\$1,000</u>
	P.	<del>License for portable</del> <u>Portable</u> gauges	\$1,000 <u>\$750</u>
	Q.	<del>License for portable</del> <u>Portable</u> X-ray fluorescence analyzer ( <u>XRF</u> ), dewpointer or gas chromatograph	\$250
	R.	Leak testing services	\$500
	S.	Instrument calibration services	\$1,000
	T.	Fixed gauges	\$1,000 <u>\$750</u>
	U.	All other <del>byproduct, naturally occurring or accelerator produced</del> <u>radioactive</u> material licenses, except as otherwise noted	\$1,500
4		Waste Processing	
	A.	Commercial waste treatment facilities, including incineration	\$200,000 <u>\$100,000</u>
	B.	All other commercial facilities involving waste compaction, repackaging, storage or transfer	\$11,000 <u>\$7,500</u>
	C.	Waste processing - all other, including decontamination service	\$5,000
5		Well Logging	
	A.	<del>License for well</del> <u>Well</u> logging using sealed sources or subsurface tracer studies	\$3,000
	B.	<del>License for well</del> <u>Well</u> logging using sealed sources and subsurface tracer studies	\$4,000 <u>\$3,000</u>

# Regulations

6		Nuclear Laundry	
	A.	<del>License for commercial</del> <u>Commercial</u> collection and laundry of items contaminated with radioactive material	\$10,000
7		Medical/Veterinary	
	A.	<del>License for human use of byproduct, source, special nuclear or NARM material in</del> <u>Human use of</u> sealed sources contained in teletherapy or stereotactic radiosurgery devices, including mobile therapy	\$7,500 <u>\$6,000</u>
	B.	<del>License of broad</del> <u>Broad</u> scope for human use <del>of byproduct, source, special nuclear or NARM materials used</del> in medical diagnosis, treatment, research and development (excluding teletherapy or stereotactic radiosurgery devices)	\$15,000 <u>\$12,000</u>
	C.	<del>License for mobile</del> <u>Mobile</u> nuclear medicine	\$2,000
	D.	<del>Medical — all others, including SNM pacemakers and high dose rate remote afterloading devices</del> <u>Medical institutions providing imaging, diagnostic or radionuclide therapy</u>	\$3,750 <u>\$2,300</u>
	<u>E.</u>	<u>Medical institutions using a High Dose Remote Afterloader (HDR) or emerging technologies</u>	<u>\$3,750</u>
	<del>E.</del> <u>F.</u>	<del>License for veterinary</del> <u>Veterinary</u> use of radioactive materials	\$2,000 <u>\$1,000</u>
	<del>F.</del> <u>G.</u>	In-vitro	\$1,000
8		Academic	
	A.	<del>License for possession and use of byproduct, naturally occurring or accelerator-produced radioactive material for educational</del> <u>Educational</u> use or academic research and development that does not authorize commercial distribution, excluding broad scope or human use licenses	\$1,000 <u>\$750</u>
9		Accelerator	
	A.	<del>License for accelerator production</del> <u>Production</u> of radioisotopes with commercial distribution	\$4,000 <u>\$2,000</u>
	B.	<del>Accelerator isotope production</del> <u>Production</u> - all other (fee waived if facility holds medical broad scope license with no commercial distribution)	\$2,000
10		Reciprocity	
	A.	Reciprocity recognition of an out-of-state specific license	50% of annual fee of applicable category
11		Amendments	
	<del>A.</del>	<del>Request to amend specific license — no license review</del>	<del>\$0</del>
	<del>B.</del>	<del>Request to amend specific license — license review required</del>	<del>\$0</del>
	<del>C.</del>	<del>Request to terminate license</del>	<del>\$200</del>

VA.R. Doc. No. R13-2176; Filed September 17, 2012; 5:14 p.m.

### Final Regulation

**Title of Regulation:** 12VAC5-520. Regulations Governing the Dental Scholarship and Loan Repayment Programs (amending 12VAC5-520-10, 12VAC5-520-130, 12VAC5-520-150, 12VAC5-520-160, 12VAC5-520-180 through 12VAC5-520-210; repealing 12VAC5-520-30).

**Statutory Authority:** § 32.1-122.9 of the Code of Virginia.

**Effective Date:** November 8, 2012.

**Agency Contact:** Elizabeth Barrett, Department of Health, 109 Governor St., Richmond, VA 23219, telephone (804) 864-7824, or email elizabeth.barrett@vdh.virginia.gov.

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# Regulations

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## Summary:

*The amendments (i) substantially amend the definitions of "loan repayment award" and "interest at the prevailing bank rate for similar amounts of unsecured debt"; (ii) extend the application time limit for specialists, allowing them to apply up to five years after completion of residency training; (iii) limit scholarship awards eligibility to junior and senior dental students, except in cases of extreme need in underclassmen; and (iv) eliminate the criteria that loan repayment awards be based on financial need.*

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

### Part I Definitions

#### 12VAC5-520-10. Definitions.

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

"Accredited dental school" means any dental school in the United States receiving accreditation from the Commission on Dental Accreditation.

"Accredited residency" means an advanced dental education program in general or specialty dentistry accredited by the Commission on Dental Accreditation and approved by the American Dental Association.

"Board" or "Board of Health" means the State Board of Health.

"Commissioner" means the State Health Commissioner.

"Dental practice" means the practice of dentistry by a recipient in general or specialty dentistry in a geographic area determined to be fulfillment of the recipient's scholarship or loan repayment obligation or practice as a dentist ~~with~~ within a designated state facility.

"Dental underserved area" means a geographic area in Virginia designated by the State Board of Health as a county or city in which the ratio of practitioners of dentistry to population is less than that for the Commonwealth as a whole as determined by the commissioner or a dental health professions shortage area using criteria described in Part II (12VAC5-520-80 et seq.) of this chapter.

~~"Dentist loan repayment award" means an amount repaid to a dentist for dental school loans in an amount equivalent to one year in-state tuition at Virginia Commonwealth University School of Dentistry for the year in which the loan was acquired, and for which the dentist is under a contractual obligation to repay through practice in an underserved area or designated state facility.~~

"Dentist loan repayment program" means the program established by § 32.1-122.9:1 of the Code of Virginia that allocates funds appropriated in conjunction with the dental scholarship program to increase the number of dentists in underserved areas of Virginia.

"Designated state facility" means practice as a dentist in a facility operated by the Virginia Department of Health, ~~or Virginia Department of Mental Health, Mental Retardation and Substance Abuse Behavioral Health and Developmental Services, Virginia Department of Juvenile Justice, or the Virginia Department of Corrections.~~

"Full-time dental practice" means the practice of dentistry for an average of a minimum of 32 hours per week excluding those exceptions enumerated in Part III ~~(12VAC5-520-130 et seq.)~~ (12VAC5-520-160 et seq.) of this chapter.

~~"Governing Board of Virginia Commonwealth University" means the official governing body of the university or their designee.~~

"Interest at the prevailing bank rate for similar amounts of unsecured debt" means the prime lending rate plus 2.0% as published in the Wall Street Journal on the ~~last~~ first day of the month in which the decision to repay is communicated to the commissioner by the recipient, ~~plus two percentage points or on the first day of the month that the commissioner determines the recipient to be in default.~~

~~"Internship or residency at an approved institution or facility" means an advanced dental education program in general dentistry or dental specialty accredited by the Commission on Dental Accreditation and approved by the American Dental Association.~~

"Loan repayment award" means an award paid to a dentist for dental school loans in an amount equivalent to the current in-state tuition and mandatory fees at Virginia Commonwealth University School of Dentistry, and for which the dentist is under a contractual obligation to repay through practice in an underserved area or designated state facility. This amount may be capped at the discretion of the commissioner.

~~"Participating dental school" means Virginia Commonwealth University School of Dentistry.~~

~~"Penalty" means an amount of money equal to three times the amount of all monetary scholarship or loan repayment awards paid to the recipient.~~

~~"Period of dental service" means one year of service in a dental underserved area in return for one year of scholarship or loan repayment as defined in Part III (12VAC5-520-130 et seq.) of this chapter.~~

"Practice of general or specialty dentistry" means the evaluation, diagnosis, prevention and treatment (nonsurgical, surgical or related procedures) of diseases, disorders and conditions of the oral cavity, maxillofacial and adjacent and associated structures and their impact on the human body.

~~"Primary dental health care" means the practice of general or specialty dentistry.~~

~~"Public health service" means employment with the United States Public Health Service.~~

~~"Restitution" means the amount of monetary reimbursement, including repayment of all pertinent scholarship or loan repayment awards three times the award amount received plus penalty and applicable interest at the prevailing bank rate for similar amounts of unsecured debt as set forth in this regulation, owed to the Commonwealth of Virginia by a scholarship or loan repayment recipient who is in default of his contractual obligation as provided for in this chapter.~~

~~"Scholarship award" means an amount equivalent to one year of in-state tuition and mandatory fees at Virginia Commonwealth University School of Dentistry for the academic year a student is enrolled and for which the dental student entered a contractual obligation to repay through practice in an underserved area or designated state facility. This amount may be capped at the discretion of the commissioner.~~

~~"Scholarship recipient" means an eligible dental student who enters into a contract with the commissioner and receives one or more scholarship awards from the Virginia Dental Scholarship Program.~~

~~"Specialty dental practice" dentistry" means the advanced practice of dentistry in any specialty approved by the American Dental Association and accredited by the Commission on Dental Accreditation.~~

~~"Virginia dental scholarship" means an award of an amount equivalent to one year of in state tuition at Virginia Commonwealth University School of Dentistry for the academic year a student is enrolled in a participating dental school and for which the dental student entered a contractual obligation to repay through practice in an underserved area or designated state facility.~~

**12VAC5-520-30. Applicability. (Repealed.)**

~~These definitions shall apply to all recipients who begin practice in an underserved area as fulfillment of their scholarship or loan repayment obligation on July 1, 2001, or later, provided that approval given by the commissioner prior to May 8, 2002, shall remain in full force and effect.~~

Part III

Scholarship and Loan Repayment Awards

**12VAC5-520-130. Eligible applicants.**

A. Any currently enrolled dental student in good standing and full-time attendance at Virginia Commonwealth University School of Dentistry who has not entered the first year of an accredited residency shall be eligible for the Virginia Dental Scholarship Program. Preference for the scholarship award shall be given to residents of the Commonwealth, students who are residents of a dental underserved area, and students from economically disadvantaged backgrounds.

B. Any graduate of an accredited dental school in the United States who is establishing a practice in general or specialty dentistry in an underserved area or practicing dentistry in a designated state facility shall be eligible to apply for the

Virginia Dentist Loan Repayment Program. Eligible applicants General practice dentists will be within five years of graduation from an accredited undergraduate dental program and have existing loans accumulated as a result of their first professional education undergraduate dental program. Dentists who have received dental scholarship program awards and dentists who have accepted Exceptional Financial Need (EFN) and Financial Assistance for Disadvantaged Health Professions Students (FADHPS) scholarships are not eligible for the Dentist Loan Repayment Program. Specialty practice dentists will be within five years of completion of their specialty training and have existing loans accumulated as a result of their undergraduate dental program. Dentists who received Virginia scholarship awards or other scholarships that paid their full tuition and fees are not eligible for the Dentist Loan Repayment Program for the years they received those awards.

**12VAC5-520-150. Distribution of scholarships and loan repayment awards.**

The Virginia General Assembly establishes the total combined appropriation for the dental scholarship and dentist loan repayment programs. Funds shall be awarded for these programs based on the following criteria:

1. Virginia Commonwealth University School of Dentistry shall ~~establish an~~ use the application procedure established by the commissioner and annually submit the names of qualified students to receive scholarships in accordance with the criteria for preference enumerated in ~~this section~~ 12VAC5-520-130. Dental scholarships will be awarded on or before October 30 of each fiscal year with remaining funds disbursed through the Dentist Loan Repayment Program. The total ~~annual~~ number of scholarship awards will be based on availability of funds. Scholarship awards will be made annually by October 30 to third-year and fourth-year dental students. First-year and second-year students will be considered for an award only in the event of extreme financial need. Individual scholarship recipients may receive a maximum of five scholarship awards.

2. The application period for the Dentist Loan Repayment Program will ~~follow that for the Dental Scholarship Program, begin in October~~ with awards made by ~~January 30~~ the end of each fiscal year. Preference for loan repayment awards will be given to ~~dental students graduating from graduates of~~ graduates of Virginia Commonwealth University School of Dentistry ~~and those with established financial need~~. Individual loan repayment recipients may receive a maximum of ~~three~~ four awards upon graduation from dental school. All awards will be competitive ~~based on the criteria enumerated in this section~~ and will be based on availability of ~~loan repayment funds once scholarship funds are disbursed.~~

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# Regulations

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## 12VAC5-520-160. Contractual practice obligation.

Prior to the payment of money to a scholarship or loan repayment ~~awardee~~ recipient, the commissioner shall prepare and enter into a contract with the recipient. The contract shall:

1. Provide that the recipient of the ~~dental~~ scholarship award shall pursue the dental course of Virginia Commonwealth University until graduation and upon graduation or upon graduation from an accredited residency program that does not exceed four years, shall notify the commissioner in writing of his proposed practice location or intent to enter a residency not more than 30 days after graduation and begin his approved practice within 90 days after completing dental school or residency, and thereafter continuously engage in full-time dental practice in a dental underserved area of Virginia or in a designated state facility for a period of years equal to the number of annual scholarships received.
2. Provide that upon graduation from an accredited dental school and receiving notification of the dentist loan repayment award, the dentist shall begin his approved practice within 90 days and thereafter continuously engage in full-time dental practice in an underserved area of Virginia or in a designated state facility for a period of years equal to the number of loan repayment awards received.
3. Provide that at any time prior to entering practice, the scholarship or loan repayment recipient shall be allowed to select a future practice location from the listing of dental underserved areas maintained by the board.
4. Provide that the recipient may request approval of a change of practice location. The commissioner in his discretion may approve such a request, but only if the change is to a practice location in a dental underserved area or a state facility designated by the Board of Health.
5. Provide that the recipient shall repay the scholarship or loan repayment obligation by practicing dentistry on a full-time basis in a dental underserved area, shall maintain office hours convenient for the population of the area to have access to the recipient's services and shall participate in all government-sponsored insurance programs designed to ensure access to dental services of recipients of public assistance. The recipient shall not selectively place limits on the numbers of such patients admitted to the practice.
6. Provide that the recipient shall not voluntarily obligate himself for more than the minimum period of military service required of dentists by the laws of the United States and that upon completion of the minimum period of military service, the recipient shall promptly begin and thereafter continuously engage in full-time dental practice in a dental underserved area of Virginia or in a designated state facility for the period of years equal to the number of scholarships received. Dental practice in federal agencies, military service or the U.S. Public Health Service may not be substituted for scholarship obligation.

7. Provide that the recipient shall receive credit toward fulfillment of his contractual obligation at the rate of 12 months of dental practice for each scholarship or loan repayment award paid to the recipient. The recipient may be absent from the place of approved practice for a total of ~~seven~~ four weeks in each 12-month period for personal reasons. Absence for a period in excess of ~~seven~~ four weeks without the written permission of the commissioner shall result in proportional reduction of the period of credit toward fulfillment of the contractual obligation.

8. Provide that should the scholarship recipient pay restitution by not serving his scholarship obligation in an underserved area, and ~~later~~ within five years of paying restitution fulfills the terms of his contract through dental practice as outlined in this section, that the recipient will be reimbursed for all or part of any scholarship ~~amount~~ award paid based on the fulfillment of the scholarship and availability of funds.

### Part V

#### Special Circumstances

## 12VAC5-520-180. Fractional need.

The Board of Health recognizes that instances will occur when the ratio of dental practitioners to population reflects a fractional share of need. In such instances and in recognition of the advantages that accrue to the dentist and the community from two or more dentists working ~~on~~ in an associated or cooperative basis, the commissioner may in his discretion favorably consider the approval of an additional dentist in order to facilitate such an arrangement.

### Part VI

#### Default

## 12VAC5-520-190. Default.

A. With respect to default, the contract shall provide that a scholarship or loan repayment recipient who fails to fulfill his obligation to practice dentistry as described in 12VAC5-520-160 shall be deemed in default under the following circumstances and shall forfeit all monetary scholarship or loan repayment awards made to him and shall ~~make repayment of those funds plus interest plus penalty, where applicable to~~ repay the Commonwealth of Virginia as provided for in this chapter. The contract shall:

1. Provide that if the scholarship recipient defaults while still in dental school, by voluntarily notifying the commissioner in writing that he will not practice dentistry in a Virginia dental underserved area as required by his contract, by voluntarily not proceeding to the next year of dental education, or by withdrawing from dental school, the student shall pay the Commonwealth of Virginia all monetary scholarship awards plus interest at the prevailing bank rate for similar amounts of unsecured debt.
2. Provide that the scholarship recipient who defaults by failing to maintain grade levels that will allow the dental student to graduate, or by reason of his dismissal from

dental school for any reason, shall repay the Commonwealth of Virginia all monetary scholarship awards plus interest at the prevailing bank rate for similar amounts of unsecured debt.

3. Provide that if the scholarship or loan repayment recipient is in default due to death or permanent disability so as not to be able to engage in dental practice, the recipient or his personal representative shall repay the Commonwealth all monetary scholarship awards plus 8.0% interest on the amount of the award. Partial fulfillment of the recipient's contractual obligation by the practice of dentistry as provided for in this contract prior to death or permanent disability shall reduce the amount of repayment plus interest due by a proportionate amount of money, such proportion being determined as the ratio of the number of whole months that a recipient has practiced dentistry in an approved location to the total number of months of the contractual obligation the recipient has incurred. The commissioner may waive all or part of the scholarship or loan repayment obligation under application by the recipient or his estate under these conditions and consider whole or partial forgiveness of payment or service in consideration of individual cases of ~~extraordinary~~ or inability to pay.

4. Provide that any recipient of a scholarship or loan repayment who defaults by evasion or refusal to fulfill the obligation to practice dentistry in an underserved area or designated state facility for a period of years equal to the number of annual scholarships or loan repayment awards received shall make restitution ~~by repaying all monetary scholarship or loan repayment awards plus penalty plus interest~~ to the Commonwealth of Virginia.

B. A scholarship or loan repayment recipient will be considered to be in such default on the date:

1. The commissioner is notified in writing by the recipient that he does not intend to fulfill his contractual obligation;
2. The recipient has not accepted a placement and commenced his period of obligated practice as provided for in ~~subdivision~~ subdivisions 1 and 2 of 12VAC5-520-160; or
3. The recipient absents himself without the consent of the commissioner from the place of dental practice that the commissioner has approved for fulfillment of his contractual obligation.

Part VII  
Repayment

**12VAC5-520-200. Repayment.**

Repayment requirements for scholarship and loan repayment recipients are as follows:

1. Payment of restitution or repayment of award plus interest shall be due on the date that the recipient is deemed by the commissioner to be in default.

2. The commissioner in his discretion shall permit extension of the period of ~~payment of restitution plus interest~~ repayment for up to 24 months from the date that the recipient is deemed to be in default.

3. Partial fulfillment of the recipient's contractual obligation by the practice of dentistry as provided for in this contract shall reduce the amount of restitution ~~or payment plus interest due by an amount of money equal to the same percentage of all monetary awards as by a percentage based on the number of whole months that the recipient has practiced dentistry in an approved location as a percentage of and~~ the total number of months of the contractual obligation the recipient has incurred.

4. Failure of a recipient to make any payment on his debt ~~of restitution plus interest~~ when it is due shall be cause for the commissioner to refer the debt to the Attorney General of the Commonwealth of Virginia for collection. The recipient shall be responsible for any costs of collection as may be provided in Virginia law.

Part VIII  
Records and Reporting

**12VAC5-520-210. Reporting requirements.**

Reporting requirements of Virginia Commonwealth University School of Dentistry scholarship and loan repayment recipients are as follows:

1. Virginia Commonwealth University School of Dentistry shall maintain accurate records of the status of scholarship recipients until the recipient's graduation from dental school. The dental school shall provide a report listing the status of each recipient annually to the commissioner.

2. Each scholarship and loan repayment recipient shall at any time provide information as requested by the commissioner to verify compliance with the practice requirements of the scholarship or loan repayment contract. The recipient shall report any changes of mailing address, change of academic standing, change of intent to fulfill his contractual obligation and any other information that may be relevant to the contract at such time as changes or information may occur. The recipient shall respond within ~~60~~ 30 days with such information as may be requested by the commissioner.

VA.R. Doc. No. R08-1336; Filed September 17, 2012, 3:42 p.m.

**DEPARTMENT OF MEDICAL ASSISTANCE  
SERVICES**

**Emergency Regulation**

Titles of Regulations: **12VAC30-50. Amount, Duration, and Scope of Medical and Remedial Care Services (adding 12VAC30-50-415).**

**12VAC30-80. Methods and Standards for Establishing Payment Rates; Other Types of Care (amending 12VAC30-80-110).**



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# Regulations

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**Statutory Authority:** § 32.1-325 of the Code of Virginia; 42 USC § 1396 et seq.

**Effective Dates:** October 8, 2012, through October 7, 2013.

**Agency Contact:** Molly Carpenter, Policy Analyst, Division of Maternal and Child Health, Department of Medical Assistance Services, 600 East Broad Street, Suite 1300, Richmond, VA 23219, telephone (804) 786-1493, FAX (804) 786-1680, or email molly.carpenter@dmas.virginia.gov.

**Preamble:**

*The Administrative Process Act (§ 2.2-4011 of the Code of Virginia) states that an agency may adopt regulations in an "emergency situation" (i) upon consultation with the Attorney General after the agency has submitted a request stating in writing the nature of the emergency, and at the sole discretion of the Governor; (ii) in a situation in which Virginia statutory law, the Virginia appropriation act, or federal law or federal regulation requires that a regulation be effective in 280 days or less from its enactment, and the regulation is not exempt under the provisions of subdivision A 4 of § 2.2-4006 of the Code of Virginia; or (iii) in a situation in which an agency has an existing emergency regulation, additional emergency regulations may be issued as needed to address the subject matter of the initial emergency regulation provided the amending action does not extend the effective date of the original action.*

*This suggested emergency regulation meets the standard at § 2.2-4011 B of the Code of Virginia. The Governor is hereby requested to approve this agency's adoption of the emergency regulations entitled Early Intervention (Part C) Case Management (12VAC30-50-415 and 12VAC30-80-110) and also authorize the initiation of the permanent regulation promulgation process provided for in § 2.2-4007 of the Code of Virginia.*

*The planned regulatory action creates a new model for Medicaid coverage of case management services for children younger than three years of age who receive services under Chapter 53 (§ 2.2-5300 et seq.) of Title 2.2 of the Code of Virginia in accordance with Part C of the Individuals with Disabilities Education Act (20 USC § 1431 et seq.). These children have (i) a 25% developmental delay in one or more areas of development, (ii) atypical development, or (iii) a diagnosed physical or mental condition that has a high probability of resulting in a developmental delay.*

*The planned regulatory action is one component of this administration's initiative to revise the system of financing for Part C early intervention services in Virginia to make more efficient use of federal and state funds. Obtaining Medicaid reimbursement for required case management services ensures that the Commonwealth will draw down the maximum available federal Medicaid match for those Part C services currently paid with state-only funds. The Department of Behavioral Health and Developmental*

*Services (DBHDS) has proposed new regulations for certification of Early Intervention Case Managers in tandem with this regulatory action. The department consulted with DBHDS and other stakeholders in developing these regulations.*

## **12VAC30-50-415. Case management for Early Intervention (Part C).**

**A. Target group:** Medicaid eligible children from birth up to age three years who have (i) a 25% developmental delay in one or more areas of development, (ii) atypical development, or (iii) a diagnosed physical or mental condition that has a high probability of resulting in a developmental delay who participate in the early intervention services system described in Chapter 53 (§ 2.2-5300 et seq.) of Title 2.2 of the Code of Virginia.

**B. Services are provided in the entire state.**

**C. Services are not comparable in amount, duration, and scope.** Authority of § 1915(g)(1) of the Social Security Act is invoked to provide services without regard to the requirements of § 1902(a)(10)(B) of the Act.

**D. Definition of services:** Early intervention case management services are services furnished to assist individuals eligible under the State plan who reside in a community setting in gaining access to needed medical, social, educational, and other services. Early intervention case management includes the following assistance as defined in 42 CFR 440.169 and Chapter 53 (§ 2.2-5300 et seq.) of Title 2.2 of the Code of Virginia:

**1. Comprehensive assessment and periodic reassessment of individual needs to determine the need for any medical, educational, social, or other services, including EPSDT services.** Needs shall be reassessed at least annually.

**2. Development and periodic revision of an individualized family service plan (IFSP) as defined in coverage of and reimbursement for Early Intervention Services under Part C of IDEA (12VAC30-50-131) based on the information collected through the assessment.** The IFSP shall be updated at least annually. A face-to-face contact with the child's family is required for the initial development and annual revision of the IFSP. The case manager shall be responsible for determining if the family's particular situation warrants additional face-to-face visits.

**3. Referral and related activities to help the eligible individual obtain needed services, including activities that help link the individual with medical, social, and educational providers or other programs and services that are capable of providing needed services to address identified needs and achieve goals specified in the IFSP.**

**4. Monitoring and follow-up activities, including activities and contacts that are necessary to ensure that the IFSP is effectively implemented and adequately addresses the needs of the eligible individual.** At a minimum one telephone, e-mail, or face-to-face contact shall be made

with the child's family every three calendar months, or attempts of such contacts documented. The case manager shall be responsible for determining if the family's particular situation warrants additional family contacts.

5. Early intervention case management includes contacts with family members, service providers, and other noneligible individuals and entities that are directly related to the identification of the eligible individual's needs and care.

E. Qualifications of providers.

1. Authority of § 1915(g)(1) of the Social Security Act is invoked to limit providers of early intervention case management services without regard to the requirements of § 1902(a)(10)(B) of the Act. Providers are limited to entities designated by the local lead agencies under contract with the Department of Behavioral Health and Developmental Services (DBHDS) pursuant to § 2.2-5304.1 of the Code of Virginia to ensure that the case managers for individuals with developmental disabilities are capable of ensuring that such individuals receive needed services.

2. Individuals providing early intervention case management must be certified as an Early Intervention Case Manager by DBHDS.

F. Freedom of choice.

1. Eligible recipients shall have free choice of the providers of early intervention case management services within the specified geographic area identified in this plan.

2. Eligible recipients shall have free choice of the providers of other medical care under the plan.

G. Access to services.

1. Case management services shall be provided in a manner consistent with the best interest of recipients and shall not be used to restrict an individual's access to other Medicaid services.

2. Individuals shall not be compelled to receive case management services. The receipt of other Medicaid services shall not be a condition for the receipt of case management services, and the receipt of case management services shall not be a condition for receipt of other Medicaid services.

3. Providers of case management services do not exercise the agency's authority to authorize or deny the provision of other Medicaid services.

H. Case management services must be documented and maintained in individual case records in accordance with 42 CFR 441.18(a)(7) and other state and federal requirements.

I. Limitations.

1. Early intervention case management shall not include the following:

a. Activities not consistent with the definition of case management services in 42 CFR 440.169.

b. The direct delivery of an underlying medical, educational, social, or other service to which an eligible individual has been referred.

c. Activities integral to the administration of foster care programs.

d. Activities for which third parties are liable to pay, except for case management that is included in an IFSP consistent with § 1903(c) of the Social Security Act.

2. Payment for case management services under the plan must not duplicate payments made to public agencies or private entities under other program authorities for this same purpose.

3. Case management may not be billed when it is an integral part of another Medicaid service including, but not limited to, intensive community treatment services and intensive in-home services for children and adolescents.

4. Case management defined for another target group shall not be billed concurrently with this case management service, except for case management services for high risk infants provided under 12VAC30-50-410. Providers of early intervention case management shall coordinate services with providers of case management services for high risk infants, pursuant to 12VAC30-50-410, to ensure that services are not duplicated.

5. Providers shall not be reimbursed for case management services provided for (i) seriously mentally ill adults and emotionally disturbed children (12VAC30-50-420), (ii) youth at risk of serious emotional disturbance (12VAC30-50-430), (iii) individuals with mental retardation (12VAC30-50-440), or (iv) individuals with mental retardation and related conditions who are participants in the home-based and community-based care waivers for persons with mental retardation and related conditions (12VAC50-30-450) when these children also fall within the target group for early intervention case management as set out herein.

6. Case management may be billed only when all of the following conditions are met:

a. A least one documented case management service is furnished during the month; and

b. The provider is certified by DBHDS and enrolled with DMAS as an Early Intervention Case Management provider.

**12VAC30-80-110. Fee-for-service: Case Management.**

A. Targeted case management for high-risk pregnant women and infants up to age two, for community mental health and mental retardation services, and for individuals who have applied for or are participating in the Individual and Family Developmental Disability Support Waiver program (IFDDS Waiver) shall be reimbursed at the lowest of: state agency fee schedule, actual charge, or Medicare (Title XVIII) allowances.

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# Regulations

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B. Targeted case management for children from birth to age three who have developmental delay who are in need of early intervention is reimbursed at the lower of the state agency fee schedule or actual charge (charge to the general public). All private and governmental fee-for-service providers are reimbursed according to the same methodology. The agency's rates were set as of October 1, 2011, and are effective for services on or after that date. Rates are published on the agency's website at [www.dmas.virginia.gov](http://www.dmas.virginia.gov).

VA.R. Doc. No. R13-2955; Filed September 12, 2012, 11:41 a.m.

## Proposed Regulation

Title of Regulation: **12VAC30-120. Waivered Services (amending 12VAC30-120-900, 12VAC30-120-920, 12VAC30-120-930; adding 12VAC30-120-905, 12VAC30-120-924, 12VAC30-120-935, 12VAC30-120-945, 12VAC30-120-990, 12VAC30-120-995; repealing 12VAC30-120-910, 12VAC30-120-940, 12VAC30-120-950, 12VAC30-120-960, 12VAC30-120-970, 12VAC30-120-980).**

Statutory Authority: §§ 32.1-324 and 32.1-325 of the Code of Virginia.

Public Hearing Information: No public hearings are scheduled.

Public Comment Deadline: December 7, 2012.

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Basis: Section 32.1-325 of the Code of Virginia grants to the Board of Medical Assistance Services the authority to administer and amend the Plan for Medical Assistance. Sections 32.1-324 and 32.1-325 of the Code of Virginia authorizes the Director of 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.

DMAS' Elderly or Disabled with Consumer Direction (EDCD) Waiver operates under the authority of § 1915 (c) of the Social Security Act and 42 CFR 430.25(b)(2), which permit the waiver of certain State Plan requirements. These cited federal statutory and regulatory provisions permit the establishment of Medicaid waivers to afford the states greater flexibility to devise different approaches to the provision of long-term care services. This particular waiver provides Medicaid recipients who are either elderly or who have a disability with numerous supportive services to enable such individuals to remain in their homes and communities at lower costs, as opposed to being institutionalized in nursing facilities.

Purpose: This proposed regulatory action updates the EDCD waiver to accommodate changes in the industry and to provide greater clarity in these regulations. These proposed changes do not affect the health, safety, or welfare of citizens. They are intended to remove physical plant standards that, subsequent to DMAS regulations of several years ago, have been adopted by the Virginia Department of Social Services. They are also intended to simplify and clarify provider requirements by permitting reasonable variances from waiver individuals' plans of care (POCs). This action also provides for the adoption of person-centered planning processes in conformance with federal requirements.

Substance: The sections of the State Plan that are affected by this action are Elderly and Disabled with Consumer Direction Waiver, Part IX (12VAC30-120-900 through 12VAC30-120-980) of 12VAC30-120.

No changes are recommended for the eligibility criteria to be applied to waiver applicants, nor are any new services or increases to the covered services being proposed. Currently, these regulations require the use of the DMAS-122 form by local departments of social services to communicate to long-term care providers relevant information about waiver individuals' eligibility and patient pay amounts. With the patient pay information on the DMAS-122 form, providers are able to submit their claims to DMAS.

Currently, the existing adult day health care services regulations contain providers' standards similar to licensing standards that are applicable to the centers' physical plants, staffing requirements, and nutrition services. For agency-directed personal care services, DMAS requires that the nurse supervisor perform visits (for initial assessments and follow up visits) to waiver individuals' homes within specified numbers of days depending on whether the waiver individual has a cognitive impairment or not. Current regulations require that DMAS approve personal care aide training classes for agencies. Current regulations permit someone who is only 10 years old to provide personal care aide services. Current regulations set a standard of a minimum of 40-hours of training for personal care aides. Currently, the regulations require that the consumer-directed services facilitator perform criminal record checks.

Changes are proposed to (i) allow for LPNs to supervise, as permitted by their professional licenses, personal care aides under agency-directed personal care and respite care services; (ii) require personal care agencies to ensure that the personal care aide has the required skills and training to perform services as specified in the waiver individual's supporting documentation; (iii) correct the typographical error of the age of 10 years old to 18 years old for program aides in Adult Day Health Care; (iv) reflect the replacement of the DMAS-122 form with the Medicaid Long-Term Care Communication Form (DMAS-225) along with the use of an automated electronic system for providers' use; (v) remove licensing-type standards that apply to the physical plant of the

adult day health care center; (vi) permit providers more time to secure service verification signatures; (vii) permit providers' to document reasonable variances from waiver individuals' POCs; and (viii) require agencies to secure criminal record and sex offender registry checks on persons in their employ.

Based on the personal care agency's assessment of the recipient, further changes (i) permit longer periods of time between supervising RN and LPN supervisory visits; (ii) add new standards, consistent with licensing statute and regulations for the new supervisory provider type of LPN; (iii) require agencies to ensure that its aides have the training and skills required to perform the services required in waiver individuals' POCs; (iv) permit alternative methods of personal care aide service documentation; (v) make the Medicaid contracted Fiscal/Employer Agent responsible for obtaining criminal record checks for personal care aides in consumer-directed services; and (vi) provide new prior (service) authorization limits for the existing covered services of assistive technology and environmental modifications pursuant to the authority of 42 CFR 440.230(d).

Duplicative statements, such as in 12VAC30-120-930 I 4 and 12VAC30-120-970, are being removed to improve clarity and reduce confusion. DMAS is also adopting a universal format and consistent definitions, where possible, for all of its home and community based waiver regulations to facilitate provider participation across multiple waiver programs in response to provider requests.

Additional suggestions received from recipients' advocates during the Notice of Intended Regulatory Action comment period are addressed in this proposed stage.

Issues: Prior to the NOIRA comment period, representative provider organizations addressed the following issues with DMAS: (i) the need for a reasonable period of time to secure waiver individuals' or family members' signatures on provider records to document service delivery; (ii) alternative ways for providers to determine waiver individual eligibility status and patient pay amounts; and (iii) legitimate documented variance from the waiver individual's plan of care. All of these provider concerns are addressed in these proposed regulations. Furthermore, DMAS has instituted an automated system for providers' use to facilitate their determination of waiver individuals' status in support of their billing processes.

The advantage of incorporating these changes into the regulations for providers is that they will enhance providers' ability to successfully render services covered by this waiver as well as effecting successful conclusions provider audits. Such changes will be beneficial to the agency and the Commonwealth due to reduced provider payment recoveries, which have resulted from failed provider audits. Such recoveries require considerable agency administrative time and costs and also drive provider appeals that are also administratively costly.

There are no disadvantages for citizens or the Commonwealth.

## Department of Planning and Budget's Economic Impact Analysis:

Summary of the Proposed Amendments to Regulation. The proposed regulations will 1) allow Licensed Practical Nurses to supervise personal care aides under agency-directed personal care and respite care services, 2) allow providers more time to secure service verification signatures, 3) permit providers to document reasonable variances from waiver individuals' plans of care, 4) allow longer periods of time between nurse supervisory visits, 5) include provisions for electronic information exchange between the local departments of social services, the Department of Medical Assistance Services, and enrolled service providers for determination of the patient pay requirement for waiver services, 6) require fiscal agent instead of service facilitator to obtain criminal record checks for personal care aides in consumer-directed services, 7) allow involuntary disenrollment from consumer directed model if consumer directed services are not working well for a recipient, 8) incorporate provisions for person-centered planning, 9) re-organize the existing requirements to be consistent with other waiver regulations, 10) pursuant to Item 297 YYY, Chapter 297 of the 2010 Acts of Assembly, add language to reduce annual limit an individual can receive from \$5,000 to \$3,000 for environmental modifications and assistive technology.

Result of Analysis. The benefits likely exceed the costs for one or more proposed changes. There is insufficient data to accurately compare the magnitude of the benefits versus the costs for other changes.

Estimated Economic Impact. The Elderly or Disabled with Consumer Direction (EDCD) Waiver program is established under section 1915(c) of the federal Social Security Act, which encourages the states to provide home and community based services as alternatives to institutionalized care. The ED CD Waiver program provides supportive services in the homes and communities of persons who are elderly or disabled. The main purpose of waiver programs is to prevent or delay placement of persons in institutions by providing care for individuals in their homes and communities consequently avoiding high long term care costs. States wishing to implement such waiver programs are required to demonstrate that the costs would be lower under a waiver than the related institutional placement. The ED CD Waiver program currently serves approximately 18,385 individuals.

One of the proposed changes will allow Licensed Practical Nurses (LPN) to supervise personal care aides under agency-directed personal care and respite care services. Currently, only Registered Nurses (RN) are allowed to supervise personal care aides in this waiver. According to Department of Medical Assistance Services (DMAS), nurse licensure rules allow LPNs to perform this task. With the proposed change, an agency will be able to have their LPNs to

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## Regulations

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supervise personal care aides. Considering compensation of RNs is significantly greater than that of LPNs, the providers are likely to shift this task, if they can, from RNs to LPNs to reduce their costs.<sup>1</sup> A reduction in the quality of personal care aide services is not expected as the nurse licensure rules indicate competency of LPNs in performing this task.

Another proposed change will allow providers an additional seven days to secure service verification signatures. Currently, if service verification signatures are not collected by the end of the week when the services are rendered, DMAS denies payment. By allowing more time to collect signatures, the proposed regulations are expected to reduce the amount of payments that must be recovered from the providers following an audit.

The proposed changes will also permit providers to document reasonable variances from waiver individuals' plans of care. Currently, if services are not provided according to the individual's plan of care, DMAS denies payment. Under the proposed changes, providers will be allowed to depart from the plan of care if it is reasonable to do so. This change recognizes that an individual's needs may change rapidly requiring a departure from the plan of care. Also, by allowing reasonable variances, the amount of payments that must be recovered from the providers following an audit is expected to decline.

One of the proposed changes will allow longer periods of time between nurse supervisory visits. Currently, providers are required to have a nurse visit their patients with a cognitive impairment once at least every 30 days and others once at least every 90 days. According to DMAS, some of the recipients with a cognitive impairment are very stable and do not require frequent visits. The proposed changes will allow the providers discretion to reduce the frequency of nurse visits to patients with cognitive impairment to once at least every 90 days if their health status allows it. A reduction in the number of nurse visits is expected to reduce compliance costs of providers.

The proposed regulations also include DMAS' conversion to an electronic information exchange between the local departments of social services, DMAS, and enrolled EDCD service providers for determination of the patient pay requirement for waiver services. Electronic exchange of patient pay information is expected to reduce administrative costs associated with distribution of paper copies.

Another proposed change will shift the responsibility of obtaining criminal record checks for personal care aides in consumer-directed services from service facilitators to fiscal agents. Service facilitators train recipients for managing certain responsibilities associated with the consumer-directed service delivery mode such as hiring, firing, and managing health professionals providing a service. Fiscal agents perform fiscal functions such as processing payroll, calculating withholdings, and filing tax forms associated with employment of health professionals hired by the recipient.

With the proposed changes, criminal record check responsibility will be transferred from service facilitators to fiscal agents. Thus, an increase in the administrative costs of fiscal agents and a corresponding decrease in the administrative costs of service facilitators are expected. No reduction in the reimbursement rate for service facilitation services is proposed as a result of this change. However, fiscal agent services are performed by a contracted provider. Thus, the fiscal agent contractor may request an increase in the contract price as a result of the added administrative responsibility of performing criminal background checks.

The proposed changes will also allow involuntary disenrollment from consumer directed model if consumer directed services are not working well for a recipient. Currently, DMAS does not have the ability to move recipients into the agency directed model if the recipient fails to comply with the requirements of the consumer directed model or if there are health and safety risks to the recipient under the consumer directed model. For example, if the recipient is consistently unable to manage the assistant and has a pattern of discrepancies in time sheets of his or her assistant, DMAS will have the authority to provide services to that individual under the agency directed model.

Currently, there are about 7,036 people in this waiver who are using the consumer directed model of service delivery. DMAS expects the number of persons being removed involuntarily to be very small, 0.5% to 1.0% of those persons who use this service model. Consequently, it is estimated that 35 to 70 persons may be affected by this change. Generally, the rates for agency directed services are higher than the rates paid in consumer directed services.<sup>2</sup> Thus, removing individuals from consumer directed model to agency directed model has the potential to increase expenditures. However, prevention of non-compliance with the requirements of consumer directed model may create fiscal savings and/or improve health and safety of recipients.

The proposed changes also incorporate provisions for person-centered planning. According to DMAS, Centers for Medicare and Medicaid Services (CMS) now requires that states use person centered planning (PCP) in their waiver programs to ensure that individuals enrolled in the state's home and community based waivers fully participate in the planning for their services and supports. Person centered planning goes beyond the traditional individualized planning processes used in the waiver. The person centered approach relies much less on the service system and focuses on the individual receiving waiver services and supports. To accomplish PCP across Virginia, these regulations incorporate the essential definitions and activities needed to implement PCP.

In addition, the proposed regulations re-organize the existing requirements to be consistent with the other waiver regulations. The proposed reorganization is expected to make it easier to locate requirements and improve clarity.

Furthermore, pursuant to Item 297 YYY, Chapter 297 of the 2010 Acts of Assembly, the proposed regulations include language reducing annual limit an individual can receive from \$5,000 to \$3,000 for environmental modifications and assistive technology effective July 1, 2011. However, the funding for this change has been restored by the 2011 Acts of Assembly. DMAS plans to remove this language through a separate exempt regulatory action. Thus, no significant economic effect is expected from this language.

**Businesses and Entities Affected.** Currently, approximately 18,385 individuals are utilizing waiver services. The waiver services are provided by about 3,741 providers which include personal care agencies, respite care agencies, adult day care centers, transition coordinators, service facilitators, and durable medical equipment providers.

Also, there are 122 local departments of social services making eligibility determinations.

**Localities Particularly Affected.** The proposed regulations apply throughout the Commonwealth.

**Projected Impact on Employment.** Some of the proposed changes are expected to reduce the demand for labor. These changes include allowing longer periods of time between nurse supervisory visits and including provisions for electronic information exchange for determination of the patient pay requirement for waiver services.

Some of the other changes are expected to shift the demand for labor from one group to another. These changes include allowing Licensed Practical Nurses to supervise personal care aides under agency-directed personal care and respite care services, requiring fiscal agent instead of service facilitator to obtain criminal record checks for personal care aides in consumer-directed services, and allowing involuntary disenrollment from consumer directed model.

**Effects on the Use and Value of Private Property.** No direct effect on the use and value of private property is expected. However, some of the changes are expected to reduce compliance costs of providers and have a positive effect on their asset values. These changes include allowing Licensed Practical Nurses to supervise personal care aides, allowing providers more time to secure service verification signatures, permitting providers to document reasonable variances from waiver individuals' Plans of Care, allowing longer periods of time between nurse supervisory visits, and allowing electronic information exchange for determination of the patient pay requirement for waiver services.

**Small Businesses: Costs and Other Effects.** Most of the affected 3,741 providers are estimated to be small businesses. As discussed above, requiring fiscal agent instead of service facilitator to obtain criminal record checks for personal care aides in consumer-directed services is expected to increase administrative costs of fiscal agents and allowing involuntary disenrollment from consumer directed model is expected to reduce demand for services offered by consumer directed care providers.

**Small Businesses: Alternative Method that Minimizes Adverse Impact.** There is no known alternative method that minimizes adverse impact on small businesses while accomplishing the same goals.

**Real Estate Development Costs.** No impact on real estate development costs is expected.

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

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<sup>1</sup> According to U.S. Bureau of Labor Statistics, 2009 mean annual compensation in Virginia was \$63,270 for Registered Nurses and \$37,950 for Licensed Practical Nurses.

<sup>2</sup> The rates for Companion Care, Personal Care, and Respite Care under consumer directed model for Northern Virginia are \$11.47 and the rates under agency directed model for Northern Virginia are \$15.20; the rates under consumer directed model for the rest of the state are \$8.86 and the rates under agency directed model for the rest of the state are \$12.91.

**Agency's Response to Economic Impact Analysis:** The Department of Medical Assistance has reviewed the economic impact analysis prepared by the Department of Planning and Budget regarding the regulations concerning Elderly or Disabled with Consumer Direction Waiver 2009 Updates. The Agency raises no issues with this analysis.

**Summary:**

*The proposed amendments to the home and community-based Elderly or Disabled with Consumer Direction (EDCD) Waiver program provide for the following changes: (i) allowing for Licensed Practical Nurses (LPNs) to supervise, as permitted by their professional licenses, personal care aides under agency-directed personal care and respite care services; (ii) requiring*

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# Regulations

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*personal care agencies to ensure that the personal care aide has the required skills and training to perform services as specified in the individuals supporting documentation (plan of care); (iii) reflecting replacement of the DMAS-122 form with the Medicaid Long-Term Care Communication Form (DMAS-225) along with the use of an automated electronic system for providers use; (iv) removing licensing-type standards that apply to the physical plant of the adult day health care center; (v) permitting providers more time to secure service verification signatures; (vi) permitting providers to document reasonable variances from waiver individuals' plans of care, and (vii) providing for person-centered planning.*

*Based on the personal care agency's assessment of the waiver individual, further changes will (i) permit longer periods of time between supervising Registered Nurse/Licensed Practical Nurse (RN/LPN) supervisory visits; (ii) add new standards for the new supervisory provider type of LPN that are consistent with licensing statute and regulations; (iii) permit alternative methods of personal care aide service documentation; and (iv) make the Medicaid contracted fiscal/employer agent responsible for obtaining criminal record checks for personal care aides in consumer-directed services.*

*The Department of Medical Assistance is proposing a universal format for all of its waiver regulations to facilitate provider participation across more than one waiver. As such, some existing regulation sections are being repealed with the content being merged into new sections in support of this new format.*

## Part IX

### Elderly or Disabled with Consumer Direction Waiver

#### 12VAC30-120-900. Definitions.

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

"Abuse" means, for the purposes of this waiver, the infliction of injury, unreasonable confinement, intimidation, punishment, mental anguish, sexual abuse, or exploitation of any person. Types of abuse include (i) physical abuse (a physical act by a person that may cause physical injury to an individual); (ii) psychological abuse (an act, other than verbal, that may inflict emotional harm, invoke fear, or humiliate, intimidate, degrade, or demean an individual); (iii) sexual abuse (an act or attempted act such as rape, incest, sexual molestation, sexual exploitation, sexual harassment, or inappropriate or unwanted touching of an individual, or any or all of these); and (iv) verbal abuse (using words to threaten, coerce, intimidate, degrade, demean, harass, or humiliate an individual).

"Activities of daily living" or "ADLs" means personal care tasks such as bathing, dressing, toileting, transferring, and eating/feeding. An individual's degree of independence in

performing these activities is a part of determining appropriate level of care and service needs.

"~~Adult day health care center~~" or "ADHC" means a DMAS-enrolled provider that offers long-term maintenance or supportive services offered by a DMAS-enrolled community-based day care program providing a variety of health, therapeutic, and social services designed to meet the specialized needs of those elderly and disabled waiver individuals who are elderly or who have a disability and who are at risk of placement in a nursing facility. The ADHC must program shall be licensed by (DSS) the Virginia Department of Social Services (VDSS) as an ADHC adult day care center (ADCC). The services offered by the center shall be required by the waiver individual in order to permit the individual to remain in his home rather than entering a nursing facility. ADHC can also refer to the center where this service is provided.

~~"Adult day health care services" means services designed to prevent institutionalization by providing participants with health, maintenance, and coordination of rehabilitation services in a congregate daytime setting.~~

"Agency-directed model of services" means services provided by a personal care agency a model of service delivery where an agency is responsible for providing direct support staff, for maintaining individuals' records, and for scheduling the dates and times of the direct support staff's presence in the individuals' homes for personal and respite care.

"Americans with Disabilities Act" or "ADA" means the United States Code pursuant to 42 USC § 12101 et seq.

"Annually" means a period of time covering 365 consecutive calendar days or 366 consecutive days in the case of leap years.

"Appeal" means the process used to challenge ~~adverse~~ actions regarding services, benefits, and reimbursement provided by Medicaid pursuant to 12VAC30-110 and 12VAC30-20-500 through 12VAC30-20-560.

"Assistive technology" means specialized medical equipment and supplies including those devices, controls, or appliances specified in the plan of care but not available under the State Plan for Medical Assistance that enable wave individuals who are participating in the Money Follows the Person demonstration program pursuant to 12VAC30-120-2000 to increase their abilities to perform activities of daily living, or to perceive, control, or communicate with the environment in which they live, or that are necessary to the proper functioning of the specialized equipment. ~~12VAC30-120-762 provides the service description, criteria, service units and limitations, and provider requirements for this service. This service shall be available only to those EDCD waiver enrollees who are participants in the Money Follows the Person demonstration.~~



"Barrier crime" means those crimes as defined at §§ 32.1-162.9:1 and 63.2-1719 of the Code of Virginia that would prohibit the continuation of employment if a person is found through a Virginia State Police criminal record check to have been convicted of such a crime.

"CMS" means the Centers for Medicare and Medicaid Services, which is the unit of the U.S. Department of Health and Human Services that administers the Medicare and Medicaid programs.

"Cognitive impairment" means a severe deficit in mental capability that affects ~~an individual's~~ a waiver individual's areas of functioning such as thought processes, problem solving, judgment, memory, or comprehension that interferes with such things as reality orientation, ability to care for self, ability to recognize danger to self or others, or impulse control.

~~"Consumer directed services" means services for which the individual or family/caregiver is responsible for hiring, training, supervising, and firing of the personal care aide.~~

"Conservator" means a person appointed by a court to manage the estate and financial affairs of an incapacitated individual.

"Consumer-directed (CD) model of services" means the model of service delivery for which the waiver individual or the individual's employer of record, as appropriate, are responsible for hiring, training, supervising, and firing of the person or persons who actually render the services that are reimbursed by DMAS.

~~"Consumer directed (CD) services facilitator" or "facilitator" means the DMAS enrolled provider who is responsible for supporting the individual and family/caregiver, by ensuring the development and monitoring of the Consumer Directed Services Plan of Care, providing employee management training, and completing ongoing review activities as required by DMAS for consumer directed personal care and respite services.~~

"Day" means, for the purposes of reimbursement, a 24-hour period beginning at 12:00 a.m. and ending at 11:59 p.m.

~~"Designated preauthorization contractor" means DMAS or the entity that has been contracted by DMAS to perform preauthorization of services.~~

"Direct marketing" means either any of the following: (i) conducting either directly or indirectly door-to-door, telephonic, or other "cold call" marketing of services at residences and provider sites; (ii) using direct mailing; (iii) paying "finders fees"; (iv) offering financial incentives, rewards, gifts, or special opportunities to eligible individuals or family/caregivers as inducements to use the providers' services; (v) providing continuous, periodic marketing activities to the same prospective individual or family/caregiver, for example, monthly, quarterly, or annual giveaways as inducements to use the providers' services; or (vi) engaging in marketing activities that offer potential

customers rebates or discounts in conjunction with the use of the providers' services or other benefits as a means of influencing the individual's or family/caregiver's use of the providers' services.

"DBHDS" means the Department of Behavioral Health and Developmental Services.

"DMAS" means the Department of Medical Assistance Services.

"DMAS staff" means persons employed by the Department of Medical Assistance Services.

~~"DRS" means the Department of Rehabilitative Services.~~

~~"DSS" means the Department of Social Services.~~

"Elderly or Disabled with Consumer Direction Waiver" or "EDCD waiver" means the CMS-approved waiver that covers a range of community support services offered to waiver individuals who are elderly or disabled who have a disability who would otherwise require a nursing facility level of care.

"Employer of record" or "EOR" means the person who performs the functions of the employer in the consumer-directed model of service delivery. The EOR may be a family member or caregiver, as appropriate, when the waiver individual is unwilling or unable to perform the employer functions.

~~"Environmental modifications" means physical adaptations to a house, place of residence, an individual's primary home or primary vehicle or work site, when the work site modification exceeds reasonable accommodation requirements of the Americans with Disabilities Act (42 USC § 1201 et seq.), and which are necessary to ensure the individuals' individual's waiver health and safety or enable functioning with greater independence when the adaptation is not being used to bring a substandard dwelling up to minimum habitation standards and is of direct medical or remedial benefit to individuals. 12VAC30-120-758 provides the service description, criteria, service units and limitations, and provider requirements for this service. This service shall be available only to those EDCD waiver enrollees who are participants in the Money Follows the Person demonstration and shall be of direct medical or remedial benefit to individuals who are participating in the Money Follows the Person demonstration program pursuant to 12VAC30-120-2000. Such physical adaptations shall not be authorized for Medicaid payment when the adaptation is being used to bring a substandard dwelling up to minimum habitation standards.~~

~~"Fiscal agent" means an agency or division within DMAS or entity contracted by DMAS to handle employment, payroll, and tax responsibilities on behalf of individuals who are receiving consumer directed personal care services and respite services.~~

"Fiscal/employer agent" means a state agency or other entity as determined by DMAS that meets the requirements of 42 CFR 441.484 and the Virginia Public Procurement Act, § 2.2-4300 et seq. of the Code of Virginia.



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# Regulations

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"Guardian" means a person appointed by a court to manage the personal affairs of an incapacitated individual pursuant to § 64.2-2000 et seq. of the Code of Virginia, including responsibility for making decisions regarding the waiver individual's support, care, health, safety, habilitation, education, therapeutic treatment, and residence.

"Health, safety, and welfare standard" means, for the purposes of this waiver, that an individual's right to receive an EDCD Waiver service is dependent on a determination that the waiver individual needs the service based on appropriate assessment criteria and a written plan of care that demonstrates medical necessity and that services can be safely provided in the community or through the model of care selected by the individual.

"Home and community-based waiver services" or "waiver services" means the range of community support services approved by the CMS pursuant to § 1915(c) of the Social Security Act to be offered to persons who are elderly or disabled who would otherwise require the level of care provided in a nursing facility. DMAS or the designated preauthorization contractor shall only give preauthorization for medically necessary Medicaid reimbursed home and community care individuals as an alternative to institutionalization.

"Individual" means the person receiving the services established in these regulations who has applied for and been approved to receive these waiver services.

"Instrumental activities of daily living" or "IADLs" means tasks such as meal preparation, shopping, housekeeping and laundry. An individual's degree of independence in performing these activities is a part of determining appropriate level of care and service needs.

"Level of care" or "LOC" means the specification of the minimum amount of assistance an individual must require in order to receive services in an institutional setting under the State Plan or to receive waiver services.

"License" means proof of official or legal permission issued by the government for an entity or person to perform an activity or service such that, in the absence of an official license, the entity or person is debarred from performing the activity or service.

"Licensed Practical Nurse" or "LPN" means a person who is licensed or holds multi-state licensure pursuant to § 54.1-3000 et seq. of the Code of Virginia to practice nursing.

"Live-in caregiver" means a personal caregiver who resides in the same household as the waiver individual who is receiving waiver services.

"Long-term care" or "LTC" means a variety of services that help individuals with health or personal care needs and activities of daily living over a period of time. Long-term care can be provided in the home, in the community, or in various types of facilities, including nursing facilities and assisted living facilities.

"Medication administration" means the direct administration of medications by injection, inhalation, or ingestion or any other means to a waiver individual by either (i) the waiver individual or (ii) persons legally permitted to administer medications.

"Medicaid Long-Term Care (LTC) Communication Form" or "DMAS-225" means the form used by the long-term care provider to report information about changes in an individual's eligibility and financial circumstances.

"Medication monitoring" means an electronic device, which is only available in conjunction with Personal Emergency Response Systems, that enables certain waiver individuals who are at high risk of institutionalization to be reminded to take their medications at the correct dosages and times.

"Money Follows the Person" or "MFP" means the program of transition services, as set out in 12VAC30-120-2000 and 12VAC30-120-2010.

"Participating provider" or "provider" means an entity that meets the standards and requirements set forth by DMAS and has a current, signed provider participation agreement, including managed care organizations, with DMAS.

"Patient pay amount" means the portion of the long-term care individual's income that must be paid as his share of the long-term care services and is calculated by the local department of social services based on the individual's documented monthly income and permitted deductions.

"Personal care agency" means a participating provider that provides personal care services.

"Personal care aide" or "aide" means a person employed by an agency who provides personal care or unskilled respite services. The aide shall have successfully completed an educational curriculum of at least 40 hours of study related to the needs of individuals who are either elderly or who have disabilities as further set out in 12VAC30-120-935. Such successful completion may be evidenced by the existence of a certificate of completion, which is provided to DMAS during provider audits, issued by the training entity.

"Personal care attendant" or "attendant" means a person who provides personal care or respite services that are directed by a consumer, family member/caregiver, or employer of record under the CD model of service delivery.

"Personal care services" means long term maintenance or support services necessary to enable the individual to remain at or return home rather than enter a nursing facility. Personal care services are provided to individuals in the areas of activities of daily living, access to the community, monitoring of self administered medications or other medical needs, and the monitoring of health status and physical condition. Where the individual requires assistance with activities of daily living, and where specified in the plan of care, such supportive services may include assistance with instrumental activities of daily living. Services may be provided in home and community settings to enable an individual to maintain

the health status and functional skills necessary to live in the community or participate in community activities a range of support services necessary to enable the waiver individual to remain at or return home rather than enter a nursing facility and that includes assistance with activities of daily living (ADLs), instrumental activities of daily living (IADLs), access to the community, self-administration of medication, or other medical needs, supervision, and the monitoring of health status and physical condition. Personal care services shall be provided by aides, within the scope of their licenses/certificates, as appropriate, under the agency-directed model or by personal care attendants under the CD model of service delivery.

"Personal emergency response system (PERS)" means an electronic device and monitoring service that enable certain waiver individuals, who are at least 14 years of age, at high risk of institutionalization to secure help in an emergency. PERS services are shall be limited to those waiver individuals who live alone or who are alone for significant parts of the day and who have no regular caregiver for extended periods of time, and who would otherwise require extensive routine supervision.

"PERS provider" means a certified home health or a personal care agency, a durable medical equipment provider, a hospital, or a PERS manufacturer that has the ability responsibility to provide furnish, install, maintain, test, monitor, and service PERS equipment, direct services (i.e., installation, equipment maintenance, and services calls), and PERS monitoring. PERS providers may also provide medication monitoring.

"Plan of care" or "POC" means the written plan developed by collaboratively by the waiver individual and the waiver individual's family/caregiver, as appropriate, and the provider related solely to the specific services required by necessary for the individual to ensure optimal to remain in the community while ensuring his health and safety while remaining in the community, and welfare.

"Preadmission screening" means the process to: (i) evaluate the functional, nursing, and social supports of individuals referred for preadmission screening for long-term care services; (ii) assist individuals in determining what specific services the individuals need; (iii) evaluate whether a service or a combination of existing community services are available to meet the individuals' needs; and (iv) refer provide a list to individuals to the of appropriate provider providers for Medicaid-funded nursing facility or home and community-based care for those individuals who meet nursing facility level of care.

"Preadmission Screening ~~Committee/Team~~ Team" means the entity contracted with DMAS that is responsible for performing preadmission screening pursuant to § 32.1-330 of the Code of Virginia.

"Primary caregiver" means the primary person who consistently assumes the role primary role of providing direct

care and support of the waiver individual to live successfully in the community without receiving compensation for providing such care. Such person's name shall be documented by the RN or services facilitator in the waiver individual's record.

"Prior authorization" or "PA" (also "service authorization" or "Srv Auth") means the process of approving either by DMAS, its prior authorization (or service authorization) contractor, or DMAS-designated entity for the purposes of reimbursement for the service for the individual before it is rendered or reimbursed.

"Prior (or service) authorization contractor" means DMAS or the entity that has been contracted by DMAS to perform prior, or service, authorization for medically necessary Medicaid covered home and community-based services.

"Registered nurse" or "RN" means a person who is licensed or who holds multi-state licensure privilege pursuant to Chapter 30 (§ 54.1-3000 et seq.) of Title 54.1 of the Code of Virginia to practice nursing.

"Respite care agency" or ~~"respite care facility"~~ means a participating provider that renders respite services.

"Respite services" means ~~those short-term personal care services provided to waiver individuals who are unable to care for themselves that are furnished on a short-term basis because of the absence of or need for the relief of those the unpaid caregivers primary caregiver who normally provide provides the care.~~

"Service authorization" or "SRV AUTH" (also "prior authorization") means the process of approving either by DMAS, its service authorization (or prior authorization) contractor, or DMAS-designated entity, for the purposes of reimbursement for a service for the individual before it is rendered or reimbursed.

"Services facilitation" means a service that assists the waiver individual (or family/caregiver, as appropriate) in arranging for, directing, training, and managing services provided through the consumer-directed model of service.

"Services facilitator" means a DMAS-enrolled provider or DMAS-designated entity who is responsible for supporting the individual and the individual's family/caregiver or EOR, as appropriate, by ensuring the development and monitoring of the CD services plans of care, providing employee management training, and completing ongoing review activities as required by DMAS for consumer-directed personal care and respite services. Services facilitator shall be deemed to mean the same thing as consumer-directed services facilitator.

"State Plan for Medical Assistance" or "State Plan" means the regulations Commonwealth's legal document approved by CMS identifying the covered groups, covered services and their limitations, and provider reimbursement methodologies as provided for under Title XIX of the Social Security Act.

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# Regulations

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"Skilled respite services" means temporary skilled nursing services that are provided to waiver individuals who need such services and that are performed by a LPN for the relief of the unpaid primary caregiver who normally provides the care.

"Transition coordinator" means the DMAS enrolled provider who is responsible for supporting the individual and family/caregiver, as appropriate, with the activities associated with transitioning from an institution to the community. 12VAC30-120-2000 provides the service description, criteria, service units and limitations, and provider requirements for this service person as defined at 12VAC30-120-2000 who facilitates MFP transition.

"Transition services" means set-up expenses for individuals who are transitioning from an institution or licensed or certified provider-operated living arrangement to a living arrangement in a private residence where the person is directly responsible for his own living expenses. 12VAC30-120-2010 provides the service description, criteria, service units and limitations, and provider requirements for this service individuals as defined at 12VAC30-120-2010.

"Uniform Assessment Instrument" or "UAI" means the standardized multidimensional questionnaire that is completed by the Preadmission Screening Team that assesses an individual's physical health, mental health, and social and functional abilities to determine if the individual meets the nursing facility level of care.

"VDSS" means the Virginia Department of Social Services.

"Virginia Uniform Assessment Instrument" or "UAI" means the standardized multidimensional comprehensive assessment that is completed by the Preadmission Screening Team or approved hospital discharge planner that assesses an individual's physical health, mental health, and psycho/social and functional abilities to determine if the individual meets the nursing facility level of care.

"Weekly" means a span of time covering seven consecutive calendar days.

## **12VAC30-120-905. Waiver description and legal authority.**

A. The Elderly and Disabled with Consumer Direction (EDCD) Waiver operates under the authority of § 1915 (c) of the Social Security Act and 42 CFR 430.25(b) which permit the waiver of certain State Plan requirements. These federal statutory and regulatory provisions permit the establishment of Medicaid waivers to afford the states with greater flexibility to devise different approaches to the provision of long-term care (LTC) services. Under this § 1915(c) waiver, DMAS waives § 1902(a)(10)(B) and (C) of the Social Security Act related to comparability of services.

B. This waiver provides Medicaid individuals who are elderly or who have a disability with supportive services to enable such individuals to remain in their communities thereby avoiding institutionalization.

C. Federal waiver requirements provide that the current aggregate average cost of care fiscal year expenditures under this waiver shall not exceed the average per capita expenditures in the aggregate for the level of care (LOC) provided in a nursing facility (NF) under the State Plan that would have been provided had the waiver not been granted.

D. DMAS shall be the single state agency authority pursuant to 42 CFR 431.10 responsible for the processing and payment of claims for the services covered in this waiver and for obtaining federal financial participation from CMS.

E. EDCD services shall not be offered or provided to an individual who resides outside of the physical boundaries of the United States. With the exception of brief illnesses or vacations, coverage of waiver services may be provided during brief absences from the Commonwealth and requires prior authorization (PA) by either DMAS or its designated prior authorization contractor. Waiver services shall not be furnished to individuals who are inpatients of a hospital, nursing facility (NF), Intermediate Care Facility for the Mentally Retarded (ICF/MR), inpatient rehabilitation facility, assisted living facility licensed by VDSS that serves five or more individuals, or a group home licensed by DBHDS.

F. An individual shall not be simultaneously enrolled in more than one waiver program but may be listed on the waiting list for another waiver program as long as criteria are met for both waiver programs.

G. DMAS shall be responsible for assuring appropriate placement of the individual in home and community-based waiver services and shall have the authority to terminate such services for the individual for the reasons set out below.

H. No waiver services shall be reimbursed until after both the provider enrollment process and individual eligibility process have been completed.

I. DMAS payment for services under this waiver shall be considered payment in full and no balance billing by the provider to the waiver individual, family/caregiver, employer of record (EOR), or any other family member of the waiver individual shall be permitted. Additional voluntary payments or gifts from family members shall not be accepted by providers of services.

J. DMAS shall not duplicate services that are required as a reasonable accommodation as a part of the Americans with Disabilities Act (42 USC §§ 12131 through 12165) or the Rehabilitation Act of 1973 (29 USC § 794). EDCD services shall not be authorized if another entity is required to provide the services, (e.g. schools, insurance, etc.) because these waiver services shall not duplicate payment for services available through other programs or funding streams.

K. In the case of termination of home and community-based waiver services by DMAS, individuals shall be notified of their appeal rights pursuant to 12VAC30-110. DMAS, or the designated PA contractor, shall have the responsibility and the authority to terminate the receipt of home and

community-based care services by the waiver individual for any of the following reasons:

1. The home and community-based care services are no longer the critical alternative to prevent or delay institutional placement within 30 days;
2. The waiver individual is no longer eligible for Medicaid;
3. The waiver individual no longer meets the NF criteria;
4. The waiver individual's environment in the community does not provide for his health, safety, and welfare; or
5. Any other circumstances (including hospitalization) that cause services to cease or be interrupted for more than 30 consecutive days. In such cases, such individuals shall be referred back to the local department of social services for redetermination of their eligibility.

**12VAC30-120-910. General coverage and requirements for Elderly or Disabled with Consumer Direction Waiver services. (Repealed.)**

~~A. EDCD Waiver services populations. Home and community based waiver services shall be available through a § 1915(c) of the Social Security Act waiver for the following Medicaid eligible individuals who have been determined to be eligible for waiver services and to require the level of care provided in a nursing facility:~~

1. ~~Individuals who are elderly as defined by § 1614 of the Social Security Act; or~~
2. ~~Individuals who are disabled as defined by § 1614 of the Social Security Act.~~

~~B. Covered services.~~

1. ~~Covered services shall include: adult day health care, personal care (both consumer directed and agency directed), respite services (consumer directed, agency directed, and facility based), PERS, assistive technology, environmental modifications, transition coordinator and transition services. Assistive technology and environmental modification services shall be available only to those EDCD waiver enrollees who are participants in the Money Follows the Person demonstration.~~
2. ~~These services shall be medically appropriate and medically necessary to maintain the individual in the community and prevent institutionalization.~~
3. ~~A recipient of EDCD Waiver services may receive personal care (agency and consumer directed), respite care (agency and consumer directed), adult day health care, transition services, transition coordination, assistive technology, environmental modifications, and PERS services in conjunction with hospice services, regardless of whether the hospice provider receives reimbursement from Medicare or Medicaid for the services covered under the hospice benefit. Assistive technology and environmental modification services shall be available only to those EDCD waiver enrollees who are participants in the Money Follows the Person demonstration.~~

~~4. Under this § 1915(c) waiver, DMAS waives §§ 1902(a)(10)(B) and (C) of the Social Security Act related to comparability of services.~~

**12VAC30-120-920. Individual eligibility requirements.**

A. Home and community-based waiver services shall be available through a § 1915(c) of the Social Security Act waiver for the following Medicaid-eligible individuals who have been determined to be eligible for waiver services and to require the level of care provided in a nursing facility (NF):

1. Individuals who are elderly as defined by § 1614 of the Social Security Act; or
2. Individuals who have a disability as defined by § 1614 of the Social Security Act.

~~A. B.~~ The Commonwealth has elected to cover low-income families with children as described in § 1931 of the Social Security Act; aged, blind, or disabled individuals who are eligible under 42 CFR 435.121; optional categorically needy individuals who are aged and disabled who have incomes at 80% of the federal poverty level; the special home and community-based waiver group under 42 CFR 435.217; and the medically needy groups specified in 42 CFR 435.320, 435.322, 435.324, and 435.330.

1. Under this waiver, the coverage groups authorized under § 1902(a)(10)(A)(ii)(VI) of the Social Security Act ~~will~~ shall be considered as if they were institutionalized in a NF for the purpose of applying institutional deeming rules. All ~~recipients under individuals in~~ the waiver must meet the financial and nonfinancial Medicaid eligibility criteria and meet the institutional level of care (LOC) criteria. The deeming rules are applied to waiver eligible individuals as if the individual were residing in an institution or would require that level of care.

2. Virginia shall reduce its payment for home and community-based services provided to an individual who is eligible for Medicaid services under 42 CFR 435.217 by that amount of the waiver individual's total income (including amounts disregarded in determining eligibility) that remains after allowable deductions for personal maintenance needs, deductions for other dependents, and medical needs have been made, according to the guidelines in 42 CFR 435.735 and § 1915(c)(3) of the Social Security Act as amended by the Consolidated Omnibus Budget Reconciliation Act of 1986. DMAS ~~will~~ shall reduce its payment for home and community-based waiver services by the amount that remains after the following deductions:

- a. For waiver individuals to whom § 1924(d) applies (Virginia waives the requirement for comparability pursuant to § 1902(a)(10)(B)), deduct the following in the respective order:

(1) An amount for the maintenance needs of the waiver individual that is equal to 165% of the SSI income limit for one individual. Working individuals have a greater need due to expenses of employment; therefore, an

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## Regulations

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additional amount of income shall be deducted. Earned income shall be deducted within the following limits: (i) for waiver individuals employed 20 hours or more per week, earned income shall be disregarded up to a maximum of both earned and unearned income up to 300% of SSI and (ii) for waiver individuals employed at least eight but less than 20 hours per week, earned income shall be disregarded up to a maximum of both earned and unearned income up to 200% of SSI. ~~However, in no case, shall the total amount of income (both earned and unearned) that is disregarded for maintenance exceed 300% of SSI.~~ If the waiver individual requires a guardian or conservator who charges a fee, the fee, not to exceed an amount greater than 5.0% of the waiver individual's total monthly income, is added to the maintenance needs allowance. However, in no case shall the total amount of the maintenance needs allowance (basic allowance plus earned income allowance plus guardianship fees) for the individual exceed 300% of SSI. ~~(The guardianship fee is not to exceed 5.0% of the individual's total monthly income.);~~

(2) For ~~an~~ a waiver individual with only a spouse at home, the community spousal income allowance is determined in accordance with § 1924(d) of the Social Security Act;

(3) For an individual with a family at home, an additional amount for the maintenance needs of the family is determined in accordance with § 1924(d) of the Social Security Act; and

(4) Amounts for incurred expenses for medical or remedial care that are not subject to payment by a third party, including Medicare and other health insurance premiums, deductibles, or coinsurance charges and necessary medical or remedial care recognized under the state law but not covered under the State Plan.

b. For waiver individuals to whom § 1924(d) of the Social Security Act does not apply, deduct the following in the respective order:

(1) An amount for the maintenance needs of the waiver individual that is equal to 165% of the SSI income limit for one individual. Working individuals have a greater need due to expenses of employment; therefore, an additional amount of income shall be deducted. Earned income shall be deducted within the following limits: (i) for waiver individuals employed 20 hours or more, earned income shall be disregarded up to a maximum of 300% of SSI and (ii) for waiver individuals employed at least eight but less than 20 hours, earned income shall be disregarded up to a maximum of 200% of SSI. ~~However, in no case, shall the total amount of income (both earned and unearned) that is disregarded for maintenance exceed 300% of SSI.~~ If the individual requires a guardian or conservator who charges a fee, the fee, not to exceed an

amount greater than 5.0% of the individual's total monthly income, is added to the maintenance needs allowance. However, in no case shall the total amount of the maintenance needs allowance (basic allowance plus earned income allowance plus guardianship fees) for the individual exceed 300% of SSI. ~~(The guardianship fee is not to exceed 5.0% of the individual's total monthly income.);~~

(2) For an individual with a family at home, an additional amount for the maintenance needs of the family that shall be equal to the medically needy income standard for a family of the same size; and

(3) Amounts for incurred expenses for medical or remedial care that are not subject to payment by a third party including Medicare and other health insurance premiums, deductibles, or coinsurance charges and necessary medical or remedial care recognized under state law but not covered under the State Plan.

B- C. Assessment and authorization of home and community-based services.

1. To ensure that Virginia's home and community-based waiver programs serve only Medicaid eligible individuals who would otherwise be placed in a nursing facility NF, home and community-based waiver services shall be considered only for individuals who are eligible for admission to a nursing facility NF. Home and community-based waiver services shall be the critical service to enable the individual to remain at home and in the community rather than being placed in a nursing facility NF.

2. The individual's eligibility for home and community-based services shall be determined by the Preadmission Screening Team or DMAS-enrolled hospital provider after completion of a thorough assessment of the individual's needs and available support. If an individual meets nursing facility NF criteria and in the absence of community-based services, is at risk of NF placement within 30 days, the Preadmission Screening Team or DMAS-enrolled hospital provider shall provide the individual and family/caregiver with the choice of ~~Elderly or Disabled with Consumer Direction EDCD~~ Waiver services or nursing facility, other appropriate services, NF placement, or Program of All Inclusive Care for the Elderly (PACE) enrollment, where available.

3. The Preadmission Screening Team or DMAS-enrolled hospital provider shall explore alternative settings or services to provide the care needed by the individual. ~~When~~ If Medicaid-funded home and community-based care services are selected by the individual and when such services are determined to be the critical services necessary to delay or avoid nursing facility NF placement, the Preadmission Screening Team or DMAS-enrolled hospital provider shall initiate referrals for such services.

4. Medicaid ~~will~~ shall not pay for any home and community-based care services delivered prior to the

individual establishing Medicaid eligibility and prior to the date of the preadmission screening by the Preadmission Screening Team or DMAS-enrolled hospital provider and the physician signature on the Medicaid Funded Long-Term Care Services Authorization Form (DMAS-96).

5. Before Medicaid ~~will~~ shall assume payment responsibility of home and community-based services, ~~preauthorization~~ prior authorization/service authorization must be obtained from DMAS or the DMAS designated preauthorization PA/Srv Auth contractor ~~on~~, in accordance with DMAS policy, for all services requiring preauthorization prior authorization/service authorization. Providers ~~must~~ shall submit all required information to DMAS or the designated preauthorization PA/Srv Auth contractor within 10 business days of initiating care or within 10 business days of receiving verification of Medicaid eligibility from the local ~~DSS~~ department of social services. If the provider submits all required information to DMAS or the designated preauthorization PA/Srv Auth contractor within 10 business days of initiating care, services may be authorized beginning from the date the provider initiated services but not preceding the date of the physician's signature on the ~~Medicaid Funded Long Term Care Services Authorization Form (DMAS-96)~~ DMAS 96 form. If the provider does not submit all required information to DMAS or the designated preauthorization PA/Srv Auth contractor within 10 business days of initiating care, the services may be authorized beginning with the date all required information was received by DMAS or the designated preauthorization PA/Srv Auth contractor, but in no event preceding the date of the ~~Preadmission Screening Team~~ physician's signature on the DMAS-96 form.

6. Once ~~services for the individual have been authorized by the designated preauthorization contractor~~ waiver eligibility has been determined by the preadmission screening team or DMAS-enrolled hospital provider and referrals have been initiated, the provider/services facilitator ~~will~~ shall submit a ~~Patient Information Form (DMAS-122), Medicaid LTC Communication Form (DMAS-225)~~ along with a written confirmation of level of care eligibility from the designated preauthorization contractor, to the local ~~DSS~~ department of social services to determine financial eligibility for the waiver program and any patient pay responsibilities. If the waiver individual who is receiving EDCD Waiver services has a patient pay amount, a provider shall use the electronic patient pay process for the required monthly monitoring of relevant changes. Local departments of social services shall enter data regarding a waiver individual's patient pay amount obligation into the Medicaid Management Information System (MMIS) at the time action is taken on behalf of the individual either as a result of an application for LTC services, redetermination of eligibility, or reported change or changes in a waiver individual's situation.

Procedures for the verification of a waiver individual's patient pay obligation are available in the appropriate Medicaid provider manual.

7. After the provider/services facilitator has received ~~written notification of Medicaid eligibility via the DMAS-225 process by DSS~~ the local department of social services and ~~written enrollment confirmation from DMAS or the designated preauthorization PA/Srv Auth contractor,~~ the provider/services facilitator shall inform the individual or family/caregiver so that services may be initiated.

7. ~~The provider/services facilitator with the most billable hours must request an updated DMAS 122 form from the local DSS annually and forward a copy of the updated DMAS 122 form to all service providers when obtained.~~

8. The provider/services facilitator shall be responsible for notifying the local department of social services via the DMAS-225 when there is an interruption of services for 30 consecutive calendar days or upon discharge from the provider/services facilitator's services.

8-9. ~~Home and community-based care services shall not be offered or provided to any individual who resides in a nursing facility NE, an intermediate care facility for the mentally retarded ICF/MR, a hospital, an assisted living facility licensed by DSS VDSS that serves five or more individuals, or a group home licensed by the Department of Mental Health, Mental Retardation and Substance Abuse Services Behavioral Health and Developmental Services with the exception of transition coordination and transition services which shall be provided only to individuals residing in a NF or ICF/MR. Additionally, home and community-based care services shall not be provided to any individual who resides outside of the physical boundaries of the Commonwealth, with the exception of brief periods of time as approved by DMAS or the designated preauthorization contractor. Brief periods of time may include, but are not necessarily restricted to, vacation or illness.~~

9-10. Certain home and community-based services shall not be available to individuals residing in an assisted living facility licensed by DSS VDSS that serves four or fewer individuals. These services are: respite, PERS, ADHC, environmental modifications and transition services. Personal care services ~~are~~ shall be covered for individuals living in these facilities but shall be limited to ADL care not to exceed five hours per day of ADL care. Personal care services shall be authorized based on the waiver individual's documented need for care over and above that provided by the facility.

11. Individuals who are receiving Auxiliary Grants shall not be eligible for EDCD enrollment or services.

C. ~~Appeals. Recipient appeals shall be considered pursuant to 12VAC30-110-10 through 12VAC30-110-380. Provider appeals shall be considered pursuant to 12VAC30-10-1000 and 12VAC30-20-500 through 12VAC30-20-560.~~

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# Regulations

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D. Waiver individual responsibilities under the consumer-directed (CD) model.

1. The individual must be authorized for CD services and successfully complete consumer/management training performed by the CD services facilitator before the waiver individual shall be permitted to hire a personal care attendant for Medicaid reimbursement. Any services rendered by an attendant prior to dates authorized by Medicaid shall not be eligible for reimbursement by Medicaid. Individuals who are eligible for CD services must have the capability to hire and train their own personal care attendants and supervise the attendants' performance including, but not limited to, creating and maintaining complete and accurate timesheets. Individuals with cognitive impairments who are unable to manage their own care may have a family/caregiver serve as the EOR on their behalf.

2. The family/caregiver that serves as the EOR on behalf of the waiver individual shall not be permitted to be the paid attendant for respite services, personal care services, or the services facilitator.

3. Individuals will acknowledge that they will not knowingly continue to accept CD personal care services when the service is no longer appropriate or necessary for their care needs and shall inform the services facilitator. If CD services continue after services have been terminated by DMAS or the designated PA contractor, the waiver individual shall be held liable for attendant compensation.

4. Individuals shall notify the CD services facilitator of all hospitalizations and admission to any rehabilitation facility, rehabilitation unit, or NF. Failure to do so may result in the waiver individual being liable for employee compensation.

## **12VAC30-120-924. Covered services; limits on covered services.**

A. Covered services in the EDCD Waiver shall include: adult day health care, personal care (both consumer-directed and agency-directed), respite services (both consumer-directed and agency-directed), PERS, PERS medication monitoring, limited assistive technology, limited environmental modifications, transition coordination, and transition services.

1. The services covered in this waiver shall be appropriate and medically necessary to maintain the individual in the community in order to prevent institutionalization and shall be cost effective in the aggregate as compared to the alternative NF placement.

2. EDCD services shall not be authorized if another entity is required to provide the services (e.g., schools, insurance, etc.). Waiver services shall not duplicate services available through other programs or funding streams.

3. Assistive technology and environmental modification services shall be available only to those EDCD Waiver

individuals who are also participants in the Money Follows the Person (MFP) (12VAC30-120-2000) demonstration program.

4. An individual receiving EDCD Waiver services who is also getting hospice care may receive Medicaid-covered personal care (agency-directed and consumer-directed), respite care (agency-directed and consumer-directed), adult day health care, transition services, transition coordination, and PERS services, regardless of whether the hospice provider receives reimbursement from Medicare or Medicaid for the services covered under the hospice benefit. Such dual waiver/hospice individuals shall only be able to receive assistive technology and environmental modifications if they are also participants in the MFP demonstration program.

B. Voluntary/involuntary disenrollment from consumer-directed services. In either voluntary or involuntary disenrollment situations, the waiver individual shall be permitted to select an agency from which to receive his agency-directed personal care and respite services.

1. A waiver individual may be found to be ineligible, under certain circumstances, by either the Pre-admission Screening Team, DMAS-enrolled hospital provider, DMAS, its designated agent, or the CD services facilitator, to begin to receive or to continue to receive CD services if there are circumstances where the waiver individual's health, safety, or welfare cannot be assured, including but not limited to:

a. It is determined that the waiver individual cannot be the EOR and no one else is able to assume this role;

b. The waiver individual cannot assure his own health, safety, or welfare or develop an emergency back-up POC that will assure his health, safety, or welfare; or

c. The waiver individual has medication or skilled nursing needs or medical or behavioral conditions that cannot be met through CD services.

2. The waiver individual may be involuntarily disenrolled from consumer direction if he or the EOR, as appropriate, is consistently unable to retain or manage the attendant as may be demonstrated by, but not necessarily limited to, a pattern of serious discrepancies with the attendant's timesheets.

3. In situations where either (i) the waiver individual's health, safety, or welfare cannot be assured or (ii) attendant timesheet discrepancies are known, the services facilitator shall assist as requested with the waiver individual's transfer to agency-directed services as follows:

a. Verify that essential training has been provided to the waiver individual or EOR;

b. Document, in the waiver individual's case record, the conditions creating the necessity for the involuntary disenrollment and actions taken by the services facilitator;

c. Discuss with the waiver individual or the EOR, as appropriate, the agency-directed option that is available and the actions needed to arrange for such services and offer choice of potential providers, and

d. Provide written notice to the waiver individual and EOR, as appropriate, of the right to appeal such involuntary termination of consumer direction. Such notice shall be given at least 10 days prior to the effective date of this change.

C. Adult day health care (ADHC) services. ADHC services shall only be offered to waiver individuals who meet pre-admission screening criteria as established in 12VAC30-60-300 and for whom ADHC services shall be an appropriate and medically necessary alternative to institutional care. ADHC services may be offered to individuals in a VDSS-licensed adult day care center (ADCC) congregate setting. ADHC may be offered either as the sole home and community-based care service or in conjunction with personal care (either agency-directed or consumer-directed), respite care (either agency-directed or consumer-directed), or PERS. A multi-disciplinary approach to developing, implementing, and evaluating each waiver individual's POC shall be essential to quality ADHC services.

1. ADHC services shall be designed to prevent institutionalization by providing waiver individuals with health care services, maintenance of their physical and mental conditions, and rehabilitation services, as may be appropriate, in a congregate daytime setting and shall be tailored to their unique needs. The minimum range of services that shall be made available to every waiver individual shall be: assistance with ADLs, nursing services, coordination of rehabilitation services, transportation, nutrition, social services, recreation, and socialization services.

a. Assistance with ADLs shall include supervision of the waiver individual and assistance with management of the individual's POC.

b. Nursing services shall include the periodic evaluation, at least every 90 days, of the waiver individual's nursing needs; provision of indicated nursing care and treatment; responsibility for monitoring, recording, and administering prescribed medications; supervision of the waiver individual in self-administered medication; support of families in their home care efforts for the waiver individuals through education and counseling; and helping families identify and appropriately utilize health care resources. Nursing services shall also include the general supervision of provider staff, who are certified through the Board of Nursing, in medication management and administering medications.

c. Coordination and implementation of rehabilitation services to ensure the waiver individual receives all rehabilitative services deemed necessary to improve or

maintain independent functioning, to include physical therapy, occupational therapy, and speech therapy.

d. Nutrition services shall be provided to include, but not necessarily limited to, one meal per day that meets the daily nutritional requirements pursuant to 22VAC40-60-800. Special diets and nutrition counseling shall be provided as required by the waiver individuals.

e. Recreation and social activities shall be provided that are suited to the needs of the waiver individuals and shall be designed to encourage physical exercise, prevent physical and mental deterioration, and stimulate social interaction.

f. ADHC coordination shall involve implementing the waiver individuals' POCs, updating such plans, recording 30-day progress notes, and reviewing the waiver individuals' daily logs each week.

2. Limits on covered ADHC services.

a. A day of ADHC services shall be defined as a minimum of six hours.

b. Centers that do not employ professional nursing staff on site shall not be permitted to admit waiver individuals who require skilled nursing care to their centers. Examples of skilled nursing care may include: (i) tube feedings; (ii) Foley catheter irrigations; (iii) sterile dressing changing; or (iv) any other procedures that require sterile technique. The ADCC shall not permit its aide employees to perform such procedures.

c. At any time that the center is no longer able to provide reliable, continuous care to any of the center's waiver individuals for the number of hours per day or days per week as contained in the individuals' POCs, then the center shall contact the waiver individuals or family/caregivers/EORs, as appropriate, to initiate other care arrangements for these individuals. The center may either subcontract with another ADCC or may transfer the waiver individual to another ADCC. The center may discharge waiver individuals from the center's services but not from the waiver. Written notice of discharge shall be provided, with the specific reason or reasons for discharge, at least 10 calendar days prior to the effective date of the discharge. In cases when the individual's or the center personnel's safety may be jeopardy, the 10 calendar days notice shall not apply.

d. ADHC services shall not be provided, for the purpose of Medicaid reimbursement, to individuals who reside in NFs, ICFs/MR, hospitals, assisted living facilities that are licensed by VDSS, or group homes that are licensed by DBHDS.

D. Agency-directed personal care services. Agency-directed personal care services shall only be offered to persons who meet the pre-admission screening criteria at 12VAC30-60-300 and for whom it shall be an appropriate alternative to institutional care. Agency-directed personal care services



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# Regulations

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shall be comprised of hands-on care of either a supportive or health-related nature and shall include, but shall not necessarily be limited to, assistance with ADLs, access to the community, monitoring of self-administered medications or other medical needs, supervision, and the monitoring of health status and physical condition. Where the individual requires assistance with ADLs, and when specified in the POC, such supportive services may include assistance with IADLs. This service shall not include skilled nursing services with the exception of skilled nursing tasks (e.g., catheterization) that may be delegated pursuant to Part VIII (18VAC90-20-420 through 18VAC90-20-460) of 18VAC90-20. Agency-directed personal care services may be provided in a home or community setting to enable an individual to maintain the health status and functional skills necessary to live in the community or participate in community activities. Personal care may be offered either as the sole home and community-based care service or in conjunction with adult day health care, respite care (agency-directed or consumer-directed), or PERS.

1. Criteria. In order to qualify for this service, the waiver individual shall have met the NF LOC criteria as set out in 12VAC30-60-300 that shall be documented on the UAI assessment form.

a. A waiver individual may receive both CD and agency-directed personal care services if the individual meets the criteria. Hours received by the individual who is receiving both CD and agency-directed services shall not exceed the total number of hours that would be needed if the waiver individual were receiving personal care services through a single delivery model.

b. CD and agency-directed services shall not be simultaneously provided but may be provided sequentially or alternately from each other.

c. The individual or family/caregiver shall have a back-up plan for the provision of services in the event the agency is unable to provide an aide.

2. Limits on covered agency-directed personal care services.

a. DMAS shall not duplicate services that are required as a reasonable accommodation as a part of the Americans with Disabilities Act (42 USC §§ 12131 through 12165) or the Rehabilitation Act of 1973 (29 USC § 794).

b. DMAS shall reimburse for services delivered, consistent with the approved POC, for personal care that the personal care aide provides to the waiver individual to assist him while he is at work or postsecondary school.

(1) Agency-directed personal care services shall be limited to 56 hours of services per week for 52 weeks per year. Individual exceptions may be granted based on criteria established by DMAS.

(2) DMAS or the designated PA/Srv Auth contractor shall review the waiver individual's needs and the

complexity of the disability, as applicable, when determining the services that are provided to him in the workplace or postsecondary school or both.

(3) DMAS shall not pay for the personal care aide to assist the enrolled waiver individual with any functions or tasks related to the individual completing his job or postsecondary school functions or for supervision time during either work or postsecondary school or both.

c. Supervision services shall only be authorized to ensure the health, safety, or welfare of the waiver individual who cannot be left alone at any time or is unable to call for help in case of an emergency, and when there is no one else in the home competent and able to call for help in case of an emergency.

d. There shall be a limit of eight hours per 24-hour day for supervision services included in the POC.

E. Agency-directed respite services. Agency-directed respite care services shall only be offered to waiver individuals who meet the pre-admission screening criteria at 12VAC30-60-300 and for whom it shall be an appropriate alternative to institutional care. Agency-directed respite care services may be either skilled nursing or unskilled care and shall be comprised of hands-on care of either a supportive or health-related nature and may include, but shall not be limited to, assistance with ADLs, access to the community, monitoring of self-administration of medications or other medical needs, supervision, and monitoring health status and physical condition.

1. Respite care shall only be offered to individuals who have an unpaid primary caregiver who requires temporary relief to avoid institutionalization of the waiver individual. Respite care services may be provided in the individual's home or other community settings.

2. When the individual requires assistance with ADLs, and where such assistance is specified in the waiver individual's POC, such supportive services may also include assistance with IADLs.

3. The unskilled care portion of this service shall not include skilled nursing services with the exception of skilled nursing tasks (e.g., catheterization) that may be delegated pursuant to Part VIII (18VAC90-20-420 through 18VAC90-20-460) of 18VAC90-20.

4. Limits on service.

a. The unit of service shall be one hour. Respite services shall be limited to 480 hours per individual per calendar year, to be prior authorized. If an individual changes waiver programs, this same maximum number of respite hours shall apply. No additional respite hours beyond the 480 maximum limit shall be approved for payment for individuals who change waiver programs. Additionally, individuals who are receiving respite services in this waiver through both the agency-directed and CD models shall not exceed 480 hours per calendar year combined.

b. If agency-directed respite service is the only service received by the waiver individual, it must be received at least as often as every 30 days. If this service is not required at this minimal level of frequency, then the provider agency shall notify the local department of social services for its redetermination of eligibility for the waiver individual.

c. The individual or family/caregiver shall have a backup plan for the provision of services in the event the agency is unable to provide an aide.

F. Services facilitation for consumer-directed services. Consumer-directed personal care and respite care services shall only be offered to persons who meet the pre-admission screening criteria at 12VAC30-60-300 and for whom there shall be appropriate alternatives to institutional care.

1. Individuals who choose CD services shall receive support from a DMAS-enrolled CD services facilitator as required in conjunction with CD services. The services facilitator shall document the waiver individual's choice of the CD model and whether there is a need for a family/caregiver to serve as the EOR on behalf of the individual. The CD services facilitator shall be responsible for assessing the waiver individual's particular needs for a requested CD service, assisting in the development of the POC, providing training to the waiver individual and family/caregiver/EOR on their responsibilities as an employer, and for providing ongoing support of the CD services.

2. Individuals who are eligible for CD services shall have, or have a family/caregiver who has, the capability to hire and train the personal care attendant or attendants and supervise the attendant's performance, including approving the attendant's timesheets.

a. If a waiver individual is unwilling or unable to direct his own care or is younger than 18 years of age, a family/caregiver/designated person shall serve as the EOR on behalf of the waiver individual in order to perform these supervisory and approval functions.

b. Specific employer duties shall include checking references of personal care attendants, determining that personal care attendants meet basic qualifications, and maintaining copies of attendants' timesheets to have available for review, on a consistent and timely basis, by the CD services facilitator, the fiscal employer/agent, DMAS, or DMAS' contracted entity.

3. The individual or family/caregiver shall have a backup plan for the provision of services in case the attendant does not show up for work as scheduled or terminates employment without prior notice.

4. The CD services facilitator shall not be the waiver individual, a provider of other Medicaid-covered services, spouse of the individual, parent of the individual who is a

minor child, or the family/caregiver/EOR who is employing the CD attendant.

5. DMAS shall either provide for fiscal employer/agent services or contract for the services of a fiscal employer/agent for CD services. The fiscal employer/agent shall be reimbursed by DMAS or DMAS contractor (if the fiscal/employer agent service is contracted) to perform certain tasks as an agent for either the waiver individual who is receiving CD services or the EOR. The fiscal employer/agent shall handle responsibilities for the waiver individual including, but not limited to, employment taxes and background checks for attendants, etc. The fiscal employer/agent shall seek and obtain all necessary authorizations and approvals of the Internal Revenue Service in order to fulfill all of these duties.

G. Consumer-directed personal care services. CD personal care services shall be comprised of hands-on care of either a supportive or health-related nature and shall include assistance with ADLs and may include, but shall not be limited to, access to the community, monitoring of self-administered medications or other medical needs, supervision, and monitoring health status and physical condition. Where the waiver individual requires assistance with ADLs and when specified in the POC, such supportive services may include assistance with IADLs. This service shall not include skilled nursing services with the exception of skilled nursing tasks (e.g. catheterization) that may be delegated pursuant to Part VIII (18VAC90-20-420 through 18VAC90-20-460) of 18VAC 90-20 and as permitted by Chapter 790 of the 2010 Acts of Assembly. CD personal care services may be provided in a home or community setting to enable an individual to maintain the health status and functional skills necessary to live in the community or participate in community activities. Personal care may be offered either as the sole home and community-based service or in conjunction with adult day health care, respite care (agency-directed or consumer-directed), or PERS.

1. In order to qualify for this service, the waiver individual shall have met the NF LOC criteria as set out in 12VAC30-60-300 that shall be documented on the UAI assessment instrument.

a. A waiver individual may receive both CD and agency-directed personal care services if the individual meets the criteria. Hours received by the waiver individual who is receiving both CD and agency-directed services shall not exceed the total number of hours that would be otherwise authorized had the individual chosen to receive personal care services through a single delivery model.

b. CD and agency-directed services shall not be simultaneously provided but may be provided sequentially or alternately from each other.

2. Limits on covered CD personal care services.

a. DMAS shall not duplicate services that are required as a reasonable accommodation as a part of the Americans

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## Regulations

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with Disabilities Act (42 USC §§ 12131 through 12165) or the Rehabilitation Act of 1973 (29 USC § 794).

b. There shall be a limit of eight hours per 24-hour day for supervision services included in the POC. Supervision services shall be authorized to ensure the health, safety, or welfare of the waiver individual who cannot be left alone at any time or is unable to call for help in case of an emergency, and when there is no one else in the home who is competent and able to call for help in case of an emergency.

c. Consumer-directed personal care services shall be limited to 56 hours of services per week for 52 weeks per year. Individual exceptions may be granted based on criteria established by DMAS.

3. CD personal care services at work or school shall be limited as follows:

a. DMAS shall reimburse for services delivered, consistent with the approved POC, for CD personal care that the attendant provides to the waiver individual to assist him while he is at work or postsecondary school or both.

b. DMAS or the designated PA/Srv Auth contractor shall review the waiver individual's needs and the complexity of the disability, as applicable, when determining the services that will be provided to him in the workplace or postsecondary school or both.

c. DMAS shall not pay for the personal care attendant to assist the waiver individual with any functions or tasks related to the individual completing his job or postsecondary school functions or for supervision time during work or postsecondary school or both.

H. Consumer-directed respite services. CD respite care services are unskilled care and shall be comprised of hands-on care of either a supportive or health-related nature and may include, but shall not be limited to, assistance with ADLs, access to the community, monitoring of self-administration of medications or other medical needs, supervision, monitoring health status and physical condition, and personal care services in a work environment.

1. In order to qualify for this service, the waiver individual shall have met the NF LOC criteria as set out in 12VAC30-60-300 that shall be documented on the UAI assessment instrument.

2. CD respite services shall only be offered to individuals who have an unpaid primary caregiver who requires temporary relief to avoid institutionalization of the waiver individual. This service shall be provided in the waiver individual's home or other community settings.

3. When the waiver individual requires assistance with ADLs, and where such assistance is specified in the individual's POC, such supportive services may also include assistance with IADLs.

4. Limits on covered CD respite care services.

a. The unit of service shall be one hour. Respite services shall be limited to 480 hours per waiver individual per calendar year. If a waiver individual changes waiver programs, this same maximum number of respite hours shall apply. No additional respite hours beyond the 480 maximum limit shall be approved for payment. Individuals who are receiving respite services in this waiver through both the agency-directed and CD models shall not exceed 480 hours per calendar year combined.

b. CD respite care services shall not include skilled nursing services with the exception of skilled nursing tasks (e.g., catheterization) that may be delegated pursuant to Part VIII (18VAC90-20-420 through 18VAC90-20-460) of 18VAC90-20 and as permitted by Chapter 790 of the 2010 Acts of Assembly.

c. If consumer-directed respite service is the only service received by the waiver individual, it shall be received at least as often as every 30 days. If this service is not required at this minimal level of frequency, then the services facilitator shall refer the waiver individual to the local department of social services for its redetermination of eligibility for the waiver individual.

I. Personal emergency response system (PERS).

1. Service description. PERS is a service that monitors waiver individual safety in the home and provides access to emergency assistance for medical or environmental emergencies through the provision of a two-way voice communication system that dials a 24-hour response or monitoring center upon activation and via the individual's home telephone line or system. PERS may also include medication monitoring devices.

a. PERS may be authorized only when there is no one else in the home with the waiver individual who is competent or continuously available to call for help in an emergency or when the individual is in imminent danger.

b. The use of PERS equipment shall not relieve the backup caregiver of his responsibilities.

c. Service units and service limitations.

(1) PERS shall be limited to waiver individuals who are ages 14 years and older who also either live alone or are alone for significant parts of the day and who have no regular caregiver for extended periods of time and who may otherwise require extensive routine supervision. PERS shall only be provided in conjunction with receipt of personal care services (either agency-directed or consumer-directed), respite services (either agency-directed or consumer-directed), or adult day health care. A waiver individual shall not receive PERS if he has a cognitive impairment as defined in 12VAC 30-120-900.

(2) A unit of service shall include administrative costs, time, labor, and supplies associated with the installation, maintenance, monitoring, and adjustments of the PERS. A unit of service shall be the one-month rental price set

by DMAS in its fee schedule. The one-time installation of the unit shall include installation, account activation, individual and family/caregiver instruction, and subsequent removal of PERS equipment when it is no longer needed.

(3) PERS services shall be capable of being activated by a remote wireless device and shall be connected to the waiver individual's telephone line or system. The PERS console unit must provide hands-free voice-to-voice communication with the response center. The activating device must be (i) waterproof, (ii) able to automatically transmit to the response center an activator low battery alert signal prior to the battery losing power, (iii) able to be worn by the waiver individual; and (iv) automatically reset by the response center after each activation, thereby ensuring that subsequent signals can be transmitted without requiring manual resetting by the waiver individual.

(4) All PERS equipment shall be approved by the Federal Communications Commission and meet the Underwriters' Laboratories, Inc. (UL) safety standard.

(5) Medication monitoring units shall be physician ordered. In order to be approved to receive the medication monitoring service, a waiver individual shall also receive PERS services. Physician orders shall be maintained in the waiver individual's record. In cases where the medical monitoring unit must be filled by the provider, the person who is filling the unit shall be either an RN or an LPN. The units may be filled as frequently as a minimum of every 14 days. There must be documentation of this action in the waiver individual's record.

J. Transition coordination and transition services. Transition coordination and transition services, as defined at 12VAC30-120-2000 and 12VAC30-120-2010, provide for applicants to move from institutional placements or licensed or certified provider-operated living arrangements to private homes or other qualified settings. 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 transition coordinator to ensure that EDCD waiver eligibility criteria shall be met.

a. Transition coordination and transition services shall be authorized by DMAS or its designated agent in order for reimbursement to occur.

b. For the purposes of transition services, an institution means an ICF/MR, as defined at 42 CFR 435.1010, a long stay hospital, or NF.

c. Transition coordination shall be authorized for a maximum of 12 consecutive months upon discharge from an institutional placement and shall be initiated within 30 days of discharge from the institution.

d. Transition coordination and transition services shall be provided in conjunction with personal care (agency-directed or consumer-directed), respite (agency-directed or consumer-directed), or adult day health care services.

EDITOR'S NOTE: 12VAC30-120-925 K 3 b and 12VAC30-120-925 L 3 b: When DMAS drafted these provisions in the proposed regulations, they were based upon a budget reduction legislative proposal to reduce the coverage of assistive technology (AT) and environmental modification (EM) services to \$3,000. Subsequent to the submission of the draft proposed regulations for Executive review, the 2011 General Assembly funded both AT and EM services up to \$5,000. DMAS has no present authority to change the proposed regulatory language as approved by the Governor; however, DMAS intends to correct these limits in the next final stage regulations to appropriately reflect the limit for AT and EM services to the funded \$5,000 level as approved by the 2011 General Assembly.

K. Assistive Technology (AT).

1. Service description. Assistive technology (AT), as defined herein, shall only be available to waiver individuals who are participating in the MFP program pursuant to 12VAC 30-120-2000.

2. In order to qualify for these services, the individual shall have a demonstrated need for equipment for remedial or direct medical benefit primarily in an individual's primary home, primary vehicle used by the individual, community activity setting, or day program to specifically serve to improve the individual's personal functioning. This shall encompass those items not otherwise covered under the State Plan for Medical Assistance. AT shall be covered in the least expensive, most cost-effective manner.

3. Service units and service limitations.

a. AT shall be available to individuals receiving transition coordination through the MFP program. All requests for AT shall be made by the transition coordinator to DMAS or the PA/Srv Auth contractor.

b. Effective July 1, 2011, the maximum funded expenditure per individual for all AT covered procedure codes (combined total of AT items and labor related to these items) shall be \$3,000 per calendar year for individuals regardless of waiver, or regardless of whether the individual changes waiver programs, for which AT is approved. Requests made for reimbursement between January 1, 2011, and June 30, 2011, shall be subject to a \$5,000 annual maximum; requests made for reimbursement between July 1, 2011, and December 31, 2011, shall be subject to \$3,000 annual maximum, and shall consider, against the \$3,000 limit, any relevant expenditure from the first six months of the calendar year. Expenditures made in the first six months of CY 2011 (subject to the \$5,000 limit) shall count against the \$3,000 limit applicable in the second six months of CY

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## Regulations

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2011. For subsequent calendar years, the limit shall be \$3,000 throughout the time period. The service unit shall always be one, for the total cost of all AT being requested for a specific timeframe.

c. AT may be provided in the individual's home or community setting.

d. A maximum expenditure limit shall be consistent with 12VAC30-120-762 during the MFP enrollment period (maximum of 12 months).

e. AT shall not be approved for purposes of convenience of the caregiver/provider or restraint of the individual.

f. An independent, professional consultation shall be obtained from qualified professionals who are knowledgeable of that item for each AT request prior to approval by the PA/Srv Auth agent and may include training on such AT by the qualified professional.

g. All AT shall be prior authorized by the PA/Srv Auth agent prior to billing.

h. Excluded shall be items that are reasonable accommodation requirements of the Americans with Disabilities Act, the Virginians with Disabilities Act, or the Rehabilitation Act or that are required to be provided through other funding sources (insurance, schools, etc.).

i. AT services or equipment shall not be rented but shall be purchased.

### L. Environmental Modifications (EM).

1. Service description. Environmental modifications (EM), as defined herein, shall only be available to waiver individuals who are participating in the MFP program pursuant to 12VAC30-120-2000. Adaptations shall be documented in the waiver individual's POC and may include, but shall not necessarily be limited to, the installation of ramps and grab-bars, widening of doorways, modification of bathroom facilities, or installation of specialized electrical and plumbing systems that are necessary to accommodate the medical equipment and supplies that are necessary for the welfare of the waiver individual. Excluded are those adaptations or improvements to the home that are of general utility and are not of direct medical or remedial benefit to the individual, such as carpeting, flooring, roof repairs, central air conditioning, etc. Adaptations that add to the total square footage of the home shall be excluded from this benefit, except when necessary to complete an adaptation, as determined by DMAS or its designated agent. All services shall be provided in the individual's primary home in accordance with applicable state or local building codes. All modifications must be prior authorized by the PA/Srv Auth agent. Modifications may only be made to a vehicle if it is the primary vehicle being used by the waiver individual. This service does not include the purchase or lease of vehicles.

2. In order to qualify for these services, the waiver individual must have a demonstrated need for modifications of a remedial or medical benefit offered in an individual's primary home or primary vehicle used by the waiver individual to specifically improve the individual's personal functioning. This service shall encompass those items not otherwise covered in the State Plan for Medical Assistance or through another program. EM shall be covered in the least expensive, most cost-effective manner.

3. Service units and service limitations. EM shall be available to individuals who are receiving transition coordination.

a. All requests for EM shall be made by the MFP transition coordinator to DMAS or the PA/Srv Auth contractor.

b. Effective July 1, 2011, the maximum funded expenditure per individual for all EM covered procedure codes (combined total of EM items and labor related to these items) shall be \$3,000 per calendar year for individuals regardless of waiver, or regardless of whether the individual changes waiver programs, for which EM is approved. Requests made for reimbursement between January 1, 2011, and June 30, 2011, shall be subject to a \$5,000 annual maximum; requests made for reimbursement between July 1, 2011, and December 31, 2011, shall be subject to \$3,000 annual maximum, and shall consider, against the \$3,000 limit, any relevant expenditure from the first six months of the calendar year. Expenditures made in the first six months of CY 2011 (subject to the \$5,000 limit) shall count against the \$3,000 limit applicable in the second six months of CY 2011. For subsequent calendar years, the limit shall be \$3,000 throughout the time period. The service unit shall always be one, for the total cost of all EM being requested for a specific timeframe.

c. To receive environmental modifications in the EDCD waiver, the individual shall be receiving at least one other waiver service.

d. A maximum expenditure limit for EM services shall be consistent with 12VAC30-120-758 per the 12 month MFP enrollment period (12 months maximum).

e. All EM shall be prior authorized by the PA/Srv Auth agent prior to billing.

f. Modifications shall not be used to bring a substandard dwelling up to minimum habitation standards. Also excluded shall be modifications that are reasonable accommodation requirements of the Americans with Disabilities Act, the Virginians with Disabilities Act, and the Rehabilitation Act.

g. Transition coordinators shall, upon completion of each modification, meet face-to-face with the waiver individual and his family/caregiver, as appropriate, to

ensure that the modification is completed satisfactorily and is able to be used by the individual.

h. EM shall not be approved for purposes of convenience of the caregiver/provider or restraint of the waiver individual.

### **12VAC30-120-930. General requirements for home and community-based participating providers.**

A. Requests for participation ~~will~~ shall be screened by DMAS or the designated DMAS contractor to determine whether the provider/services facilitator applicant meets ~~these~~ the requirements for participation, as set out in the provider agreement, and demonstrates the abilities to perform, at a minimum, the following activities:

1. Screen all new and existing employees and contractors to determine whether any are excluded from eligibility for payment from federal healthcare programs, including Medicaid (i.e., via the United States Department of Health and Human Services Office of Inspector General List of Excluded Individuals or Entities (LEIE) website). Immediately report in writing to DMAS any exclusion information discovered to: DMAS, ATTN: Program Integrity/Exclusions, 600 East Broad Street, Suite 1300, Richmond, VA 23219, or email to providerexclusions@dmass.virginia.gov.

~~1.~~ 2. Immediately notify DMAS in writing of any change in the information that the provider previously submitted to DMAS;

~~2. Assure~~ 3. Except for waiver individuals who are subject to the DMAS Client Medical Management program Part VIII (12VAC30-130-800 et seq.) of 12VAC 30-130 or are enrolled in a Medicaid managed care program, freedom of choice to individuals in seeking services from any institution, pharmacy, practitioner, or other provider qualified to perform the service or services required and participating in the Medicaid Program at the time the service or services are performed;

~~3.~~ 4. Assure the individual's freedom to refuse medical care, treatment, and services;

~~4.~~ 5. Accept referrals for services only when staff is available to initiate and perform such services on an ongoing basis;

~~5.~~ 6. Provide services and supplies to individuals in full compliance with Title VI (42 USC § 2000d et seq.) of the Civil Rights Act of 1964 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 (29 USC § 794), which prohibits discrimination on the basis of a disability; and the Americans with Disabilities Act of 1990 (42 USC § 12101 et seq.), which provides comprehensive civil rights protections to individuals with disabilities in the areas of employment, public

accommodations, state and local government services, and telecommunications;

~~6.~~ 7. Provide services and supplies to individuals of the same quality and in the same mode of delivery as ~~is~~ are provided to the general public;

~~7.~~ 8. 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 and accept as payment in full the amount established by DMAS payment methodology beginning with the individual's authorization date for the waiver services;

~~8.~~ 9. Use only DMAS-designated forms for service documentation. The provider ~~must~~ shall not alter the DMAS forms in any manner ~~unless~~ without prior written approval from DMAS is obtained prior to using the altered forms;

~~9.~~ 10. Use DMAS-designated billing forms for submission of charges;

~~10. Not perform any~~ 11. Perform no type of direct marketing activities to Medicaid individuals;

~~11.~~ 12. Maintain and retain business and professional records sufficient to document fully and accurately the nature, scope, and details of the services provided.

a. In general, such records shall be retained for a period of 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. Records of minors shall be kept for a period of at least six years after such minor has reached 18 years of age.

b. 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;

~~12.~~ 13. Furnish information on the request of and in the form requested to DMAS, the Attorney General of Virginia or ~~his~~ their authorized representatives, federal personnel, and the state Medicaid Fraud Control Unit. The Commonwealth's right of access to provider agencies and records shall survive any termination of the provider agreement;

~~13.~~ 14. Disclose, as requested by DMAS, all financial, beneficial, ownership, equity, surety, or other interests in any and all firms, corporations, partnerships, associations, business enterprises, joint ventures, agencies, institutions, or other legal entities providing any form of health care services to recipients of Medicaid;

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## Regulations

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~~14. Pursuant to 42 CFR 431.300 et seq., 12VAC30-20-90, and any other applicable federal or state law, hold confidential and use for authorized DMAS purposes only all medical assistance information regarding individuals served. A provider shall disclose information in his possession only when the information is used in conjunction with a claim for health benefits or the data is necessary for the functioning of DMAS in conjunction with the cited laws; 15. Pursuant to 42 CFR 431.300 et seq., § 32.1-325.3 of the Code of Virginia, and the Health Insurance Portability and Accountability Act (HIPAA), all information associated with an applicant or enrollee or individual that could disclose the applicant's/enrollee's/individual's identity is confidential and shall be safeguarded. Access to information concerning the applicant/enrollee/individual 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;~~

~~15. 16. When ownership of the provider changes, notify DMAS in writing at least 15 calendar days before the date of change;~~

~~16. 17. Pursuant to §§ 63.2-1509 and 63.2-1606 of the Code of Virginia, if a participating provider or the provider's staff knows or suspects that a home and community-based waiver services individual is being abused, neglected, or exploited, the party having knowledge or suspicion of the abuse, neglect, or exploitation ~~must~~ shall report this immediately from first knowledge or suspicion of such knowledge to the local ~~DSS~~ department of social services adult or child protective services worker as applicable or to the toll-free, 24-hour hotline as described on the local department of social services' website. Employers shall ensure and document that their staff is aware of this requirement;~~

~~17. 18. In addition to compliance with the general conditions and requirements, adhere to the conditions of participation outlined in the individual provider's participation agreements ~~and~~, in the applicable DMAS provider manual, and in other DMAS laws, regulations, and policies. DMAS shall conduct ongoing monitoring of compliance with ~~provider's~~ provider participation standards and DMAS policies. A provider's noncompliance with DMAS policies and procedures may result in a retraction of Medicaid payment or termination of the provider agreement, or both; ~~and~~~~

~~18. 19. Meet minimum qualifications of staff. All employees must have a satisfactory work record, as evidenced by references from prior job experience, including no evidence of abuse, neglect, or exploitation of incapacitated or older adults and children. The criminal record check shall be available for review by DMAS staff~~

~~who are authorized by the agency to review these files. DMAS will not reimburse the provider for any services provided by an employee who has committed a barrier crime as defined herein. Providers are responsible for complying with § ~~32.1-162.9:1~~ of the Code of Virginia regarding criminal record checks.~~

~~a. For reasons of Medicaid individuals' safety and welfare, all employees shall have a satisfactory work record, as evidenced by at least two references from prior job experience, including no evidence of abuse, neglect, or exploitation of incapacitated or older adults or children (including a founded adult protective services complaint). In instances of employees who have worked for only one employer, such employees shall be permitted to provide one employment reference and one personal reference.~~

~~b. The criminal record and sex offender registry check results for both employees and volunteers as conducted by the Virginia State Police shall be available for review by DMAS staff or its designated agent who are authorized by the agency to review these files. DMAS shall not reimburse the provider for any services provided by an employee or volunteer who has been convicted of committing a barrier crime as defined in § 32.1-162.9:1 or 63.2-1719 of the Code of Virginia. Providers shall be responsible for complying with §§ 32.1-162.9:1 and 63.2-1719 of the Code of Virginia regarding criminal record checks. Provider staff shall not be reimbursed for services provided to the waiver individual effective on the date and thereafter that the criminal record check or sex offender register check confirms the provider's staff person or volunteer was convicted of a barrier crime or is listed in any sex offender registry.~~

~~c. Provider staff and volunteers that serve waiver individuals who are minor children shall also be screened through the VDSS Child Protective Services (CPS) Central Registry. Provider staff and volunteers shall not be reimbursed for services provided to the waiver individual effective on the date and thereafter that the VDSS CPS Central Registry check confirms the provider's staff person or volunteer has a finding.~~

~~B. For DMAS to approve provider agreements with home and community based waiver providers, providers must meet staffing, financial solvency, disclosure of ownership, and assurance of comparability of services requirements as specified in the applicable provider manual. DMAS shall terminate the provider's/services facilitator's Medicaid provider agreement pursuant to § 32.1-325 of the Code of Virginia and as may be required for federal financial participation. A provider who 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 shall within 30 days of such conviction notify~~

DMAS of this conviction and relinquish its provider agreement. Such provider agreement terminations, subject to applicable appeal rights, shall conform to § 32.1-325 D and E of the Code of Virginia and Part VII (12VAC30-20-500 et seq.) of 12VAC30-20.

C. For DMAS to approve provider/services facilitator agreements with home and community-based waiver providers, the following standards shall be met:

1. Staffing, financial solvency, disclosure of ownership, and assurance of comparability of services requirements as specified in the applicable provider manual;
2. The ability to document and maintain waiver individuals' case records in accordance with state and federal requirements;
3. Compliance with all applicable laws, regulations, and policies pertaining to EDCD Waiver services.

C. D. The waiver individual shall have the option of selecting the provider of his choice from among those providers/services facilitators who are approved and who can appropriately meet his needs.

D. E. A participating provider/services facilitator may voluntarily terminate his participation in Medicaid by providing 30 days' written notification to DMAS.

E. F. DMAS may terminate at-will a provider's/services facilitator's participation agreement on 30 days' written notice as specified in the DMAS participation agreement. DMAS may immediately terminate a provider's/services facilitator's participation agreement if the provider/services facilitator is no longer eligible to participate in the Medicaid program. Such action precludes further payment by DMAS for services provided to individuals on or after the date specified in the termination notice.

F. A provider shall have the right to appeal adverse actions taken by DMAS. Provider appeals shall be considered pursuant to 12VAC30-10-1000 and 12VAC30-20-500 through 12VAC30-20-560.

G. The Medicaid provider agreement shall terminate upon conviction of the provider of a felony pursuant to § 32.1-325 of the Code of Virginia. A provider convicted of 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 notify the Virginia Medicaid Program of this conviction and relinquish the provider agreement.

H. G. The provider/services facilitator shall be responsible for the Patient Information Form (DMAS 122) completing the DMAS-225 form. The service provider/services facilitator's provider facilitator shall notify the designated preauthorization PA/Serv Auth contractor, as appropriate, and the local DSS, and DMAS, department of social services, in writing, when any of the following circumstances events occur. Furthermore, it shall be the responsibility of the designated preauthorization PA/Serv Auth contractor to also

update DMAS, as requested, when any of the following events occur:

1. Home and community-based waiver services are implemented;
2. ~~An~~ A waiver individual dies;
3. ~~An~~ A waiver individual is discharged from EDCD waiver services;
4. Any other ~~circumstances~~ events (including hospitalization) that cause home and community-based waiver services to cease or be interrupted for more than 30 consecutive calendar days; or
5. The initial selection by the waiver individual or family/caregiver of a provider/services facilitator to provide services, or a change by the waiver individual or family/caregiver of a provider/services facilitator, if it affects the individual's patient pay amount.

I. H. Changes or termination of services.

1. The provider/services facilitator may decrease the amount of authorized care if the revised ~~plan of care~~ POC is appropriate and based on the medical needs of the waiver individual. ~~If the individual disagrees with the proposed decrease, the individual has the right to appeal to DMAS. The participating provider/services facilitator is responsible for developing the new plan of care and calculating the new hours of service delivery shall collaborate with the waiver individual or the family/caregiver/EOR, or both as appropriate, to develop the new POC and calculate the new hours of service delivery. The individual or person responsible for supervising the individual's care provider/services facilitator shall discuss the decrease in care with the waiver individual or family/caregiver/EOR, document the conversation in the waiver individual's record, and notify the designated preauthorization PA/Serv Auth contractor. The preauthorization PA/Serv Auth contractor will notify shall process the decrease request and the waiver individual or family family/caregiver/EOR shall be notified of the change by letter. This letter shall clearly state the waiver individual's right to appeal this change.~~

2. If a change in the waiver individual's condition necessitates an increase in care, the participating provider/services facilitator ~~must~~ shall assess the need for the increase and, if appropriate, collaborate with the waiver individual and family/caregiver, as appropriate, to develop a plan of care POC for services to meet the changed needs. The provider/services facilitator may implement the increase in personal/respite care hours without approval from DMAS, or the designated ~~preauthorization PA/Serv Auth~~ contractor, if the amount of services does not exceed the total amount established by DMAS, ~~or the designated preauthorization contractor~~, as the maximum for the level of care designated for that individual on the plan of care.



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# Regulations

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~~3.~~ Any increase to an waiver individual's plan of care POC that exceeds the number of hours allowed for that individual's level of care or any change in the waiver individual's level of care ~~must~~ shall be ~~preauthorized~~ authorized by DMAS or the designated ~~preauthorization~~ PA/Serv Auth contractor prior to the increase and be accompanied by adequate documentation justifying the increase.

~~3. 4.~~ In an emergency situation when either the health and, safety, or welfare of the waiver individual or provider personnel is endangered, or both, DMAS, or the designated ~~preauthorization~~ PA/Serv Auth contractor, ~~must~~ shall be notified prior to discontinuing services. The written notification period set out below shall not be required. If appropriate, ~~the local DSS department of social services adult or child protective services department~~ must, as may be appropriate, shall be notified immediately. Appeal rights shall be afforded to the waiver individual.

~~4. 5.~~ In a nonemergency situation, ~~i.e.,~~ when neither the health and, safety, nor welfare of the waiver individual or provider/services facilitator personnel is ~~not~~ endangered, the participating provider, ~~other than a PERS provider,~~ shall give the waiver individual or family/caregiver, or both, at least 10 calendar days' written notification (plus three days for mailing (for mail transit) for a total of 13 calendar days from the letter's date) of the intent to discontinue services. The notification letter shall provide the reasons for and the effective date the provider ~~is~~ will be discontinuing services. ~~The effective date shall be at least 10 days plus three days for mailing from the date of the notification letter. A PERS provider shall give the individual or family/caregiver at least 14 days' prior written notification of the intent to discontinue services. The letter shall provide the reasons for and the effective date of the action. The effective date shall be at least 14 days from the date of the notification letter.~~ Appeal rights shall be afforded to the waiver individual.

~~5.~~ In the case of termination of home and community-based waiver services by DMAS or the designated ~~preauthorization~~ contractor, individuals shall be notified of their appeal rights pursuant to 12VAC30-110. DMAS, or the designated ~~preauthorization~~ contractor, has the responsibility and the authority to terminate the receipt of home and community based care services by the individual for any of the following reasons:

- ~~a.~~ The home and community based care services are no longer the critical alternative to prevent or delay institutional placement;
- ~~b.~~ The individual is no longer eligible for Medicaid;
- ~~c.~~ The individual no longer meets the nursing facility criteria; or
- ~~d.~~ The individual's environment does not provide for his health, safety, and welfare.

~~J.~~ DMAS will conduct annual level of care reviews for all ~~waiver recipients.~~

## I. Staff education and training requirements.

1. RNs shall be currently licensed to practice in the Commonwealth as an RN, or shall hold multi-state licensure privilege pursuant to Chapter 30 (§ 54.1-3000 et seq.) of Title 54.1 of the Code of Virginia, and have at least one year of related clinical nursing experience, which may include work in an acute care hospital, public health clinic, home health agency, rehabilitation hospital, or NF, or as an LPN who worked for at least one year in one of these settings.

2. LPNs shall work under supervision as set out in 18VAC90-20-270. LPNs shall be currently licensed to practice in the Commonwealth as an LPN, or shall hold multi-state licensure privilege pursuant to Chapter 30 (§ 54.1-3000 et seq.) of Title 54.1 of the Code of Virginia, and shall have at least one year of related clinical nursing experience, which may include work in an acute care hospital, public health clinic, home health agency, rehabilitation hospital, or NF. The LPN shall meet the qualifications and skills, prior to being assigned to care for the waiver individual, that are required by the individual's POC.

3. Personal care aides who are employed by personal care agencies that are licensed by the Virginia Department of Health (VDH) shall meet the requirements resulting from Chapter 790 of the 2010 Acts of Assembly. In addition, personal care aides shall also be required to physically attend annually a minimum of 12 hours of agency-provided training in the performance of these services. On-line computer classes shall not satisfy this training requirement.

4. Personal care aides who are employed by personal care agencies that are not licensed by the VDH shall have completed an educational curriculum of at least 40 hours of study related to the needs of individuals who are either elderly or who have disabilities, as ensured by the provider prior to being assigned to the care of an individual, and shall have the required skills and training to perform the services as specified in the waiver individual's POC and related supporting documentation.

a. Personal care aides' required initial (that is, at the onset of employment) training, as further detailed in the applicable provider manual, shall be met in one of the following ways: (i) registration with the Board of Nursing as a certified nurse aide; (ii) graduation from an approved educational curriculum as listed by the Board of Nursing; or (iii) completion of the provider's educational curriculum, that must be a minimum of 40 hours in duration, as taught by an RN who meets the same requirements as the RN listed in subdivision 1 of this subsection.

b. In addition, personal care aides shall also be required to physically attend annually a minimum of 12 hours of

agency-provided training in the performance of these services. On-line computer classes shall not satisfy this training requirement.

c. Personal care aides shall:

(1) Be at least 18 years of age or older;

(2) Be able to read and write English to the degree necessary to perform the expected tasks and create and maintain the required documentation;

(3) Be physically able to perform the required tasks and have the required skills to perform services as specified in the waiver individual's supporting documentation;

(4) Have a valid social security number that has been issued to the personal care aide by the Social Security Administration;

(5) Submit to a criminal records check and, if the waiver individual is a minor, consent to a search of the VDSS Child Protective Services Central Registry. The aide shall not be compensated for services provided to the waiver individual if this record check verifies that the aide has been convicted of barrier crimes described in § 32.1-162.9:1 or 63.2-1719 of the Code of Virginia or if the aide has a founded complaint confirmed by the VDSS Child Protective Services Central Registry;

(6) Submit to a check of records by a local department of social services to determine if he has been found to have abused, neglected, or exploited an adult 60 years of age or older or an adult who is 18 years of age or older and who is also incapacitated. The aide shall not be compensated for services provided to the waiver individual beginning with the date that such records are located;

(7) Understand and agree to comply with the DMAS EDCD Waiver requirements; and

(8) Receive tuberculosis (TB) screening as specified in the criteria used by the VDH.

5. Consumer-directed personal care attendants shall:

a. Be 18 years of age or older;

b. Be physically able to perform the work and have the required skills to perform consumer-directed services as specified in the waiver individual's supporting documentation;

c. Be able to read and write in English to the degree necessary to perform the tasks expected and create and maintain the required documentation;

d. Have a valid social security number that has been issued to the personal care attendant by the Social Security Administration;

e. Submit to a criminal records check and, if the waiver individual is a minor, consent to a search of the VDSS Child Protective Services Central Registry. The attendant shall not be compensated for services provided to the waiver individual, after the individual has been notified,

if this record check verifies that the attendant has been convicted of barrier crimes described in § 32.1-162.9:1 or 63.2-1719 of the Code of Virginia or if the attendant has a founded complaint confirmed by the VDSS Child Protective Services Central Registry;

f. Submit to a check of records by a local department of social services to determine if he has been found to have abused, neglected, or exploited an adult 60 year of age or older or an adult who is 18 years of age or older and who is also incapacitated. The attendant shall not be compensated for services provided to the waiver individual beginning with the date that such records are located;

g. Be willing to attend training at the individual's or family/caregiver's request;

h. Understand and agree to comply with the DMAS EDCD Waiver requirements; and

i. Receive tuberculosis (TB) screening as specified in the criteria used by the VDH.

**12VAC30-120-935. Participation standards for specific covered services.**

A. The personal care, respite, and ADHC providers shall develop an individualized POC that addresses the waiver individual's service needs. Such plan must be developed in collaboration with the waiver individual or the individual's family/caregiver/EOR, as appropriate.

B. Agency providers shall employ appropriately licensed professional staff to provide the covered waiver services as may be required by the waiver individuals. RNs/LPNs shall either be licensed as nursing professionals by the Commonwealth of Virginia or they shall hold multi-state licensing privilege pursuant to Chapter 30 (§ 54.1-3000 et. seq.) of Title 54.1 of the Code of Virginia. Providers shall require that the supervising RN/LPN be available by phone at all times that the LPN/attendant, as appropriate, is providing services to the waiver individual.

C. Agency staff (RN, LPNs, or aides) or CD employees (attendants) shall not be reimbursed by DMAS for services rendered to waiver individuals when the agency staff or the CD employee is either (i) the spouse; or (ii) parent (biological, adoptive, legal guardian) or other legal guardian of the minor child waiver individual or an adult waiver individual.

D. Failure to meet the documentation standards as stated herein may result in DMAS charging audited providers with overpayments and requiring the return of the overpaid funds.

E. In addition to meeting the general conditions and requirements, home and community-based services participating providers shall also meet the following requirements:

1. ADHC services provider. In order to provide these services, the ADCC shall:

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# Regulations

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a. Make available a copy of the current VDSS license for DMAS' review and verification purposes prior to the provider applicant's enrollment as a Medicaid provider.

b. Adhere to VDSS' ADCC standards as defined in 22VAC40-60 including, but not limited to, provision of activities for waiver individuals; and

c. Employ the following:

(1) A director who shall be responsible for overall management of the center's programs and employees pursuant to 22VAC40-60-320. The director shall be the provider contact person for DMAS and the designated PA/Serv Auth contractor and shall be responsible for responding to communication from DMAS and the designated PA/Serv Auth contractor. The director shall be responsible for assuring the development of the POCs for waiver individuals. The director shall assign either himself, the activities director if there is one, RN, or therapist to act as the care coordinator for each waiver individual and shall document in the individual's medical record the identity of the care coordinator. The care coordinator shall be responsible for management of the waiver individual's POC and for its review with the program aides and any other staff, as necessary.

(2) A RN shall be responsible for administering to and monitoring the health needs of the waiver individuals. The RN may also contract with the center. The RN shall be responsible for the planning and implementation of the POC involving multiple services where specialized health care knowledge may be needed. The RN shall be present a minimum of eight hours each month at the center. DMAS may require the RN's presence at the center for more than this minimum standard depending on the number of waiver individuals who are in attendance and according to the medical and nursing needs of the waiver individuals who attend the center. Although DMAS does not require that the RN be a full-time staff position, there shall be a RN available, either in person or by telephone, to the center's waiver individuals and staff during all times that the center is in operation. The RN shall be responsible for:

(a) Providing periodic evaluation, at least every 90 days, of the nursing needs of each waiver individual;

(b) Providing the nursing care and treatment as documented in individuals' POCs; and

(c) Monitoring, recording, and administering of prescribed medications or supervising the waiver individual in self-administered medication.

(3) Personal care aides who shall be responsible for overall care of waiver individuals such as assistance with ADLs, social/recreational activities, and other health and therapeutic-related activities. Each program aide hired by the provider shall be screened to ensure compliance with training and skill mastery qualifications required by

DMAS. The aide shall, at a minimum, have the following qualifications:

(a) Be 18 years of age or older;

(b) Be able to read and write in English to the degree necessary to perform the tasks expected and create and maintain the required waiver individual documentation of services rendered;

(c) Be physically able to perform the work and have the skills required to perform the tasks required in the waiver individual's POC;

(d) Have a valid social security number issued to the program aide by the Social Security Administration;

(e) Have satisfactorily completed an educational curriculum as set out in this subdivision. Documentation of successful completion shall be maintained in the aide's personnel file and be available for review by DMAS' staff. Prior to assigning a program aide to a waiver individual, the center shall ensure that the aide has either (i) registered with the Board of Nursing as a certified nurse aide; (ii) graduated from an approved educational curriculum as listed by the Board of Nursing; or (iii) completed the provider's educational curriculum, at least 40 hours in duration, as taught by an RN who is licensed in the Commonwealth or who holds a multi-state licensing privilege.

(4) The ADHC coordinator shall coordinate, pursuant to 22VAC40-60-695, the delivery of the activities and services as prescribed in the waiver individuals' POCs and keep such plans updated, record 30-day progress notes, and review the waiver individuals' daily records each week. If a waiver individual's condition changes more frequently, more frequent reviews and recording of progress notes shall be required to reflect the individual's changing condition.

2. Recreation and social activities responsibilities. The center shall provide planned recreational and social activities suited to the waiver individuals' needs and interests and designed to encourage physical exercise, prevent deterioration of each waiver individual's condition, and stimulate social interaction.

3. The center shall maintain all records of each Medicaid individual. These records shall be reviewed periodically by DMAS staff or its designated agent who is authorized by DMAS to review these files. At a minimum, these records shall contain, but shall not necessarily be limited to:

a. DMAS required forms as specified in the center's provider-appropriate guidance documents;

b. Interdisciplinary POCs developed, in collaboration with the waiver individual or family/caregiver, or both as may be appropriate, by the center's director, RN, and therapist, as may be appropriate, and any other relevant support persons;

c. Documentation of interdisciplinary staff meetings that shall be held at least every three months to reassess each waiver individual and evaluate the adequacy of the POC and make any necessary revisions;

d. At a minimum, 30-day goal-oriented progress notes recorded by the designated ADHC care coordinator. If a waiver individual's condition and treatment POC changes more often, progress notes shall be written more frequently than every 30 days;

e. The daily record of services provided shall contain the specific services delivered by center staff. The record shall also contain the arrival and departure times of the waiver individual and shall be signed weekly by either the director, activities director, RN, or therapist employed by the center. The record shall be completed on a daily basis, neither before nor after the date of services delivery. At least once a week, a staff member shall chart significant comments regarding care given to the waiver individual. If the staff member writing comments is different from the staff signing the weekly record, that staff member shall sign the weekly comments. A copy of this record shall be given weekly to the waiver individual or family/caregiver; and it shall also be maintained in the waiver individual-specific medical record; and

f. All contacts shall be documented in the waiver individual's medical record, including correspondence made to and from the individual with family/caregivers, physicians, DMAS, the designated PA/Serv Auth contractor, formal and informal services providers, and all other professionals related to the waiver individual's Medicaid services or medical care.

F. Agency-directed personal care services. The personal care provider agency shall hire or contract with and directly supervise a RN who provides ongoing supervision of all personal care aides and LPNs. LPNs may supervise personal care aides based upon RN assessment of the waiver individuals' health, safety, and welfare needs.

1. The RN supervisor shall make an initial home assessment visit on or before the start of care for all individuals admitted to personal care when a waiver individual is readmitted after being discharged from services or if he is transferred from another provider, ADHC, or from a CD services program.

2. The RN supervisor shall evaluate, at least every six months, the LPN supervisor's performance and the waiver individual's needs to ensure the LPN supervisor's abilities to function competently and shall provide training as necessary. This shall be documented in the waiver individual's record.

3. The RN/LPN supervisor shall also make supervisory visits based on the assessment and evaluation of the care needs of waiver individuals as often as needed and as

defined in this subdivision to ensure both quality and appropriateness of services.

a. The personal care provider agency shall have the responsibility of determining when supervisory visits are appropriate for the waiver individual's health, safety, and welfare. Supervisory visits shall be at least every 90 days. This determination must be documented in the waiver individuals' records by the RN on the initial assessment and in the ongoing records.

b. If DMAS determines that the waiver individual's health, safety, or welfare is in jeopardy, DMAS may require the provider's RN or LPN supervisor to supervise the personal care aides more frequently than once every 90 days. These visits shall be conducted at this designated increased frequency until DMAS determines that the waiver individual's health, safety, or welfare is no longer in jeopardy. This shall be documented by the provider and entered into the individual's record.

c. During visits to the waiver individual's home, the RN/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's/caregiver's, or both, satisfaction with the type and amount of services discussed.

d. If the supervising RN/LPN must be delayed in conducting the regular supervisory visit, such delay shall be documented in the waiver individual's record with the reasons for the delay. Such supervisory visits shall be conducted within 15 calendar days of the waiver individual's first availability.

e. A RN/LPN supervisor shall be available to the personal care aide for conferences pertaining to waiver individuals being served by the aide.

(1) The RN/LPN supervisor shall be available to the aide by telephone at all times that the aide is providing services to waiver individuals.

(2) The RN/LPN supervisor shall evaluate the personal care aide's performance and the waiver individual's needs to identify any insufficiencies in the personal care aide's abilities to function competently and shall provide training as indicated. This shall be documented in the waiver individual's record.

f. Licensed Practical Nurses (LPNs). As permitted by his license, the LPN may supervise personal care aides. To ensure both quality and appropriateness of services, the LPN supervisor shall make supervisory visits of the aides as often as needed, but no fewer visits than provided in waiver individuals' POCs as developed by the RN in collaboration with individuals and the individuals' family/caregivers, or both, as appropriate.

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# Regulations

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(1) During visits to the waiver individual's home, a 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 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.

(2) The LPN supervisor shall evaluate the personal care aide's performance and the waiver individual's needs to identify any insufficiencies in the aide's abilities to function competently and shall provide training as required to resolve the insufficiencies. This shall be documented in the waiver individual's record and reported to the RN supervisor.

(3) An LPN supervisor shall be available to personal care aides for conferences pertaining to waiver individuals being served by them.

g. Personal care aides. The agency provider shall employ and the RN/LPN supervisor shall directly supervise personal care aides who provide direct care to waiver individuals. Each aide hired to provide personal care shall be evaluated by the provider agency to ensure compliance with qualifications and skills required by DMAS pursuant to 12VAC30-120-930.

4. Payment may be made for services furnished by live-in caregivers or family members, other than the (i) spouse of the waiver individual; (ii) parent or parents of the waiver individual; or (iii) legal guardian who are functioning as personal care aides when there is objective written documentation as to why there are no other providers or aides available to provide the care. These family members who may be appropriate to be reimbursed by DMAS for personal care aide services shall meet the same education and physical requirements as aides who are not family members. The provider shall initially make the determination that a family member may be permitted to serve as the personal care aide and document it fully in the waiver individual's record. DMAS shall make the final determination of the appropriateness of such family members providing these services during its reviews.

5. Required documentation for waiver individuals' records. The provider shall maintain all records for each individual receiving personal care services. These records shall be separate from those of non-home and community-based care services, such as companion or home health services. These records shall be reviewed periodically by DMAS or its designated agent. At a minimum, the record shall contain:

(a) All personal care aides' records (DMAS-90) to include (i) the specific services delivered to the waiver individual by the aide; (ii) the personal care aide's actual daily arrival and departure times; (iii) the aide's weekly comments or observations about the waiver individual,

including observations of the individual's physical and emotional condition, daily activities, and responses to services rendered; and (iv) any other information appropriate and relevant to the waiver individual's care and need for services.

(b) The personal care aide's and individual's or responsible caregiver's signatures, including the date, shall be recorded on these records verifying that personal care services have been rendered during the week of the service delivery.

(i) An employee of the provider shall not sign for the waiver individual unless he is a family member or unpaid caregiver of the waiver individual.

(ii) Signatures, times, and dates shall not be placed on the personal care aide record earlier than the last day of the week in which services were provided nor later than seven calendar days from the date of the last service.

## G. Agency-directed respite care services.

1. To be approved as a respite care provider with DMAS, the respite care agency provider shall:

a. Employ or contract with and directly supervise either a RN or LPN, or both, who will provide ongoing supervision of all respite care aides/LPNs, as appropriate. A RN shall provide supervision to all direct care and supervisory LPNs.

(1) When respite care services are received on a routine basis, the minimum acceptable frequency of the required RN/LPN supervisor's visits shall not exceed every 90 days, based on the initial assessment. If an individual is also receiving personal care services, the respite care RN/LPN supervisory visit may coincide with the personal care RN/LPN supervisory visits. However, the RN/LPN supervisor shall document supervision of respite care separately from the personal care documentation. For this purpose, the same individual record may be used with a separate section for respite care documentation.

(2) When respite care services are not received on a routine basis but are episodic in nature, a RN/LPN supervisor shall not be required to conduct a supervisory visit within a specified number of days. Instead, a RN/LPN supervisor shall conduct the home supervisory visit with the aide/LPN on or before the start of care and make a second home supervisory visit during the second respite care visit. If a waiver individual is also receiving personal care services, the respite care RN/LPN supervisory visit may coincide with the personal care RN/LPN supervisory visit.

(3) During visits to the waiver individual's home, the RN/LPN supervisor shall observe, evaluate, and document the adequacy and appropriateness of respite care services with regard to the waiver individual's current functioning status and medical and social needs.

The aide's/LPN's record shall be reviewed along with the waiver individual's or family's/caregiver's, or both, satisfaction with the type and amount of services discussed.

(4) Should the required RN/LPN supervisory visit be delayed, the reason for the delay shall be documented in the waiver individual's record. This visit shall be completed within 15 days of the waiver individual's first availability.

b. Employ or contract with aides to provide respite care services who shall meet the same education and training requirements as personal care aides.

c. Not hire respite care aides for DMAS' reimbursement for services that are rendered to waiver individuals when the aide is either (i) the spouse of the waiver individual or (ii) the parent (biological, adoptive, legal guardian) or other guardian of the minor child waiver individual.

d. Employ an LPN to perform skilled respite care services. Such services shall be reimbursed by DMAS under the following circumstances:

(1) The waiver individual shall have a documented need for routine skilled respite care that cannot be provided by unlicensed personnel, such as an aide. These waiver individuals would typically require a skilled level of care involving, for example but not necessarily limited to, ventilators for assistance with breathing or either nasogastric or gastrostomy feedings;

(2) No other person in the waiver individual's support system is willing and able to supply the skilled component of the individual's care during the primary caregiver's absence; and

(3) The waiver individual is unable to receive skilled nursing visits from any other source that could provide the skilled care usually given by the caregiver.

e. Document in the waiver individual's record the circumstances that require the provision of services by an LPN. At the time of the LPN's service, the LPN shall also provide all of the services normally provided by an aide.

2. Payment shall not be made for services furnished by other family members or live-in caregivers who are living under the same roof as the waiver individual receiving services unless there is objective written documentation as to why there are no other providers or aides available to provide the care. Other family members or live-in caregivers of the waiver individual who are approved to provide paid respite services shall meet the same training and physical standard requirements as those who are employed by an agency. The provider shall initially make this determination and document it fully in the waiver individual's record. DMAS shall make the final determination of the appropriateness of such family members providing these services during reviews.

3. Required documentation for waiver individuals' records. The provider shall maintain all records for each waiver individual receiving respite services. These records shall be separate from those of non-home and community-based care services, such as companion or home health services. These records shall be reviewed periodically either by the DMAS staff or a contracted entity who is authorized by DMAS to review these files. At a minimum these records shall contain:

a. Forms as specified in the DMAS' guidance documents;

b. All respite care LPN/aide records shall contain:

(1) The specific services delivered to the waiver individual by the LPN/aide;

(2) The respite care LPN's/aide's daily arrival and departure times;

(3) Comments or observations recorded weekly about the waiver individual. LPN/aide comments shall include, but shall not be limited to, observation of the waiver individual's physical and emotional condition, daily activities, the individual's response to services rendered, and documentation of vital signs if taken as part of the POC.

c. All respite care LPN records (DMAS-90A) shall be reviewed and signed by the supervising RN and shall contain:

d. The respite care LPN/aide's and individual's or responsible family/caregiver's signatures, including the date, verifying that respite care services have been rendered during the week of service delivery as documented in the record.

(1) An employee of the provider shall not sign for the waiver individual unless he is a family member or unpaid caregiver of the waiver individual.

(2) Signatures, times, and dates shall not be placed on the respite care LPN/aide record earlier than the last day of the week in which services were provided nor shall signatures be placed on the respite care LPN/aide records later than seven calendar days from the date of the last service.

H. Consumer-directed (CD) services facilitation for personal care and respite services.

1. Any services rendered by attendants prior to dates authorized by DMAS or the PA/Serv Auth contractor shall not be eligible for Medicaid reimbursement and shall be the responsibility of the waiver individual.

2. The CD services facilitator shall meet the following qualifications:

a. To be enrolled as a Medicaid CD services facilitator and maintain provider status, the CD services facilitator shall have sufficient knowledge, skills, and abilities to perform the activities required of such providers. In addition, the CD services facilitator shall have the ability

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## Regulations

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to maintain and retain business and professional records sufficient to fully and accurately document the nature, scope, and details of the services provided.

b. If the CD services facilitator is not a RN, the CD services facilitator shall inform the waiver individual's primary health care provider that services are being provided and request consultation as needed. These contacts shall be documented in the waiver individual's record.

### 3. Initiation of services and service monitoring.

a. For CD services, the CD services facilitator shall make an initial comprehensive in-home visit at the primary residence of the waiver individual to collaborate with the waiver individual or family/caregiver to identify the needs, assist in the development of the POC with the waiver individual or family/caregiver, as appropriate, and provide employer of record (EOR) training within seven days of the initial visit. The initial comprehensive home visit shall be conducted only once upon the waiver individual's entry into CD services. If the waiver individual changes, either voluntarily or involuntarily, the CD services facilitator, the new CD services facilitator must complete a reassessment visit in lieu of an initial comprehensive visit.

b. After the initial comprehensive visit, the CD services facilitator shall continue to monitor the POC on an as-needed basis, but in no event less frequently than every 90 days for personal care, and shall conduct face-to-face meetings with the waiver individual and family/caregiver. The CD services facilitator shall review the utilization of CD respite services, either every six months or upon the use of half of the approved respite services hours, whichever comes first, and shall conduct a face-to-face meeting with the waiver individual or family/caregiver, or both.

c. During visits with the waiver individual, the CD services facilitator shall observe, evaluate, and consult with the individual or family/caregiver, and document the adequacy and appropriateness of CD services with regard to the waiver individual's current functioning, cognitive status, and medical and social needs. The CD services facilitator's written summary of the visit shall include, but shall not necessarily be limited to:

(1) A discussion with the waiver individual or family/caregiver/EOR concerning whether the service is adequate to meet the waiver individual's needs;

(2) Any suspected abuse, neglect, or exploitation and to whom it was reported;

(3) Any special tasks performed by the attendant and the attendant's qualifications to perform these tasks;

(4) The waiver individual's or family/caregiver's/EOR's satisfaction with the service;

(5) Any hospitalization or change in medical condition, functioning, or cognitive status; and

(6) The presence or absence of the attendant in the home during the CD services facilitator's visit.

4. DMAS, its designated contractor, or the fiscal/employer agent shall request a criminal record check and a check of the VDSS Child Protective Services Central Registry, in accordance with 12VAC30-120-930, pertaining to the attendant on behalf of the waiver individual and report findings of these records checks to the waiver individual or the family/caregiver or EOR.

5. The CD services facilitator shall review copies of timesheets during the face-to-face visits to ensure that the hours approved in the POC are being provided and are not exceeded. If discrepancies are identified, the CD services facilitator shall discuss these with the waiver individual, family/caregiver, or EOR to resolve discrepancies and shall notify the fiscal/employer agent. The CD services facilitator shall also review the waiver individual's POC to assure that the waiver individual's needs are being met.

6. The CD services facilitator shall maintain records of each waiver individual that he serves. At a minimum, these records shall contain:

a. Results of the initial comprehensive home visit completed prior to or on the date services are initiated and subsequent reassessments and changes to the supporting documentation;

b. The personal care POC goals, objectives, and activities. Such plans shall be reviewed by the provider every 90 days, annually, and more often as needed, and modified as appropriate. Respite POC goals, objectives, and activities shall be reviewed by the provider every six months or when half of the approved respite service hours have been used. For the annual review and in cases where the POC is modified, the POC shall be reviewed with the waiver individual, the family/caregiver, and EOR, as appropriate;

c. CD services facilitator's dated notes documenting any contacts with the waiver individual or family/caregiver/EOR and visits to the individual;

d. All contacts, including correspondence, made to and from the waiver individual, with family/caregiver, physicians, DMAS, the designated PA/Serv Auth contractor, formal and informal services provider, and all other professionals related to the individual's Medicaid services or medical care;

e. All employer management training provided to the waiver individual or family/caregiver/EOR to include, but not necessarily be limited to (i) the individual's or family/caregiver's/EOR's receipt of training on their responsibilities for the accuracy of the attendant's timesheets and (ii) the availability of the Consumer-

Directed Waiver Services Employer Manual available at [www.dmas.virginia.gov](http://www.dmas.virginia.gov);

f. All documents signed by the waiver individual, the family/caregiver, or EOR, as appropriate, that acknowledge the responsibilities as the employer; and

g. The DMAS required forms as specified in the agency's waiver-specific guidance document.

7. Waiver individuals shall not employ attendants for DMAS reimbursement for services rendered to themselves when the attendant is (i) the spouse of the waiver individual; (ii) parent (biological, adoptive, legal guardian) or other guardian of the minor-child waiver individual; or (iii) family/caregiver or caregivers/EOR who may be directing the waiver individual's care.

8. Payment shall not be made for services furnished by other family/caregivers/EOR living under the same roof as the waiver individual being served unless there is objective written documentation by the CD services facilitator as to why there are no other providers available to provide the required care. Other family members who are approved to provide paid attendant services shall meet the previously specified education and physical qualifications for attendants. The CD services facilitator shall make and document the determination that specific other family members can be permitted to be paid attendants. DMAS staff shall also review and make a final determination of the appropriateness of such family members to provide these services during provider reviews.

9. In instances when either the waiver individual is consistently unable to hire and retain the employment of a personal care attendant to provide CD personal care or respite services such as, but not limited to, a pattern of discrepancies with the attendant's timesheets, the CD services facilitator shall make arrangements, after conferring with DMAS, to have the needed services transferred to an agency-directed services provider of the individual's choice or discuss with the waiver individual or family/caregiver/EOR, or both, other service options.

10. Waiver individual responsibilities.

a. The waiver individual shall be authorized for CD services and successfully complete consumer/management training performed by the CD services facilitator before the individual shall be permitted to hire a personal care attendant for Medicaid reimbursement. Any services that may be rendered by an attendant prior to authorization by Medicaid shall not be eligible for reimbursement by Medicaid. Waiver individuals who are eligible for CD services shall have the capability to hire and train their own personal care attendants and supervise the attendants' performance. Waiver individuals with cognitive impairments who are unable to manage their own care may have a family/caregiver serve as the EOR on their behalf. The family/caregiver who serves as the EOR on behalf of the

waiver individual shall be prohibited from also being the Medicaid-reimbursed attendant for respite or personal care or the services facilitator for the waiver individual.

b. Waiver individuals shall acknowledge that they will not knowingly continue to accept CD personal care services when the service is no longer appropriate or necessary for their care needs and shall inform the services facilitator of their change in care needs. If CD services continue after services have been terminated by DMAS or the designated PA/Serv Auth contractor, the waiver individual shall be held liable for attendant compensation.

c. Waiver individuals shall notify the CD services facilitator of all hospitalizations or admissions, such as but not necessarily limited to, to any rehabilitation facility or rehabilitation unit or NF as CD attendant services shall not be reimbursed during such admissions. Failure to do so may result in the waiver individual being held liable for attendant compensation.

I. Personal emergency response systems. In addition to meeting the general conditions and requirements for home and community-based waiver participating providers as specified in 12VAC30-120-930, PERS providers must also meet the following qualifications and requirements:

1. A PERS provider shall be either, but not necessarily limited to, a personal care agency, a durable medical equipment provider, a licensed home health provider, or a PERS manufacturer. All such providers shall have the ability to provide PERS equipment, direct services (i.e., installation, equipment maintenance, and service calls), and PERS monitoring;

2. The PERS provider shall provide an emergency response center with fully trained operators who are capable of (i) receiving signals for help from an individual's PERS equipment 24 hours a day, 365 or 366 days per year, as appropriate; (ii) determining whether an emergency exists; and (iii) notifying an emergency response organization or an emergency responder that the PERS individual needs emergency help;

3. A PERS provider shall comply with all applicable Virginia statutes, all applicable regulations of DMAS, and all other governmental agencies having jurisdiction over the services to be performed;

4. The PERS provider shall have the primary responsibility to furnish, install, maintain, test, and service the PERS equipment, as required, to keep it fully operational. The provider shall replace or repair the PERS device within 24 hours of the waiver individual's notification of a malfunction of the console unit, activating devices, or medication monitoring unit and shall provide temporary equipment, as may be necessary for the waiver individual's health, safety, and welfare, while the original equipment is being repaired;



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## Regulations

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5. The PERS provider shall install, consistent with the manufacturer's instructions, all PERS equipment into a waiver individual's functioning telephone line or system within seven days of the request of such installation unless there is appropriate documentation of why this timeframe cannot be met. The PERS provider shall furnish all supplies necessary to ensure that the system is installed and working properly. The PERS provider shall test the PERS device monthly, or more frequently if needed, to ensure that the device is fully operational;

6. The PERS installation shall include local seize line circuitry, which guarantees that the unit shall have priority over the telephone connected to the console unit should the telephone be off the hook or in use when the unit is activated;

7. A PERS provider shall maintain a data record for each waiver individual at no additional cost to DMAS or the waiver individual. The record shall document all of the following:

a. Delivery date and installation date of the PERS equipment;

b. Waiver individual/caregiver/EOR signature verifying receipt of the PERS equipment;

c. Verification by a test that the PERS device is operational and the waiver individual is still using it monthly or more frequently as needed;

d. Waiver individual contact information, to be updated annually or more frequently as needed, as provided by the individual or the individual's caregiver/EOR;

e. A case log documenting the waiver individual's utilization of the system, all contacts, and all communications with the individual, caregiver/EOR, and responders;

f. Documentation that the waiver individual is able to use the PERS equipment through return demonstration; and

g. Copies of all equipment checks performed on the PERS unit;

8. The PERS provider shall have backup monitoring capacity in case the primary system cannot handle incoming emergency signals;

9. The emergency response activator shall be capable of being activated either by breath, touch, or some other means and shall be usable by waiver individuals who are visually or hearing impaired or physically disabled. The emergency response communicator shall be capable of operating without external power during a power failure at the waiver individual's home for a minimum period of 24 hours. The emergency response console unit shall also be able to self-disconnect and redial the backup monitoring site without the waiver individual resetting the system in the event it cannot get its signal accepted at the response center;

10. PERS providers shall be capable of continuously monitoring and responding to emergencies under all conditions, including power failures and mechanical malfunctions. It shall be the PERS provider's responsibility to ensure that the monitoring agency and the monitoring agency's equipment meets the following requirements. The PERS provider shall be capable of simultaneously responding to multiple signals for help from the waiver individuals' PERS equipment. The PERS provider's equipment shall include the following:

a. A primary receiver and a backup receiver, which shall be independent and interchangeable;

b. A backup information retrieval system;

c. A clock printer, which shall print out the time and date of the emergency signal, the waiver individual's identification code, and the emergency code that indicates whether the signal is active, passive, or a responder test;

d. A backup power supply;

e. A separate telephone service;

f. A toll-free number to be used by the PERS equipment in order to contact the primary or backup response center; and

g. A telephone line monitor, which shall give visual and audible signals when the incoming telephone line is disconnected for more than 10 seconds;

11. The PERS provider shall maintain detailed technical and operation manuals that describe PERS elements, including the installation, functioning, and testing of PERS equipment; emergency response protocols; and recordkeeping and reporting procedures;

12. The PERS provider shall document and furnish within 30 days of the action taken, a written report for each emergency signal that results in action being taken on behalf of the waiver individual. This excludes test signals or activations made in error. This written report shall be furnished to (i) the personal care provider; (ii) the respite care provider; (iii) the CD services facilitation provider; (iv) in cases where the individual only receives ADHC services, to the ADCC provider; or (v) to the transition coordinator for the service in which the individual is enrolled; and

13. The PERS provider shall obtain and keep on file a copy of the most recently completed DMAS-225 form. Until the PERS provider obtains a copy of the DMAS-225 form, the PERS provider shall clearly document efforts to obtain the completed DMAS-225 form from the personal care provider, respite care provider, CD services facilitation provider, or ADCC provider.

J. Assistive technology (AT) and environmental modification (EM) services. AT and EM shall be provided only to waiver individuals who also participate in the MFP demonstration program by providers who have current

provider participation agreements with DMAS. AT shall be provided consistent with the limits contained in 12VAC30-120-762. EM shall be provided consistent with the limits contained in 12VAC30-120-758.

1. AT shall be rendered by providers having a current provider participation agreement with DMAS as durable medical equipment and supply providers. An independent, professional consultation shall be obtained, as may be required, from qualified professionals who are knowledgeable of that item for each AT request prior to approval by either DMAS or the PA/Serv Auth agent and may include training on such AT by the qualified professional. Independent, professional consultants shall include, but shall not necessarily be limited to, speech/language therapists, physical therapists, occupational therapists, physicians, behavioral therapists, certified rehabilitation specialists, or rehabilitation engineers. Providers that supply AT for a waiver individual may not perform assessment/consultation, write specifications, or inspect the AT for that individual. Providers of services shall not be (i) spouses of the waiver individual or (ii) parents (biological, adoptive, foster, or legal guardian) of the waiver individual. AT shall be delivered within a year from the start date of the authorization.

2. In addition to meeting the general conditions and requirements for home and community-based waiver services participating providers as specified in 12VAC30-120-930, as appropriate, environmental modifications shall be provided in accordance with all applicable state or local building codes by contractors who have a provider agreement with DMAS. Providers of services shall not be (i) spouses of the waiver individual or (ii) the parent (biological, adoptive, foster, or legal guardian) of the waiver individual. Modifications shall be completed within a year of the start date of the authorization.

3. Providers of AT and EM services shall not be permitted to recover equipment that has been provided to waiver individuals whenever the provider has been charged, by either DMAS or its designated service authorization agent, with overpayments and is therefore being required to return payments to DMAS.

K. Transition coordination. This service shall be provided consistent with 12VAC30-120-2000 and 12VAC30-120-2010.

L. Transition services. This service shall be provided consistent with 12VAC30-120-2000 and 12VAC30-120-2010.

**12VAC30-120-940. ~~Adult day health care services. (Repealed.)~~**

A. This section contains specific requirements governing the provision of adult day health care (ADHC).

~~B. Adult day health care services may be offered to individuals in an ADHC setting. Adult day health care may be offered either as the sole home and community based care service or in conjunction with personal care (agency or consumer directed), respite care (agency or consumer directed), or PERS.~~

~~C. Special provider participation conditions. In order to be a participating provider, the adult day health care center shall:~~

~~1. Be an adult day care center licensed by DSS. A copy of the current license shall be available to DMAS for verification purposes prior to the applicant's enrollment as a Medicaid provider and shall be available for DMAS review;~~

~~2. Adhere to DSS adult day health care center standards;~~

~~3. Adhere to and meet the following DMAS special participation standards that are imposed in addition to DSS standards:~~

~~a. Provide a separate room or an area equipped with one bed, cot, or recliner for every 12 Medicaid adult day health care participants;~~

~~b. Employ sufficient interdisciplinary staff to adequately meet the health, maintenance, and safety needs of each participant;~~

~~c. Maintain a minimum staff to participant ratio of at least one staff member to every six participants. This includes Medicaid and other participants;~~

~~d. Provide at least two staff members awake and on duty at the ADHC at all times when there are Medicaid participants in attendance;~~

~~e. In the absence of the director, designate the activities director, registered nurse, or therapist to supervise the program;~~

~~f. May include volunteers in the staff to participant ratio if these volunteers meet the qualifications and training requirements for compensated employees, and, for each volunteer so counted, include at least one compensated employee in the staff to participant ratio;~~

~~g. For any center that is co-located with another facility, count only its own separate identifiable staff in the center's staff to participant ratio; and~~

~~h. Employ the following:~~

~~(1) A director who shall be responsible for overall management of the center's programs. The director shall be the provider contact person for DMAS and the designated preauthorization contractor and shall be responsible for responding to communication from DMAS and the designated preauthorization contractor.~~

~~(a) The director shall be responsible for assuring the development of the plan of care for adult day health care individuals. The director has ultimate responsibility for directing the center program and supervision of its~~

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# Regulations

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employees. The director can also serve as the activities director if they meet the qualifications for that position.

~~(b) The director shall assign himself, the activities director, registered nurse or therapist to act as adult day health care coordinator for each participant and shall document in the participant's file the identity of the care coordinator. The adult day health care coordinator shall be responsible for management of the participant's plan of care and for its review with the program aides.~~

~~(c) The director shall meet the qualifications specified in the DSS standards for adult day health care for directors.~~

~~(2) An activities director who shall be responsible for directing recreational and social activities for the adult day health care participants. The activities director shall:~~

~~(a) Have a minimum of 48 semester hours or 72 quarter hours of postsecondary education from an accredited college or university with a major in recreational therapy, occupational therapy, or a related field such as art, music, or physical education; and~~

~~(b) Have one year of related experience, which may include work in an acute care hospital, rehabilitation hospital, nursing facility, or have completed a course of study including any prescribed internship in occupational, physical, and recreational therapy or music, dance, art therapy, or physical education.~~

~~(3) Program aides who shall be responsible for overall care and maintenance of the participant (assistance with activities of daily living, social/recreational activities, and other health and therapeutic related activities). Each program aide hired by the provider shall be screened to ensure compliance with qualifications required by DMAS. The aide shall, at a minimum, have the following qualifications:~~

~~(a) Be at least 10 years of age or older;~~

~~(b) Be able to read and write in English to the degree necessary to perform the tasks expected;~~

~~(c) Be physically able to do the work;~~

~~(d) Have satisfactorily completed an educational curriculum related to the needs of the elderly and disabled. Acceptable curriculums are offered by educational institutions, nursing facilities, and hospitals. Training consistent with DMAS training guidelines may also be given by the center's professional staff. Curriculum titles include: Nurses Aide, Geriatric Nursing Assistant, and Home Health Aide. Documentation of successful completion shall be maintained in the aide's personnel file and be available for review by DMAS staff who are authorized by DMAS to review these files. Prior to assigning a program aide to a participant, the ADHC shall ensure that the aide has satisfactorily completed a DMAS approved training program.~~

~~(4) A registered nurse (RN) employed or contracted with the center who shall be responsible for administering to~~

~~and monitoring the health needs of the participants. The nurse shall be responsible for the planning and implementation of the plan of care involving multiple services where specialized health care knowledge is needed. The nurse shall be present a minimum of eight hours each month at the center. DMAS may require the nurse's presence at the adult day health care center for more than this minimum standard depending on the number of participants in attendance and according to the medical and nursing needs of the participants. Although DMAS does not require that the registered nurse be a full time staff position, there shall be a registered nurse available, either in person or by telephone, to the center's participants and staff during all times that the center is in operation. The registered nurse shall:~~

~~(a) Be registered and licensed as a registered nurse to practice nursing in the Commonwealth; and~~

~~(b) Have two years of related clinical experience, which may include work in an acute care hospital, public health clinic, home health agency, rehabilitation hospital, nursing facility, or as an LPN.~~

~~D. Service responsibilities of the adult day health care center and staff shall be:~~

~~1. Aide responsibilities. The aide shall be responsible for assisting with activities of daily living, supervising the participant, and assisting with the management of the participant's plan of care.~~

~~2. RN responsibilities. The RN shall be responsible for:~~

~~a. Providing periodic evaluation of the nursing needs of each participant;~~

~~b. Providing the indicated nursing care and treatment; and~~

~~c. Monitoring, recording, and administering of prescribed medications or supervising the participant in self-administered medication.~~

~~3. Rehabilitation services coordination responsibilities. These services are designed to ensure the participant receives all rehabilitative services deemed necessary to improve or maintain independent functioning, to include the coordination and implementation of physical therapy, occupational therapy, and speech language therapy. Rendering of the specific rehabilitative therapy is not included in the center's fee for services but must be rendered as a separate service by a rehabilitative provider.~~

~~4. Nutrition responsibilities. The center shall provide one meal per day that supplies one third of the daily nutritional requirements established by the U.S. Department of Agriculture. Special diets and counseling shall be provided to Medicaid participants as necessary.~~

~~5. Adult day health care coordination. The designated adult day health care coordinator shall coordinate the delivery of the activities as prescribed in the participants' plans of care and keep them updated, record 30 day progress notes, and~~

review the participants' daily records each week. If the individual's condition changes more frequently, more frequent reviews and recording of progress notes shall be required to reflect the participant's changing condition.

6. Recreation and social activities responsibilities. The center shall provide planned recreational and social activities suited to the individuals' needs and designed to encourage physical exercise, prevent deterioration of the individual's condition, and stimulate social interaction.

E. Documentation required. The ADHC shall maintain all records of each Medicaid participant. These records shall be reviewed periodically by DMAS staff who are authorized by DMAS to review these files. At a minimum, these records shall contain:

1. The Long Term Care Uniform Assessment Instrument, the Medicaid Funded Long Term Care Service Authorization Form (DMAS 96), the Screening Team Plan of Care for Medicaid Funded Long Term Care form (DMAS 97), the DMAS 101A and the DMAS 101B forms (if applicable), and the most recent patient information from the DMAS 122 form;

2. Interdisciplinary plans of care developed by the ADHC's director, registered nurse, or therapist and relevant support persons, in conjunction with the participant;

3. Documentation of interdisciplinary staff meetings that shall be held at least every three months to reassess each participant and evaluate the adequacy of the adult day health care plan of care and make any necessary revisions;

4. At a minimum, 30 day goal oriented progress notes recorded by the designated adult day health care coordinator. If a participant's condition and treatment plan changes more often, progress notes shall be written more frequently than every 30 days;

5. The rehabilitative progress report and updated treatment plan from all professional disciplines involved in the participant's care obtained every 30 days (physical therapy, speech therapy, occupational therapy, home health, and others);

6. Daily records of services provided. The daily record shall contain the specific services delivered by ADHC staff. The record shall also contain the arrival and departure times of the participant and be signed weekly by the director, activities director, registered nurse, or therapist employed by the center. The daily record shall be completed on a daily basis, neither before nor after the date of services delivery. At least once a week, a staff member shall chart significant comments regarding care given to the participant. If the staff member writing comments is different from the staff signing the weekly record, that staff member shall sign the weekly comments. A copy of this record must be given to the participant or family/caregiver weekly; and

7. All correspondence to the individual, DMAS, and the designated preauthorization contractor.

## **12VAC30-120-945. Payment for covered services.**

A. DMAS shall not reimburse providers, either agency-directed or consumer-directed, for any staff training required by these waiver regulations or any other training that may be required.

B. All services provided in the EDCD Waiver shall be reimbursed at a rate established by DMAS in its agency fee schedule.

1. DMAS shall reimburse a per diem fee for ADHC services that shall be considered as payment in full for all services rendered to that waiver individual as part of the individual's approved ADHC plan of care.

2. Agency personal care/respite care services shall be reimbursed on an hourly basis consistent with the agency's fee schedule.

3. Consumer-directed personal care/respite care services shall be reimbursed on an hourly basis consistent with the agency's fee schedule.

4. Transition Services. The total costs of these transition services shall be limited to \$5,000 per waiver individual per lifetime and shall be expended within nine months from the date of authorization.

5. Reimbursement for assistive technology (AT) and environmental modification (EM) services shall be limited to those waiver individuals who are also receiving transition coordination services and shall be limited as follows:

a. All AT services provided in the EDCD Waiver shall be reimbursed as a service limit of one. AT services in this waiver shall be reimbursed up to a per individual annual MFP enrollment period not to exceed 12 months pursuant to 12VAC30-120-762. These limits shall apply regardless of whether the waiver individual remains in this waiver or changes to another waiver program.

b. All EM services provided in the EDCD Waiver shall be reimbursed pursuant to 12VAC30-120-758 per individual annual MFP enrollment period not to exceed 12 months regardless of waiver year as long as such services are not duplicative. All EM services shall be reimbursed at the actual cost of material and labor and no mark ups shall be permitted.

c. Providers of all EDCD Waiver AT and EM services shall not be permitted to recover any equipment that has been provided to waiver individuals subsequent to provider audits in which DMAS or its designated contractor has recovered payments made to providers.

6. DMAS shall reimburse a monthly fee for transition coordination consistent with the agency's fee schedule.

7. PERS monthly fee payments shall be consistent with the agency's fee schedule.

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# Regulations

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## C. Duplication of services.

1. DMAS shall not duplicate services that are required as a reasonable accommodation as a part of the American with Disabilities Act (42 USC §§ 12131 through 12165), the Rehabilitation Act of 1973, or the Virginians with Disabilities Act.

2. Payment for waiver services shall not duplicate payments made to public agencies or private entities under other program authorities for this same purpose. All private insurance benefits for these waiver covered services shall be exhausted before Medicaid reimbursement can occur as Medicaid shall be the payer of last resort.

3. DMAS payments for EM services shall not be duplicative in homes where multiple waiver individuals reside. For example, one waiver individual may be approved for required medically necessary bathroom modifications while a second waiver individual in the same household would be approved for a medically necessary access ramp but not additional improvements to the same bathroom.

## **12VAC30-120-950. ~~Agency directed personal care services. (Repealed.)~~**

~~A. This section contains requirements governing the provision of agency directed personal care services.~~

~~B. Service description. Personal care services are comprised of hands on care of either a supportive or health based nature and may include, but are not limited to, assistance with activities of daily living, access to the community, monitoring of self administered medications or other medical needs, and the monitoring of health status and physical condition. Where the individual requires assistance with activities of daily living, and where specified in the plan of care, such supportive services may include assistance with instrumental activities of daily living. This service does not include skilled nursing services with the exception of skilled nursing tasks (e.g., catheterization) that may be delegated pursuant to 18VAC90-20-420 through 18VAC90-20-460. It may be provided in a home and community setting to enable an individual to maintain the health status and functional skills necessary to live in the community or participate in community activities. Personal care may be offered either as the sole home and community based care service or in conjunction with adult day health care, respite care (agency or consumer directed), or PERS.~~

~~1. Effective July 1, 2011, agency directed personal care services shall be limited to 56 hours of services per week for 52 weeks per year.~~

~~2. Individual exceptions may be granted based on criteria established by DMAS.~~

~~C. Criteria. In order to qualify for these services, the individual must demonstrate a need for care with activities of daily living.~~

~~1. DMAS will also pay, consistent with the approved plan of care, for personal care that the personal care aide provides to the enrolled individual to assist him at work or postsecondary school. DMAS will not duplicate services that are required as a reasonable accommodation as a part of the Americans with Disabilities Act (ADA) (42 USC §§ 12131 through 12165) or the Rehabilitation Act of 1973.~~

~~2. DMAS or the designated preauthorization contractor will review the individual's needs and the complexity of the disability, as applicable, when determining the services that will be provided to him in the workplace or postsecondary school or both.~~

~~3. DMAS will not pay for the personal care aide to assist the enrolled individual with any functions related to the individual completing his job or postsecondary school functions or for supervision time during work or school or both.~~

~~4. There shall be a limit of eight hours per 24 hour day for supervision services.~~

~~5. The provider must develop an individualized plan of care that addresses the individual's needs at home and work and in the community.~~

~~D. Special provider participation conditions. The personal care provider shall:~~

~~1. Operate from a business office.~~

~~2. Employ persons who have a satisfactory work record, as evidenced by references from prior job experience, including no evidence of abuse, neglect, or exploitation of incapacitated or older adults and children. Providers are responsible for complying with § 32.1-162.9:1 of the Code of Virginia regarding criminal record checks. The criminal record check shall be available for review by DMAS staff who are authorized by DMAS to review these files.~~

~~3. Hire employees (or contract with) and directly supervise a registered nurse who will provide ongoing supervision of all personal care aides.~~

~~a. The registered nurse shall be currently licensed to practice in the Commonwealth as an RN and have at least two years of related clinical nursing experience, which may include work in an acute care hospital, public health clinic, home health agency, rehabilitation hospital, nursing facility, or as a licensed practical nurse (LPN).~~

~~b. The registered nurse supervisor shall make an initial home assessment visit on or before the start of care for all individuals admitted to personal care, when an individual is readmitted after being discharged from services, or if he is transferred from another provider, ADHC, or from a consumer directed services program.~~

~~e. The registered nurse supervisor shall make supervisory visits as often as needed, but no fewer visits than provided as follows, to ensure both quality and appropriateness of services:~~

(1) A minimum frequency of these visits is every 30 days for individuals with a cognitive impairment and every 90 days for individuals who do not have a cognitive impairment, as defined herein. The provider agency shall have the responsibility of determining if 30 day registered nurse supervisory visits are appropriate for the individual.

(2) The initial home assessment visit by the registered nurse shall be conducted to create the plan of care and assess the individual's needs. The registered nurse shall return for a follow up visit within 30 days after the initial visit to assess the individual's needs and make a final determination that there is no cognitive impairment. This determination must be documented in the individual's record by the registered nurse. Individuals who are determined to have a cognitive impairment will continue to have supervisory visits every 30 days.

(3) If there is no cognitive impairment, the registered nurse may give the individual or family/caregiver the option of having the supervisory visit every 90 days or any increment in between, not to exceed 90 days, or the provider may choose to continue the 30-day supervisory visits based on the needs of the individual. The registered nurse supervisor must document in the individual's record this conversation and the option that was chosen. The individual or the family/caregiver must sign and date this document.

(4) If an individual's personal care aide is supervised by the provider's registered nurse supervisor less frequently than every 30 days and DMAS, or the designated preauthorization contractor, determines that the individual's health, safety, or welfare is in jeopardy, DMAS, or the designated preauthorization contractor, may require the provider's registered nurse supervisor to supervise the personal care aide every 30 days or more frequently than has been determined by the registered nurse supervisor. This will be documented by the provider and entered in the individual's record.

d. During visits to the individual's home, a registered nurse 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 individual's or family's/caregiver's satisfaction with the type and amount of services discussed. The registered nurse supervisor's summary shall note:

- (1) Whether personal care services continue to be appropriate;
- (2) Whether the plan of care is adequate to meet the individual's needs or if changes are indicated in the plan;
- (3) Any special tasks performed by the personal care aide and the personal care aide's qualifications to perform these tasks;

(4) The individual's satisfaction with the services;

(5) Whether the individual has been hospitalized or there has been a change in the medical condition or functional status of the individual;

(6) Other services received by the individual and the amount; and

(7) The presence or absence of the personal care aide in the home during the registered nurse supervisor's visit.

e. A registered nurse supervisor shall be available to the personal care aide for conferences pertaining to individuals being served by the aide and shall be available to the aide by telephone at all times that the aide is providing services to individuals.

f. The registered nurse supervisor shall evaluate the personal care aide's performance and the individual's needs to identify any insufficiencies in the personal care aide's abilities to function competently and shall provide training as indicated. This shall be documented in the individual's record.

g. If there is a delay in the registered nurses' supervisory visits because the individual was unavailable, the reason for the delay must be documented in the individual's record.

4. Employ and directly supervise personal care aides who provide direct care to individuals. Each aide hired for personal care shall be evaluated by the provider agency to ensure compliance with qualifications required by DMAS. Each personal care aide shall:

a. Be at least 18 years of age or older;

b. Be able to read and write in English to the degree necessary to perform the expected tasks;

e. Complete a minimum of 40 hours of training consistent with DMAS standards. Prior to assigning an aide to an individual, the provider agency shall ensure that the personal care aide has satisfactorily completed a DMAS approved training program consistent with DMAS standards;

d. Be physically able to do the work; and

e. Not be (i) the parents of minor children who are receiving waiver services or (ii) spouses of individuals who are receiving waiver services.

Payment may be made for services furnished by other family members when there is objective written documentation as to why there are no other providers or aides available to provide the care. These family members must meet the same requirements as personal care aides who are not family members.

E. Required documentation for individuals' records. The provider shall maintain all records for each individual receiving personal care services. These records shall be separate from those of nonhome and community based care services, such as companion or home health services. These

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# Regulations

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records shall be reviewed periodically by DMAS. At a minimum, the record shall contain:

- ~~1. The most recently updated Long Term Care Uniform Assessment Instrument, the Medicaid Funded Long Term Care Service Authorization Form (DMAS 96), the Screening Team Plan of Care for Medicaid Funded Long Term Care (DMAS 97), all Provider Agency Plans of Care (DMAS 97A), all Patient Information Forms (DMAS 122), and all DMAS 101A and 101B forms (if applicable);~~
- ~~2. The initial assessment by a registered nurse or a RN supervisor completed prior to or on the date that services are initiated;~~
- ~~3. Registered nurse supervisor's notes recorded and dated during significant contacts with the personal care aide and during supervisory visits to the individual's home;~~
- ~~4. All correspondence to the individual, DMAS, and the designated preauthorization contractor;~~
- ~~5. Reassessments made during the provision of services;~~
- ~~6. Significant contacts made with family/caregivers, physicians, DMAS, the designated preauthorization contractor, formal, informal services providers and all professionals related to the individual's Medicaid services or medical care;~~
- ~~7. All personal care aides' records (DMAS 90). The personal care aide record shall contain:
  - ~~a. The specific services delivered to the individual by the aide and his responses to this service;~~
  - ~~b. The personal care aide's daily arrival and departure times;~~
  - ~~c. The aide's weekly comments or observations about the individual, including observations of the individual's physical and emotional condition, daily activities, and responses to services rendered; and~~
  - ~~d. The personal care aide's and individual's or responsible caregiver's weekly signatures, including the date, to verify that personal care services have been rendered during that week as documented in the record. An employee of the provider cannot sign for the individual unless he is a family/caregiver of the individual. This family member cannot be the same family member who is providing the service. Signatures, times and dates shall not be placed on the personal care aide record prior to the last date that the services are actually delivered; and~~~~
- ~~8. All of the individual's progress reports.~~

## **12VAC30-120-960. Agency directed respite care services. (Repealed.)**

~~A. This section contains requirements governing the provision of agency directed respite care services.~~

~~B. Agency directed respite care services are comprised of hands on care of either a supportive or health related nature and may include, but are not limited to, assistance with activities of daily living, access to the community, monitoring~~

~~of self administration of medications or other medical needs, monitoring health status and physical condition, and personal care services provided in a work environment. Where the individual requires assistance with activities of daily living, and where specified in the plan of care, such supportive services may include assistance with instrumental activities of daily living. This service does not include skilled nursing services with the exception of skilled nursing tasks (e.g., catheterization) that may be delegated pursuant to 18VAC90-20-420 through 18VAC90-20-460.~~

~~C. General. Respite care may only be offered to individuals who have a primary caregiver who requires temporary relief to avoid institutionalization of the individual. Respite care services may be provided in the individual's home or place of residence, or a facility licensed as a nursing facility and enrolled in Medicaid. The authorization of respite care (agency directed and consumer directed) is limited to a total of 480 hours per year per individual effective July 1, 2011. Reimbursement shall be made on an hourly basis.~~

~~D. Special provider participation conditions. To be approved as a respite care provider with DMAS, the respite care provider shall:~~

- ~~1. Operate from a business office.~~
- ~~2. Have employees who have satisfactory work records, as evidenced by references from prior job experience, including no evidence of abuse, neglect, or exploitation of incapacitated or older adults and children. Providers are responsible for complying with § 32.1-162.9:1 of the Code of Virginia regarding criminal record checks. The criminal record check shall be available for review by DMAS staff who are authorized by the agency to review these files. DMAS will not reimburse the provider for any services provided by an employee who has committed a barrier crime.~~
- ~~3. Employ (or contract with) and directly supervise a registered nurse who will provide ongoing supervision of all respite care aides/LPNs.
  - ~~a. The registered nurse supervisor shall be currently licensed to practice in the Commonwealth as an RN and have at least two years of related clinical nursing experience, which may include work in an acute care hospital, public health clinic, home health agency, rehabilitation hospital, nursing facility, or as an LPN.~~
  - ~~b. Based on continuing evaluations of the aide's/LPN's performance and the individual's needs, the registered nurse supervisor shall identify any insufficiencies in the aide's/LPN's abilities to function competently and shall provide training as indicated.~~
  - ~~c. The registered nurse supervisor shall make an initial home assessment visit on or before the start of care for any individual admitted to respite care.~~~~

d. A registered nurse supervisor shall make supervisory visits as often as needed to ensure both quality and appropriateness of services.

(1) When respite care services are received on a routine basis, the minimum acceptable frequency of these supervisory visits shall be every 30 to 90 days dependent on the cognitive status of the individual. If an individual is also receiving personal care services, the respite care RN supervisory visit may coincide with the personal care RN supervisory visits.

(2) When respite care services are not received on a routine basis, but are episodic in nature, a registered nurse supervisor shall not be required to conduct a supervisory visit every 30 to 90 days. Instead, a registered nurse supervisor shall conduct the initial home assessment visit with the aide/LPN on or before the start of care and make a second home visit during the second respite care visit. If an individual is also receiving personal care services, the respite care RN supervisory visit may coincide with the personal care RN supervisory visit.

(3) When respite care services are routine in nature and offered in conjunction with personal care, the RN supervisory visit conducted for personal care services may serve as the registered nurse supervisory visit for respite care. However, the registered nurse supervisor shall document supervision of respite care separately from the personal care documentation. For this purpose, the same individual record can be used with a separate section for respite care documentation.

e. During visits to the individual's home, the registered nurse supervisor shall observe, evaluate, and document the adequacy and appropriateness of respite care services with regard to the individual's current functioning status and medical and social needs. The aide's/LPN's record shall be reviewed along with the individual's or family's satisfaction with the type and amount of services discussed. The registered nurse supervisor shall document in a summary note:

- (1) Whether respite care services continue to be appropriate;
- (2) Whether the plan of care is adequate to meet the individual's needs or if changes need to be made to the plan of care;
- (3) The individual's satisfaction with the services;
- (4) Any hospitalization or change in the medical condition or functioning status of the individual;
- (5) Other services received by the individual and the amount of the services received; and
- (6) The presence or absence of the aide/LPN in the home during the RN supervisory visit.

f. An RN supervisor shall be available to the aide/LPN for conference pertaining to individuals being served by

the aide/LPN and shall be available to the aide/LPN by telephone at all times that the aide/LPN is providing services to respite care individuals.

g. If there is a delay in the registered nurse's supervisory visits because the individual is unavailable, the reason for the delay must be documented in the individual's record.

4. Employ and directly supervise aides/LPNs who provide direct care to respite care individuals. Each aide/LPN hired by the provider shall be evaluated by the provider to ensure compliance with qualifications as required by DMAS. Each aide must:

- a. Be at least 18 years of age or older;
- b. Be physically able to do the work;
- c. Be able to read and write in English to the degree necessary to perform the tasks expected;
- d. Have completed a minimum of 40 hours of DMAS-approved training consistent with DMAS standards. Prior to assigning an aide to an individual, the provider shall ensure that the aide has satisfactorily completed a training program consistent with DMAS standards; and
- e. Be evaluated in his job performance by the registered nurse supervisor.

Respite care aides may not be the parents of minor children who are receiving waiver services or spouses of individuals who are receiving waiver services. Payment may not be made for services furnished by other family members living under the same roof as the individual receiving services unless there is objective written documentation as to why there are no other providers or aides available to provide the care. Family members who are approved to provide paid respite services must meet the qualifications for respite care aides.

5. Employ a licensed practical nurse (LPN) to perform skilled respite care services. Such services shall be reimbursed by DMAS under the following circumstances:

- a. The individual has a need for routine skilled care that cannot be provided by unlicensed personnel. These individuals would typically require a skilled level of care if in a nursing facility (e.g., individuals on a ventilator, individuals requiring nasogastric or gastrostomy feedings, etc.);
- b. No other individual in the individual's support system is willing and able to supply the skilled component of the individual's care during the caregiver's absence; and
- c. The individual is unable to receive skilled nursing visits from any other source that could provide the skilled care usually given by the caregiver.

The provider must document in the individual's record the circumstances that require the provision of services by an LPN. When an LPN is required, the LPN must also provide any of the services normally provided by an aide.



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# Regulations

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E. Required documentation for individuals' records. The provider shall maintain all records of each individual receiving respite services. These records shall be separated from those of nonhome and community based care services, such as companion or home health services. These records shall be reviewed periodically by the DMAS staff who are authorized by DMAS to review these files. At a minimum these records shall contain:

1. The most recently updated Long Term Care Uniform Assessment Instrument, the Medicaid Funded Long Term Care Service Authorization Form (DMAS 96), the Screening Team Plan of Care for Medicaid Funded Long Term Care (DMAS 97), all respite care assessments and plans of care, all aide records (DMAS 90), all LPN skilled respite records (DMAS 90A), all Patient Information Forms (DMAS 122), and all DMAS-101A and DMAS-101B forms, as applicable;
2. The physician's order for services, obtained prior to the service begin date and updated every six months;
3. The initial assessment by a registered nurse completed prior to or on the date services are initiated;
4. Registered nurse supervisor's notes recorded and dated during significant contacts with the care aide and during supervisory visits to the individual's home;
5. All correspondence to the recipient, DMAS, and the designated preauthorization contractor;
6. Reassessments made during the provision of services;
7. Significant contacts made with family, physicians, DMAS, the designated preauthorization contractor, formal and informal services providers, and all professionals related to the individual's Medicaid services or medical care; and
8. All respite care records. The respite care record shall contain:
  - a. The specific services delivered to the individual by the aide or LPN and his response to this service;
  - b. The daily arrival and departure times of the aide or LPN for respite care services;
  - c. Comments or observations recorded weekly about the individual. Aide or LPN comments shall include but not be limited to observation of the individual's physical and emotional condition, daily activities, and the individual's response to services rendered;
  - d. The signatures of the aide or LPN, and the individual, once each week to verify that respite care services have been rendered. Signature, times, and dates shall not be placed on the aide's record prior to the last date of the week that the services are delivered. If the individual is unable to sign the aide record, it must be documented in his record how or who will sign in his place. An employee of the provider shall not sign for the individual

unless he is a family member or legal guardian of the recipient; and

e. All individual progress reports.

Documentation signed by the LPN must be reviewed and signed by the supervising RN.

## **12VAC30-120-970. Personal emergency response system (PERS). (Repealed.)**

A. Service description. PERS is a service that monitors individual safety in the home and provides access to emergency assistance for medical or environmental emergencies through the provision of a two way voice communication system that dials a 24 hour response or monitoring center upon activation and via the individual's home telephone line. PERS may also include medication monitoring devices.

B. Standards for PERS equipment. All PERS equipment must be approved by the Federal Communications Commission and meet the Underwriters' Laboratories, Inc. (UL) safety standard Number 1635 for digital alarm communicator system units and Number 1637 for home health care signaling equipment. The UL listing mark on the equipment will be accepted as evidence of the equipment's compliance with such standard. The PERS device must be automatically reset by the response center after each activation, ensuring that subsequent signals can be transmitted without requiring manual reset by the recipient.

C. Criteria. PERS services are limited to those individuals ages 14 and older who live alone or are alone for significant parts of the day and who have no regular caregiver for extended periods of time and who would otherwise require extensive routine supervision. PERS may only be provided in conjunction with personal care (agency or consumer directed), respite (agency or consumer directed), or adult day health care. An individual may not receive PERS if he has a cognitive impairment as defined in 12VAC30-120-900.

1. PERS can be authorized when there is no one else, other than the individual, in the home who is competent and continuously available to call for help in an emergency. If the individual's caregiver has a business in the home, such as, but not limited to, a day care center, PERS will only be approved if the individual is evaluated as being dependent in the categories of "Behavior Pattern" and "Orientation" on the Uniform Assessment Instrument (UAI).

2. Medication monitoring units must be physician ordered. In order to receive medication monitoring services, an individual must also receive PERS services. The physician orders must be maintained in the individual's file.

D. Services units and services limitations.

1. A unit of service shall include administrative costs, time, labor, and supplies associated with the installation, maintenance, adjustments, and monitoring of the PERS. A unit of service equals the one month rental of PERS, the price of which is set by DMAS. The one time installation

of the unit includes installation, account activation, and individual and caregiver instruction. The one time installation fee shall also include the cost of the removal of the PERS equipment.

2. PERS service must be capable of being activated by a remote wireless device and be connected to the individual's telephone line. The PERS console unit must provide hands free voice to voice communication with the response center. The activating device must be waterproof, automatically transmit to the response center an activator low battery alert signal prior to the battery losing power, and be able to be worn by the individual.

3. In cases where medication monitoring units must be filled by the provider, the person filling the unit must be a registered nurse, a licensed practical nurse, or a licensed pharmacist. The units can be refilled every 14 days. There must be documentation of this in the individual's record.

E. Provider requirements. In addition to meeting the general conditions and requirements for home and community based waiver participating providers as specified in 12VAC30-120-80, 12VAC30-120-160, and 12VAC30-120-930, PERS providers must also meet the following qualifications and requirements:

1. A PERS provider must be either a personal care agency, a durable medical equipment provider, a hospital, a licensed home health provider, or a PERS manufacturer. All such providers shall have the ability to provide PERS equipment, direct services (i.e., installation, equipment maintenance, and service calls), and PERS monitoring;

2. The PERS provider must provide an emergency response center with fully trained operators who are capable of (i) receiving signals for help from an individual's PERS equipment 24 hours a day, 365 or 366 days per year as appropriate; (ii) determining whether an emergency exists; and (iii) notifying an emergency response organization or an emergency responder that the PERS individual needs emergency help;

3. A PERS provider must comply with all applicable Virginia statutes, all applicable regulations of DMAS, and all other governmental agencies having jurisdiction over the services to be performed;

4. The PERS provider has the primary responsibility to furnish, install, maintain, test, and service the PERS equipment, as required, to keep it fully operational. The provider shall replace or repair the PERS device within 24 hours of the individual's notification of a malfunction of the console unit, activating devices, or medication monitoring unit and shall provide temporary equipment while the original equipment is being repaired;

5. The PERS provider must properly install all PERS equipment into a PERS individual's functioning telephone line within seven days of the request unless there is appropriate documentation of why this timeframe cannot

be met. The PERS provider must furnish all supplies necessary to ensure that the system is installed and working properly. The PERS provider must test the PERS device monthly, or more frequently if needed, to ensure that the device is fully operational;

6. The PERS installation shall include local seize line circuitry, which guarantees that the unit will have priority over the telephone connected to the console unit should the telephone be off the hook or in use when the unit is activated;

7. A PERS provider must maintain a data record for each PERS individual at no additional cost to DMAS or the individual. The record must document all of the following:

- a. Delivery date and installation date of the PERS;
- b. Individual/caregiver signature verifying receipt of the PERS device;
- c. Verification by a test that the PERS device is operational, monthly or more frequently as needed;
- d. Updated and current individual responder and contact information, as provided by the individual or the individual's caregiver; and
- e. A case log documenting the individual's utilization of the system, all contacts, and all communications with the individual, caregiver, and responders;

8. The PERS provider must have backup monitoring capacity in case the primary system cannot handle incoming emergency signals;

9. All PERS equipment must be approved by the Federal Communications Commission and meet the Underwriters' Laboratories, Inc. (UL) Safety Standard Number 1635 for digital alarm communicator system units and Safety Standard Number 1637 for home health care signaling equipment. The UL listing mark on the equipment will be accepted as evidence of the equipment's compliance with such standard. The PERS device must be automatically reset by the response center after each activation, ensuring that subsequent signals can be transmitted without requiring a manual reset by the individual;

10. A PERS provider must furnish education, data, and ongoing assistance to DMAS and the designated preauthorization contractor to familiarize staff with the services, allow for ongoing evaluation and refinement of the program, and instruct the individual, caregiver, and responders in the use of the PERS services;

11. The emergency response activator must be activated either by breath, by touch, or by some other means, and must be usable by individuals who are visually or hearing impaired or physically disabled. The emergency response communicator must be capable of operating without external power during a power failure at the individual's home for a minimum period of 24 hours and automatically transmit a low battery alert signal to the response center if the backup battery is low. The emergency response console

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# Regulations

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unit must also be able to self disconnect and redial the backup monitoring site without the individual resetting the system in the event it cannot get its signal accepted at the response center;

~~12. PERS providers must be capable of continuously monitoring and responding to emergencies under all conditions, including power failures and mechanical malfunctions. It is the PERS provider's responsibility to ensure that the monitoring agency and the monitoring agency's equipment meets the following requirements. The PERS provider must be capable of simultaneously responding to multiple signals for help from individuals' PERS equipment. The PERS provider's equipment must include the following:~~

- ~~a. A primary receiver and a backup receiver, which must be independent and interchangeable;~~
- ~~b. A backup information retrieval system;~~
- ~~e. A clock printer, which must print out the time and date of the emergency signal, the PERS individual's identification code, and the emergency code that indicates whether the signal is active, passive, or a responder test;~~
- ~~d. A backup power supply;~~
- ~~e. A separate telephone service;~~
- ~~f. A toll free number to be used by the PERS equipment in order to contact the primary or backup response center; and~~
- ~~g. A telephone line monitor, which must give visual and audible signals when the incoming telephone line is disconnected for more than 10 seconds;~~

~~13. The PERS provider must maintain detailed technical and operation manuals that describe PERS elements, including the installation, functioning, and testing of PERS equipment; emergency response protocols; and recordkeeping and reporting procedures;~~

~~14. The PERS provider shall document and furnish within 30 days of the action taken a written report for each emergency signal that results in action being taken on behalf of the individual. This excludes test signals or activations made in error. This written report shall be furnished to the personal care provider, the respite care provider, the CD services facilitation provider, the transition coordinator, case manager, as appropriate to the waiver in which the individual is enrolled or, in cases where the individual only receives ADHC services, to the ADHC provider;~~

~~15. The PERS provider is prohibited from performing any type of direct marketing activities to Medicaid individuals; and~~

~~16. The PERS provider must obtain and keep on file a copy of the most recently completed Patient Information form (DMAS 122). Until the PERS provider obtains a copy of~~

~~the DMAS 122 form, the PERS provider must clearly document efforts to obtain the completed DMAS 122 form from the personal care provider, respite care provider, the CD services facilitation provider, the transition coordinator, the case manager, or the ADHC provider, as appropriate to the waiver in which the individual is enrolled.~~

## **12VAC30-120-980. Consumer-directed services: personal care and respite services. (Repealed.)**

### **A. Service description.**

~~1. Consumer directed personal care services and respite care services are comprised of hands on care of either a supportive or health related nature and may include, but are not limited to, assistance with activities of daily living, access to the community, monitoring of self administration of medications or other medical needs, monitoring health status and physical condition, and personal care services provided in a work environment. Where the individual requires assistance with activities of daily living, and where specified in the plan of care, such supportive services may include assistance with instrumental activities of daily living. This service does not include skilled nursing services with the exception of skilled nursing tasks (e.g., catheterization) that may be delegated pursuant to 18VAC90-20-420 through 18VAC90-20-460.~~

~~2. Consumer directed respite services are specifically designed to provide temporary, periodic, or routine relief to the unpaid primary caregiver of an individual. This service may be provided in the individual's home or other community settings.~~

~~3. DMAS shall either provide for fiscal agent services or contract for the services of a fiscal agent for consumer-directed services. The fiscal agent will be reimbursed by DMAS (if the service is contracted) to perform certain tasks as an agent for the individual/employer who is receiving consumer directed services. The fiscal agent will handle responsibilities for the individual for employment taxes. The fiscal agent will seek and obtain all necessary authorizations and approvals of the Internal Revenue Services in order to fulfill all of these duties.~~

~~4. Individuals choosing consumer directed services must receive support from a CD services facilitator. This is not a separate waiver service, but is required in conjunction with consumer directed services. The CD services facilitator is responsible for assessing the individual's particular needs for a requested CD service, assisting in the development of the plan of care, providing training to the individual and family/caregiver on his responsibilities as an employer, and providing ongoing support of the consumer directed services. The CD services facilitator cannot be the individual, direct service provider, spouse, or parent of the individual who is a minor child, or a family/caregiver employing the aide.~~

### **B. Criteria.**

1. In order to qualify for consumer directed personal care services, the individual must demonstrate a need for personal care services as defined in 12VAC30-120-900.

2. Consumer directed respite services may only be offered to individuals who have an unpaid primary caregiver who requires temporary relief to avoid institutionalization of the individual. Respite services are designed to focus on the need of the unpaid primary caregiver for temporary relief and to help prevent the breakdown of the unpaid primary caregiver due to the physical burden and emotional stress of providing continuous support and care to the individual.

3. DMAS will also pay, consistent with the approved plan of care, for personal care that the personal care aide provides to the enrolled individual to assist him at work or postsecondary school. DMAS will not duplicate services that are required as a reasonable accommodation as a part of the Americans with Disabilities Act (ADA) (42 USC §§ 12131 through 12165) or the Rehabilitation Act of 1973.

a. DMAS or the designated preauthorization contractor will review the individual's needs and the complexity of the disability, as applicable, when determining the services that will be provided to him in the workplace or postsecondary school or both.

b. DMAS will not pay for the personal care aide to assist the enrolled individual with any functions related to the individual completing his job or postsecondary school functions or for supervision time during work or school or both.

4. Individuals who are eligible for consumer directed services must have, or have a family/caregiver who has, the capability to hire and train their own personal care aides and supervise the aide's performance. If an individual is unable to direct his own care or is under 18 years of age, a family/caregiver may serve as the employer on behalf of the individual.

5. The individual, or if the individual is unable, a family/caregiver, shall be the employer of consumer directed services and, therefore, shall be responsible for hiring, training, supervising, and firing personal care aides. Specific employer duties include checking references of personal care aides, determining that personal care aides meet basic qualifications, and maintaining copies of timesheets to have available for review by the CD services facilitator and the fiscal agent on a consistent and timely basis. The individual or family/caregiver must have a backup plan for the provision of services in case the aide does not show up for work as expected or terminates employment without prior notice.

#### C. Service units and limitations.

1. The unit of services for consumer directed respite services is one hour. Effective July 1, 2011, consumer directed respite services are limited to a maximum of 480 hours per year. Individuals who receive consumer directed

respite services, agency directed respite services or facility based respite services, or both, may not receive more than 480 hours combined, regardless of service delivery method.

2. The unit of service for consumer directed personal care services is one hour. Effective July 1, 2011, these personal care services shall be limited to 56 hours per week for 52 weeks per year. Individual exceptions may be granted based on criteria established by DMAS.

D. Provider qualifications. In addition to meeting the general conditions and requirements for home and community based services participating providers as specified in 12VAC30-120-930, the CD services facilitator must meet the following qualifications:

1. To be enrolled as a Medicaid CD services facilitator and maintain provider status, the CD services facilitator shall have sufficient resources to perform the required activities. In addition, the CD services facilitator must have the ability to maintain and retain business and professional records sufficient to fully and accurately document the nature, scope, and details of the services provided.

2. It is preferred that the CD services facilitator possess, at a minimum, an undergraduate degree in a human services field or be a registered nurse currently licensed to practice in the Commonwealth. In addition, it is preferable that the CD services facilitator have at least two years of satisfactory experience in a human services field working with individuals who are disabled or elderly. The CD services facilitator must possess a combination of work experience and relevant education that indicates possession of the following knowledge, skills, and abilities. Such knowledge, skills and abilities must be documented on the CD services facilitator's application form, found in supporting documentation, or be observed during a job interview. Observations during the interview must be documented. The knowledge, skills, and abilities include:

#### a. Knowledge of:

(1) Types of functional limitations and health problems that may occur in individuals who are elderly or individuals with disabilities, as well as strategies to reduce limitations and health problems;

(2) Physical care that may be required by individuals who are elderly or individuals with disabilities, such as transferring, bathing techniques, bowel and bladder care, and the approximate time those activities normally take;

(3) Equipment and environmental modifications that may be required by individuals who are elderly or individuals with disabilities that reduce the need for human help and improve safety;

(4) Various long term care program requirements, including nursing facility and assisted living facility placement criteria, Medicaid waiver services, and other

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# Regulations

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federal, state, and local resources that provide personal care and respite services;

(5) ~~Elderly or Disabled with Consumer Direction Waiver requirements, as well as the administrative duties for which the services facilitator will be responsible;~~

(6) ~~How to conduct assessments (including environmental, psychosocial, health, and functional factors) and their uses in services planning;~~

(7) ~~Interviewing techniques;~~

(8) ~~The individual's right to make decisions about, direct the provisions of, and control his consumer directed services, including hiring, training, managing, approving time sheets, and firing an aide;~~

(9) ~~The principles of human behavior and interpersonal relationships; and~~

(10) ~~General principles of record documentation.~~

b. ~~Skills in:~~

(1) ~~Negotiating with individuals, family/caregivers and service providers;~~

(2) ~~Assessing, supporting, observing, recording, and reporting behaviors;~~

(3) ~~Identifying, developing, or providing services to individuals who are elderly or individuals with disabilities; and~~

(4) ~~Identifying services within the established services system to meet the individual's needs.~~

c. ~~Abilities to:~~

(1) ~~Report findings of the assessment or onsite visit, either in writing or an alternative format for individuals who have visual impairments;~~

(2) ~~Demonstrate a positive regard for individuals and their families;~~

(3) ~~Be persistent and remain objective;~~

(4) ~~Work independently, performing position duties under general supervision;~~

(5) ~~Communicate effectively, orally and in writing; and~~

(6) ~~Develop a rapport and communicate with individuals from diverse cultural backgrounds.~~

3. ~~If the CD services facilitator is not a registered nurse, the CD services facilitator must inform the individual's primary health care provider that services are being provided and request consultation as needed.~~

4. ~~Initiation of services and service monitoring.~~

a. ~~For consumer directed services, the CD services facilitator must make an initial comprehensive home visit to collaborate with the individual and family/caregiver to identify the needs, assist in the development of the plan of care with the individual or family/caregiver, and provide employee management training within seven days of the initial visit. The initial comprehensive home~~

~~visit is done only once per provider upon the individual's entry into CD services. If the individual changes CD services facilitator, the new CD services facilitator must complete a reassessment visit in lieu of a comprehensive visit.~~

b. ~~After the initial visit, the CD services facilitator will continue to monitor the plan of care on an as needed basis, but in no event less frequently than quarterly for personal care. The CD services facilitator will review the utilization of consumer directed respite services, either every six months or upon the use of 300 respite services hours, whichever comes first.~~

c. ~~A CD services facilitator must conduct face to face meetings with the individual or family/caregiver at least every six months for respite services and quarterly for personal care to ensure appropriateness of any consumer directed services received by the individual.~~

5. ~~During visits with the individual, the CD services facilitator must observe, evaluate, and consult with the individual or family/caregiver, and document the adequacy and appropriateness of consumer directed services with regard to the individual's current functioning and cognitive status and medical and social needs. The CD services facilitator's written summary of the visit must include, but is not necessarily limited to:~~

a. ~~A discussion with the individual or family/caregiver concerning whether the service is adequate to meet the individual's needs;~~

b. ~~Any suspected abuse, neglect, or exploitation and who it was reported to;~~

c. ~~Any special tasks performed by the aide and the aide's qualifications to perform these tasks;~~

d. ~~The individual's or family/caregiver's satisfaction with the service;~~

e. ~~Any hospitalization or change in medical condition, functioning, or cognitive status; and~~

f. ~~The presence or absence of the aide in the home during the CD services facilitator's visit.~~

6. ~~The CD services facilitator must be available to the individual or family/caregiver by telephone.~~

7. ~~The CD services facilitator must request a criminal record check and a sex offender record check pertaining to the aide on behalf of the individual and report findings of these records checks to the individual or the family/caregiver and the program's fiscal agent. If the individual is a minor, the aide must also be screened through the DSS Child Protective Services Central Registry. The criminal record check and DSS Child Protective Services Registry finding must be requested by the CD services facilitator prior to beginning CD services. Aides will not be reimbursed for services provided to the individual effective on the date that the criminal record check confirms an aide has been found to have been~~

convicted of a crime as described in § 32.1-162.9:1 of the Code of Virginia or if the aide has a confirmed record on the DSS Child Protective Services Central Registry.

8. The CD services facilitator shall review copies of timesheets during the face-to-face visits to ensure that the number of plan-of-care approved hours are being provided and are not exceeded. If discrepancies are identified, the CD services facilitator must discuss these with the individual or family/caregiver to resolve discrepancies and must notify the fiscal agent.

9. The CD services facilitator must maintain records of each individual. At a minimum these records must contain:

- a. Results of the initial comprehensive home visit completed prior to or on the date services are initiated and subsequent reassessments and changes to the supporting documentation;
- b. The personal care plan of care goals, objectives, and activities must be reviewed by the provider quarterly, annually, and more often as needed, and modified as appropriate. Respite plan of care goals, objectives, and activities must be reviewed by the provider annually and every six months or when 240 service hours have been used. For the annual review and in cases where the plan of care is modified, the plan of care must be reviewed with the individual;
- c. CD services facilitator's dated notes documenting any contacts with the individual or family/caregiver and visits to the individual's home;
- d. All correspondence to and from the individual, the designated preauthorization contractor, and DMAS;
- e. Records of contacts made with the individual, family/caregiver, physicians, formal and informal service providers, and all professionals concerning the individual;
- f. All training provided to the aides on behalf of the individual or family/caregiver;
- g. All employee management training provided to the individual or family/caregiver, including the individual's or family/caregiver's receipt of training on their responsibility for the accuracy of the aide's timesheets;
- h. All documents signed by the individual or the individual's family/caregiver that acknowledge the responsibilities as the employer; and
- i. All copies of the completed Uniform Assessment Instrument (UAI), the Medicaid Funded Long Term Care Service Authorization Form (DMAS 96), the Screening Team Plan of Care form (DMAS 97), all Consumer Directed Personal Assistance Plans of Care forms (DMAS 97B), all Patient Information Forms (DMAS-122), the DMAS 95 Addendum, the Outline and Checklist for Consumer Directed Recipient Comprehensive Training, and the Services Agreement Between the Consumer and the Services Facilitator.

10. For consumer directed personal care and consumer directed respite services, individuals or family/caregivers will hire their own personal care aides and manage and supervise their performance. The aide must meet the following requirements:

- a. Be 18 years of age or older;
- b. Have the required skills to perform consumer directed services as specified in the individual's supporting documentation;
- c. Be able to read and write in English to the degree necessary to perform the tasks expected;
- d. Possess basic math, reading, and writing skills;
- e. Possess a valid Social Security number;
- f. Submit to a criminal records check and, if the individual is a minor, consent to a search of the DSS Child Protective Services Central Registry. The aide will not be compensated for services provided to the individual if either of these records checks verifies the aide has been convicted of crimes described in § 32.1-162.9:1 of the Code of Virginia or if the aide has a founded complaint confirmed by the DSS Child Protective Services Central Registry;
- g. Be willing to attend training at the individual's or family/caregiver's request;
- h. Understand and agree to comply with the DMAS Elderly or Disabled with Consumer Direction Waiver requirements; and
- i. Receive periodic tuberculosis (TB) screening.

11. Aides may not be the parents of minor children who are receiving waiver services or the spouse of the individuals who are receiving waiver services or the family/caregivers that are directing the individual's care. Payment may not be made for services furnished by other family/caregivers living under the same roof as the individual being served unless there is objective written documentation as to why there are no other providers available to provide the care.

12. Family/caregivers who are reimbursed to provide consumer directed services must meet the aide qualifications.

13. If the individual is consistently unable to hire and retain the employment of a personal care aide to provide consumer directed personal care or respite services, the CD services facilitator will make arrangements to have the services transferred to an agency directed services provider of the individual's choice or to discuss with the individual or family/caregiver other service options.

14. The CD services facilitator is required to submit to DMAS biannually, for every individual, an individual progress report, the most recently updated UAI, and any monthly visit/progress reports. This information is used to assess the individual's ongoing need for Medicaid funded

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# Regulations

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~~long term care and appropriateness and adequacy of services rendered.~~

## ~~D. Individual responsibilities.~~

~~1. The individual must be authorized for consumer directed services and successfully complete management training performed by the CD services facilitator before the individual can hire a personal care aide for Medicaid reimbursement. Individuals who are eligible for consumer directed services must have the capability to hire and train their own personal care aides and supervise aides' performance. Individuals with cognitive impairments who are unable to manage their own care may have a family/caregiver serve as the employer on behalf of the individual.~~

~~2. Individuals will acknowledge that they will not knowingly continue to accept consumer directed personal care services when the service is no longer appropriate or necessary for their care needs and will inform the services facilitator. If consumer directed services continue after services have been terminated by DMAS or the designated preauthorization contractor, the individual will be held liable for employee compensation.~~

## **12VAC30-120-990. Quality management review; utilization review; level of care (LOC) reviews.**

A. DMAS shall perform quality management reviews for the purpose of assuring high quality of service delivery consistent with the attending physicians' orders, approved POCs, prior authorized services for the waiver individuals, and DMAS' compliance with CMS assurances. Providers identified as not rendering reimbursed services consistent with such orders, POCs, and prior authorizations shall be required to submit corrective action plans (CAPs) to DMAS for approval. Once approved, such CAPs shall be implemented to resolve the cited deficiencies.

B. If the DMAS staff determines, during any review or at any other time, that the waiver individual no longer meets the criteria for participation in the waiver (such as functional dependencies, medical/nursing needs, risk of NF placement, or Medicaid financial eligibility), then the DMAS staff, as appropriate, shall deny payment for waiver services for such waiver individuals and they shall be discharged from the waiver.

C. Securing PA shall not necessarily guarantee reimbursement pursuant to DMAS utilization review of waiver services.

D. Failure to meet documentation requirements and supervisory reviews in a timely manner may result in either a plan of corrective action or retraction of payments.

E. Once waiver enrollment occurs, Level of Care Eligibility Re-determination audits (LOCERI) shall be performed at DMAS.

1. This independent electronic calculation of eligibility determination is performed and communicated to the

DMAS supervisor. Any individual whose LOCERI audit shows failure to meet eligibility criteria shall receive a second manual review and may receive a home visit by DMAS staff.

2. The agency provider and the CD services facilitator shall submit to DMAS upon request an updated DMAS-99 C form, a current DMAS-97 A/B form, and, if applicable, the DMAS-225 form for designated waiver individuals. This information is required by DMAS to assess the waiver individual's ongoing need for Medicaid-funded long-term care and appropriateness and adequacy of services rendered.

F. 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 a waiver 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. Failure to maintain the required documentation may result in DMAS' determination of overpayments against providers and requiring such providers to repay these overpayments pursuant to § 32.1-325.1 of the Code of Virginia.

## **12VAC30-120-995. Appeals.**

A. Providers shall have the right to appeal actions taken by DMAS. Provider appeals shall be considered pursuant to § 32.1-325.1 of the Code of Virginia and the Virginia Administrative Process Act (§ 2.2-4000 et seq.) of the Code of Virginia and DMAS regulations at 12VAC30-10-1000 and Part VII (12VAC30-20-500 et seq.) of 12VAC30-20.

B. Individuals shall have the right to appeal actions taken by DMAS. Individuals' appeals shall be considered pursuant to 12VAC30-110-10 through 12VAC30-110-370. DMAS shall provide the opportunity for a fair hearing, consistent with 42 CFR Part 431, Subpart E.

C. The individual shall be advised in writing of such denial and of his right to appeal consistent with DMAS client appeals regulations 12VAC30-110-70 and 12VAC30-110-80.

**NOTICE:** The following forms used in administering the regulation have been filed by the agency. Amended or added forms are reflected in the listing and are published following the listing. Online users of this issue of the Virginia Register of Regulations may also click on the name to access a form. The forms are also available from the agency contact or may be at the Office of Registrar of Regulations, General Assembly Building, 2nd Floor, Richmond, VA 23219.

FORMS (12VAC30-120)

Virginia Uniform Assessment Instrument (UAI) (1994).

Consent to Exchange Information, DMAS-20 (rev. 4/03).

Provider Aide/LPN Record Personal/Respite Care, DMAS-90 (rev. 12/02).

LPN Skilled Respite Record, DMAS-90A (eff. 7/05).  
 Personal Assistant/Companion Timesheet, DMAS-91 (rev. 8/03).

Questionnaire to Assess an Applicant's Ability to Independently Manage Personal Attendant Services in the CD-PAS Waiver or DD Waiver, DMAS-95 Addendum (eff. 8/00).

~~Medicaid Funded Long Term Care Service Authorization Form, DMAS-96 (rev. 10/06).~~

~~Screening Team Plan of Care for Medicaid Funded Long Term Care, DMAS-97 (rev. 12/02).~~

~~Provider Agency Plan of Care, DMAS-97A (rev. 9/02).~~

~~Consumer Directed Services Plan of Care, DMAS-97B (rev. 1/98).~~

~~Community Based Care Recipient Assessment Report, DMAS-99 (rev. 4/03).~~

[Medicaid Funded Long-term Care Service Authorization Form, DMAS-96 \(rev. 8/12\).](#)

[Individual Choice - Institutional Care or Waiver Services Form, DMAS-97 \(rev. 8/12\).](#)

[Agency or Consumer Direction Provider Plan of Care, DMAS-97A/B \(rev. 3/10\).](#)

[Community-based Care Recipient Assessment Report, DMAS-99 \(rev. 9/09\).](#)

Consumer-Directed Personal Attendant Services Recipient Assessment Report, DMAS-99B (rev. 8/03).

MI/MR Level I Supplement for EDCD Waiver Applicants, DMAS-101A (rev. 10/04).

Assessment of Active Treatment Needs for Individuals with MI, MR, or RC Who Request Services under the Elder or Disabled with Consumer-Direction Waivers, DMAS-101B (rev. 10/04).

AIDS Waiver Evaluation Form for Enteral Nutrition, DMAS-116 (6/03).

~~Medicaid Long Term Care Communication Form, DMAS-225 (3/09).~~

[Medicaid Long-Term Care Communication Form, DMAS-225 \(rev.10/11\).](#)

Technology Assisted Waiver/EPSTDT Nursing Services Provider Skills Checklist for Individuals Caring for Tracheostomized and/or Ventilator Assisted Children and Adults, DMAS-259.

Home Health Certification and Plan of Care, CMS-485 (rev. 2/94).

IFDDS Waiver Level of Care Eligibility Form (eff. 5/07).

VA.R. Doc. No. R10-2177; Filed September 11, 2012, 3:39 p.m.



**TITLE 18. PROFESSIONAL AND OCCUPATIONAL LICENSING**

**BOARD OF ACCOUNTANCY**

**Final Regulation**

**Title of Regulation: 18VAC5-22. Board of Accountancy Regulations (amending 18VAC5-22-20).**

**Statutory Authority:** §§ 54.1-4402 and 54.1-4403 of the Code of Virginia.

**Effective Date:** January 1, 2013.

**Agency Contact:** Wade A. Jewell, Executive Director, Board of Accountancy, 9960 Mayland Drive, Suite 402, Henrico, VA 23233, telephone (804) 367-8540, FAX (804) 527-4409, or email wade.jewell@boa.virginia.gov.

**Summary:**

*The amendments create several new categories of fees and increase most fees paid by licensees that are subject to the board's authority.*

**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.

**18VAC5-22-20. Fees.**

A. The board shall charge the following fees for services it provides:

Processing an <u>initial</u> application to take <u>one or more sections</u> of the CPA examination	\$120
<u>Processing additional applications to take one or more sections of the CPA examination</u>	<u>\$20</u>
<u>Preliminary evaluation of whether a person has met the requirements to take the CPA examination</u>	<u>\$25</u>
Processing an application for issuance of a Virginia license <u>to a person</u>	\$24 <u>\$75</u>
<u>Processing an application for issuance of a Virginia license to a firm</u>	<u>\$100</u>
Processing an application for the timely renewal of a <u>person's</u> Virginia license	\$24 <u>\$60</u>
<u>Processing an application for the timely renewal of a firm's Virginia license</u>	<u>\$75</u>
Additional fee for processing an application for a <u>the renewal of a person's Virginia license renewal</u> that is not timely	\$25 <u>\$100</u>
<u>Additional fee for processing an application for the renewal of a firm's Virginia license that is not timely</u>	<u>\$100</u>
Processing an application for reinstatement	<u>\$250</u>



# Regulations

of a person's Virginia license	\$350
<u>Processing an application for reinstatement of a firm's Virginia license</u>	<u>\$500</u>
Processing an application for lifting the suspension of the privilege of using the CPA title in Virginia <del>or for lifting the suspension of the privilege of providing attest services or compilation services for persons or entities located in Virginia</del>	<del>\$250</del> <u>\$350</u>
<u>Processing an application for lifting the suspension of the privilege of providing attest services or compilation services for persons or entities located in Virginia</u>	<u>\$500</u>
<u>Providing or obtaining information about a person's grades on sections of the CPA examination</u>	<u>\$25</u>
<u>Processing requests for verification that a person or firm holds a Virginia license:</u>	
<u>1. Online request</u>	<u>\$25</u>
<u>2. Manual request</u>	<u>\$50</u>
Providing an additional wall certificate	\$25
<u>Additional fee for not responding within 30 calendar days to any request for information by the board under subsection A of 18VAC5-22-170</u>	<u>\$100</u>
Additional fee for not using the online payment option for any service provided by the board	\$5 <u>\$25</u>

B. All fees for services the board provides are due when the service is requested and are nonrefundable.

VA.R. Doc. No. R08-1113; Filed September 10, 2012, 3:26 p.m.

## BOARD FOR CONTRACTORS

### Final Regulation

Title of Regulation: **18VAC50-22. Board for Contractors Regulations (amending 18VAC50-22-10 through 18VAC50-22-70, 18VAC50-22-210, 18VAC50-22-230, 18VAC50-22-260).**

Statutory Authority: §§ 54.1-201 and 54.1-1102 of the Code of Virginia.

Effective Date: December 1, 2012.

Agency Contact: Eric L. Olson, Executive Director, Board for Contractors, 9960 Mayland Drive, Suite 400, Richmond, VA 23233, telephone (804) 367-2785, FAX (804) 527-4401, or email contractors@dpor.virginia.gov.

#### Summary:

*The Board of Contractors is amending its regulations to account for several statutory changes, clarify current*

*requirements, and respond to changes in affected industries. Specifically, the amendments:*

*1. Separate the current manufactured/modular home contractor specialty license into two licenses: one for manufactured home contractors and one for industrial building (modular home) contractors;*

*2. Require applicants for a specialty classification to pass a qualifying exam;*

*3. Amend the requirements for licensure by reciprocity to allow individuals to gain licensure in Virginia if they were originally licensed in a state with licensure eligibility criteria that are substantially equivalent to Virginia; and*

*4. Require legal business entities that dissolve and reform under another business name to return their old, invalid, license to the board within 30 days of the change.*

*The proposed increase in the net worth or equity that firms must prove to qualify for licensure as Class B or Class A contractors was removed from the final regulation leaving the current requirement in place.*

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

#### Part I Definitions

#### **18VAC50-22-10. General definitions.**

The following words and terms when used in this chapter, unless a different meaning is provided or is plainly required by the context, shall have the following meanings:

"Address of record" means the mailing address designated by the licensee to receive notices and correspondence from the board.

"Affidavit" means a written statement of facts, made voluntarily, and confirmed by the oath or affirmation of the party making it, taken before a notary or other person having the authority to administer such oath or affirmation.

"Business entity" means a sole proprietorship, partnership, corporation, limited liability company, limited liability partnership, or any other form of organization permitted by law.

"Change order" means any modification to the original contract including, but not limited to, the time to complete the work, change in materials, change in cost, and change in the scope of work.

"Controlling financial interest" means the direct or indirect ownership or control of more than 50% ownership of a firm.

"Firm" means any business entity recognized under the laws of the Commonwealth of Virginia.

"Formal vocational training" means courses in the trade administered at an accredited educational facility; or formal training, approved by the department, conducted by trade

associations, businesses, military, correspondence schools or other similar training organizations.

"Full-time employee" means an employee who spends a minimum of 30 hours a week carrying out the work of the licensed contracting business.

"Helper" or "laborer" means a person who assists a licensed tradesman and who is not an apprentice as defined in 18VAC50-30-10.

"Licensee" means a firm holding a license issued by the Board for Contractors to act as a contractor, as defined in § 54.1-1100 of the Code of Virginia.

"Net worth" means assets minus liabilities. For purposes of this chapter, assets shall not include any property owned as tenants by the entirety.

"Prime contractor" means a licensed contractor that performs, supervises, or manages the construction, removal, repair, or improvement of real property pursuant to the terms of a primary contract with the property owner/lessee. The prime contractor may use its own employees to perform the work or use the services of other properly licensed contractors.

"Principal place of business" means the location where the licensee principally conducts business with the public.

"Reciprocity" means an arrangement by which the licensees of two states are allowed to practice within each other's boundaries by mutual agreement.

"Reinstatement" means having a license restored to effectiveness after the expiration date has passed.

"Renewal" means continuing the effectiveness of a license for another period of time.

"Responsible management" means the following individuals:

1. The sole proprietor of a sole proprietorship;
2. The partners of a general partnership;
3. The managing partners of a limited partnership;
4. The officers of a corporation;
5. The managers of a limited liability company;
6. The officers or directors of an association or both; and
7. Individuals in other business entities recognized under the laws of the Commonwealth as having a fiduciary responsibility to the firm.

"Sole proprietor" means any individual, not a corporation, who is trading under his own name, or under an assumed or fictitious name pursuant to the provisions of §§ 59.1-69 through 59.1-76 of the Code of Virginia.

"Supervision" means providing guidance or direction of a delegated task or procedure by a tradesman licensed in accordance with Chapter 11 (§ 54.1-1100 et seq.) of Title 54.1 of the Code of Virginia, being accessible to the helper or laborer, and periodically observing and evaluating the performance of the task or procedure.

"Supervisor" means the licensed master or journeyman tradesman who has the responsibility to ensure that the installation is in accordance with the applicable provisions of the Virginia Uniform Statewide Building Code and provides supervision to helpers and laborers as defined in this chapter.

"Tenants by the entirety" means a tenancy which is created between a husband and wife and by which together they hold title to the whole with right of survivorship so that, upon death of either, the other takes whole to exclusion of the deceased's remaining heirs.

"Virginia Uniform Statewide Building Code" or "USBC" means building regulations comprised of those promulgated by the Virginia Board of Housing and Community Development in accordance with § 36-98 of the Code of Virginia, including any model codes and standards that are incorporated by reference and that regulate construction, reconstruction, alteration, conversion, repair, maintenance or use of structures, and building and installation of equipment therein.

#### **18VAC50-22-20. Definitions of license classifications.**

The following words and terms when used in this chapter unless a different meaning is provided or is plainly required by the context shall have the following meanings:

"Building contractors" (Abbr: BLD) means those individuals whose contracts include construction on real property owned, controlled or leased by another person of commercial, industrial, institutional, governmental, residential (single-family, two-family or multifamily) and accessory use buildings or structures. This classification also provides for remodeling, repair, improvement or demolition of these buildings and structures. ~~A holder of this license can do general contracting.~~

If the BLD contractor performs specialty services other than those listed below, all required specialty designations shall be obtained. The BLD contractor may act as a prime contractor and contract with subcontractors to perform work not permitted by the BLD license. The building classification includes but is not limited to the functions carried out by the following specialties:

- Billboard/sign contracting
- Commercial improvement contracting
- Concrete contracting
- Farm improvement contracting
- Home improvement contracting
- Industrialized building contracting
- Landscape service contracting
- Marine facility contracting
- Masonry contracting
- ~~Modular manufactured building contracting~~
- Recreational facility contracting
- Roofing contracting

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# Regulations

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"Electrical contractors" (Abbr: ELE) means those individuals whose contracts include the construction, repair, maintenance, alteration, or removal of electrical systems ~~under the National Electrical Code~~. This classification provides for all work covered by the ~~National Electrical Code~~ electrical provisions of the USBC including ~~electrical work covered by the alarm/security systems contracting (ALS)~~, electronic/communication service contracting (ESC) and fire alarm systems contracting (FAS) specialties. A firm holding an ~~electrical~~ ELE license is responsible for meeting all applicable ~~tradesman licensing standards~~ individual license and certification regulations.

"Highway/heavy contractors" (Abbr: H/H) means those individuals whose contracts include construction, repair, improvement, or demolition of the following:

- Bridges
- Dams
- Drainage systems
- Foundations
- Parking lots
- Public transit systems
- Rail roads
- Roads
- Runways
- Streets
- Structural signs & lights
- Tanks

The functions carried out by these contractors include but are not limited to the following:

- Building demolition
- Clearing
- Concrete work
- Excavating
- Grading
- Nonwater well drilling
- Paving
- Pile driving
- Road marking
- Steel erection

These contractors also install, maintain, or dismantle the following:

1. Power systems for the generation and primary and secondary distribution of electric current ahead of the customer's meter;
2. Pumping stations and treatment plants;
3. Telephone, telegraph, or signal systems for public utilities; and

4. Water, gas, and sewer connections to residential, commercial, and industrial sites, subject to local ordinances.

This classification may also install backflow prevention devices incidental to work in this classification when the installer has received formal vocational training approved by the board that included instruction in the installation of backflow prevention devices.

"HVAC contractors" (Abbr: HVA) means those individuals whose work includes the installation, alteration, repair, or maintenance of heating systems, ventilating systems, cooling systems, steam and hot water heaters, heating systems, boilers, process piping, and mechanical refrigeration systems, including tanks incidental to the system. This classification does not provide for fire suppression installations, sprinkler system installations, or gas piping. A firm holding a HVAC license is responsible for meeting all applicable ~~tradesman licensure standards~~ individual license and certification regulations. This classification may install backflow prevention devices incidental to work in this classification.

"Plumbing contractors" (Abbr: PLB) means those individuals whose contracts include the installation, maintenance, extension, or alteration, or removal of all piping, fixtures, appliances, and appurtenances in connection with any of the following:

- Backflow prevention devices
- Boilers
- Hot water baseboard heating systems
- Hot water heaters
- Hydronic systems
- Limited area sprinklers (as defined by ~~BOCA~~) the USBC)
- Process piping
- Public/private water supply systems within or adjacent to any building, structure or conveyance
- Sanitary or storm drainage facilities
- Steam heating systems
- Storage tanks incidental to the installation of related systems
- Venting systems related to plumbing

These contractors also install, maintain, extend or alter the following:

- Liquid waste systems
- Sewerage systems
- Storm water systems
- Water supply systems

This classification does not provide for gas piping or the function of fire sprinkler contracting as noted above. A firm holding a ~~plumbing~~ PLB license is responsible for meeting all applicable ~~tradesman licensure standards~~ individual license and certification regulations. The classification may install

sprinkler systems permitted to be designed in accordance with the plumbing provisions of the USBC when the installer has received formal vocational training approved by the board that included instruction of installation of sprinkler systems.

"Specialty contractors" means those individuals whose contracts are for specialty services which do not generally fall within the scope of any other classification within this chapter.

### **18VAC50-22-30. Definitions of specialty services.**

The following words and terms when used in this chapter unless a different meaning is provided or is plainly required by the context shall have the following meanings:

"Alternative energy system contracting" (Abbr: AES) means that service which provides for the installation, repair or improvement, from the customer's meter, of alternative energy generation systems, supplemental energy systems and associated equipment annexed to real property. This service does not include the installation of emergency generators powered by fossil fuels. No other classification or specialty service provides this function. This specialty does not provide for electrical, plumbing, gas fitting, or HVAC functions.

"Asbestos contracting" (Abbr: ASB) means that service which provides for the installation, removal, or encapsulation of asbestos containing materials annexed to real property. No other classification or specialty service provides for this function.

"Asphalt paving and sealcoating contracting" (Abbr: PAV) means that service which provides for the installation of asphalt paving and/or sealcoating on subdivision streets and adjacent intersections, driveways, parking lots, tennis courts, running tracks, and play areas, using materials and accessories common to the industry. This includes height adjustment of existing sewer manholes, storm drains, water valves, sewer cleanouts and drain grates, and all necessary excavation and grading. The H/H classification also provides for this function.

"Billboard/sign contracting" (Abbr: BSC) means that service which provides for the installation, repair, improvement, or dismantling of any billboard or structural sign permanently annexed to real property. H/H and BLD are the only other classifications that can perform this work except that a contractor in this specialty may connect or disconnect signs to existing electrical circuits. No trade related plumbing, electrical, or HVAC work is included in this function.

"Blast/explosive contracting" (Abbr: BEC) means that service which provides for the use of explosive charges for the repair, improvement, alteration, or demolition of any real property or any structure annexed to real property.

"Commercial improvement contracting" (Abbr: CIC) means that service which provides for repair or improvement to nonresidential property and multifamily property as defined in the Virginia Uniform Statewide Building Code. The BLD classification also provides for this function. The CIC

classification does not provide for the construction of new buildings, accessory buildings, electrical, plumbing, HVAC, or gas work.

"Concrete contracting" (Abbr: CEM) means that service which provides for all work in connection with the processing, proportioning, batching, mixing, conveying and placing of concrete composed of materials common to the concrete industry. This includes but is not limited to finishing, coloring, curing, repairing, testing, sawing, grinding, grouting, placing of film barriers, sealing and waterproofing. Construction and assembling of forms, molds, slipforms, pans, centering, and the use of rebar is also included. The BLD and H/H classifications also provide for this function.

"Electronic/communication service contracting" (Abbr: ESC) means that service which provides for the installation, repair, improvement, or removal of electronic or communications systems annexed to real property including telephone wiring, computer cabling, sound systems, data links, data and network installation, television and cable TV wiring, antenna wiring, and fiber optics installation, all of which operate at 50 volts or less. A firm holding an ESC license is responsible for meeting all applicable tradesman licensure standards. The ELE classification also provides for this function.

"Elevator/escalator contracting" (Abbr: EEC) means that service which provides for the installation, repair, improvement or removal of elevators or escalators permanently annexed to real property. A firm holding an EEC license is responsible for meeting all applicable ~~tradesman licensure standards~~ individual license and certification regulations. No other classification or specialty service provides for this function.

"Environmental monitoring well contracting" (Abbr: EMW) means that service which provides for the construction of a well to monitor hazardous substances in the ground.

"Environmental specialties contracting" (Abbr: ENV) means that service which provides for installation, repair, removal, or improvement of pollution control and remediation devices. No other specialty provides for this function. This specialty does not provide for electrical, plumbing, gas fitting, or HVAC functions.

"Equipment/machinery contracting" (Abbr: EMC) means that service which provides for the installation or removal of equipment or machinery including but not limited to conveyors or heavy machinery. Boilers exempted by the Virginia Uniform Statewide Building Code but regulated by the Department of Labor and Industry are also included in this specialty. This specialty does not provide for any electrical, plumbing, process piping or HVAC functions.

"Farm improvement contracting" (Abbr: FIC) means that service which provides for the installation, repair or improvement of a nonresidential farm building or structure, or nonresidential farm accessory-use structure, or additions

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# Regulations

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thereto. The BLD classification also provides for this function. The FIC specialty does not provide for any electrical, plumbing, HVAC, or gas fitting functions.

"Fire alarm systems contracting" (Abbr: FAS) means that service which provides for the installation, repair, or improvement of fire alarm systems which operate at 50 volts or less. The ELE classification also provides for this function. A firm with an FAS license is responsible for meeting all applicable tradesman licensure standards.

"Fire sprinkler contracting" (Abbr: SPR) means that service which provides for the installation, repair, alteration, addition, testing, maintenance, inspection, improvement, or removal of sprinkler systems using water as a means of fire suppression when annexed to real property. This specialty does not provide for the installation, repair, or maintenance of other types of fire suppression systems. The PLB classification allows for the installation of ~~limited area sprinklers as defined by BOCA systems permitted to be designed in accordance with the plumbing provisions of the USBC.~~ This specialty may engage in the installation of backflow prevention devices in the fire sprinkler supply main and incidental to the sprinkler system installation when the installer has received formal vocational training approved by the board that included instruction in the installation of backflow prevention devices.

"Fire suppression contracting" (Abbr: FSP) means that service which provides for the installation, repair, improvement, or removal of fire suppression systems including but not limited to halon and other gas systems; dry chemical systems; and carbon dioxide systems annexed to real property. No other classification provides for this function. The FSP specialty does not provide for the installation, repair, or maintenance of water sprinkler systems.

"Gas fitting contracting" (Abbr: GFC) means that service which provides for the installation, repair, improvement, or removal of gas piping and appliances annexed to real property. A firm ~~with holding~~ a GFC license is responsible for meeting all applicable ~~tradesman~~ individual (tradesman) licensure standards regulations.

"Home improvement contracting" (Abbr: HIC) means that service which provides for repairs or improvements to one-family and two-family residential buildings or structures annexed to real property. The BLD classification also provides for this function. The HIC specialty does not provide for electrical, plumbing, HVAC, or gas fitting functions. It does not include high rise buildings, buildings with more than two dwelling units, or new construction functions beyond the existing building structure other than decks, patios, driveways and utility out buildings.

"Industrial building contracting" (Abbr: IBC) means that service that provides for the installation or removal of an industrialized building as defined in the Virginia Industrialized Building Safety Regulations. This classification

covers foundation work in accordance with the provisions of the USBC and allows the licensee to complete internal tie-ins of plumbing, gas, electrical, and HVAC systems. It does not allow for installing additional plumbing, gas, electrical, or HVAC work such as installing the service meter, or installing the outside compressor for the HVAC system. The BLD classification also provides for this function.

"Landscape irrigation contracting" (Abbr: ISC) means that service which provides for the installation, repair, improvement, or removal of irrigation sprinkler systems or outdoor sprinkler systems. The PLB and H/H classifications also provide for this function. This specialty may install backflow prevention devices incidental to work in this specialty when the installer has received formal vocational training approved by the board that included instruction in the installation of backflow prevention devices.

"Landscape service contracting" (Abbr: LSC) means that service which provides for the alteration or improvement of a land area not related to any other classification or service activity by means of excavation, clearing, grading, construction of retaining walls for landscaping purposes, or placement of landscaping timbers. This specialty may remove stumps and roots below grade. The BLD ~~classification~~ and H/H classifications also ~~provides~~ provide for this function.

"Lead abatement contracting" (Abbr: LAC) means that service which provides for the removal or encapsulation of lead-containing materials annexed to real property. No other classification or specialty service provides for this function, except that the PLB and HVA classifications may provide this service incidental to work in those classifications.

"Liquefied petroleum gas contracting" (Abbr: LPG) means that service which includes the installation, maintenance, extension, alteration, or removal of all piping, fixtures, appliances, and appurtenances used in transporting, storing or utilizing liquefied petroleum gas. This excludes hot water heaters, boilers, and central heating systems that require a HVA or PLB license. The GFC specialty also provides for this function. A firm holding a LPG license is responsible for meeting all applicable ~~tradesman licensure standards~~ individual license and certification regulations.

"Manufactured home contracting" (Abbr: MHC) means that service that provides for the installation or removal of a manufactured home as defined in the Virginia Manufactured Home Safety Regulations. This classification does not cover foundation work; however, it does allow installation of piers covered under HUD regulations. It does allow a licensee to do internal tie-ins of plumbing, gas, electrical, or HVAC equipment. It does not allow for installing additional plumbing, gas, electrical, or HVAC work such as installing the service meter, or installing the outside compressor for the HVAC system. The H/H and BLD classifications also provide for this function.

"Marine facility contracting" (Abbr: MCC) means that service which provides for the construction, repair,

improvement, or removal of any structure the purpose of which is to provide access to, impede, or alter a body of surface water. The BLD and H/H classifications also provide for this function. The MCC specialty does not provide for the construction of accessory structures or electrical, HVAC or plumbing functions.

"Masonry contracting" (Abbr: BRK) means that service which includes the installation of brick, concrete block, stone, marble, slate or other units and products common to the masonry industry, including mortarless type masonry products. This includes installation of grout, caulking, tuck pointing, sand blasting, mortar washing, parging and cleaning and welding of reinforcement steel related to masonry construction. The BLD classification and HIC and CIC specialties also provide for this function.

~~"Modular/manufactured building contracting" (Abbr: MBC) means that service which provides for the installation or removal of a modular or manufactured building manufactured under ANSI standards. This classification does not cover foundation work; however, it does allow installation of piers covered under HUD regulations. It does allow a licensee to do internal tie-ins of plumbing, gas and electrical or HVAC equipment. It does not allow for installing additional plumbing, electrical, or HVAC work such as installing the service meter, or installing the outside compressor for the HVAC system. The H/H and BLD classifications also provide for this function.~~

"Natural gas fitting provider contracting" (Abbr: NGF) means that service which provides for the incidental repair, testing, or removal of natural gas piping or fitting annexed to real property. This does not include new installation of gas piping for hot water heaters, boilers, central heating systems, or other natural gas equipment which requires a HVA or PLB license. The GFC specialty also provides for this function. A firm holding a NGF license is responsible for meeting all applicable ~~tradesman licensure standards~~ individual license and certification regulations.

"Painting and wallcovering contracting" (Abbr: PTC) means that service which provides for the application of materials common to the painting and decorating industry for protective or decorative purposes, the installation of surface coverings such as vinyls, wall papers, and cloth fabrics. This includes surface preparation, caulking, sanding and cleaning preparatory to painting or coverings and includes both interior and exterior surfaces. The BLD classification and the HIC and CIC specialties also provide for this function.

"Radon mitigation contracting" (Abbr: RMC) means that service which provides for additions, repairs or improvements to buildings or structures, for the purpose of mitigating or preventing the effects of radon gas. This function can only be performed by a firm holding the BLD classification or CIC (for other than one-family and two-family dwellings), FIC (for nonresidential farm buildings) or HIC (for one-family and two-family dwellings) specialty services. No electrical,

plumbing, gas fitting, or HVAC functions are provided by this specialty.

"Recreational facility contracting" (Abbr: RFC) means that service which provides for the construction, repair, or improvement of any recreational facility, excluding paving and the construction of buildings, plumbing, electrical, and HVAC functions. The BLD classification also provides for this function.

"Refrigeration contracting" (Abbr: REF) means that service which provides for installation, repair, or removal of any refrigeration equipment (excluding HVAC equipment). No electrical, plumbing, gas fitting, or HVAC functions are provided by this specialty. This specialty is intended for those contractors who repair or install coolers, refrigerated casework, ice-making machines, drinking fountains, cold room equipment, and similar hermetic refrigeration equipment. The HVAC classification also provides for this function.

"Roofing contracting" (Abbr: ROC) means that service which provides for the installation, repair, removal or improvement of materials common to the industry that form a watertight, weather resistant surface for roofs and decks. This includes roofing system components when installed in conjunction with a roofing project, application of dampproofing or waterproofing, and installation of roof insulation panels and other roof insulation systems above roof deck. The BLD classification and the HIC and CIC specialties also provide for this function.

"Sewage disposal systems contracting" (Abbr: SDS) means that service which provides for the installation, repair, improvement, or removal of septic tanks, septic systems, and other on-site sewage disposal systems annexed to real property.

"Swimming pool construction contracting" (Abbr: POL) means that service which provides for the construction, repair, improvement or removal of in-ground swimming pools. The BLD classification and the RFC specialty also provide for this function. No trade related plumbing, electrical, backflow or HVAC work is included in this specialty.

"Vessel construction contracting" (Abbr: VCC) means that service which provides for the construction, repair, improvement, or removal of nonresidential vessels, tanks, or piping that hold or convey fluids other than sanitary, storm, waste, or potable water supplies. The H/H classification also provides for this function.

"Water well/pump contracting" (Abbr: WWP) means that service which provides for the installation of a water well system, including geothermal wells, which includes construction of a water well to reach groundwater, as defined in § 62.1-255 of the Code of Virginia, and the installation of the well pump and tank, including pipe and wire, up to and including the point of connection to the plumbing and electrical systems. No other classification or specialty service

# Regulations

provides for construction of water wells. This regulation shall not exclude PLB, ELE or HVAC from installation of pumps and tanks.

Note: Specialty contractors engaging in construction which involves the following activities or items or similar activities or items may fall under the CIC, HIC and/or FIC specialty services, or they may fall under the BLD classification.

Appliances	Fireplaces	Rubber linings
Awnings	Fireproofing	Sandblasting
Blinds	Fixtures	Scaffolding
Bulkheads	Floor coverings	Screens
Cabinetry	Flooring	Sheet metal
Carpentry	Floors	Shutters
Carpeting	Glass	Siding
Casework	Glazing	Skylights
Ceilings	Grouting	Storage bins and lockers
Chimneys	Grubbing	Stucco
Chutes	Guttering	Temperature controls
Conduit rodding	Insulation	Terrazzo
Curtains	Interior decorating	Tile
Curtain walls	Lubrication	Vaults
Decks	Metal work	Vinyl flooring
Doors	Millwrighting	Wall panels
Drapes	Mirrors	Wall tile
Drywall	Miscellaneous iron	Waterproofing
Epoxy	Ornamental iron	Weatherstripping
Exterior decoration	Partitions	Welding
Facings	Protective coatings	Windows
Fences	Railings	Wood floors
Fiberglass	Rigging	

## Part II Entry

### 18VAC50-22-40. Requirements for a Class C license.

A. A firm applying for a Class C license must meet the requirements of this section.

B. For every classification or specialty in which the firm seeks to be licensed, the firm shall name a qualified individual who meets the following requirements:

1. Is at least 18 years old;
2. Has a minimum of two years experience in the classification or specialty for which he is the qualifier;
3. Is a full-time employee of the firm as defined in this chapter or is a member of the responsible management of the firm; and

~~4. Where appropriate, has passed the trade related examination or has completed an education and training program approved by the board and required for the specialties listed below:~~

- ~~Blast/explosive contracting~~
- ~~Electrical~~
- ~~Fire sprinkler~~
- ~~Gas fitting~~
- ~~HVAC~~
- ~~Plumbing~~
- ~~Radon mitigation~~
- ~~Water well drilling~~

~~5. Has obtained, pursuant to the tradesman regulations, a master tradesman license as required for those classifications and specialties listed in 18VAC50-22-20 and 18VAC50-22-30.~~

4. a. Has obtained the appropriate certification for the following specialties:

- Blast/explosive contracting (Department of Fire Programs explosive use certification)
- Fire sprinkler (NICET Sprinkler III certification)
- Radon mitigation (EPA or DEQ accepted radon certification)

b. Has obtained, pursuant to the Individual Licensing and Certification Regulations, a master license for Plumbing, HVAC, Electrical, Gas Fitting, Natural Gas Fitting Provider, and Liquefied Petroleum Gas Contracting.

c. Has obtained, pursuant to the Individual Licensing and Certification Regulations, certification as an Elevator Mechanic for Elevator Escalator Contracting and certification as a Water Well Systems Provider for Water Well/Pump Contracting.

d. Has completed a board-approved examination for all other classifications and specialties that do not require other certification or licensure.

C. The firm shall provide information for the past five years prior to application on any outstanding, past-due debts and judgments; outstanding tax obligations; defaults on bonds; or pending or past bankruptcies. The firm, its qualified individual or individuals, and all members of the responsible management of the firm shall submit information on any past-due debts and judgments or defaults on bonds directly related to the practice of contracting as defined in Chapter 11 (§ 54.1-1100 et seq.) of Title 54.1 of the Code of Virginia.

D. The firm, the qualified individual, and all members of the responsible management of the firm shall disclose at the time of application any current or previous contractor licenses held in Virginia or in other jurisdictions and any disciplinary actions taken on these licenses. This includes but is not limited to any monetary penalties, fines, suspensions, revocations, surrender of a license in connection with a disciplinary action, or voluntary termination of a license in Virginia or in any other jurisdiction.

E. In accordance with § 54.1-204 of the Code of Virginia, each applicant shall disclose the following information about the firm, all members of the responsible management, and the qualified individual or individuals for the firm:

1. All misdemeanor convictions within three years of the date of application; and
2. All felony convictions during their lifetime.

Any plea of nolo contendere shall be considered a conviction for purposes of this subsection. The record of a conviction received from a court shall be accepted as prima facie evidence of a conviction or finding of guilt. The board, in its discretion, may deny licensure to any applicant in accordance with § 54.1-204 of the Code of Virginia.

F. A member of responsible management shall have successfully completed a board-approved basic business course.

**18VAC50-22-50. Requirements for a Class B license.**

A. A firm applying for a Class B license must meet the requirements of this section.

B. A firm shall name a designated employee who meets the following requirements:

1. Is at least 18 years old;
2. Is a full-time employee of the firm as defined in this chapter, or is a member of responsible management as defined in this chapter;
3. Has passed a board-approved examination as required by § 54.1-1108 of the Code of Virginia or has been exempted from the exam requirement in accordance with § 54.1-1108.1 of the Code of Virginia; and
4. Has followed all rules established by the board or by the testing service acting on behalf of the board with regard to conduct at the examination. Such rules shall include any written instructions communicated prior to the examination

date and any oral or written instructions given at the site on the date of the exam.

C. For every classification or specialty in which the firm seeks to be licensed, the firm shall name a qualified individual who meets the following requirements:

1. Is at least 18 years old;
2. Has a minimum of three years experience in the classification or specialty for which he is the qualifier;
3. Is a full-time employee of the firm as defined in this chapter or is a member of the responsible management of the firm;
4. ~~Where appropriate, has passed the trade related examination or has completed an education and training program approved by the board and required for the classifications and specialties listed below:~~

- ~~Blast/explosive contracting~~
- ~~Electrical~~
- ~~Fire sprinkler~~
- ~~Gas fitting~~
- ~~HVAC~~
- ~~Plumbing~~
- ~~Radon mitigation~~
- ~~Water well drilling~~

5. ~~Has obtained, pursuant to the tradesman regulations, a master tradesman license as required for those classifications and specialties listed in 18VAC50-22-20 and 18VAC50-22-30.~~

4. a. Has obtained the appropriate certification for the following specialties:

- Blast/explosive contracting (Department of Fire Programs explosive use certification)
- Fire sprinkler (NICET Sprinkler III certification)
- Radon mitigation (EPA or DEQ accepted radon certification)

b. Has obtained, pursuant to the Individual Licensing and Certification Regulations, a master license for Plumbing, HVAC, Electrical, Gas Fitting, Natural Gas Fitting Provider, and Liquefied Petroleum Gas Contracting.

c. Has obtained, pursuant to the Individual Licensing and Certification Regulations, certification as an Elevator Mechanic for Elevator Escalator Contracting and certification as a Water Well Systems Provider for Water Well/Pump Contracting.

d. Has completed a board-approved examination for all other classifications and specialties that do not require other certification or licensure.

D. Each firm shall submit information on its financial position. Excluding any property owned as tenants by the entirety, the firm shall state a net worth or equity of [ \$15,000 ~~\$50,000~~ ] or more.



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# Regulations

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E. Each firm shall provide information for the five years prior to application on any outstanding, past-due debts and judgments; outstanding tax obligations; defaults on bonds; or pending or past bankruptcies. The firm, its designated employee, qualified individual or individuals, and all members of the responsible management of the firm shall submit information on any past-due debts and judgments or defaults on bonds directly related to the practice of contracting as defined in Chapter 11 (§ 54.1-1100 et seq.) of Title 54.1 of the Code of Virginia.

F. The firm, the designated employee, the qualified individual, and all members of the responsible management of the firm shall disclose at the time of application any current or previous substantial identities of interest with any contractor licenses issued in Virginia or in other jurisdictions and any disciplinary actions taken on these licenses. This includes but is not limited to any monetary penalties, fines, suspension, revocation, or surrender of a license in connection with a disciplinary action. The board, in its discretion, may deny licensure to any applicant when any of the parties listed above have had a substantial identity of interest (as deemed in § 54.1-1110 of the Code of Virginia) with any firm that has had a license suspended, revoked, voluntarily terminated or surrendered in connection with a disciplinary action in Virginia or any other jurisdiction.

G. In accordance with § 54.1-204 of the Code of Virginia, each applicant shall disclose the following information about the firm, designated employee, all members of the responsible management, and the qualified individual or individuals for the firm:

1. All misdemeanor convictions within three years of the date of application; and
2. All felony convictions during their lifetime.

Any plea of nolo contendere shall be considered a conviction for purposes of this subsection. The record of a conviction received from a court shall be accepted as prima facie evidence of a conviction or finding of guilt. The board, in its discretion, may deny licensure to any applicant in accordance with § 54.1-204 of the Code of Virginia.

H. The designated employee or a member of responsible management shall have successfully completed a board-approved basic business course.

## **18VAC50-22-60. Requirements for a Class A license.**

A. A firm applying for a Class A license shall meet all of the requirements of this section.

B. A firm shall name a designated employee who meets the following requirements:

1. Is at least 18 years old;
2. Is a full-time employee of the firm as defined in this chapter or is a member of the responsible management of the firm as defined in this chapter;

3. Has passed a board-approved examination as required by § 54.1-1106 of the Code of Virginia or has been exempted from the exam requirement in accordance with § 54.1-1108.1 of the Code of Virginia; and

4. Has followed all rules established by the board or by the testing service acting on behalf of the board with regard to conduct at the examination. Such rules shall include any written instructions communicated prior to the examination date and any oral or written instructions given at the site on the day of the exam.

C. For every classification or specialty in which the firm seeks to be licensed, the firm shall name a qualified individual who meets the following requirements:

1. Is at least 18 years old;
2. Has a minimum of five years of experience in the classification or specialty for which he is the qualifier;
3. Is a full-time employee of the firm as defined in this chapter or is a member of the firm as defined in this chapter or is a member of the responsible management of the firm;
4. ~~Where appropriate, has passed the trade related examination or has completed an education and training program approved by the board and required for the classifications and specialties listed below:~~

~~Blast/explosive contracting~~

~~Electrical~~

~~Fire sprinkler~~

~~Gas fitting~~

~~HVAC~~

~~Plumbing~~

~~Radon mitigation~~

~~Water well drilling~~

5. ~~Has obtained, pursuant to the tradesman regulations, a master tradesman license as required for those classifications and specialties listed in 18VAC50-22-20 and 18VAC50-22-30.~~

4. a. Has obtained the appropriate certification for the following specialties:

Blast/explosive contracting (DHCD explosive use certification)

Fire sprinkler (NICET Sprinkler III certification)

Radon mitigation (EPA or DEQ accepted radon certification)

b. Has obtained, pursuant to the Individual Licensing and Certification Regulations, a master license for Plumbing, HVAC, Electrical, Gas Fitting, Natural Gas Fitting Provider, and Liquefied Petroleum Gas Contracting.

c. Has obtained, pursuant to the Individual Licensing and Certification Regulations, certification as an Elevator Mechanic for Elevator Escalator Contracting and

certification as a Water Well Systems Provider for Water Well/Pump Contracting.

d. Has completed a board-approved examination for all other classifications and specialties that do not require other certification or licensure.

D. Each firm shall submit information on its financial position. Excluding any property owned as tenants by the entirety, the firm shall state a net worth or equity of [ \$45,000 ~~\$100,000 or more~~ ].

E. The firm shall provide information for the five years prior to application on any outstanding, past-due debts and judgments; outstanding tax obligations; defaults on bonds; or pending or past bankruptcies. The firm, its designated employee, qualified individual or individuals, and all members of the responsible management of the firm shall submit information on any past-due debts and judgments or defaults on bonds directly related to the practice of contracting as defined in Chapter 11 (§ 54.1-1100 et seq.) of Title 54.1 of the Code of Virginia.

F. The firm, the designated employee, the qualified individual, and all members of the responsible management of the firm shall disclose at the time of application any current or previous substantial identities of interest with any contractor licenses issued in Virginia or in other jurisdictions and any disciplinary actions taken on these licenses. This includes but is not limited to, any monetary penalties, fines, suspensions, revocations, or surrender of a license in connection with a disciplinary action. The board, in its discretion, may deny licensure to any applicant when any of the parties listed above have had a substantial identity of interest (as deemed in § 54.1-1110 of the Code of Virginia) with any firm that has had a license suspended, revoked, voluntarily terminated, or surrendered in connection with a disciplinary action in Virginia or in any other jurisdiction.

G. In accordance with § 54.1-204 of the Code of Virginia, each applicant shall disclose the following information about the firm, all members of the responsible management, the designated employee and the qualified individual or individuals for the firm:

1. All misdemeanor convictions within three years of the date of application; and
2. All felony convictions during their lifetime.

Any plea of nolo contendere shall be considered a conviction for purposes of this subsection. The record of a conviction received from a court shall be accepted as prima facie evidence of a conviction or finding of guilt. The board, in its discretion, may deny licensure to any applicant in accordance with § 54.1-204 of the Code of Virginia.

H. The designated employee or a member of responsible management shall have successfully completed a board-approved basic business course.

**18VAC50-22-70. Qualifications for licensure by reciprocity or substantial equivalency.**

Firms originally licensed in a state with which the board has a reciprocal agreement or whose eligibility criteria are substantially equivalent may obtain a Virginia contractor's license in accordance with the terms of that agreement.

**18VAC50-22-210. Change of business entity requires a new license.**

Licenses are issued to firms as defined in this chapter and are not transferable. Whenever the legal business entity holding the license is dissolved or altered to form a new business entity, the original license becomes void and shall be returned to the board within 30 days of the change. Additionally, the firm shall apply for a new license, on a form provided by the board, within 30 days of the change in the business entity. Such changes include but are not limited to:

1. Death of a sole proprietor;
2. Death or withdrawal of a general partner in a general partnership or the managing partner in a limited partnership; and
3. ~~Formation~~ Conversion, formation, or dissolution of a corporation, a limited liability company, or an association or any other business entity recognized under the laws of the Commonwealth of Virginia.

**18VAC50-22-230. Change of name or address.**

A. A licensee must operate under the name in which the license is issued. Any name change shall be reported in writing to the board within 30 days of the change. The board shall not be responsible for the licensee's failure to receive notices or correspondence due to the licensee's not having reported a change of name.

B. Any change of ~~address~~ the address of record or principal place of business shall be reported in writing to the board within 30 days of the change. The board shall not be responsible for the licensee's failure to receive notices or correspondence due to the licensee's not having reported a change of address.

**18VAC50-22-260. Filing of charges; prohibited acts.**

A. All complaints against contractors may be filed with the Department of Professional and Occupational Regulation at any time during business hours, pursuant to § 54.1-1114 of the Code of Virginia.

B. The following are prohibited acts:

1. Failure in any material way to comply with provisions of Chapter 1 (§ 54.1-100 et seq.) or Chapter 11 (§ 54.1-1100 et seq.) of Title 54.1 of the Code of Virginia or the regulations of the board.
2. Furnishing substantially inaccurate or incomplete information to the board in obtaining, renewing, reinstating, or maintaining a license.
3. Failure of the responsible management, designated employee, or qualified individual to report to the board, in

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# Regulations

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writing, the suspension or revocation of a contractor license by another state or conviction in a court of competent jurisdiction of a building code violation.

4. Publishing or causing to be published any advertisement relating to contracting which contains an assertion, representation, or statement of fact that is false, deceptive, or misleading.

5. Negligence and/or incompetence in the practice of contracting.

6. Misconduct in the practice of contracting.

7. A finding of improper or dishonest conduct in the practice of contracting by a court of competent jurisdiction or by the board.

8. Failure of all those who engage in residential contracting, excluding subcontractors to the contracting parties and those who engage in routine maintenance or service contracts, to make use of a legible written contract clearly specifying the terms and conditions of the work to be performed. For the purposes of this chapter, residential contracting means construction, removal, repair, or improvements to single-family or multiple-family residential buildings, including accessory-use structures as defined in § 54.1-1100 of the Code of Virginia. Prior to commencement of work or acceptance of payments, the contract shall be signed by both the consumer and the licensee or his agent.

9. Failure of those engaged in residential contracting as defined in this chapter to comply with the terms of a written contract which contains the following minimum requirements:

a. When work is to begin and the estimated completion date;

b. A statement of the total cost of the contract and the amounts and schedule for progress payments including a specific statement on the amount of the down payment;

c. A listing of specified materials and work to be performed, which is specifically requested by the consumer;

d. A "plain-language" exculpatory clause concerning events beyond the control of the contractor and a statement explaining that delays caused by such events do not constitute abandonment and are not included in calculating time frames for payment or performance;

e. A statement of assurance that the contractor will comply with all local requirements for building permits, inspections, and zoning;

f. Disclosure of the cancellation rights of the parties;

g. For contracts resulting from a door-to-door solicitation, a signed acknowledgment by the consumer that he has been provided with and read the Department of Professional and Occupational Regulation statement of

protection available to him through the Board for Contractors;

h. Contractor's name, address, license number, class of license, and classifications or specialty services; and

i. Statement providing that any modification to the contract, which changes the cost, materials, work to be performed, or estimated completion date, must be in writing and signed by all parties.

10. Failure to make prompt delivery to the consumer before commencement of work of a fully executed copy of the contract as described in subdivisions 8 and 9 of this subsection for construction or contracting work.

11. Failure of the contractor to maintain for a period of five years from the date of contract a complete and legible copy of all documents relating to that contract, including, but not limited to, the contract and any addenda or change orders.

12. Refusing or failing, upon request, to produce to the board, or any of its agents, any document, book, record, or copy of it in the licensee's possession concerning a transaction covered by this chapter or for which the licensee is required to maintain records.

13. Failing to respond to an ~~investigator~~ agent of the board or providing false, misleading or incomplete information to an investigator seeking information in the investigation of a complaint filed with the board against the contractor. Failing or refusing to claim certified mail sent to the licensee's address of record shall constitute a violation of this regulation.

14. Abandonment defined as the unjustified cessation of work under the contract for a period of 30 days or more.

15. The intentional and unjustified failure to complete work contracted for and/or to comply with the terms in the contract.

16. The retention or misapplication of funds paid, for which work is either not performed or performed only in part.

17. Making any misrepresentation or making a false promise that might influence, persuade, or induce.

18. Assisting another to violate any provision of Chapter 1 (§ 54.1-100 et seq.) or Chapter 11 (§ 54.1-1100 et seq.) of Title 54.1 of the Code of Virginia, or this chapter; or combining or conspiring with or acting as agent, partner, or associate for another.

19. Allowing a firm's license to be used by another.

20. Acting as or being an ostensible licensee for undisclosed persons who do or will control or direct, directly or indirectly, the operations of the licensee's business.

21. Action by the firm, responsible management as defined in this chapter, designated employee or qualified individual to offer, give, or promise anything of value or benefit to any federal, state, or local employee for the purpose of

influencing that employee to circumvent, in the performance of his duties, any federal, state, or local law, regulation, or ordinance governing the construction industry.

22. Where the firm, responsible management as defined in this chapter, designated employee or qualified individual has been convicted or found guilty, after initial licensure, regardless of adjudication, in any jurisdiction, of any felony or of any misdemeanor, there being no appeal pending therefrom or the time of appeal having elapsed. Any plea of guilty or nolo contendere shall be considered a conviction for the purposes of this subdivision. The record of a conviction received from a court shall be accepted as prima facie evidence of a conviction or finding of guilt.

23. Failure to inform the board in writing, within 30 days, that the firm, a member of responsible management as defined in this chapter, its designated employee, or its qualified individual has pleaded guilty or nolo contendere or was convicted and found guilty of any felony or of a Class 1 misdemeanor or any misdemeanor conviction for activities carried out while engaged in the practice of contracting.

24. Having been disciplined by any county, city, town, or any state or federal governing body including action by the Virginia Department of Health, which action shall be reviewed by the board before it takes any disciplinary action of its own.

25. Failure to abate a violation of the Virginia Uniform Statewide Building Code, as amended.

26. Failure of a contractor to comply with the notification requirements of the Virginia Underground Utility Prevention Act, Chapter 10.3 (§ 56-265.14 et seq.) of Title 56 of the Code of Virginia (Miss Utility).

27. Practicing in a classification, specialty service, or class of license for which the contractor is not licensed.

28. Failure to satisfy any judgments.

29. Contracting with an unlicensed or improperly licensed contractor or subcontractor in the delivery of contracting services.

30. Failure to honor the terms and conditions of a warranty.

31. Failure to obtain written change orders, which are signed by both the consumer and the licensee or his agent, to an already existing contract.

32. Failure to ensure that supervision, as defined in this chapter, is provided to all helpers and laborers assisting licensed tradesman.

33. Failure to obtain a building permit or applicable inspection, where required.

**NOTICE:** The forms used in administering the above regulation are not being published; however, the name of each form is listed below. The forms are available for public inspection by contacting the agency contact for this

regulation, or at the office of the Registrar of Regulations, General Assembly Building, 2nd Floor, Richmond, Virginia.

[ FORMS (18VAC50-22)

~~Contractor Licensing Information, 27INTRO (5/09).~~

~~Trade Related Examinations and Qualifications Information, 27EXINFO (5/09).~~

~~License Application, 27LIC (rev. 4/10).~~

~~Class C License Application (Short Form), 27CSF (rev. 4/10).~~

~~Additional License Classification/Specialty Designation Application, 27ADDCL (rev. 4/10).~~

~~Change of Qualified Individual Application, 27CHQI (rev. 4/10).~~

~~Change of Designated Employee Application, 27CHDE (rev. 4/10).~~

~~Changes of Responsible Management Form, 27CHRM (eff. 5/09).~~

~~Experience Reference, 27EXP (8/07).~~

~~Certificate of License Termination, 27TERM (5/09).~~

~~Education Provider Registration/Course Approval Application; Contractors Prelicense and Continuing Education, 27EDREG (rev. 6/09).~~

~~Certificate of License Termination, 27TERM (5/09).~~

~~Education Provider Listing Form, 27EDLIST (5/09).~~

~~Financial Statement, 27FINST (5/09).~~

~~Additional Qualified Individual Experience Reference Form, 27QIEXP (5/09).~~

[Contractor Licensing Information, A503-27INTRO \(rev. 9/12\).](#)

[Requirements for Qualified Individuals, A503-27EXINFO \(rev. 9/12\).](#)

[License Application, A503-27LIC \(rev. 9/12\).](#)

[Expedited Class A License Application, A503-2705A\\_ELIC \(rev. 9/12\).](#)

[Class C License Application \(Short Form\), A503-27CSF \(rev. 9/12\).](#)

[Additional Specialty Designation Application, A503-27ADDSP \(rev 9/12\).](#)

[Change in Qualified Individual and Designated Employee Application, A503-27CH\\_QIDE \(rev. 9/12\).](#)

[Change of Responsible Management Application, A503-syCHRM \(rev. 7/11\).](#)

[Certificate of License Termination, A503-27TERM \(3/11\).](#)

[Education Provider Registration/Course Approval Application, A503-27EDREG \(rev. 10/11\).](#)

[Education Provider Listing Application, A503-27EDLIST \(rev. 3/11\).](#)

[Financial Statement, A503-27FINST \(rev. 7/11\).](#)

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# Regulations

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[Additional Qualified Individual Experience Reference Form, A504-27QIEXP \(rev. 3/11\).](#) ]

V.A.R. Doc. No. R08-1340; Filed September 17, 2012, 4:39 p.m.

## BOARD OF DENTISTRY

### Fast-Track Regulation

**Title of Regulation:** 18VAC60-20. Regulations Governing Dental Practice (amending 18VAC60-20-61).

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

**Public Hearing Information:** No public hearings are scheduled.

**Public Comment Deadline:** November 7, 2012.

**Effective Date:** November 22, 2012.

**Agency Contact:** Sandra Reen, Executive Director, Board of Dentistry, 9960 Mayland Drive, Suite 300, Richmond, VA 23233-1463, telephone (804) 367-4538, FAX (804) 527-4428, or email [sandra.reen@dhp.virginia.gov](mailto:sandra.reen@dhp.virginia.gov).

**Basis:** Section 54.1-2400 of the Code of Virginia provides the Board of Dentistry the authority to promulgate regulations to administer the regulatory system.

**Purpose:** The purpose of the amended regulation is to ensure that dental assistants II, after completion of required education and training, will be able to perform procedures on patients that were previously nondelegable and only performed by a dentist. Pulp capping is a necessary part of amalgam or composite resin restoration, so if a dental assistant II is authorized to perform those tasks, it is essential for the health and safety of dental patients that he is properly trained in a laboratory and in clinical practice.

**Rationale for Using Fast-Track Process:** This regulatory action is necessary for the fast-track process to ensure clarity in the education and training of a dental assistant II. In the development of regulations, pulp capping was not initially listed in 18VAC60-20-230 as a duty delegable to a dental assistant II, so it was not considered in the formulation of regulations for the education and training of a dental assistant II. In the adoption of proposed regulations, it was stricken from the list of duties that a dentist cannot delegate and added to the list that could be delegated to a dental assistant II. Training in pulp capping procedures should have been added to 18VAC60-20-61 but was inadvertently omitted.

In September of 2010, the board recognized the omission and authorized the promulgation of a fast-track action as soon as the regulations for dental assistant IIs were effective. There are no additional hours of training required, and it is generally acknowledged that appropriate training in amalgam and composite resin restoration should be inclusive of pulp capping procedures. Therefore, the board has determined that the promulgation of this amendment is appropriate as a fast-track action.

**Substance:** The amendments to 18VAC60-20-61 will include pulp capping procedures in the 40 hours of training in

placing, packing, carving, and polishing amalgam restorations and in the 60 hours of training in placing and shaping composite resin restorations.

**Issues:** The primary advantage to the public is assurance of some training and clinical experience in pulp capping by a dental assistant II, which if done improperly, could result in patient harm. There are no disadvantages to the public.

There are no advantages or disadvantages to the agency or the Commonwealth.

**Department of Planning and Budget's Economic Impact Analysis:**

Summary of the Proposed Amendments to Regulation. Rules on registration of dental assistants II (DAII) were added to these regulations and became effective on March 2, 2011. In these rules pulp capping procedures are among the duties that a dentist may delegate to a DAII. However, training in pulp capping as part of training in amalgam or composite resin restorations was inadvertently omitted in the educational requirements for DAII's set forth in the regulations. The Board of Dentistry (Board) therefore proposes to include the topic of pulp capping in 18VAC60-20-61 without adding to the number of hours of training required for each area of practice.

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

**Estimated Economic Impact.** In the initial development of regulations for DAII, pulp capping was not initially listed as a duty delegable to a DAII, so it was not considered in the formulation of regulations for education and training of DAII's. In the adoption of proposed regulations, it was stricken from the list of duties that a dentist cannot delegate and added to the list that could be delegated to a DAII. According to the Department of Health Professions, training in pulp capping procedures should have been added to the list of educational requirements but was inadvertently omitted.

In September of 2010, the Board recognized the omission and authorized the promulgation of a fast-track action as soon as the regulations for DAII's were effective. There are no additional hours of training required, and it is generally acknowledged that appropriate training in amalgam and composite resin restoration should be inclusive of pulp capping procedures. There should not be a significant increase in cost since under the proposed amendment the number of hours of required training does not change. The proposed amendment is beneficial in that it provides assurance that DAII's are trained to perform a procedure which dentists may delegate to them under these regulations.

**Businesses and Entities Affected.** The proposed amendments potentially affect those seeking to meet educational and training requirements for registration as a DAII. Since the registration of DAII's only became effective March 2, 2011, there is no one currently registered and the Board does not know how many students are working towards registration.

There are currently three educational programs planned for DAI; those programs will need to ensure training in pulp capping as part of training in restorations. There are currently 6,392 licensed dentists in the Commonwealth. The proposed amendment potentially affects dentists who delegate tasks to DAIs.

**Localities Particularly Affected.** The proposed amendments do not disproportionately affect particular localities.

**Projected Impact on Employment.** The proposal amendments are unlikely to significantly affect employment.

**Effects on the Use and Value of Private Property.** The proposed amendments are unlikely to significantly affect the value of private property, but may moderately increase the likelihood that dentists assign pulp capping tasks to DAIs.

**Small Businesses: Costs and Other Effects.** The proposed amendments are unlikely to significantly affect costs for small businesses.

**Small Businesses: Alternative Method that Minimizes Adverse Impact.** The proposed amendments do not adversely affect small businesses.

**Real Estate Development Costs.** The proposed amendments are unlikely to significantly affect real estate development costs.

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

**Agency's Response to Economic Impact Analysis:** The Board of Dentistry concurs with the analysis of the Department of Planning and Budget for the proposed regulation, 18VAC60-20, Regulations Governing the Practice of Dentistry and

Dental Hygiene, relating to inclusion of training in pulp capping for dental assistants II.

**Summary:**

*According to regulations for registration of dental assistants II, which became effective March 2, 2011, pulp capping procedures are among the duties that a dentist may delegate to a dental assistant II. However, training in pulp capping as part of training in amalgam or composite resin restorations was inadvertently omitted in the educational requirements for dental assistants II set forth in 18VAC60-20-61 of the regulation. The amendments include the topic of pulp capping in 18VAC60-20-61 without adding to the number of hours of training required for each area of practice.*

**18VAC60-20-61. Educational requirements for dental assistants II.**

A. A prerequisite for entry into an educational program preparing a person for registration as a dental assistant II shall be current certification as a Certified Dental Assistant (CDA) conferred by the Dental Assisting National Board.

B. To be registered as a dental assistant II, a person shall complete the following requirements from an educational program accredited by the Commission on Dental Accreditation of the American Dental Association:

1. At least 50 hours of didactic course work in dental anatomy and operative dentistry that may be completed on-line.
2. Laboratory training that may be completed in the following modules with no more than 20% of the specified instruction to be completed as homework in a dental office:
  - a. At least 40 hours of placing, packing, carving, and polishing of amalgam restorations and pulp capping procedures;
  - b. At least 60 hours of placing and shaping composite resin restorations and pulp capping procedures;
  - c. At least 20 hours of taking final impressions and use of a non-epinephrine retraction cord; and
  - d. At least 30 hours of final cementation of crowns and bridges after adjustment and fitting by the dentist.
3. Clinical experience applying the techniques learned in the preclinical coursework and laboratory training that may be completed in a dental office in the following modules:
  - a. At least 80 hours of placing, packing, carving, and polishing of amalgam restorations;
  - b. At least 120 hours of placing and shaping composite resin restorations;
  - c. At least 40 hours of taking final impressions and use of a non-epinephrine retraction cord; and
  - d. At least 60 hours of final cementation of crowns and bridges after adjustment and fitting by the dentist.

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# Regulations

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4. Successful completion of the following competency examinations given by the accredited educational programs:

- a. A written examination at the conclusion of the 50 hours of didactic coursework;
- b. A practical examination at the conclusion of each module of laboratory training; and
- c. A comprehensive written examination at the conclusion of all required coursework, training, and experience for each of the corresponding modules.

C. All treatment of patients shall be under the direct and immediate supervision of a licensed dentist who is responsible for the performance of duties by the student. The dentist shall attest to successful completion of the clinical competencies and restorative experiences.

VA.R. Doc. No. R13-2758; Filed September 18, 2012, 10:18 a.m.

## Emergency Regulation

**Title of Regulation:** 18VAC60-20. Regulations Governing Dental Practice (amending 18VAC60-20-10, 18VAC60-20-30, 18VAC60-20-107, 18VAC60-20-110, 18VAC60-20-120, 18VAC60-20-135).

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

**Effective Dates:** September 14, 2012, through September 13, 2013.

**Agency Contact:** Sandra Reen, Executive Director, Board of Dentistry, 9960 Mayland Drive, Suite 300, Richmond, VA 23233-1463, telephone (804) 367-4538, FAX (804) 527-4428, or email sandra.reen@dhp.virginia.gov.

### Preamble:

*Chapter 526 of the 2011 Acts of the Assembly requires the Board of Dentistry to revise its regulations to provide for permits for dentists who provide or administer conscious/moderate sedation or deep sedation/general anesthesia in a dental office. The legislation, which was introduced at the request of the board and the department, further requires that the board promulgate regulations to implement the provisions of the act to be effective within 280 days of its enactment. Therefore, there is an emergency situation as defined in § 2.2-4011 of the Administrative Process Act.*

*Dentists who meet current qualifications of education and training will be qualified for permits under the emergency regulations. The intent is to have some accountability for such qualifications to ensure that patients are being treated by dentists who are appropriately trained and experienced in sedation or anesthesia. Dentists who were self-certified (no formal education or training required) prior to January 1989 will be allowed to hold a temporary permit for two years to allow adequate time to obtain the appropriate qualifications for administration of conscious/moderate sedation.*

*Additionally, regulatory provisions relating to sedation and anesthesia previously adopted by the board during the periodic review of this regulation (18VAC60-20) are included in this action to set standards for safe administration and monitoring of sedation and anesthesia in a dental office. Those standards include essential emergency equipment, recordkeeping, emergency management, monitoring and sedation of pediatric patients. The goal of the amended regulation is to allow persons currently qualified to administer sedation and anesthesia in dental offices to continue to do so, provided they administer or delegate administration in a safe environment with appropriate personnel and equipment to monitor and to handle emergency situations. Once dentists have obtained sedation or anesthesia permits, the board will be able to periodically inspect dental offices to ensure there are qualified personnel and essential equipment and practices in place as necessary for patient health and safety.*

*The key provisions of the regulations are: (i) establishment of definitions for words and terms used in sedation and anesthesia regulations; (ii) general provisions for administration, including recordkeeping and requirements for emergency management; (iii) requirements for deep sedation/general anesthesia permits including training, delegation of administration emergency equipment, and monitoring and discharge of patients; and (iv) requirements for conscious/moderate sedation permits including training, delegation of administration emergency equipment, and monitoring and discharge of patients.*

### Part I

#### General Provisions

#### 18VAC60-20-10. Definitions.

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

"ADA" means the American Dental Association.

"Advertising" means a representation or other notice given to the public or members thereof, directly or indirectly, by a dentist on behalf of himself, his facility, his partner or associate, or any dentist affiliated with the dentist or his facility by any means or method for the purpose of inducing purchase, sale or use of dental methods, services, treatments, operations, procedures or products, or to promote continued or increased use of such dental methods, treatments, operations, procedures or products.

"Analgesia" means the diminution or elimination of pain in the conscious patient.

"Anxiolysis" means the diminution or elimination of anxiety through the use of pharmacological agents in a dosage that does not cause depression of consciousness.

"CODA" means the Commission on Dental Accreditation of American Dental Association.



~~"Conscious sedation" means a minimally depressed level of consciousness that retains the patient's ability to independently and continuously maintain an airway and respond appropriately to physical stimulation and verbal commands, produced by pharmacological or nonpharmacological methods, including inhalation, parenteral, transdermal or enteral, or a combination thereof.~~

"Conscious/moderate sedation" means a drug-induced depression of consciousness, during which patients respond purposefully to verbal commands, either alone or accompanied by light tactile stimulation. No interventions are required to maintain a patent airway and spontaneous ventilation is adequate. Cardiovascular function is usually maintained.

~~"Deep sedation/general anesthesia" "Deep sedation" means an induced state of depressed consciousness or unconsciousness accompanied by a complete or partial loss of protective reflexes, including the inability to continually maintain an airway independently and/or respond purposefully to physical stimulation or verbal command and is produced by a pharmacological or nonpharmacological method or a combination thereof~~ a drug-induced depression of consciousness during which patients cannot be easily aroused but respond purposefully following repeated or painful stimulation. The ability to independently maintain ventilatory function may be impaired. Patients may require assistance in maintaining a patent airway and spontaneous ventilation may be inadequate. Cardiovascular function is usually maintained.

"Dental assistant I" means any unlicensed person under the direction of a dentist who renders assistance for services provided to the patient as authorized under this chapter but shall not include an individual serving in purely a secretarial or clerical capacity.

"Dental assistant II" means a person under the direction and direct supervision of a dentist who is registered to perform reversible, intraoral procedures as specified in this chapter.

"Direct supervision" means that the dentist examines the patient and records diagnostic findings prior to delegating restorative or prosthetic treatment and related services to a dental assistant II for completion the same day or at a later date. The dentist prepares the tooth or teeth to be restored and remains immediately available to the dental assistant II for guidance or assistance during the delivery of treatment and related services. The dentist examines the patient to evaluate the treatment and services before the patient is dismissed.

"Direction" means the level of supervision that a dentist is required to exercise with a dental hygienist, a dental assistant I, or a dental assistant II or that a dental hygienist is required to exercise with a dental assistant to direct and oversee the delivery of treatment and related services.

"Enteral" means any technique of administration in which the agent is absorbed through the gastrointestinal tract or oral mucosa (i.e., oral, rectal, sublingual).

"General anesthesia" means a drug-induced loss of consciousness during which patients are not arousable, even by painful stimulation. The ability to independently maintain ventilatory function is often impaired. Patients often require assistance in maintaining a patent airway and positive pressure ventilation may be required because of depressed spontaneous ventilation or drug-induced depression of neuromuscular function. Cardiovascular function may be impaired.

"General supervision" means that a dentist completes a periodic comprehensive examination of the patient and issues a written order for hygiene treatment that states the specific services to be provided by a dental hygienist during one or more subsequent appointments when the dentist may or may not be present. The order may authorize the dental hygienist to supervise a dental assistant performing duties delegable to dental assistants I.

"Immediate supervision" means the dentist is in the operatory to supervise the administration of sedation or provision of treatment.

"Indirect supervision" means the dentist examines the patient at some point during the appointment, and is continuously present in the office to advise and assist a dental hygienist or a dental assistant who is (i) delivering hygiene treatment, (ii) preparing the patient for examination or treatment by the dentist or dental hygienist, or (iii) preparing the patient for dismissal following treatment.

"Inhalation" means a technique of administration in which a gaseous or volatile agent, including nitrous oxide, is introduced into the pulmonary tree and whose primary effect is due to absorption through the pulmonary bed.

"Inhalation analgesia" means the inhalation of nitrous oxide and oxygen to produce a state of reduced sensibility to pain without the loss of consciousness.

"Local anesthesia" means the loss of sensation or pain in the oral cavity or the maxillofacial or adjacent and associated structures generally produced by a topically applied or injected agent without depressing the level of consciousness.

"Minimal sedation" means a minimally depressed level of consciousness, produced by a pharmacological method, which retains the patient's ability to independently and continuously maintain an airway and respond normally to tactile stimulation and verbal command. Although cognitive function and coordination may be modestly impaired, ventilatory and cardiovascular functions are unaffected.

"Moderate sedation" (see meaning of conscious/moderate sedation).

"Monitoring" means to observe, interpret, assess, and record appropriate physiologic functions of the body during sedative procedures and general anesthesia appropriate to the level of sedation as provided in Part IV (18VAC20-60-107 et seq.) of this chapter.



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# Regulations

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"Mobile dental facility" means a self-contained unit in which dentistry is practiced that is not confined to a single building and can be transported from one location to another.

"Parenteral" means a technique of administration in which the drug bypasses the gastrointestinal tract (i.e., intramuscular, intravenous, intranasal, submucosal, subcutaneous, or intraocular).

"Portable dental operation" means a nonfacility in which dental equipment used in the practice of dentistry is transported to and utilized on a temporary basis at an out-of-office location, including patients' homes, schools, nursing homes, or other institutions.

"Radiographs" means intraoral and extraoral x-rays of hard and soft tissues to be used for purposes of diagnosis.

## **18VAC60-20-30. Other fees.**

A. Dental licensure application fees. The application fee for a dental license by examination, a license to teach dentistry, a full-time faculty license, or a temporary permit as a dentist shall be \$400. The application fee for dental license by credentials shall be \$500.

B. Dental hygiene licensure application fees. The application fee for a dental hygiene license by examination, a license to teach dental hygiene, or a temporary permit as a dental hygienist shall be \$175. The application fee for dental hygienist license by endorsement shall be \$275.

C. Dental assistant II registration application fee. The application fee for registration as a dental assistant II shall be \$100.

D. Wall certificate. Licensees desiring a duplicate wall certificate or a dental assistant II desiring a wall certificate shall submit a request in writing stating the necessity for a wall certificate, accompanied by a fee of \$60.

E. Duplicate license or registration. Licensees or registrants desiring a duplicate license or registration shall submit a request in writing stating the necessity for such duplicate, accompanied by a fee of \$20. If a licensee or registrant maintains more than one office, a notarized photocopy of a license or registration may be used.

F. Licensure or registration certification. Licensees or registrants requesting endorsement or certification by this board shall pay a fee of \$35 for each endorsement or certification.

G. Restricted license. Restricted license issued in accordance with § 54.1-2714 of the Code of Virginia shall be at a fee of \$285.

H. Restricted volunteer license. The application fee for licensure as a restricted volunteer dentist or dental hygienist issued in accordance with § 54.1-2712.1 or § 54.1-2726.1 of the Code of Virginia shall be \$25.

I. Returned check. The fee for a returned check shall be \$35.

J. Inspection fee. The fee for an inspection of a dental office shall be \$350 with the exception of a routine inspection of an

office in which the dentist has a conscious/moderate sedation permit or a deep sedation/general anesthesia permit.

K. Conscious/moderate sedation permit. The application fee for a permit to administer conscious/moderate sedation shall be \$100. The annual renewal fee shall be \$100 and shall be due by March 31. A late fee of \$35 shall be charged for renewal received after that date.

L. Deep sedation/general anesthesia permit. The application fee for a permit to administer deep sedation/general anesthesia shall be \$100. The annual renewal fee shall be \$100 and shall be due by March 31. A late fee of \$35 shall be charged for renewal received after that date.

## Part IV

### Anesthesia, Sedation and Analgesia

## **18VAC60-20-107. General provisions.**

A. This part (18VAC60-20-107 et seq.) shall not apply to:

1. The administration of local anesthesia in dental offices; or
2. The administration of anesthesia in (i) a licensed hospital as defined in § 32.1-123 of the Code of Virginia or state-operated hospitals or (ii) a facility directly maintained or operated by the federal government.

B. Appropriateness of administration of general anesthesia or sedation in a dental office.

1. Anesthesia and sedation may be provided in a dental office for patients who are Class I and II as classified by the American Society of Anesthesiologists (ASA).

2. Conscious sedation, deep sedation or general anesthesia shall not be provided in a dental office for patients in ASA risk categories of Class IV and V.

3. Patients in ASA risk category Class III shall only be provided general anesthesia, deep sedation, conscious/moderate sedation, or minimal sedation by:

- a. A dentist after he has documented a consultation with their primary care physician or other medical specialist regarding potential risk and special monitoring requirements that may be necessary; or
- b. An oral and maxillofacial surgeon after performing an evaluation and documenting the ASA risk assessment category of the patient and any special monitoring requirements that may be necessary.

C. Prior to administration of sedation or general anesthesia, the dentist shall discuss the nature and objectives of the anesthesia or sedation planned along with the risks, benefits and alternatives and shall obtain informed, written consent from the patient or other responsible party. The written consent shall be maintained in the patient record.

D. The determinant for the application of these rules shall be the degree of sedation or consciousness level of a patient that should reasonably be expected to result from the type and dosage of medication, the method of administration and the individual characteristics of the patient as documented in the

patient's record. The drugs and techniques used must carry a margin of safety wide enough to render an unintended reduction of or loss of consciousness unlikely factoring in titration, and the patient's age, weight and ability to metabolize drugs.

E. A dentist who is administering anesthesia or sedation to patients prior to June 29, 2005 shall have one year from that date to comply with the educational requirements set forth in this chapter for the administration of anesthesia or sedation. When conscious/moderate sedation, deep sedation or general anesthesia is administered, the patient record shall also include:

1. Notation of the patient's American Society of Anesthesiologists classification;
2. Review of medical history and current conditions;
3. Written informed consent for administration of sedation and anesthesia and for the dental procedure to be performed;
4. Pre-operative vital signs;
5. A record of the name, dose, and strength of drugs and route of administration including the administration of local anesthetics with notations of the time sedation and anesthesia were administered;
6. Monitoring records of all required vital signs and physiological measures recorded every five minutes; and
7. A list of staff participating in the administration, treatment, and monitoring including name, position, and assigned duties.

F. Pediatric patients. No sedating medication shall be prescribed for or administered to a child age 12 and under prior to his arrival at the dentist office or treatment facility.

G. Emergency management.

1. If a patient enters a deeper level of sedation than the dentist is qualified and prepared to provide, the dentist shall stop the dental procedure until the patient returns to and is stable at the intended level of sedation.
2. A dentist in whose office sedation or anesthesia is administered shall have written basic emergency procedures established and staff trained to carry out such procedures.

**18VAC60-20-110. Requirements for a permit to administer deep sedation/general anesthesia.**

A. Educational requirements After March 31, 2013, no dentist may employ or use deep sedation/general anesthesia in a dental office unless he has been issued a permit by the board. The requirement for a permit shall not apply to an oral and maxillofacial surgeon who maintains membership in the American Association of Oral and Maxillofacial Surgeons (AAOMS) and who provides the board with reports which result from the periodic office examinations required by AAOMS. Such an oral and maxillofacial surgeon shall be required to post a certificate issued by AAOMS.

B. To determine eligibility for a deep sedation/general anesthesia permit, a dentist shall submit the following:

1. A completed application form;
2. The application fee as specified in 18VAC60-20-30;
3. A copy of the certificate of completion of a CODA accredited program or other documentation of training content which meets the educational and training qualifications specified in subsection C of this section; and
4. A copy of current certification in ACLS or PALS as required in subsection C of this section.

C. Educational and training qualifications for a deep sedation/general anesthesia permit.

1. A dentist may employ or be issued a permit to use deep sedation/general anesthesia on an outpatient basis in a dental office by meeting one of the following educational criteria and by posting the educational certificate, in plain view of the patient, which verifies completion of the advanced training as required in subdivision 1 or 2 of this subsection. These requirements shall not apply nor interfere with requirements for obtaining hospital staff privileges.

1. Has completed a. Completion of a minimum of one calendar year of advanced training in anesthesiology and related academic subjects beyond the undergraduate dental school level in a training program in conformity with published guidelines by the American Dental Association (Guidelines for Teaching the Comprehensive Control of Anxiety and Pain in Dentistry) in effect at the time the training occurred; or
2. b. Completion of an American Dental Association approved a CODA accredited residency in any dental specialty which incorporates into its curriculum a minimum of one calendar year of full-time training in clinical anesthesia and related clinical medical subjects (i.e. medical evaluation and management of patients), comparable to those set forth in published guidelines by the American Dental Association for Graduate and Postgraduate Training in Anesthesia in effect at the time the training occurred.

After June 29, 2006, dentists 2. Dentists who administer deep sedation/general anesthesia shall hold current certification in advanced resuscitative techniques with hands-on simulated airway and megacode training for healthcare providers, including basic electrocardiographic interpretation, such as courses in Advanced Cardiac Life Support (ACLS) for Health Professionals or Pediatric Advanced Life Support (PALS) for Health Professionals and current Drug Enforcement Administration registration.

B. Exceptions.

1. A dentist who has not met the requirements specified in subsection A of this section may treat patients under deep sedation/general anesthesia in his practice if a qualified anesthesiologist or a dentist who fulfills the requirements

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# Regulations

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~~specified in subsection A of this section, is present and is responsible for the administration of the anesthetic.~~

~~2. If a dentist fulfills the requirements specified in subsection A of this section, he may employ the services of a certified nurse anesthetist.~~

~~C. D. Posting. Any dentist who utilizes deep sedation/general anesthesia shall post with the dental license and current registration with the Drug Enforcement Administration, the certificate of education deep sedation/general anesthesia permit or AAOMS certificate required under subsection A of this section.~~

## E. Delegation of administration.

1. A dentist not qualified to administer deep sedation and general anesthesia shall only use the services of a dentist with a current deep sedation/general anesthesia permit or an anesthesiologist to administer deep sedation or general anesthesia in a dental office. In a licensed outpatient surgery center, a dentist not qualified to administer deep sedation or general anesthesia shall use either a permitted dentist, an anesthesiologist, or a certified registered nurse anesthetist to administer deep sedation or general anesthesia.

2. A dentist qualified pursuant to subsection B of this section may administer or use the services of the following personnel to administer deep sedation or general anesthesia:

a. A dentist with a current deep sedation/anesthesia permit;

b. An anesthesiologist; or

c. A certified registered nurse anesthetist under the medical direction and indirect supervision of a dentist who meets the educational requirements of subsection B of this section.

3. Preceding the administration of deep sedation or general anesthesia, a permitted dentist may use the services of the following personnel under indirect supervision to administer local anesthesia to numb the injection or treatment site:

a. A dental hygienist with the training required in 18VAC60-20-81 to parenterally administer Schedule VI local anesthesia to persons age 18 or older; or

b. A dental hygienist, dental assistant, registered nurse, or licensed practical nurse to administer Schedule VI topical oral anesthetics.

~~D. F. Emergency equipment and techniques. A dentist who administers deep sedation/general anesthesia shall be proficient in handling emergencies and complications related to pain control procedures, including the maintenance of respiration and circulation, immediate establishment of an airway and cardiopulmonary resuscitation, and shall maintain the following emergency equipment in the dental facility~~

working order and immediately available to the areas where patients will be sedated and treated and will recover:

1. Full face mask for children or adults, as appropriate for the patient being treated;

2. Oral and nasopharyngeal ~~airways~~ airway management adjuncts;

3. Endotracheal tubes for children or adults, or both, with appropriate connectors or other appropriate airway management adjunct such as a laryngeal mask airway;

4. A laryngoscope with reserve batteries and bulbs and appropriately sized laryngoscope blades for children or adults, or both;

5. Source of delivery of oxygen under controlled positive pressure;

6. Mechanical (hand) respiratory bag;

7. Pulse oximetry and blood pressure monitoring equipment available and used in the treatment room;

8. Appropriate emergency drugs for patient resuscitation;

9. EKG monitoring equipment and temperature measuring devices;

10. Pharmacologic antagonist agents;

11. External defibrillator (manual or automatic); ~~and~~

12. For intubated patients, an End-Tidal CO<sup>2</sup> monitor;

13. Suction apparatus;

14. Throat pack; and

15. Precordial or pretracheal stethoscope.

## E. G. Monitoring requirements.

1. The treatment team for deep sedation/general anesthesia shall consist of the operating dentist, a second person to monitor and observe the patient and a third person to assist the operating dentist, all of whom shall be in the operatory with the patient during the dental procedure.

2. Monitoring of the patient under deep sedation/general anesthesia, including direct, visual observation of the patient by a member of the team, is to begin prior to induction of anesthesia and shall take place continuously during the dental procedure and recovery from anesthesia. The person who administered the anesthesia or another licensed practitioner qualified to administer the same level of anesthesia must remain on the premises of the dental facility until the patient has regained consciousness and is discharged.

3. Monitoring deep sedation/general anesthesia shall include the following: ~~recording and reporting of blood pressure, pulse, respiration and other vital signs to the attending dentist.~~

a. Baseline vital signs shall be taken and recorded prior to administration of any controlled drug at the facility to include: temperature, blood pressure, pulse, pulse oximeter, oxygen saturation, respiration, and heart rate.

b. The patient's vital signs shall be monitored, recorded every five minutes and reported to the treating dentist throughout the administration of controlled drugs and recovery. When depolarizing medications are administered temperature shall be monitored constantly.

c. A secured intravenous line must be established and maintained throughout the procedure.

H. Discharge requirements.

1. The patient shall not be discharged until the responsible licensed practitioner determines that the patient's level of consciousness, oxygenation, ventilation and circulation are satisfactory for discharge and vital signs have been taken and recorded.

2. Postoperative instructions shall be given verbally and in writing. The written instructions shall include a 24-hour emergency telephone number for the dental practice.

3. Patients shall be discharged with a responsible individual who has been instructed with regard to the patient's care.

**18VAC60-20-120. Requirements for a permit to administer conscious sedation.**

A. After March 31, 2013, no dentist may employ or use conscious/moderate sedation in a dental office unless he has been issued a permit by the board. The requirement for a permit shall not apply to an oral and maxillofacial surgeon who maintains membership in the American Association of Oral and Maxillofacial Surgeons (AAOMS) and who provides the board with reports which result from the periodic office examinations required by AAOMS. Such an oral and maxillofacial surgeon shall be required to post a certificate issued by AAOMS.

B. Automatic qualification. Dentists ~~qualified~~ who hold a current permit to administer deep sedation/general anesthesia may administer conscious/moderate sedation.

C. To determine eligibility for a conscious/moderate sedation permit, a dentist shall submit the following:

1. A completed application form indicating one of the following permits for which the applicant is qualified:

- a. Conscious/moderate sedation by any method;
- b. Conscious/moderate sedation by enteral administration only; or
- c. Temporary conscious/moderate sedation permit (may be renewed one time);

2. The application fee as specified in 18VAC60-20-30;

3. A copy of a transcript, certification or other documentation of training content which meets the educational and training qualifications as specified in subsection D or E of this section, as applicable; and

4. A copy of current certification in ACLS or PALS as required in subsection F of this section.

~~B. D. Educational requirements for administration of a permit to administer conscious/moderate sedation by any method.~~

1. A dentist may be issued a conscious/moderate sedation permit to employ or use any method of conscious sedation by meeting one of the following criteria:

a. Completion of training for this treatment modality according to guidelines published by the American Dental Association (Guidelines for Teaching the Comprehensive Control of Anxiety and Pain in Dentistry) in effect at the time the training occurred, while enrolled at an accredited dental program or while enrolled in a post-doctoral university or teaching hospital program; or

b. Completion of ~~an approved~~ a continuing education course, offered by a provider approved in 18VAC60-20-50, and consisting of 60 hours of didactic instruction plus the management of at least 20 patients per participant, demonstrating competency and clinical experience in parenteral conscious sedation and management of a compromised airway. The course content shall be consistent with guidelines published by the American Dental Association (Guidelines for Teaching the Comprehensive Control of Anxiety and Pain in Dentistry) in effect at the time the training occurred.

2. A dentist who was self-certified in anesthesia and conscious sedation prior to January 1989 may be issued a temporary conscious/moderate sedation permit to continue to administer only conscious sedation until September 14, 2014. After September 14, 2014, a dentist shall meet the requirements for and obtain a conscious/moderate sedation permit by any method or by enteral administration only.

~~C. E. Educational requirement for enteral administration of conscious sedation only. A dentist may be issued a conscious/moderate sedation permit to only administer conscious sedation by an enteral method if he has completed ~~an approved~~ a continuing education program, offered by a provider approved in 18VAC60-20-50, of not less than 18 hours of didactic instruction plus 20 clinically-oriented experiences in enteral and/or combination inhalation-enteral conscious sedation techniques. The course content shall be consistent with the guidelines published by the American Dental Association (Guidelines for Teaching the Comprehensive Control of Anxiety and Pain in Dentistry) in effect at the time the training occurred. The certificate of completion and a detailed description of the course content must be maintained.~~

~~D. F. Additional training required. After June 29, 2006, dentists Dentists who administer conscious sedation shall hold current certification in advanced resuscitation techniques with hands-on simulated airway and megacode training for health care providers, including basic electrocardiographic interpretation, such as Advanced Cardiac Life Support (ACLS) for Health Professionals or Pediatric Advanced Life~~

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# Regulations

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~~Support (PALS) for Health Professionals as evidenced by a certificate of completion posted with the dental license, and current registration with the Drug Enforcement Administration.~~

G. Posting. Any dentist who utilizes conscious/moderate sedation shall post with the dental license and current registration with the Drug Enforcement Administration, the conscious/moderate sedation permit required under subsection A of this section and issued in accordance with subsection C of this section or the AAOMS certificate issued to an oral and maxillofacial surgeon.

H. Delegation of administration.

1. A dentist not qualified to administer conscious/moderate sedation shall only use the services of a permitted dentist or an anesthesiologist to administer such sedation in a dental office. In a licensed outpatient surgery center, a dentist not qualified to administer conscious/moderate sedation shall use either a permitted dentist, an anesthesiologist, or a certified registered nurse anesthetist to administer such sedation.

2. A qualified dentist may administer or use the services of the following personnel to administer conscious/moderate sedation:

a. A dentist with the training required by subsection D of this section to administer by an enteral method;

b. A dentist with the training required by subsection C of this section to administer by any method;

c. An anesthesiologist;

d. A certified registered nurse anesthetist under the medical direction and indirect supervision of a dentist who meets the education and training requirements of subsection C or D of this section; or

e. A registered nurse upon his direct instruction and under the immediate supervision of a dentist who meets the education and training requirements of subsection C of this section.

3. If minimal sedation is self-administered by or to a patient age 13 or above before arrival at the dental office, the dentist may only use the personnel listed in subdivision 2 of this subsection to administer local anesthesia. No sedating medication shall be prescribed for or administered to a child age 12 and under prior to his arrival at the dentist office or treatment facility.

4. Preceding the administration of conscious/moderate sedation, a qualified dentist may use the services of the following personnel under indirect supervision to administer local anesthesia to numb the injection or treatment site:

a. A dental hygienist with the training required by 18VAC60-20-81 to parenterally administer Schedule VI local anesthesia to persons age 18 or older; or

b. A dental hygienist, dental assistant, registered nurse, or licensed practical nurse to administer Schedule VI topical oral anesthetics.

~~E. I. Emergency equipment and techniques. A dentist who administers conscious sedation shall be proficient in handling emergencies and complications related to pain control procedures, including the maintenance of respiration and circulation, immediate establishment of an airway and cardiopulmonary resuscitation, and shall maintain the following emergency airway equipment in the dental facility working order and immediately available to the areas where patients will be sedated and treated and will recover:~~

~~1. Full face mask for children or adults, as appropriate for the patient being treated;~~

~~2. Oral and nasopharyngeal ~~airways~~ airway management adjuncts;~~

~~3. Endotracheal tubes for children or adults, or both, with appropriate connectors or other appropriate airway management adjunct such as a laryngeal mask airway and a laryngoscope with reserve batteries and bulbs and appropriately sized laryngoscope blades for children or adults, or both. In lieu of a laryngoscope and endotracheal tubes, a dentist may maintain airway adjuncts designed for the maintenance of a patent airway and the direct delivery of positive pressure oxygen;~~

~~4. Pulse oximetry;~~

~~5. Blood pressure monitoring equipment;~~

~~6. Pharmacologic antagonist agents;~~

~~7. Source of delivery of oxygen under controlled positive pressure;~~

~~8. Mechanical (hand) respiratory bag; and~~

~~9. Appropriate emergency drugs for patient resuscitation;~~

~~10. Defibrillator;~~

~~11. Electrocardiographic monitor;~~

~~12. Suction apparatus;~~

~~13. Temperature measuring device;~~

~~14. Throat pack; and~~

~~15. Precordial and pretracheal stethoscope.~~

~~E. J. Monitoring requirements.~~

~~1. The administration team for conscious sedation shall consist of the operating dentist and a second person to assist, monitor and observe the patient. Both shall be in the operatory with the patient throughout the dental procedure.~~

~~2. Monitoring of the patient under conscious sedation, including direct, visual observation of the patient by a member of the team, is to begin prior to administration of sedation, or if medication is self-administered by the patient, when the patient arrives at the dental office and shall take place continuously during the dental procedure and recovery from sedation. The person who administers the sedation or another licensed practitioner qualified to~~

administer the same level of sedation must remain on the premises of the dental facility until the patient is responsive and is discharged.

3. Monitoring conscious/moderate sedation shall include the following:

a. Baseline vital signs shall be taken and recorded prior to administration of any controlled drug at the facility and prior to discharge.

b. Blood pressure, oxygen saturation, pulse and heart rate shall be monitored continually during the administration and recorded every five minutes.

c. Monitoring of the patient under moderate sedation is to begin prior to administration of sedation, or, if pre-medication is self-administered by the patient, immediately upon the patient's arrival at the dental office and shall take place continuously during the dental procedure and recovery from sedation. The person who administers the sedation or another licensed practitioner qualified to administer the same level of sedation must remain on the premises of the dental facility until the patient is evaluated and is discharged.

#### K. Discharge requirements.

1. The patient shall not be discharged until the responsible licensed practitioner determines that the patient's level of consciousness, oxygenation, ventilation, and circulation are satisfactory for discharge and vital signs have been taken and recorded.

2. Postoperative instructions shall be given verbally and in writing. The written instructions shall include a 24-hour emergency telephone number of the dental practice.

3. Patients shall be discharged with a responsible individual who has been instructed with regard to the patient's care.

#### **18VAC60-20-135. Ancillary personnel.**

After June 29, 2006, dentists Dentists who employ ancillary personnel to assist in the administration and monitoring of any form of conscious/moderate sedation or deep sedation/general anesthesia shall maintain documentation that such personnel have:

1. Minimal training resulting in current certification in basic resuscitation techniques, with hands-on airway training for healthcare providers, such as Basic Cardiac Life Support for Health Professionals or ~~an approved~~, a clinically oriented course devoted primarily to responding to clinical emergencies offered by an approved provider of continuing education as set forth in 18VAC60-20-50 C; or

2. Current certification as a certified anesthesia assistant (CAA) by the American Association of Oral and Maxillofacial Surgeons or the American Dental Society of Anesthesiology (ADSA).

VA.R. Doc. No. R13-2984; Filed September 5, 2012, 2:41 p.m.

## **BOARD OF FUNERAL DIRECTORS AND EMBALMERS**

### **Emergency Regulation**

**Title of Regulation: 18VAC65-20. Regulations of the Board of Funeral Directors and Embalmers (amending 18VAC65-20-436).**

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

**Effective Dates:** October 1, 2012, through September 30, 2013.

**Agency Contact:** Lisa Russell Hahn, Executive Director, Board of Funeral Directors and Embalmers, 9960 Mayland Drive, Suite 300, Richmond, VA 23233-1463, telephone (804) 367-4424, FAX (804) 527-4637, or email lisa.hahn@dhp.virginia.gov.

#### **Preamble:**

*Chapter 377 of the 2010 Acts of the Assembly provided the specific mandate to adopt regulations for identification of human remains as a prerequisite for cremation. The second enactment requires that the board promulgate regulations to implement the provisions of the act to be effective within 280 days of its enactment. Therefore, there is an "emergency situation" as defined in § 2.2-4011 of the Administrative Process Act.*

*The key provisions of the amended regulation are guidance on the identifiers that may be used for visual identification of the remains and the resources available to achieve positive identification if visual identification is not feasible.*

*In order to ensure authorization for cremation can be obtained in accordance with § 54.1-2818.1 as amended in 2010 and in a timely manner, the proposed regulation expands on the statutory mandate for visual identification, or if that is not feasible, positive identification. Visual identification may be accomplished by viewing unique identifiers or markings (tattoos, birth marks, etc.). If positive identification must be used, a crematory may consult with law enforcement for fingerprints, DNA, etc., with the local medical examiner, or with medical personnel at a hospital or other facility. With the amendments the board has adopted, the statute can be more clearly implemented and families or designated persons are able to achieve closure in a more humanely and timely manner. Proper identification of human remains prior to cremation is essential to the health, safety, and welfare of the public because it is necessary to ensure that misidentified or unidentified persons are not cremated. Cremation eliminates the possibility that a lost loved one could later be identified or that the remains may provide evidence in a criminal investigation.*

**18VAC65-20-436. Standards for registered crematories or funeral establishments that operate a crematory.**

A. Authorization to cremate.

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# Regulations

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1. In accordance with § 54.1-2818.1 of the Code of Virginia, a crematory shall require a cremation authorization form executed in person or electronically in a manner that provides a copy of an original signature of the next-of-kin or his representative, who may be any person designated to make arrangements for the decedent's burial or the disposition of his remains pursuant to § 54.1-2825 of the Code of Virginia; an agent named in an advance directive pursuant to § 54.1-2984; or a sheriff, upon court order, if no next-of-kin, designated person, or agent is available.

2. The cremation authorization form shall include an attestation of visual identification of the deceased from a viewing of the remains or a photograph signed by the person making the identification. Visual identification may be made by viewing unique identifiers or markings on the remains. The identification attestation shall either be given on the cremation authorization form or on an identification form attached to the cremation authorization form.

3. In the event visual identification is not feasible, a crematory may use other positive identification of the deceased in consultation with law enforcement, a medical examiner, or medical personnel as a prerequisite for cremation pursuant to § 54.1-2818.1 of the Code of Virginia.

B. Standards for cremation. The following standards shall be required for every crematory:

1. Every crematory shall provide evidence at the time of an inspection of a permit to operate issued by the Department of Environmental Quality (DEQ).

2. A crematory shall not knowingly cremate a body with a pacemaker, defibrillator or other potentially hazardous implant in place.

3. A crematory shall not cremate the human remains of more than one person simultaneously in the same retort, unless the crematory has received specific written authorization to do so from the person signing the cremation authorization form.

4. A crematory shall not cremate nonhuman remains in a retort permitted by DEQ for cremation of human remains.

5. Whenever a crematory is unable to cremate the remains within 24 hours upon taking custody thereof, the crematory shall maintain the remains in refrigeration at approximately 40° Fahrenheit or less, unless the remains have been embalmed.

C. Handling of human remains.

1. Human remains shall be transported to a crematory in a cremation container and shall not be removed from the container unless the crematory has been provided with written instructions to the contrary by the person who signed the authorization form. A cremation container shall substantially meet all the following standards:

a. Be composed of readily combustible materials suitable for cremation;

b. Be able to be closed in order to provide complete covering for the human remains;

c. Be resistant to leakage or spillage; and

d. Be rigid enough for handling with ease.

2. No crematory shall require that human remains be placed in a casket before cremation nor shall it require that the cremains be placed in a cremation urn, cremation vault or receptacle designed to permanently encase the cremains after cremation. Cremated remains shall be placed in a plastic bag inside a rigid container provided by the crematory or by the next-of-kin for return to the funeral establishment or to the next-of-kin. If cremated remains are placed in a biodegradable container, a biodegradable bag shall be used. If placed in a container designed for scattering, the cremated remains may be placed directly into the container if the next-of-kin so authorized in writing.

3. The identification of the decedent shall be physically attached to the remains and appropriate identification placed on the exterior of the cremation container. The crematory operator shall verify the identification on the remains with the identification attached to the cremation container and with the identification attached to the cremation authorization. The crematory operator shall also verify the identification of the cremains and place evidence of such verification in the cremation record.

D. Recordkeeping. A crematory shall maintain the records of cremation for a period of three years from the date of the cremation that indicate the name of the decedent, the date and time of the receipt of the body, and the date and time of the cremation and shall include:

1. The cremation authorization form signed by the person authorized by law to dispose of the remains and the form on which the next-of-kin or the person authorized by § 54.1-2818.1 of the Code of Virginia to make the identification has made a visual identification of the deceased or evidence of positive identification if visual identification is not feasible;

2. The permission form from the medical examiner;

3. The DEQ permit number of the retort used for the cremation and the name of the retort operator; and

4. The form verifying the release of the cremains, including date and time of release, the name of the person and the entity to whom the cremains were released and the name of the decedent.

VA.R. Doc. No. R13-2543; Filed September 11, 2012, 1:06 p.m.

**BOARD OF FUNERAL DIRECTORS AND  
EMBALMERS**

**Fast-Track Regulation**

**Title of Regulation: 18VAC65-30. Regulations for Preneed Funeral Planning (amending 18VAC65-30-110, 18VAC65-30-230).**

**Statutory Authority: §§ 54.1-2400 and 54.1-2803 of the Code of Virginia.**

**Public Hearing Information: No public hearings are scheduled.**

**Public Comment Deadline: November 7, 2012.**

**Effective Date: November 23, 2012.**

**Agency Contact: Lisa Russell Hahn, Executive Director, Board of Funeral Directors and Embalmers, 9960 Mayland Drive, Suite 300, Richmond, VA 23233-1463, telephone (804) 367-4424, FAX (804) 527-4637, or email [lisa.hahn@dhp.virginia.gov](mailto:lisa.hahn@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 of the Board of Funeral Directors and Embalmers to promulgate regulations.**

In addition to the general powers and duties of a health regulatory board, the Board of Funeral Directors and Embalmers has specific statutory authority to regulate preneed trust accounts in § 54.1-2803 of the Code of Virginia.

**Purpose: The goal of the proposal is to eliminate confusion and inconsistency in the regulations for preneed funeral planning and to provide clear guidance to consumers about the termination of an irrevocable trust agreement. The proposed regulation will protect the welfare of citizens who are consumers of preneed planning.**

**Rationale for Using Fast-Track Process: Since there is inconsistency between the regulation in 18VAC65-30-110 and the content of disclosures in 18VAC65-30-230, the reference to the applicable code section on termination or modification of a noncharitable trust should be clarifying and eliminate the confusion about irrevocable trusts. Therefore, the clarification should not be controversial because it is consistent with the current law.**

**Substance: 18VAC65-30-110 and 18VAC65-30-230 are amended to clarify that an irrevocable trust funding a preneed funeral contract may not be cancelled or modified except in accordance with current law on trusts as stated in § 64.2-729 of the Code of Virginia.**

**Issues: The primary advantage to the public is clarity in the regulations and inclusion of the statutory citation for termination or modification of an irrevocable trust. There are no disadvantages to the public.**

There are no advantages or disadvantages to the board; the amendments do not affect the regulation of funeral directors but are applicable to their business dealings with consumers.

**Department of Planning and Budget's Economic Impact Analysis:**

Summary of the Proposed Amendments to Regulation. The current regulations include some text concerning the termination of irrevocable trusts that conflicts with the Code of Virginia. The Board of Funeral Directors and Embalmers (Board) proposes to amend the language so as to be consistent with the Code.

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

Estimated Economic Impact. The current regulations state that "If you have funded your preneed arrangement through an irrevocable trust you will not be able to cancel the trust agreement or receive a refund. An irrevocable trust is one that cannot be cancelled." This conflicts with Code of Virginia Section 64.2-729 which permits the canceling of such agreements under specified circumstances. The Board proposes to amend the regulatory language so that it is consistent with the Code. Since when the Code of Virginia and regulations are in conflict the Code applies, the proposed amendments do not change the effective law. The proposed amendments will be beneficial though, since the current language may mislead the public as toward the actual law in effect.

Businesses and Entities Affected. The proposed amendments affect potential purchasers and sellers of preneed policies funded by trust agreements, and funeral establishments named beneficiaries of such trusts. According to the Department of Health Professions, there are approximately 510 funeral establishments in Virginia.

Localities Particularly Affected. The proposed amendments do not disproportionately affect particular localities.

Projected Impact on Employment. The proposal amendments are unlikely to significantly affect employment.

Effects on the Use and Value of Private Property. The proposed amendments are unlikely to significantly affect the use and value of private property.

Small Businesses: Costs and Other Effects. The proposed amendments are unlikely to significantly affect small businesses.

Small Businesses: Alternative Method that Minimizes Adverse Impact. The proposed amendments are unlikely to significantly affect small businesses.

Real Estate Development Costs. The proposed amendments are unlikely to significantly affect real estate development costs.

Legal Mandate. The Department of Planning and Budget (DPB) has analyzed the economic impact of this proposed regulation in accordance with § 2.2-4007.04 of the Administrative Process Act and Executive Order Number 14 (10). Section 2.2-4007.04 requires that such economic impact analyses include, but need not be limited to, the projected number of businesses or other entities to whom the regulation



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# Regulations

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would apply, the identity of any localities and types of businesses or other entities particularly affected, the projected number of persons and employment positions to be affected, the projected costs to affected businesses or entities to implement or comply with the regulation, and the impact on the use and value of private property. Further, if the proposed regulation has adverse effect on small businesses, § 2.2-4007.04 requires that such economic impact analyses include (i) an identification and estimate of the number of small businesses subject to the regulation; (ii) the projected reporting, recordkeeping, and other administrative costs required for small businesses to comply with the regulation, including the type of professional skills necessary for preparing required reports and other documents; (iii) a statement of the probable effect of the regulation on affected small businesses; and (iv) a description of any less intrusive or less costly alternative methods of achieving the purpose of the regulation. The analysis presented above represents DPB's best estimate of these economic impacts.

Agency's Response to Economic Impact Analysis: The Board of Funeral Directors and Embalmers concurs with the analysis of the Department of Planning and Budget for amendments to 18VAC65-30-10, relating to termination of irrevocable trusts for preneed funeral contracts.

Summary:

*The proposed amendments specify that after 30 days an irrevocable trust established to fund a preneed funeral contract may only be modified or terminated by a court order in accordance with § 64.2-729 of the Code of Virginia. Currently, the regulations are inconsistent, stating in 18VAC65-30-110 that the contract can be cancelled and the buyer can receive a refund if all parties agree and in 18VAC65-30-230 that an irrevocable trust is one that cannot be terminated.*

**18VAC65-30-110. Cancellation or transfer of contract.**

A. Any person who makes payment under this contract may terminate the agreement at any time prior to the time for which the services or supplies are furnished.

B. If the contract buyer terminates the contract within 30 days of the execution of the contract, the contract buyer shall be refunded all consideration paid or delivered and any interest or income accrued on it.

C. If the contract buyer uses a revocable trust as the funding source and terminates the contract after 30 days of the execution of the contract, the contract buyer shall be refunded:

1. All consideration paid or delivered on nonguaranteed items;
2. At least 90% of all consideration paid for guaranteed items; and
3. All interest or income accrued on it.

D. If the contract buyer uses an irrevocable trust as the funding source ~~and terminates the contract after 30 days of its~~

~~execution, the contract buyer may be eligible for a refund only with the agreement of the contract buyer, the contract beneficiary, and the trustee is not able to cancel the trust after 30 days following its execution except in accordance with § 64.2-729 of the Code of Virginia.~~

**18VAC65-30-230. Content of disclosure statements.**

The following disclosure statements shall be provided as a part of any contract used for preneed funeral planning:

We are required by law and/or the Virginia Board of Funeral Directors and Embalmers to provide access to and the opportunity for you to read the following information to assist you in preplanning. A question and answer format is used for clarity and includes the most commonly asked questions.

**PRENEED CONTRACTS**

-- Is there more than one type of preneed agreement?

Yes. Guaranteed contracts mean that the costs of certain individual items or the cost of the total package will never be more to your family or estate. Nonguaranteed means just the opposite. (See the section entitled "General Funding Information" for more information on guaranteed and nonguaranteed costs.)

Contracts may be funded by insurance/annuity policies, trusts, or transfer of real estate/personal property.

-- What are my protections?

You should take your completed preneed contract home before you sign it and review it with your family or your legal advisor. You have a right to this review before you sign the contract or pay any money.

You should also read carefully the information in this disclosure statement. If you have any questions, contact the seller for more information or contact your legal advisor.

**CANCELLATION**

-- Can I cancel my preneed agreement if I change my mind? Will I get my money back?

You may cancel payment for supplies or services within 30 days after signing the agreement. If you funded your preneed arrangement through a trust, the contract seller will refund all the money you have paid plus any interest or income you have earned.

If you funded your preneed arrangement through a revocable trust and you cancel the preneed contract AFTER the 30-day deadline, you will be refunded all of your money on the items that are not guaranteed and 90% of all your money on the items that are guaranteed. You will also receive any interest or income on that amount. A revocable trust is a trust that you can cancel.

There may be a penalty to withdraw money from a revocable trust account which has already been established in your name. If there is, your contract will give you this information. (See the first question under the section entitled "Payment" below.)

If you have funded your preneed arrangement through an irrevocable trust you will not be able to cancel the trust agreement or receive a refund. ~~An irrevocable trust is one that cannot be cancelled after 30 days following its execution except in accordance with § 64.2-729 of the Code of Virginia.~~

If you funded your preneed arrangement through an insurance policy/annuity contract which will be used at the time of your death to purchase the supplies and services you have selected, you will need to pay careful attention to the cancellation terms and conditions of the policy. You may not be eligible for a refund.

## PAYMENT

-- What happens to my money after the contract is signed?

Your money will be handled in one of several ways. It may be deposited in a separate trust account in your name. The trust account will list a trustee who will be responsible for handling your account. The funeral home you have selected as your beneficiary will also be listed. You have the right to change the funeral home and the trustee of your account prior to receiving the supplies and services under the preneed contract.

Your money may be used to purchase a preneed life insurance policy which may be used to pay for your arrangements upon your death. The proceeds of the policy will be assigned to the funeral home of your choice. You may change the funeral home assignment at any time prior to receiving the supplies and services under the preneed contract.

You may decide to choose a life insurance policy or a trust account that requires regular premium payments and not have to make an up-front, lump sum payment.

-- May I pay for goods and services with real estate or personal property?

Yes. When you pay for these supplies and services in whole or in part with any real estate you may own, the preneed contract that you sign will be attached to the deed on the real estate and the deed will be recorded in the clerk's office of the circuit court in the city or county where the real estate is located.

If you pay for goods and services with personal property other than cash or real estate, the contract seller, will declare in writing that the property will be placed in a trust until the time of your death and will give you written information on all the terms, conditions, and considerations surrounding the trust. The contract seller will confirm in writing that he has received property.

You may decide not to transfer the title of the personal property to the contract seller of your preneed contract. In this situation, you will have to submit information to the contract seller in writing that you are giving him the property without a title, and describe the property and where it will be kept until the time of your death.

In either case, the written statements will be recorded in the clerk's office of the circuit court of the city or county in which you live. The written statement does not have to be a separate document.

## GENERAL FUNDING INFORMATION

-- If the prices of the goods and services are affected by inflation between now and my death, will the funding I choose be adjusted accordingly?

There is a possibility that the funding may fail to keep up with inflation. This could mean that the funding you choose could have insufficient value to cover all expenses.

-- What happens if my funding is not enough to cover the full cost of these arrangements?

If the entire funeral or specific items in the agreement are guaranteed by the contract seller, your family or estate will not have to pay any more for those items provided that you have paid the grand total in full and all interest earned is allowed to accumulate in your account. However, if you have not paid the account in full and have not allowed the interest to accumulate in the account and any items increase in price, your family or estate would be responsible for the extra amount if the funds are not sufficient. In some situations where you pay toward your funding with regular premiums rather than in one lump sum, your account may not be enough at the time of your death to cover everything.

-- What happens to the extra money if my funding is more than what is needed to pay for these arrangements?

Sometimes, as explained in the answer above, your funding account may not have had the time to grow sufficiently before your death to cover items which are guaranteed in price to you, yet have increased in price for the funeral home.

After funeral expenses are paid, there may be money left over. Because of the ongoing risk that a funeral home takes in guaranteeing prices for you, the funeral home may not be required to return this excess money.

Some funding agreements and funeral homes, however, require that extra money be returned to the estate or family. Others do not. You should obtain information concerning this in writing before signing the preneed contract.

The answers to the following questions will depend upon the terms and conditions of the individual's funding and preneed agreements.

Please review your preneed contract and/or funding agreement for answers to these questions.

-- What happens to my preneed contract if I change my assignment from one funeral home to another?

(Funeral home shall place answer here)

-- What happens to my preneed contract if I change the beneficiary of my funding or the use of my proceeds from the funding.

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# Regulations

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If you make such changes, it could void your contract. You should request specific information from the contract seller and the funding arrangement.

-- What will happen to my preneed contract if I fail to make agreed to premium payments to my funding source?

(Funeral home shall place answer here)

-- Do I get any money back if I surrender or cancel my funding arrangements?

(Funeral home shall place answer here)

## TRUST ACCOUNT

-- If my money goes into a trust account, what information will I receive about that account?

If you want your money to go into a trust fund, the trust agreement must furnish you with information about the amount to be deposited into the account, the name of the trustee, information about what happens to the interest your trust account will earn, and information about your responsibility to file and pay taxes on that interest.

If there are filing expenses connected with your trust account, you will be notified what the expenses are and whether you or the contract seller is the responsible party for paying those.

-- What happens to the interest earned by the trust?

The interest earned by the trust may be handled in different ways by different trust arrangements. The interest may have to go back into your account if items on your contract are guaranteed. You may be responsible for reporting that interest to the Internal Revenue Service and paying taxes on it. You will be responsible to pay any taxes on the interest earned even if you cancel your trust account.

Some trust accounts cannot be cancelled.

There may be special fees deducted from your interest. However, you may still be responsible for paying taxes on the entire amount of interest earned before the fees were deducted. Please ask your contract seller for a written list of any fees so you will have a clear understanding about them before you sign the contract.

-- If I pay my trust in premium payments, what happens if I die before the grand total of the funeral has been placed in trust?

(Funeral home shall place answer here)

## CLAIMS AGAINST THIS CONTRACT

-- Can someone to whom I owe money make a claim against the money, personal property, or real estate that I have used to pay for this contract?

No. This money or property cannot be used to settle a debt, a bankruptcy, or resolve a claim. These funds cannot be garnished.

-- Can the money or property be taxed?

No. Currently, interest earned on the money you deposit in a trust, savings account, or the value of the property you

used for payment can be taxed but not the original amount which you invested. Interest earned on annuities is generally deferred until withdrawal.

## GENERAL GOODS AND SERVICES

-- If I choose goods and services that might not be available at the time of my death, what is the provider required to do?

The funeral home which you select is required to furnish supplies and services that are similar in style and equal in value and quality if what you choose is no longer made or is not available at the time of your death.

Your representative or next-of-kin will have the right to choose the supplies or services to be substituted. However, if the substitute is more expensive than the item originally selected by you, your designee or next-of-kin would be responsible for paying the difference. Under no circumstances will the funeral establishment be allowed to substitute lesser goods and services than the ones you chose.

If, before your death, the funeral home goes out of business or is otherwise unable to fulfill its obligation to you under the preneed contract, you have the right to use the proceeds at the funeral home of your choice.

If the inability to provide services does not become apparent until the time of your death, the individual that you named as your designee could use the funds for services at another funeral home.

-- May I choose the exact item I want now and have the funeral home store it until my death?

If the funeral home or supplier has a storage policy you may ask for this service. If the funeral home or contract seller agrees to store these items, the risk of loss or damage shall be upon the funeral home during the storage period.

For example, what would happen if you select a casket which is in-stock at the time you make these arrangements and the funeral home or supplier agrees to store it for you in their warehouse and: (i) damage occurs, (ii) the funeral home or supplier goes out of business, (iii) the funeral home or supplier is sold, etc.? You need to be assured in writing of protection in these types of situations.

-- What happens if I choose to have a unique service that is not customary or routine in my community? Must the funeral home comply with my wishes?

The funeral home which you have chosen to conduct your service may be able to only provide certain types of services. They may not be able to fulfill your request. If there is a restriction on what they can provide, you will be notified in writing before you sign the preneed contract.

If the funeral home agrees in writing before you sign the contract to perform such services, the funeral home shall provide you a written, itemized statement of fees which you will be charged.

-- Will the funeral home agree to transport my body to another area for burial?

Again, the funeral home may have restrictions on the distance they are willing to travel to conduct a burial. If restrictions apply, you will be notified in writing.

If the funeral home agrees in writing before you sign the contract to honor your wishes, the funeral home shall provide you a written, itemized statement of any penalties (fees) which you will be charged.

-- I may die and be buried in a city other than one where the funeral home that I select for my goods and services is located. Will the funeral home that I select under this contract deliver my merchandise to the city where I die and am to be buried?

This is entirely up to the funeral home to decide. If the funeral home has restrictions on this, they will notify you in writing. If they agree to ship merchandise to another area for your funeral, you will be notified before signing this contract of the fees involved if they can be determined and guaranteed at this time.

However, the preneed contract arrangements and funding is considered portable. This means that they are available for transfer from one locality to another. It is unusual for actual goods and merchandise to be transferred.

## PRICING

-- How will I know that the prices of items which I select are the same for everyone?

The funeral home maintains a general price list and a casket and outer burial container price list. Your contract seller will give this to you before you begin talking about arrangements. After your discussion is finished, you will be given a copy of your preneed contract on which charges will be listed. Charges will only be made for the items you select. If there are any legal or other requirements that mandate that you must buy any items you did not specifically ask for, the contract seller will explain the reason for the charges to you in writing.

You may ask a funeral home to purchase certain items or make special arrangements for you. If the funeral home charges you for these services, you will receive an explanation in writing. The charges to you for these services may be higher than if you or your family purchased them directly.

At the time of your death, your family or estate will be given an itemized statement which will list all of the specific charges.

-- What is meant by guaranteed and nonguaranteed prices?

Some contract sellers may agree that certain prices are guaranteed. Some may guarantee the price of the total package. Other funeral homes may not guarantee any prices.

Guaranteed prices are those that will not increase for your family or estate at the time of your death. Basically, this means that your funeral arrangement for those items will be covered by and will not exceed your funding and the interest it earns. Nonguaranteed prices are those which might increase or decrease. The nonguaranteed prices may be written in at the time of this contract with you understanding that the price is an estimate only and may increase or decrease. A settlement to that effect may have to be made with your family or representative after your death.

-- Can the contract seller and I negotiate a projected charge for the nonguaranteed items based on the rate of inflation?

It is entirely up to the contract seller to inform you of the funeral home policy in that regard.

## CASKETS AND CONTAINERS

-- Do I have to buy a vault or a container to surround the casket in the grave?

In most areas of the country, state and local laws do not require that you buy a container to surround the casket in the grave. However, many cemeteries ask that you have such a container to support the earth above the grave. Either a burial vault or a grave liner will satisfy if such requirements exist.

-- Is a casket required?

A casket is not required for direct cremation. If you want to arrange a direct cremation, you may use an unfinished wood box or an alternative container made of heavy cardboard or composition materials. You may choose a canvas pouch.

-- Do certain cemeteries and crematoriums have special requirements?

Particular cemeteries and crematoriums may have policies requiring that certain goods and services be purchased. If you decide not to purchase goods and services required by a particular cemetery or crematorium, you have the right to select another location that has no such policy.

## EMBALMING

-- Is embalming always required?

Except in certain special cases, embalming is not required by law. Embalming may be necessary, however, if you select certain funeral arrangements such as viewing or visitation with an open casket. You do not have to pay for embalming you did not approve if you select arrangements such as a direct cremation or immediate burial. If the funeral home must charge to conduct an embalming, your designee will be notified of the reasons in writing.

## ASSISTANCE

-- This is all very confusing to me. May I pick someone close to me to help with all of this? May this person also work with the funeral home to ensure that my wishes as written in the preneed contract are carried out?

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# Regulations

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You may designate in writing a person of your choice to work with the funeral home and contract seller either before or after your death to ensure that your wishes are fulfilled. You must sign the statement and have it notarized. The person that you designate must agree to this in writing. Under the laws governing preneed contracts, the individual whom you designate has final authority at the time of your death.

-- Where can I complain if I have a problem concerning my preneed contract, the contract seller, or the funeral home?

You may direct your complaints or concerns to:

The Board of Funeral Directors and Embalmers  
9960 Mayland Drive, Suite 300  
Richmond, Virginia 23233  
Telephone Number (804) 367-4479  
Toll Free Number 1-800-533-1560  
Fax: (804) 527-4413

V.A.R. Doc. No. R13-2386; Filed September 11, 2012, 2:43 p.m.

## BOARD OF MEDICINE

### Emergency Regulation

Title of Regulation: **18VAC85-150. Regulations Governing the Practice of Behavior Analysis (adding 18VAC85-150-10 through 18VAC85-150-200).**

Statutory Authority: §§ 54.1-2400 and 54.1-2957.16 of the Code of Virginia.

Effective Dates: September 19, 2012, through September 18, 2013.

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.

Preamble:

*Chapter 3 of the 2012 Acts of Assembly (House Bill 1106) mandates that the Board of Medicine promulgate regulations to implement the provisions of the act within 280 days of its enactment, which is November 13, 2012. The legislation defines the practice of behavior analysis and requires licensure for behavior analysts and assistant behavior analysts. The board is required to establish criteria for licensure and to promulgate regulations for applications, standards of practice, requirements and procedures for the supervision of assistant behavior analysts, and supervision of unlicensed individuals who assist in the provision of applied behavior analysis.*

## CHAPTER 150 REGULATIONS GOVERNING THE PRACTICE OF BEHAVIOR ANALYSIS

### Part I

#### General Provisions

#### **18VAC85-150-10. Definitions.**

A. The following words and terms when used in this chapter shall have the meanings ascribed to them in § 54.1-2900 of the Code of Virginia:

Board

Practice of behavior analysis

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

"BACB" means the Behavior Analyst Certification Board, Inc.

"BCBA®" means a Board Certified Behavior Analyst®.

"BCaBA®" means a Board Certified Assistant Behavior Analyst®.

#### **18VAC85-150-20. Public participation.**

A separate board regulation, 18VAC85-10, provides for involvement of the public in the development of all regulations of the Virginia Board of Medicine.

#### **18VAC85-150-30. Current name and address.**

Each licensee shall furnish the board his current name and address of record. All notices required by law or by this chapter to be given by the board to any such licensee shall be validly given when mailed to the latest address of record provided or served to the licensee. Any change of name or change in the address of record or public address, if different from the address of record, shall be furnished to the board within 30 days of such change.

#### **18VAC85-150-40. Fees.**

A. The following fees have been established by the board:

1. The initial fee for the behavior analyst license shall be \$130; for the assistant behavior analyst, it shall be \$70.

2. The fee for reinstatement of the behavior analyst license that has been lapsed for two years or more shall be \$180; for the assistant behavior analyst, it shall be \$90.

3. The fee for active license renewal for a behavior analyst shall be \$135; for any assistant behavior analyst, it shall be \$70. The fees for inactive license renewal shall be \$70 for a behavior analyst and \$35 for an assistant behavior analyst. Renewals shall be due in the birth month of the licensee in each odd-numbered year.

4. The additional fee for processing a late renewal application within one renewal cycle shall be \$50 for a behavior analyst and \$30 for an assistant behavior analyst.

5. The fee for a letter of good standing or verification to another state for a license shall be \$10.

6. The fee for reinstatement of licensure pursuant to § 54.1-2408.2 of the Code of Virginia shall be \$2,000.

7. The fee for a returned check shall be \$35.

8. The fee for a duplicate license shall be \$5.00, and the fee for a duplicate wall certificate shall be \$15.

B. Unless otherwise provided, fees established by the board shall not be refundable.

**Part II**

**Requirements for Licensure as a Behavior Analyst or an Assistant Behavior Analyst**

**18VAC85-150-50. Application requirements.**

An applicant for licensure shall submit the following on forms provided by the board:

1. A completed application and a fee as prescribed in 18VAC85-150-40.

2. Verification of certification as required in 18VAC85-150-60.

3. Verification of practice as required on the application form.

4. If licensed or certified in any other jurisdiction, verification that there has been no disciplinary action taken or pending in that jurisdiction.

5. Verification from the BACB on disciplinary action taken or pending by that body.

**18VAC85-150-60. Licensure requirement.**

An applicant for a license to practice as a behavior analyst or an assistant behavior analyst shall hold current certification as a BCBA® or a BCaBA® obtained by meeting qualifications and passage of the examination required for certification as a BCBA® or a BCaBA® by the BACB.

**Part III**

**Renewal and Reinstatement**

**18VAC85-150-70. Renewal of licensure.**

A. Every behavior analyst or assistant behavior analyst who intends to maintain an active license shall biennially renew his license each odd-numbered year during his birth month and shall:

1. Submit the prescribed renewal fee; and

2. Attest to having met the continuing education requirements of 18VAC85-150-100.

B. The license of a behavior analyst or assistant behavior analyst which has not been renewed by the first day of the month following the month in which renewal is required is lapsed. Practice with a lapsed license may be grounds for disciplinary action. A license that is lapsed for two years or less may be renewed by payment of the renewal fee, a late fee as prescribed in 18VAC85-150-40, and documentation of compliance with continuing education requirements.

**18VAC85-150-80. Inactive licensure.**

A behavior analyst or assistant behavior analyst who holds a current, unrestricted license in Virginia shall, upon a request on the renewal application and submission of the required fee, be issued an inactive license. The holder of an inactive license shall not be entitled to perform any act requiring a license to practice as a behavior analyst or assistant behavior analyst in Virginia.

**18VAC85-150-90. Reactivation or reinstatement.**

A. To reactivate an inactive license or to reinstate a license that has been lapsed for more than two years, a behavior analyst or assistant behavior analyst shall submit evidence of competency to return to active practice to include one of the following:

1. Information on continued practice in another jurisdiction as a licensed behavior analyst or a licensed assistant behavior analyst or with certification as a BCBA® or BCaBA® during the period in which the license has been inactive or lapsed;

2. Twelve hours of continuing education for each year in which the license has been inactive or lapsed, not to exceed three years; or

3. Recertification by passage of the BCBA® or the BCaBA® certification examination from the BACB.

B. To reactivate an inactive license, a behavior analyst or assistant behavior analyst shall pay a fee equal to the difference between the current renewal fee for inactive licensure and the renewal fee for active licensure.

C. To reinstate a license which has been lapsed for more than two years, a behavior analyst or assistant behavior analyst shall file an application for reinstatement and pay the fee for reinstatement of his licensure as prescribed in 18VAC85-150-40. The board may specify additional requirements for reinstatement of a license so lapsed to include education, experience, or reexamination.

D. A behavior analyst or assistant behavior analyst whose licensure has been revoked by the board and who wishes to be reinstated shall make a new application to the board, fulfill additional requirements as specified in the order from the board, and make payment of the fee for reinstatement of his licensure as prescribed in 18VAC85-150-40 pursuant to § 54.1-2408.2 of the Code of Virginia.

E. The board reserves the right to deny a request for reactivation or reinstatement to any licensee who has been determined to have committed an act in violation of § 54.1-2915 of the Code of Virginia or any provisions of this chapter.

**18VAC85-150-100. Continuing education requirements.**

A. In order to renew an active license, a behavior analyst shall attest to having completed 24 hours of continuing education and an assistant behavior analyst shall attest to having completed 16 hours of continuing education as

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# Regulations

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approved and documented by a sponsor recognized by the BACB within the last biennium.

B. A practitioner shall be exempt from the continuing education requirements for the first biennial renewal following the date of initial licensure in Virginia.

C. The practitioner shall retain in his records the completed form with all supporting documentation for a period of four years following the renewal of an active license.

B. The board shall periodically conduct a random audit of its active licensees to determine compliance. The practitioners selected for the audit shall provide all supporting documentation within 30 days of receiving notification of the audit.

C. Failure to comply with these requirements may subject the licensee to disciplinary action by the board.

D. The board may grant an extension of the deadline for continuing education requirements, for up to one year, for good cause shown upon a written request from the licensee prior to the renewal date.

F. The board may grant an exemption for all or part of the requirements for circumstances beyond the control of the licensee, such as temporary disability, mandatory military service, or officially declared disasters.

## Part IV Scope of Practice

### **18VAC85-150-110. Scope of practice.**

The practice of a behavior analyst includes:

1. Design, implementation, and evaluation of environmental modifications using the principles and methods of behavior analysis to produce socially significant improvement in human behavior, including the use of direct observation, measurement, and functional analysis of the relationship between environment and behavior; and

2. Supervision of licensed assistant behavior analysts and unlicensed personnel.

### **18VAC85-150-120. Supervisory responsibilities.**

A. The licensed behavior analyst is ultimately responsible and accountable for client care and outcomes under his clinical supervision.

B. There shall be a written supervisory agreement between the licensed behavior analyst and the licensed assistant behavior analyst that shall address:

1. The domains of competency within which services may be provided by the licensed assistant behavior analyst; and

2. The nature and frequency of the supervision of the practice of the licensed assistant behavior analyst by the licensed behavior analyst.

A copy of the written supervisory agreement shall be maintained by the licensed behavior analyst and the licensed

assistant behavior analyst and made available to the board upon request.

C. Delegation shall only be made if, in the judgment of the licensed behavior analyst, the task or procedures can be properly and safely performed by an appropriately trained assistant behavior analyst or other person, and the delegation does not jeopardize the health or safety of the client.

D. Supervision activities by the licensed behavior analyst include:

1. Direct, real-time observation of the supervisee implementing behavior analytic assessment and intervention procedures with clients in natural environments and/or training others to implement them, with feedback from the supervisor.

2. One-to-one real-time interactions between supervisor and supervisee to review and discuss assessment and treatment plans and procedures, client assessment and progress data and reports, published research, ethical and professional standards and guidelines, professional development needs and opportunities, and relevant laws, regulations, and policies.

3. Real-time interactions between a supervisor and a group of supervisees to review and discuss assessment and treatment plans and procedures, client assessment and progress data and reports, published research, ethical and professional standards and guidelines, professional development needs and opportunities, and relevant laws, regulations, and policies.

4. Informal interactions between supervisors and supervisees via telephone, electronic mail, and other written communication are encouraged but may not be considered formal supervision.

For the purposes of this subsection, "real-time" shall mean live and person-to-person.

E. The frequency and nature of supervision interactions are determined by the individualized assessment or treatment plans of the clients served by the licensed behavior analyst and the assistant behavior analyst, but shall occur not less than once every four weeks with each supervision session lasting no less than one hour.

### **18VAC85-150-130. Supervision of unlicensed personnel.**

A. Unlicensed personnel may be supervised by a licensed behavior analyst or a licensed assistant behavior analyst.

B. Unlicensed personnel may be utilized to perform:

1. Nonclient-related tasks including, but not limited to, clerical and maintenance activities and the preparation of the work area and equipment; and

2. Certain routine client-related tasks that, in the opinion of and under the supervision of a licensed behavior analyst or a licensed assistant behavior analyst, have no potential to adversely impact the client or the client's treatment plan and do not constitute the practice of behavior analysis.

Part V  
Standards of Professional Conduct

**18VAC85-150-140. Confidentiality.**

A practitioner shall not willfully or negligently breach the confidentiality between a practitioner and a client. A breach of confidentiality that is required or permitted by applicable law or beyond the control of the practitioner shall not be considered negligent or willful.

**18VAC85-150-150. Client records.**

A. Practitioners shall comply with the provisions of § 32.1-127.1:03 of the Code of Virginia related to the confidentiality and disclosure of client records.

B. Practitioners shall provide client records to another practitioner or to the client or his personal representative in a timely manner in accordance with provisions of § 32.1-127.1:03 of the Code of Virginia.

C. Practitioners shall properly manage and keep timely, accurate, legible, and complete client records.

D. Practitioners who are employed by a health care institution, educational institution, school system or other entity in which the individual practitioner does not own or maintain his own records shall maintain client records in accordance with the policies and procedures of the employing entity.

E. Practitioners who are self-employed or employed by an entity in which the individual practitioner owns and is responsible for client records shall:

1. Maintain a client record for a minimum of six years following the last client encounter with the following exceptions:

a. Records of a minor child shall be maintained until the child reaches the age of 18 or becomes emancipated, with a minimum time for record retention of six years from the last client encounter regardless of the age of the child;

b. Records that have previously been transferred to another practitioner or health care provider or provided to the client or his legally authorized representative; or

c. Records that are required by contractual obligation or federal law may need to be maintained for a longer period of time.

2. Post information or in some manner inform all clients concerning the time frame for record retention and destruction. Client records shall only be destroyed in a manner that protects client confidentiality, such as by incineration or shredding.

3. When closing, selling or relocating his practice, meet the requirements of § 54.1-2405 of the Code of Virginia for giving notice that copies of records can be sent to any like-regulated provider of the client's choice or provided to the client or legally authorized representative.

**18VAC85-150-160. Practitioner-client communication; termination of relationship.****A. Communication with clients.**

1. Except as provided in § 32.1-127.1:03 F of the Code of Virginia, a practitioner shall accurately present information to a client or his legally authorized representative in understandable terms and encourage participation in decisions regarding the client's care.

2. A practitioner shall not deliberately make a false or misleading statement regarding the practitioner's skill or the efficacy or value of a treatment or procedure provided or directed by the practitioner.

3. Before an initial assessment or intervention is performed, informed consent shall be obtained from the client or his legally authorized representative. Practitioners shall inform clients or their legally authorized representative of the risks, benefits, and alternatives of the recommended procedure that a reasonably prudent practitioner would tell a client.

a. Informed consent shall also be obtained if there is a significant change to a therapeutic procedure or intervention performed on a client that is not part of routine, general care and which is more restrictive on the continuum of care.

b. In the instance of a minor or a client who is incapable of making an informed decision on his own behalf or is incapable of communicating such a decision due to a physical or mental disorder, the legally authorized person available to give consent shall be informed and the consent documented.

c. An exception to the requirement for consent prior to performance of a procedure or intervention may be made in an emergency situation when a delay in obtaining consent would likely result in imminent harm to the client.

4. Practitioners shall adhere to requirements of § 32.1-162.18 of the Code of Virginia for obtaining informed consent from clients prior to involving them as subjects in human research with the exception of retrospective chart reviews.

**B. Termination of the practitioner/client relationship.**

1. The practitioner or the client may terminate the relationship. In either case, the practitioner shall make the client record available, except in situations where denial of access is allowed by law.

2. A practitioner shall not terminate the relationship or make his services unavailable without documented notice to the client that allows for a reasonable time to obtain the services of another practitioner.

**18VAC85-150-170. Practitioner responsibility.****A. A practitioner shall not:**



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# Regulations

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1. Perform procedures or techniques that are outside the scope of his practice or for which he is not trained and individually competent;

2. Knowingly allow subordinates to jeopardize client safety or provide client care outside of the subordinate's scope of practice or area of responsibility. Practitioners shall delegate client care only to subordinates who are properly trained and supervised;

3. Engage in an egregious pattern of disruptive behavior or interaction in a health care setting that interferes with client care or could reasonably be expected to adversely impact the quality of care rendered to a client; or

4. Exploit the practitioner/client relationship for personal gain.

B. Advocating for client safety or improvement in client care within a health care entity shall not constitute disruptive behavior provided the practitioner does not engage in behavior prohibited in subdivision A 3 of this section.

## **18VAC85-150-180. Solicitation or remuneration in exchange for referral.**

A practitioner shall not knowingly and willfully solicit or receive any remuneration, directly or indirectly, in return for referring an individual to a facility or institution as defined in § 37.2-100 of the Code of Virginia or hospital as defined in § 32.1-123 of the Code of Virginia.

Remuneration shall be defined as compensation, received in cash or in kind, but shall not include any payments, business arrangements, or payment practices allowed by 42 USC § 1320 a-7(b), as amended, or any regulations promulgated thereto.

## **18VAC85-150-190. Sexual contact.**

A. For purposes of § 54.1-2915 A 12 and A 19 of the Code of Virginia and this section, sexual contact includes, but is not limited to, sexual behavior or verbal or physical behavior that:

1. May reasonably be interpreted as intended for the sexual arousal or gratification of the practitioner, the client, or both; or

2. May reasonably be interpreted as romantic involvement with a client regardless of whether such involvement occurs in the professional setting or outside of it.

### **B. Sexual contact with a client.**

1. The determination of when a person is a client for purposes of § 54.1-2915 A 19 of the Code of Virginia is made on a case-by-case basis with consideration given to the nature, extent, and context of the professional relationship between the practitioner and the person. The fact that a person is not actively receiving treatment or professional services from a practitioner is not determinative of this issue. A person is presumed to remain a client until the client-practitioner relationship is terminated.

2. The consent to, initiation of, or participation in sexual behavior or involvement with a practitioner by a client does not change the nature of the conduct nor negate the statutory prohibition.

C. Sexual contact between a practitioner and a former client after termination of the practitioner-client relationship may still constitute unprofessional conduct if the sexual contact is a result of the exploitation of trust, knowledge, or influence of emotions derived from the professional relationship.

D. Sexual contact between a practitioner and a key third party shall constitute unprofessional conduct if the sexual contact is a result of the exploitation of trust, knowledge, or influence derived from the professional relationship or if the contact has had or is likely to have an adverse effect on client care. For purposes of this section, key third party of a client means spouse or partner, parent or child, guardian, or legal representative of the client.

E. Sexual contact between a supervisor and a trainee shall constitute unprofessional conduct if the sexual contact is a result of the exploitation of trust, knowledge, or influence derived from the professional relationship or if the contact has had or is likely to have an adverse effect on client care.

## **18VAC85-150-200. Refusal to provide information.**

A practitioner shall not willfully refuse to provide information or records as requested or required by the board or its representative pursuant to an investigation or to the enforcement of a statute or regulation.

VA.R. Doc. No. R13-3281; Filed September 12, 2012, 1:25 p.m.

## **BOARD OF NURSING**

### **Proposed Regulation**

Title of Regulation: **18VAC90-20. Regulations Governing the Practice of Nursing (amending 18VAC90-20-10, 18VAC90-20-220; adding 18VAC90-20-221, 18VAC90-20-222).**

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

#### Public Hearing Information:

November 13, 2012 - 9 a.m. - Department of Health Professions, 9960 Mayland Drive, Perimeter Center, 2nd Floor Conference Center, Henrico, VA

Public Comment Deadline: December 7, 2012.

Agency Contact: Jay P. Douglas, R.N., Executive Director, Board of Nursing, 9960 Mayland Drive, Suite 300, Richmond, VA 23233-1463, telephone (804) 367-4515, FAX (804) 527-4455, or email jay.douglas@dhp.virginia.gov.

Basis: Section 54.1-2400 of the Code of Virginia provides authority to establish qualifications for licensure as necessary to ensure competence and provides general authority to promulgate regulations to administer the regulatory system. Additionally, § 54.1-103 authorizes the board to require additional training of regulated persons for renewal of licensure.

Purpose: Along with national organizations and commissions, the Board of Nursing has been studying the issue of competency assessment for continuation of licensure. After a review of national recommendations, reports, and regulatory models, the board has concluded that there should be evidence of continued competency for renewal of a nursing license. Registered and practical nurses are the only health professionals in Virginia who do not currently have any requirement to maintain competency beyond that required for initial licensure. While there may be value to an individual nurse in obtaining continuing education (CE), the board does not intend to rely solely on the CE model for demonstration of competency. The goal is to engage the nurse in a continuum of learning and renewal of knowledge and skills through a variety of practical and didactic experiences.

The National Council of State Boards of Nursing (NCSBN) defines continued competence as "the ongoing ability of a nurse to integrate knowledge, skills, judgment and personal attributes to practice safely and ethically in a designated role and setting in accordance with the scope of nursing practice." The mission of a licensing board is to protect public health, welfare, and safety by assuring that persons are minimally competent to practice at initial licensure and that they remain competent and safe throughout their careers. At the present time, there is no regulatory requirement that nurses demonstrate any measure of competency following initial licensure.

A 2009 report on continued competence from NCSBN states that maintaining competency to practice is a responsibility shared by the individual nurse, his or her employer, and the regulatory entity that must answer to the public. Therefore, the board has determined that there should be some regulatory framework for demonstrating continued competency for the health and safety of the patients in the care of nurses in Virginia.

Substance: The Board of Nursing proposes that regulations offer options for measurement of continued competence including (i) evidence of specialty certification from a board-approved entity; (ii) nursing-related coursework for academic credit or a refresher course; (iii) evidence-based nursing-related research and publication or teaching; (iv) a combination of 15 hours of continuing education and 640 practice hours in a two-year period while holding an unencumbered license; or (v) 30 hours of continuing education hours in workshops, seminars, or courses relevant to the practice of nursing.

A listing of providers recognized by the board, requirements for persons who hold dual licensure, and provisions for extensions or exemptions are set out in regulation. Finally, specific documentation of compliance is delineated for each of the types of continued competency activities or options selected.

Issues: The primary advantage of the amended provisions would be a more highly qualified, competent corps of nurses

who have obtained additional training, knowledge, and competency to practice. There are no disadvantages to private citizens or businesses. Institutional employers of nurses currently require continued learning activities or courses. For those nurses who are not currently engaged in continued learning, there will be some additional costs. The availability of online courses at little or no cost will mean that a nurse can fulfill the requirements without taking time from work or incurring the expense of attendance at a meeting or workshop. The primary advantage to the board is consistency with continuing education or continuing competency requirements of all other professions in Virginia and with most other states in the United States. There are no disadvantages to the agency.

Department of Planning and Budget's Economic Impact Analysis:

Summary of the Proposed Amendments to Regulation. The Board of Nursing (Board) proposes to amend its regulations by adding a definition for active practice and by newly requiring proof of continuing education as a part of the biennial renewal process.

Result of Analysis. There is insufficient information to accurately gauge whether benefits are likely to outweigh costs for these proposed changes.

Estimated Economic Impact. Currently, Board regulations do not require nurses to complete any continuing education as a condition of license renewal. Board staff reports that the Board has had several disciplinary actions come before them that indicate a lack of continued competency among some of their licensees. The Board now proposes to require proof of continuing competency as a condition of biennial renewal for every renewal cycle after the first. The Board proposes to allow many different kinds of educational experiences to count toward fulfilling this new continuing competency requirement. Amongst the learning activities that will count are:

- Having a current specialty certification from a Board recognized national certification organization,
- Completing a three credit hour college course that is relevant to the practice of nursing,
- Completing a Board certified refresher course in nursing,
- Completing a nursing-related, evidence-based practice project or research study,
- Authoring or co-authoring an article that is published during a renewal cycle,
- Teaching a three credit hour college course that is relevant to the practice of nursing,
- Teaching nursing-related continuing education courses for up to 30 contact hours,
- Working at least 640 hours as a nurse during the renewal cycle and completing 15 contact hours of

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# Regulations

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workshops, seminars, conferences or courses relevant to the practice of nursing or

- Completing 30 contact hours of workshops, seminars, conferences or courses relevant to the practice of nursing.

Licensees may complete contact hour activities that are approved by the American Nurses Credentialing Center (ANCC), American Nurses Association (ANA), National Council of State Boards of Nursing (NCSBN), Area Health Education Centers (AHEC), any state nurses association, National Association for Practical Nurse Education and Services (NAPNES) or the National Federation of Licensed Practical Nurses (NFLPN). Individuals who are licensed as both registered nurses and licensed practical nurses only have to meet continuing competency for one license. Registered nurses who are also licensed as nurse practitioners must only meet the continuing educational requirements for nurse practitioners and nurse practitioners with prescriptive authority will also have to meet the continuing education requirements that are listed in the regulations that govern prescriptive authority. Licensees will be required to maintain records to prove continuing competency for two years following the renewal cycle.

Board staff reports that entities such as hospitals are required to offer continuing education opportunities to their nursing staff as a part of hospital licensure requirements and that various nurses associations offer online educational opportunities that would meet the requirements of these regulations at a cost of approximately \$5 to \$6 per hour (approximately \$75 to \$180 per renewal cycle). Board staff also reports that college courses would likely cost approximately \$300 per credit hour but that individuals who are not already enrolled in college courses for some other reason would likely choose one of the lower explicit cost or no explicit cost educational options. Individuals who teach nursing-related college or continuing education courses can meet their continuing competency requirements with activities for which they actually earn money (the number of individuals who can do this is likely very small when compared to the total number of Board licensees). Individual licensees will incur explicit costs equal to the cost of the educational opportunity chosen and most individuals will also incur implicit opportunity costs for time spent meeting Board requirements. To the extent that Board required continuing education improves the quality of nursing in the Commonwealth, both nurses and their patients will benefit. There is insufficient information to ascertain whether benefits will outweigh costs.

**Businesses and Entities Affected.** The Department of Health Professions (DHP) reports that the Board currently regulates 29,828 licensed practical nurses and 91,316 registered nurses; 6,227 of these registered nurses are also licensed as nurse practitioners and 3,685 nurse practitioners have prescriptive authority. All of these entities, as well as any individuals or

entities who may wish to become licensed or registered in the future, will be affected by these proposed regulations.

**Localities Particularly Affected.** No locality will be particularly affected by this proposed regulatory action.

**Projected Impact on Employment.** New requirements for continuing education will likely marginally increase the cost of licensure. This may marginally decrease the number of individuals who choose to work in professional fields that are regulated by the Board. Individuals who work part time or whose earnings are only slightly higher in these licensed fields than they would be in other jobs that do not require licensure will be more likely to be affected.

**Effects on the Use and Value of Private Property.** These proposed regulatory changes are unlikely to affect the use or value of private property in the Commonwealth.

**Small Businesses: Costs and Other Effects.** Small businesses that employ nursing staff may see their costs slightly increase if they have to raise nurses salaries to offset some or all of the costs of newly required continuing education.

**Small Businesses: Alternative Method that Minimizes Adverse Impact.** There are likely no alternate methods to implement the proposed regulatory changes that would both achieve the Board's goals and be less costly.

**Real Estate Development Costs.** This regulatory action will likely have no effect on real estate development costs in the Commonwealth.

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

Agency's Response to Economic Impact Analysis: The Board of Nursing concurs with the analysis of the Department of Planning and Budget for the proposed amendments to 18VAC90-20, Regulations Governing the Practice of Nursing, with one exception.

The EIA states that the board now proposes to require proof of continuing competency as a condition of biennial renewal for every renewal cycle. Proof of continuing competency or submission of documentation will not be a condition of renewal; licensees will be required to participate in continuing competency activities and maintain a record of such participation. Only if requested by the board will the licensee be required to submit evidence of compliance.

Summary:

*The proposed amendments establish requirements for continuing competency activities or courses in order to renew an active license as a registered nurse or a practical nurse each biennium. The options available include a refresher course, post-licensure academic course, current specialty certification, research and teaching, active practice for 640 hours and 15 hours of courses, or 30 hours of approved courses. The entities and organizations that can recognize or approve a continuing education provider are listed in regulation.*

*Regulations provide an exemption for nurses who have an active license as a nurse practitioner and for the second license if someone is licensed as an RN and LPN. Finally, there is a requirement for documentation of completion to be maintained for two years following renewal, and the documentation required for each type of activity or requirement is specified.*

Part I

General Provisions

**18VAC90-20-10. Definitions.**

In addition to words and terms defined in § 54.1-3030 of the Code of Virginia, the following words and terms when used in this chapter shall have the following meanings unless the context clearly indicates otherwise:

"Accreditation" means having been accredited by the National League for Nursing Accrediting Commission (NLNAC) or by the Commission on Collegiate Nursing Education (CCNE).

"Active practice" means activities performed, whether or not for compensation, for which an active license to practice nursing is required.

"Approval" means the process by which the board or a governmental agency in another state or foreign country evaluates and grants official recognition to nursing education programs that meet established standards not inconsistent with Virginia law.

"Associate degree nursing program" means a nursing education program preparing for registered nurse licensure, offered by a Virginia college or other institution and designed

to lead to an associate degree in nursing, provided that the institution is authorized to confer such degree by the State Council of Higher Education.

"Baccalaureate degree nursing program" means a nursing education program preparing for registered nurse licensure, offered by a Virginia college or university and designed to lead to a baccalaureate degree with a major in nursing, provided that the institution is authorized to confer such degree by the State Council of Higher Education.

"Board" means the Board of Nursing.

"CGFNS" means the Commission on Graduates of Foreign Nursing Schools.

"Clinical setting" means any location in which the clinical practice of nursing occurs as specified in an agreement between the cooperating agency and the school of nursing.

"Conditional approval" means a time-limited status which results when an approved nursing education program has failed to maintain requirements as set forth in Article 2 (18VAC90-20-70 et seq.) of Part II of this chapter.

"Cooperating agency" means an agency or institution that enters into a written agreement to provide learning experiences for a nursing education program.

"Diploma nursing program" means a nursing education program preparing for registered nurse licensure, offered by a hospital and designed to lead to a diploma in nursing, provided the hospital is licensed in this state.

"NCLEX" means the National Council Licensing Examination.

"NCSBN" means the National Council of State Boards of Nursing.

"National certifying organization" means an organization that has as one of its purposes the certification of a specialty in nursing based on an examination attesting to the knowledge of the nurse for practice in the specialty area and is accredited by a national body recognized by NCSBN.

"Nursing education program" means an entity offering a basic course of study preparing persons for licensure as registered nurses or as licensed practical nurses. A basic course of study shall include all courses required for the degree, diploma or certificate.

"Nursing faculty" means registered nurses who teach the practice of nursing in nursing education programs.

"Practical nursing program" means a nursing education program preparing for practical nurse licensure that leads to a diploma or certificate in practical nursing, provided the school is authorized by the Virginia State Board of Education or the appropriate governmental credentialing agency.

"Preceptor" means a licensed health care provider who is employed in the clinical setting, serves as a resource person and role model, and is present with the nursing student in that setting.

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# Regulations

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"Primary state of residence" means the state of a person's declared fixed permanent and principal home or domicile for legal purposes.

"Program director" means a registered nurse who holds a current, unrestricted license in Virginia or a multistate licensure privilege and who has been designated by the controlling authority to administer the nursing education program.

"Provisional approval" means the initial status granted to a nursing education program which shall continue until the first class has graduated and the board has taken final action on the application for approval.

"Recommendation" means a guide to actions that will assist an institution to improve and develop its nursing education program.

"Requirement" means a mandatory condition that a nursing education program must meet to be approved.

## **18VAC90-20-220. Renewal of licenses.**

A. Licensees born in even-numbered years shall renew their licenses by the last day of the birth month in even-numbered years. Licensees born in odd-numbered years shall renew their licenses by the last day of the birth month in odd-numbered years.

~~B. No less than 30 days prior to the last day of the licensee's birth month, a notice for renewal of license shall be mailed by the board to the last known address of each licensee, who is currently licensed~~ After [insert date], a nurse shall be required to meet the requirements for continued competency set forth in 18VAC90-20-221 in order to renew an active license.

C. A notice for renewal of license shall be sent by the board to the last known address of the licensee. The licensee shall complete the renewal form and submit it with the required fee.

D. Failure to receive the renewal form shall not relieve the licensee of the responsibility for renewing the license by the expiration date.

E. The license shall automatically lapse if the licensee fails to renew by the expiration date.

F. Any person practicing nursing during the time a license has lapsed shall be considered an illegal practitioner and shall be subject to prosecution under the provisions of § 54.1-3008 of the Code of Virginia.

G. Upon renewal, all licensees shall declare their primary state of residence. If the declared state of residence is another compact state, the licensee is not eligible for renewal.

## **18VAC90-20-221. Continued competency requirements for renewal of an active license.**

A. In order to renew an active nursing license, a licensee shall complete at least one of the following learning activities or courses:

1. Current specialty certification by a national certifying organization, as defined in 18VAC90-20-10;

2. Completion of a minimum of three credit hours of post-licensure academic education relevant to nursing practice, offered by a regionally accredited college or university;

3. A board-approved refresher course in nursing;

4. Completion of nursing-related, evidence-based practice project or research study;

5. Completion of publication as the author or co-author during a renewal cycle;

6. Teaching a nursing-related course resulting in no less than three semester hours of college credit or specialty certification;

7. Teaching nursing-related continuing education courses for up to 30 contact hours;

8. Fifteen contact hours of workshops, seminars, conferences, or courses relevant to the practice of nursing and 640 hours of active practice as a nurse; or

9. Thirty contact hours of workshops, seminars, conferences, or courses relevant to the practice of nursing.

B. To meet requirements of subdivision A 8 or 9 of this section, workshops, seminars, conferences, or courses shall be offered by a provider recognized or approved by one of the following:

1. American Nurses Credentialing Center (ANCC)/American Nurses Association (ANA);

2. National Council of State Boards of Nursing (NCSBN);

3. Area Health Education Centers (AHEC) in any state in which the AHEC is a member of the National AHEC Organization;

4. Any state nurses association;

5. National League for Nursing (NLN);

6. National Association for Practical Nurse Education and Service (NAPNES);

7. National Federation of Licensed Practical Nurses (NFLPN);

8. A licensed health care facility, agency, or hospital;

9. The American Heart Association or the American Red Cross for courses in advanced resuscitation; or

10. Virginia Board of Nursing or any state board of nursing.

## C. Dual licensed persons.

1. Those persons dually licensed by this board as a registered nurse and a licensed practical nurse shall only meet one of the continued competency requirements as set forth in subsection A of this section.

2. Registered nurses who also hold an active license as a nurse practitioner shall only meet the requirements of 18VAC90-30-105 and, for those with prescriptive authority, 18VAC90-40-55.

D. A licensee is exempt from the continued competency requirement for the first renewal following initial licensure by examination or endorsement.

E. The board may grant an extension for good cause of up to one year for the completion of continuing competency requirements upon written request from the licensee 60 days prior to the renewal date. Such extension shall not relieve the licensee of the continuing competency requirement.

F. The board may grant an exemption for all or part of the continuing competency requirements due to circumstances beyond the control of the licensee such as temporary disability, mandatory military service, or officially declared disasters.

G. Continued competency activities or courses required by board order in a disciplinary proceeding shall not be counted as meeting the requirements for licensure renewal.

**18VAC90-20-222. Documenting compliance with continued competency requirements.**

A. All licensees are required to maintain original documentation of completion for a period of two years following renewal and to provide such documentation within 30 days of a request from the board for proof of compliance.

B. Documentation of compliance shall be as follows:

1. Evidence of national certification shall include a copy of a certificate that includes name of licensee, name of certifying body, date of certification, and date of certification expiration. Certification shall be initially attained during the licensure period, have been in effect during the entire licensure period, or have been recertified during the licensure period.

2. Evidence of post-licensure academic education shall include a copy of transcript with the name of the licensee, name of educational institution, date of attendance, name of course with grade, and number of credit hours received.

3. Evidence of completion of a board-approved refresher course shall include written correspondence from the provider with the name of the licensee, name of the provider, and verification of successful completion of the course.

4. Evidence of completion of a nursing research or project shall include an abstract or summary, the name of the licensee, role of the licensee as principal or coprincipal investigator, date of completion, statement of the problem, research or project objectives, methods used, and summary of findings.

5. Evidence of authoring or co-authoring a published nursing-related article, paper, book, or book chapter, which shall include a copy of the publication to include the name of the licensee and publication date.

6. Evidence of teaching a course for college credit shall include documentation of the course offering, indicating instructor, course title, course syllabus, and the number of

credit hours. Teaching a particular course may only be used once to satisfy the continued competency requirement unless the course offering and syllabus has changed.

7. Evidence of teaching a course for continuing education credit shall include a written attestation from the director of the program or authorizing entity including the date or dates of the course or courses and the number of contact hours awarded. If the total number of contact hours totals less than 30, the licensee shall obtain additional hours in continuing learning activities or courses.

8. Evidence of contact hours of continuing learning activities or courses shall include the name of the licensee title of educational activity, name of the provider, number of contact hours, and date of activity.

9. Evidence of 640 hours of active practice in nursing shall include documentation satisfactory to the board of the name of the licensee, number of hours worked in calendar or fiscal year, name and address of employer, and signature of supervisor. If self-employed, hours worked may be validated through other methods such as tax records or other business records. If active practice is of a volunteer or gratuitous nature, hours worked may be validated by the recipient agency.

VA.R. Doc. No. R10-2363; Filed September 18, 2012, 2:16 p.m.

## **BOARD OF PHARMACY**

### **Emergency Regulation**

**Title of Regulation: 18VAC110-20. Regulations Governing the Practice of Pharmacy (amending 18VAC110-20-10; adding 18VAC110-20-418).**

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

**Effective Dates:** October 1, 2012, through September 30, 2013.

**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.

**Preamble:**

*Chapter 124 of the 2011 Acts of Assembly mandates that the Board of Pharmacy promulgate regulations to specify the elements of a continuous quality improvement program that provides "a systematic, ongoing process of analysis of dispensing errors that uses findings to formulate an appropriate response and to develop or improve pharmacy systems and workflow processes designed to prevent or reduce future errors." The legislation further requires that the board promulgate regulations to implement the provisions of the act to be effective within 280 days of its enactment. Therefore, there is an "emergency situation" as defined in § 2.2-4011 of the Administrative Process Act. The statutory deadline for regulations to be in effect is December 20, 2011.*

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# Regulations

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*The key provisions of the regulations are: (i) definitions for terms used in regulation, such as "actively reports," "analysis" and "dispensing error"; (ii) provisions for pharmacies actively reporting to a patient safety organization; and (iii) provisions for a continuous quality improvement program (CQI) in a pharmacy, to include notification responsibilities, documentation requirements, remediation of systems or procedures, and maintenance of a record of the analysis of the error.*

*The goal of the regulations is to provide a framework for a CQI program that can identify, analyze, and reduce risks and errors associated with dispensing of drugs to patients. An analysis of an error is required to identify systems failures and personnel deficiencies and to review any gaps in the efficiency and effectiveness of policies and processes that might result in dispensing errors. Oversight of CQI programs by the board can be accomplished through routine inspections or investigations initiated by a complaint, so documentation of an analysis is required to be maintained for at least 12 months from the date of the analysis.*

## Part I General Provisions

### 18VAC110-20-10. Definitions.

In addition to words and terms defined in §§ 54.1-3300 and 54.1-3401 of the Code of Virginia, the following words and terms when used in this chapter shall have the following meanings, unless the context clearly indicates otherwise:

"ACPE" means the Accreditation Council for Pharmacy Education.

"Acquisition" of an existing entity permitted, registered or licensed by the board means (i) the purchase or transfer of all or substantially all of the assets of the entity or of any corporation that owns or controls the entity; (ii) the creation of a partnership by a sole proprietor or change in partnership composition; (iii) the acquiring of 50% or more of the outstanding shares of voting stock of a corporation owning the entity or of the parent corporation of a wholly owned subsidiary owning the entity, except that this shall not apply to any corporation the voting stock of which is actively traded on any securities exchange or in any over-the-counter market; or (iv) the merger of a corporation owning the entity, or of the parent corporation of a wholly owned subsidiary owning the entity, with another business or corporation.

"Actively reports" means reporting all dispensing errors and analyses of such errors to a patient safety organization as soon as practical or at least within 30 days of identifying the error.

"Alternate delivery site" means a location authorized in 18VAC110-20-275 to receive dispensed prescriptions on behalf of and for further delivery or administration to a patient.

"Analysis" means a review of the findings collected and documented on each dispensing error, assessment of the cause and any factors contributing to the dispensing error, and any recommendation for remedial action to improve pharmacy systems and workflow processes to prevent or reduce future errors.

"Beyond-use date" means the date beyond which the integrity of a compounded, repackaged, or dispensed drug can no longer be assured and as such is deemed to be adulterated or misbranded as defined in §§ 54.1-3461 and 54.1-3462 of the Code of Virginia.

"Board" means the Virginia Board of Pharmacy.

"CE" means continuing education as required for renewal of licensure by the Board of Pharmacy.

"CEU" means a continuing education unit awarded for credit as the equivalent of 10 contact hours.

"Chart order" means a lawful order for a drug or device entered on the chart or in a medical record of a patient by a prescriber or his designated agent.

"Compliance packaging" means packaging for dispensed drugs which is comprised of a series of containers for solid oral dosage forms and which is designed to assist the user in administering or self-administering the drugs in accordance with directions for use.

"Contact hour" means the amount of credit awarded for 60 minutes of participation in and successful completion of a continuing education program.

"Correctional facility" means any prison, penitentiary, penal facility, jail, detention unit, or other facility in which persons are incarcerated by government officials.

"DEA" means the United States Drug Enforcement Administration.

"Dispensing error" means one or more of the following discovered after the final verification by the pharmacist:

1. Variation from the prescriber's prescription drug order, including, but not limited to:

a. Incorrect drug;

b. Incorrect drug strength;

c. Incorrect dosage form;

d. Incorrect patient; or

e. Inadequate or incorrect packaging, labeling, or directions.

2. Failure to exercise professional judgment in identifying and managing:

a. Therapeutic duplication;

b. Drug-disease contraindications, if known;

c. Drug-drug interactions, if known;

d. Incorrect drug dosage or duration of drug treatment;

e. Drug-allergy interactions;

f. A clinically significant, avoidable delay in therapy; or

g. Any other significant, actual, or potential problem with a patient's drug therapy.

3. Delivery of a drug to the incorrect patient.

4. Variation in bulk repackaging or filling of automated devices, including, but not limited to:

a. Incorrect drug;

b. Incorrect drug strength;

c. Incorrect dosage form; or

d. Inadequate or incorrect packaging or labeling.

"Drug donation site" means a permitted pharmacy that specifically registers with the board for the purpose of receiving or redispensing eligible donated prescription drugs pursuant to § 54.1-3411.1 of the Code of Virginia.

"Electronic prescription" means a written prescription that is generated on an electronic application in accordance with 21 CFR Part 1300 and is transmitted to a pharmacy as an electronic data file.

"Expiration date" means that date placed on a drug package by the manufacturer or repacker beyond which the product may not be dispensed or used.

"Facsimile (FAX) prescription" means a written prescription or order which is transmitted by an electronic device over telephone lines which sends the exact image to the receiver (pharmacy) in a hard copy form.

"FDA" means the United States Food and Drug Administration.

"Floor stock" means a supply of drugs that have been distributed for the purpose of general administration by a prescriber or other authorized person pursuant to a valid order of a prescriber.

"Foreign school of pharmacy" means a school outside the United States and its territories offering a course of study in basic sciences, pharmacology, and pharmacy of at least four years in duration resulting in a degree that qualifies a person to practice pharmacy in that country.

"Forgery" means a prescription that was falsely created, falsely signed, or altered.

"FPGEC certificate" means the certificate given by the Foreign Pharmacy Equivalency Committee of NABP that certifies that the holder of such certificate has passed the Foreign Pharmacy Equivalency Examination and a credential review of foreign training to establish educational equivalency to board approved schools of pharmacy, and has passed approved examinations establishing proficiency in English.

"Generic drug name" means the nonproprietary name listed in the United States Pharmacopeia-National Formulary (USP-NF) or in the USAN and the USP Dictionary of Drug Names.

"Hospital" or "nursing home" means those facilities as defined in Title 32.1 of the Code of Virginia or as defined in regulations by the Virginia Department of Health.

"Inactive license" means a license which is registered with the Commonwealth but does not entitle the licensee to practice, the holder of which is not required to submit documentation of CE necessary to hold an active license.

"Long-term care facility" means a nursing home, retirement care, mental care or other facility or institution which provides extended health care to resident patients.

"NABP" means the National Association of Boards of Pharmacy.

"Nuclear pharmacy" means a pharmacy providing radiopharmaceutical services.

"On duty" means that a pharmacist is on the premises at the address of the permitted pharmacy and is available as needed.

"Patient safety organization" means an organization that has as its primary mission continuous quality improvement under the Patient Safety and Quality Improvement Act of 2005 (P.L. 109-41) and is credentialed by the Agency for Healthcare Research and Quality.

"Permitted physician" means a physician who is licensed pursuant to § 54.1-3304 of the Code of Virginia to dispense drugs to persons to whom or for whom pharmacy services are not reasonably available.

"Perpetual inventory" means an ongoing system for recording quantities of drugs received, dispensed or otherwise distributed by a pharmacy.

"Personal supervision" means the pharmacist must be physically present and render direct, personal control over the entire service being rendered or act being performed. Neither prior nor future instructions shall be sufficient nor, shall supervision rendered by telephone, written instructions, or by any mechanical or electronic methods be sufficient.

"Pharmacy closing" means that the permitted pharmacy ceases pharmacy services or fails to provide for continuity of pharmacy services or lawful access to patient prescription records or other required patient records for the purpose of continued pharmacy services to patients.

"Pharmacy technician trainee" means a person who is currently enrolled in an approved pharmacy technician training program and is performing duties restricted to pharmacy technicians for the purpose of obtaining practical experience in accordance with § 54.1-3321 D of the Code of Virginia.

"PIC" means the pharmacist-in-charge of a permitted pharmacy.

"Practice location" means any location in which a prescriber evaluates or treats a patient.

"Prescription department" means any contiguous or noncontiguous areas used for the compounding, dispensing and storage of all Schedule II through VI drugs and devices and any Schedule I investigational drugs.

"PTCB" means the Pharmacy Technician Certification Board, co-founded by the American Pharmaceutical



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# Regulations

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Association and the American Society of Health System Pharmacists, as the national organization for voluntary examination and certification of pharmacy technicians.

"Quality assurance plan" means a plan approved by the board for ongoing monitoring, measuring, evaluating, and, if necessary, improving the performance of a pharmacy function or system.

"Radiopharmaceutical" means any drug that exhibits spontaneous disintegration of unstable nuclei with the emission of nuclear particles or photons and includes any nonradioactive reagent kit or radionuclide generator that is intended to be used in the preparation of any such substance, but does not include drugs such as carbon-containing compounds or potassium-containing salts that include trace quantities of naturally occurring radionuclides. The term also includes any biological product that is labeled with a radionuclide or intended solely to be labeled with a radionuclide.

"Repackaged drug" means any drug removed from the manufacturer's original package and placed in different packaging.

"Robotic pharmacy system" means a mechanical system controlled by a computer that performs operations or activities relative to the storage, packaging, labeling, dispensing, or distribution of medications, and collects, controls, and maintains all transaction information.

"Safety closure container" means a container which meets the requirements of the federal Poison Prevention Packaging Act of 1970 (15 USC §§ 1471-1476), i.e., in testing such containers, that 85% of a test group of 200 children of ages 41-52 months are unable to open the container in a five-minute period and that 80% fail in another five minutes after a demonstration of how to open it and that 90% of a test group of 100 adults must be able to open and close the container.

"Satellite pharmacy" means a pharmacy which is noncontiguous to the centrally permitted pharmacy of a hospital but at the location designated on the pharmacy permit.

"Special packaging" means packaging that is designed or constructed to be significantly difficult for children under five years of age to open to obtain a toxic or harmful amount of the drug contained therein within a reasonable time and not difficult for normal adults to use properly, but does not mean packaging which all such children cannot open or obtain a toxic or harmful amount within a reasonable time.

"Special use permit" means a permit issued to conduct a pharmacy of a special scope of service that varies in any way from the provisions of any board regulation.

"Storage temperature" means those specific directions stated in some monographs with respect to the temperatures at which pharmaceutical articles shall be stored, where it is considered that storage at a lower or higher temperature may

produce undesirable results. The conditions are defined by the following terms:

1. "Cold" means any temperature not exceeding 8°C (46°F). A refrigerator is a cold place in which temperature is maintained thermostatically between 2° and 8°C (36° and 46°F). A freezer is a cold place in which the temperature is maintained thermostatically between -20° and -10°C (-4° and 14°F).

2. "Room temperature" means the temperature prevailing in a working area.

3. "Controlled room temperature" means a temperature maintained thermostatically that encompasses the usual and customary working environment of 20° to 25°C (68° to 77°F); that results in a mean kinetic temperature calculated to be not more than 25°C; and that allows for excursions between 15° and 30°C (59° and 86°F) that are experienced in pharmacies, hospitals, and warehouses.

4. "Warm" means any temperature between 30° and 40°C (86° and 104°F).

5. "Excessive heat" means any temperature above 40°C (104°F).

6. "Protection from freezing" means where, in addition to the risk of breakage of the container, freezing subjects a product to loss of strength or potency, or to the destructive alteration of its characteristics, the container label bears an appropriate instruction to protect the product from freezing.

7. "Cool" means any temperature between 8° and 15°C (46° and 59°F).

"Terminally ill" means a patient with a terminal condition as defined in § 54.1-2982 of the Code of Virginia.

"Unit dose container" means a container that is a single-unit container, as defined in United States Pharmacopeia-National Formulary, for articles intended for administration by other than the parenteral route as a single dose, direct from the container.

"Unit dose package" means a container that contains a particular dose ordered for a patient.

"Unit dose system" means a system in which multiple drugs in unit dose packaging are dispensed in a single container, such as a medication drawer or bin, labeled only with patient name and location. Directions for administration are not provided by the pharmacy on the drug packaging or container but are obtained by the person administering directly from a prescriber's order or medication administration record.

"USP-NF" means the United States Pharmacopeia-National Formulary.

"Well-closed container" means a container that protects the contents from extraneous solids and from loss of the drug under the ordinary or customary conditions of handling, shipment, storage, and distribution.

**18VAC110-20-418. Continuous quality improvement programs.**

A. Notwithstanding practices constituting unprofessional practice indicated in 18VAC110-20-25, any pharmacy that actively reports dispensing errors and the analysis of such errors to a patient safety organization consistent with § 54.1-3434.03 of the Code of Virginia and 18VAC110-20-10 shall be deemed in compliance with this section. A record indicating the date a report was submitted to a patient safety organization shall be maintained for 12 months from the date of reporting. If no dispensing errors have occurred within the past 30 days, a zero report with date shall be recorded on the record.

B. Pharmacies not actively reporting to patient safety organizations, consistent with § 54.1-3434.03 Code of Virginia and 18VAC110-20-10, shall implement a program for continuous quality improvement in compliance with this section.

1. Notification requirements:

a. A pharmacy intern or pharmacy technician who identifies or learns of a dispensing error shall immediately notify a pharmacist on-duty of the dispensing error.

b. A pharmacist on-duty shall appropriately respond to the dispensing error in a manner that protects the health and safety of the patient.

c. A pharmacist on-duty shall immediately notify the patient or the person responsible for administration of the drug to the patient and communicate steps to avoid injury or mitigate the error if the patient is in receipt of a drug involving a dispensing error which may cause patient harm or affect the efficacy of the drug therapy. Additionally, reasonable efforts shall be made to determine if the patient self-administered or was administered the drug involving the dispensing error. If it is known or reasonable to believe the patient self-administered or was administered the drug involving the dispensing error, the pharmacist shall immediately assure that the prescriber is notified.

2. Documentation and record requirements; remedial action:

a. Documentation of the dispensing error must be initiated as soon as practical, not to exceed three days from identifying the error. Documentation shall include, at a minimum, a description of the event that is sufficient to allow further investigation, categorization and analysis of the event.

b. The pharmacist-in-charge or designee shall perform a systematic, ongoing analysis, as defined in 18VAC110-20-10, of dispensing errors. An analysis of each dispensing error shall be performed within 30 days of identifying the error.

c. The pharmacist-in-charge shall inform pharmacy personnel of changes made to pharmacy policies, procedures, systems, or processes as a result of the analysis.

d. Documentation associated with the dispensing error need only to be maintained until the systematic analysis has been completed. Prescriptions, dispensing information, and other records required by federal or state law shall be maintained accordingly.

e. A separate record shall be maintained and available for inspection to ensure compliance with this section for 12 months from the date of the analysis of dispensing errors and shall include the following information:

(1) Dates the analysis was initiated and completed;

(2) Names of the participants in the analysis;

(3) General description of remedial action taken to prevent or reduce future errors; and

(4) A zero report with date shall be recorded on the record if no dispensing errors have occurred within the past 30 days.

VA.R. Doc. No. R11-2888; Filed September 18, 2012, 9:52 a.m.

**DEPARTMENT OF PROFESSIONAL AND  
OCCUPATIONAL REGULATION**

**Proposed Regulation**

Title of Regulation: 18VAC120-30. Regulations Governing Polygraph Examiners (amending 18VAC120-30-30, 18VAC120-30-40, 18VAC120-30-70, 18VAC120-30-100, 18VAC120-30-110, 18VAC120-30-160, 18VAC120-30-170, 18VAC120-30-180, 18VAC120-30-200, 18VAC120-30-220, 18VAC120-30-230, 18VAC120-30-240, 18VAC120-30-260, 18VAC120-30-270, 18VAC120-30-300).

Statutory Authority: § 54.1-1802.1 of the Code of Virginia.

Public Hearing Information:

November 2, 2012 - 10 a.m. - Department of Professional and Occupational Regulation, 2nd Floor (Board Room 3), 9960 Mayland Drive, Suite 400, Richmond, VA

Public Comment Deadline: December 7, 2012.

Agency Contact: Eric L. Olson, Executive Director, Polygraph Examiners Advisory Board, 9960 Mayland Drive, Suite 400, Richmond, VA 23233, telephone (804) 367-6166, FAX (804) 527-4401, or email polygraph@dpor.virginia.gov.

Basis: Section 54.1-1802.1 of the Code of Virginia provides the authority for the Department of Professional and Occupational Regulation to promulgate regulations necessary to administer the regulatory system.

Purpose: These actions are essential to protect the health, safety, and welfare of citizens by ensuring that those individuals licensed to perform polygraph examinations are adequately trained and have sufficient experience to ensure that those examinations are done properly and correctly.

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# Regulations

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While polygraph examinations are not generally admissible in court proceedings, an incorrectly or improperly done examination may have serious consequences to the individual subject to the exam.

The proposed regulations solve a number of issues that have been brought to the attention of the department. Polygraph examiner interns and their sponsors, often government agencies, have expended resources to send the interns to school and maintain their employment while they are completing a training program. Under the current regulations, some interns have been unable to complete a program when the sponsor has left the agency due to death or retirement. This is a burden on the agency and the citizens that fund that agency. This and other proposed amendments will help address similar situations.

Substance: While the majority of the proposed amendments address clarifications and minor changes there are several that will affect the vast majority of licensees. Changing the size of the advisory board has both fiscal and logistical benefits. Currently, the Polygraph Examiners Advisory Board is made up of eight members. Having an even number of members to vote on items to take to the department can result in a sensitive issue for the director in those cases of a tie. Having an odd number of members all but eliminates the possibility of a deadlocked vote. Additionally, with the decrease in the number of private polygraph examiners in the programs population, it has become extremely difficult to fill the position on the board. Currently, the private sector polygraph examiners position on the board has remained vacant for two years. The proposal would bring the board to seven members, which would also have a small affect on the cost of meetings. The proposed change would alter the composition of the board to include three law-enforcement polygraph examiners, two private sector polygraph examiners, and two citizen members.

The promulgation of these regulations would amend the current examination procedures by allowing an individual to take the exam over a multiday period and placing a one year "expiration date" on examination results. This will allow an individual who was unable to schedule the entire examination in a single day, to take the written exam on one day and the practical on another while clarifying the limit on how long an applicant has to complete the entire examination.

The section of the regulations currently entitled "Grounds for fines, denial, suspension or revocation of license or denial or withdrawal of school approval" (18VAC120-30-240) will be entitled "Prohibited acts" for consistency with the regulations for other regulatory programs. Additionally, five acts were added that are also consistent with those of other regulatory boards.

Issues: In amending these regulations, the department with the technical expertise of the Polygraph Examiners Advisory Board reviewed current regulations, amendments to the statutes, and current federal polygraph law and weighed them

along with the protection to the public and the burden to the regulant population. Many of these amendments were the direct result of feedback received from applicants as well as input from the licensing staff, who provided anecdotal data of difficulties in processing applications and interactions with applicants. As a result, the board clarified issues involving intern experience verification and examination difficulties. Other amendments clarify renewal and reinstatement requirements and add consistent language to examination standards. There is no perceived disadvantage to amending the regulations to make them easier to understand.

Expanding and clarifying the acts that can result in disciplinary action brings the regulations in line with other licensing programs and is advantageous to both the licensee and the public. These "prohibited acts" provide both the examiner and the public with a more clear set of guidelines as to what is allowed and what is prohibited. There is no perceived disadvantage to amending the regulations to make them easier to understand and to provide protection to both licensees and the public.

This program directly affects a small number of regulants (less than 300) and it is not anticipated that this population will change significantly as a result of these regulatory amendments. The anticipated changes should be an advantage to the licensing staff since the clarifications should lead to a decrease in telephone calls from applicants trying to understand the internship and examination criteria, resulting in more time to process applications, lowering the processing time.

There were no other items identified that would be considered pertinent matters of interest to the regulated community, government officials, or the public.

## Department of Planning and Budget's Economic Impact Analysis:

Summary of the Proposed Amendments to Regulation. The Department of Professional and Occupational Regulation (Department) proposes to: 1) reduce the size of the Polygraph Examiners Advisory Board from eight members to seven members, 2) allow applicants to pass all parts of the polygraph examiners licensing examination within one year from examination approval rather than the current requirement of all at a single administration, 3) increase the fee an examiner may charge from \$25 to \$35, 4) provide for a procedure to be used in the event that an examiner supervising an intern is unable to provide verification of experience, 5) remove the listing of duplicate wall certificate and certificate of licensure fees from the regulations, 6) specify the number of days within which licensees must provide requested records or other information to the Department, 7) add new grounds for discipline which are already grounds for discipline for other Boards housed within the Department, and 8) clarify renewal and reinstatement requirements.

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

Estimated Economic Impact. Under the current regulations the Polygraph Examiners Advisory Board (Board) is "composed of three Virginia licensed polygraph examiners employed by law enforcement agencies of the Commonwealth, or any of its political subdivisions; three Virginia licensed polygraph examiners employed in private industry; and two citizen members as defined in §§ 54.1-107 and 54.1-200 of the Code of Virginia." The department proposes to eliminate one of the private industry slots. This would reduce the size of the Board from eight members to seven. This is advantageous in that having an odd number of members avoids ties in voting. Further, according to the Department, "with the decrease in the number of private polygraph examiners in the programs population, it has become extremely difficult to fill the position on the Board." Thus the proposed change in allotment of seats on the Board better represents the actual population of polygraph examiners and their sources of employment. Also, one fewer Board member modestly reduces Board costs. Since there is no apparent disadvantage to the proposal, it clearly produces a net benefit for the Commonwealth.

The current regulations require that applicants pass all parts of the licensing examination at a single administration in order to be eligible for a polygraph examiners license. The Department proposes to instead require that applicants pass all parts of the licensing examination within one year from examination approval. This proposed change would allow an individual who is unable to schedule the entire examination in a single day to take the written exam on one day and the practical on another, while also clarifying the limit on how long an applicant has to complete the entire examination. Currently exams are given three or four times a year only in Richmond. Under the proposed language the written portion could be taken at testing centers around the state. According to the Department, the current vendor has five or six testing centers around the state. The proposed language increases convenience and potentially reduces travel costs for applicants. Neither the Department nor the Board believes that passing all parts in a single sitting is necessary to display competence. Thus, this proposal also produces a net benefit for the Commonwealth.

According to the Department the maximum fee that an examiner may charge has not been changed in a decade. Therefore the Department proposes to increase the cap from \$25 to \$35. Examiners are not required to charge the maximum amount and if clients wish to compare offered examiner services based on price they can. Thus, this loosening of the restraint on the free market will likely produce a net benefit.

The Department points out that "Under the current regulations on any number of occasions an intern has been unable to complete a program when a supervisor has either left the

agency or is no longer available due to illness, death or retirement. This has been a reoccurring issue that has been brought to the department's attention." To address this issue the Department proposes to add language to the regulations that permit the Board to review an intern's charts in lieu of a supervisor who is unable to continue. This will alleviate an intern having to repeat the period of internship previously served because their supervisor is no longer available. This proposal will also eliminate the burden placed on the sponsors of the interns who are generally agencies and citizens that fund the agency.

The current regulations list \$25 fees for requested duplicate wall certificates and certificates of licensure. The Department states that "These fees are administrative fees set by the department for all other programs. Since this fee is an administration fee and not a licensing fee, to be consistent with other program within the department it should not be in the regulations of a specific Board." According to the Department, the amount charged will most likely be less than \$25 in practice. Also, these certificates are very rarely requested. Given the likely reduction in fee charged and lack of burden on the Department, this proposal also should produce a net benefit.

The current regulations list "Has failed, within a reasonable period of time, to provide any records or other information requested or demanded by the department" as grounds for discipline. The Department proposes to replace the vague "a reasonable amount of time" with "21 days." Specificity is superior to vagueness in that it will reduce the likelihood of dispute toward the actual requirement in practice. Twenty-one days is also clearly a reasonable amount of time within which to produce records.

The Department proposes to add the following to the list of grounds for discipline:

- Failure of the regulant, school's owner, or instructor to maintain for a period of one year from the date of each administered polygraph examination a complete and legible copy of all documents relating to the polygraph examination, including but not limited to, examination questions, results, conclusions drawn, written or electronic reports;
- Failure to inform the board in writing, within 30 days, that the regulant, school's owner, or instructor has pleaded guilty or nolo contendere or was convicted and found guilty of any felony or of a Class 1 misdemeanor or any misdemeanor conviction for activities carried out while engaged in the practice of polygraphy.
- Refusing or failing, upon request, to produce to the board, or any of its agents, any document, book, record, or copy of it in the regulant's, or school's owner's possession concerning all records for which the regulant, schools owner or instructor is required to maintain.
- Failing to respond to an investigator or providing false, misleading or incomplete information to an investigator

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# Regulations

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seeking information in the investigation of a complaint filed with the board against the regulant, school's owner or instructor.

In regards to discipline, the Department may fine, deny, suspend, or revoke any license or registration, or deny or withdraw school approval. According to Department, all of the above new grounds for discipline are standard grounds for discipline in the other boards housed within the Department.

**Businesses and Entities Affected.** The proposed amendments affect the 275 licensed polygraph examiners in the Commonwealth, as well as their private and public employers, polygraph examiner schools and instructors, applicants for licensure, and polygraph examination clients.

**Localities Particularly Affected.** The proposed amendments do not disproportionately affect particular localities.

**Projected Impact on Employment.** The proposal amendments are unlikely to significantly affect employment.

**Effects on the Use and Value of Private Property.** Private polygraph examiners will be able to charge up to \$35 per examination rather than the current maximum of \$25. Thus polygraph examination could potentially become more profitable.

**Small Businesses: Costs and Other Effects.** Private polygraph examiners will be able to charge up to \$35 per examination rather than the current maximum of \$25. Thus firms that offer polygraph examination could potentially become more profitable.

**Small Businesses: Alternative Method that Minimizes Adverse Impact.** The proposed amendments do not adversely affect small businesses.

**Real Estate Development Costs.** The proposed amendments are unlikely to significantly affect real estate development costs.

**Legal Mandate.** The Department of Planning and Budget (DPB) has analyzed the economic impact of this proposed regulation in accordance with § 2.2-4007.04 of the Administrative Process Act and Executive Order Number 14 (10). Section 2.2-4007.04 requires that such economic impact analyses include, but need not be limited to, the projected number of businesses or other entities to whom the regulation would apply, the identity of any localities and types of businesses or other entities particularly affected, the projected number of persons and employment positions to be affected, the projected costs to affected businesses or entities to implement or comply with the regulation, and the impact on the use and value of private property. Further, if the proposed regulation has adverse effect on small businesses, § 2.2-4007.04 requires that such economic impact analyses include (i) an identification and estimate of the number of small businesses subject to the regulation; (ii) the projected reporting, recordkeeping, and other administrative costs required for small businesses to comply with the regulation, including the type of professional skills necessary for

preparing required reports and other documents; (iii) a statement of the probable effect of the regulation on affected small businesses; and (iv) a description of any less intrusive or less costly alternative methods of achieving the purpose of the regulation. The analysis presented above represents DPB's best estimate of these economic impacts.

**Agency's Response to Economic Impact Analysis:** The Department of Professional and Occupational Regulation concurs with the analysis performed by the Department of Planning and Budget.

**Summary:**

*The proposed amendments (i) change the size of the Polygraph Examiners Advisory Board, (ii) allow an applicant to take portions of the examination at different dates within a one year period, (iii) clarify renewal and reinstatement requirements; and (iv) provide for a procedure to be used in the event that an examiner supervising an intern is unable to provide verification of experience.*

**18VAC120-30-30. Advisory board.**

A. The Polygraph Examiners Advisory Board, consisting of ~~eight~~ seven members appointed by the director, shall exercise the authority delegated by the director consistent with § 2.2-2100 A of the Code of Virginia and advise the department on any matters relating to the practice of polygraphy and the licensure of polygraph examiners in the Commonwealth of Virginia.

B. The advisory board shall be composed of three Virginia licensed polygraph examiners employed by law enforcement agencies of the Commonwealth, or any of its political subdivisions; three Virginia licensed polygraph examiners employed in private industry; and two citizen members as defined in §§ 54.1-107 and 54.1-200 of the Code of Virginia. All members must be residents of the Commonwealth of Virginia.

C. Each member shall serve a four-year term. No member shall serve more than two consecutive four-year terms.

Part II

Entry Requirements

**18VAC120-30-40. Basic qualifications for licensure and registration.**

A. Every applicant to the board for a license shall provide information on his application establishing that:

1. The applicant is at least 18 years old.
2. The applicant is in good standing as a licensed polygraph examiner in every jurisdiction where licensed. The applicant must disclose if he has had a license as a polygraph examiner which was suspended, revoked, or surrendered in connection with a disciplinary action or which has been the subject of discipline in any jurisdiction prior to applying for licensure in Virginia. At the time of application for licensure, the applicant must also disclose

any disciplinary action taken in another jurisdiction in connection with the applicant's practice as a polygraph examiner and whether he has been previously licensed in Virginia as a polygraph examiner.

3. The applicant is fit and suited to engage in the profession of polygraphy. The applicant must disclose if he has been convicted in any jurisdiction of a felony or misdemeanor involving lying, cheating, stealing, sexual offense, drug distribution, physical injury, or relating to the practice of the profession. Any plea of nolo contendere shall be considered a conviction for purposes of this subdivision. The record of a conviction authenticated in such form as to be admissible in the evidence under the laws of the jurisdiction where convicted shall be admissible as prima facie evidence of such conviction.

4. The applicant has disclosed his physical address. A post office box is not acceptable.

5. The nonresident applicant for a license has filed and maintained with the department an irrevocable consent for the department to serve as a service agent for all actions filed in any court in this Commonwealth.

6. The applicant has signed, as part of the application, a statement certifying that he has read and understands the Virginia polygraph examiner's license law and regulations.

7. The applicant has submitted an application, provided by the department, which shall include criminal history record information from the Central Criminal Records Exchange, with a report date within 30 days of the date the application is received by the department.

B. The department may (i) make further inquiries and investigations with respect to the qualifications of the applicant, (ii) require a personal interview with the applicant, (iii) or both.

C. The applicant shall pass all parts of the polygraph examiners licensing examination approved by the department ~~at a single administration~~ within one year from examination approval in order to be eligible for a polygraph examiners license.

**18VAC120-30-70. Procedures for licensed polygraph examiners to certify the procedures to be used to supervise an intern during an internship.**

A. Each licensee supervising an intern shall file with the application of the intern a description of the following:

1. The frequency and duration of contact between the licensee and the intern; and
2. The procedures to be employed by the licensee in reviewing and evaluating the intern's performance; and
3. The polygraph technique(s) to be used.

B. The licensee supervising the intern shall review the intern's charts prior to the intern rendering ~~of any an~~ opinion or conclusion on any polygraph examination administered by the intern.

C. In the event the licensed supervisor is unable to continue any review of experience shall be at the discretion of the board.

**18VAC120-30-100. Fees.**

A. All application fees for licenses and registrations are nonrefundable and shall not be prorated. The date of receipt by the department is the date that will be used to determine whether or not the fee is on time.

B. Application and examination fees must be submitted with the application for licensure. All other fees are discussed in greater detail in later sections of this chapter.

C. In the event that a check, money draft, or similar instrument for payment of a fee required by statute or regulation is not honored by the bank or financial institution named, the applicant or regulant shall be required to remit fees sufficient to cover the original fee, plus an additional processing charge set by the department.

D. The following fees listed in the table apply:

FEE TYPE	AMOUNT DUE	WHEN DUE
Application for Examiner's License	\$45	With application
Application for Examiner's License by Reciprocity	\$95	With application
Application for Intern Registration	\$75	With application
Application for Examiner's License by Examination	\$200	With application
Reexamination	\$200	With approval letter
Renewal	\$55	Up to one calendar month after the expiration date on license
Reinstatement	\$75	One to six calendar months after the expiration date on license
Duplicate Wall Certificate	\$25	With written request
Certificate of Licensure	\$25	With written request

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# Regulations

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## 18VAC120-30-110. Examinations.

All examinations required for licensure shall be approved by the advisory board and provided by the department, a testing service acting on behalf of the advisory board, or another governmental agency or organization.

Applicants for licensure shall pass a two-part licensing examination approved by the board, of which Part I is a written examination and Part II is an Advisory Board Evaluation. Applicants must pass the written examination in order to sit for the advisory board evaluation ~~being administered the same day.~~

The applicant shall follow all the rules established by the department with regard to conduct at the examination. Such rules shall include any written instructions communicated prior to the examination date and any instructions communicated at the site, either written or oral, on the date of the examination. Failure to comply with all rules established by the department with regard to conduct at the examination shall be grounds for denial of application.

## 18VAC120-30-160. Qualifications for renewal.

A. Applicants for renewal of a license shall continue to meet the standards for entry as set forth in subdivisions A 2 through A 5 of 18VAC120-30-40. The board may deny renewal of a license for the same reasons as it may refuse initial issuance or discipline a regulant. The regulant has a right to appeal any such action by the board under the Virginia Administrative Process Act (§ 2.2-4000 et seq. of the Code of Virginia).

B. Failure to timely pay any monetary penalty, reimbursement of cost, or other fee assessed by consent order or final order shall result in delaying or withholding services provided by the department, such as, but not limited to, renewal, reinstatement, or processing of a new application; or exam administration.

### Part IV Reinstatement

## 18VAC120-30-170. Reinstatement required.

A. Any licensee who fails to renew his license within one calendar month after the expiration date on the license shall be required to apply for reinstatement and submit the proper fee referenced in 18VAC120-30-100.

B. Six calendar months after the expiration date on the license, reinstatement is no longer possible. To resume practice as a polygraph examiner, the former licensee must apply as a new applicant for licensure, meeting all ~~educational, examination and experience requirements as listed in the regulations~~ then current entry requirements at the time of reapplication, including retaking an examination.

C. Any examiner activity conducted subsequent to the expiration of the license may constitute unlicensed activity and may be subject to prosecution under § 54.1-111 of the Code of Virginia.

## 18VAC120-30-180. Department discretion to deny reinstatement.

The department may deny reinstatement of a license for the same reasons as it may refuse initial licensure or discipline a licensee.

Failure to timely pay any monetary penalty, reimbursement of cost, or other fee assessed by consent order or final order shall result in delaying or withholding the services provided by the department, such as, but not limited to, renewal, reinstatement, processing of a new application, or examination administration. The regulant has a right to appeal any such action by the board under the Virginia Administrative Process Act (§ 2.2-4000 et seq. of the Code of Virginia).

### Part V Standards of Practice and Conduct

## 18VAC120-30-200. Polygraph examination procedures.

A. Each licensed polygraph examiner and registered polygraph examiner intern must post, in a conspicuous place for the examinee, his license or registration, or a legible copy of his license or registration to practice in Virginia.

B. The examiner shall provide the examinee with a written explanation of the provisions of 18VAC120-30-200, 18VAC120-30-210 and 18VAC120-30-220 at the beginning of each polygraph examination.

C. The examinee may request a recording of the polygraph examination being administered. Each examiner shall maintain recording equipment and recording media adequate for such recording. The examiner shall safeguard all examination recordings with the records he is required to keep pursuant to 18VAC120-30-230. All recordings shall be made available to the department, the examinee or the examinee's attorney upon request. The examiner may charge the examinee a fee not to exceed ~~\$25~~ \$35 only if the examinee requests and receives a copy of an examination ~~tape~~ recording.

D. The examinee shall be entitled to a copy of all portions of any written report pertaining to his examination which is prepared by the examiner and provided to any person or organization. The examinee shall make his request in writing to the examiner. The examiner shall comply within 10 business days of providing the written report to any person or organization or receiving the examinee's written request, whichever occurs later. The examiner may collect not more than \$1.00 per page from the examinee for any copy provided.

E. The provisions of subsections B, C, and D of this section shall not be applicable to any examination conducted by or on behalf of the Commonwealth or any of its political subdivisions when the examination is for the purpose of preventing or detecting crime or the enforcement of penal laws. However, examiners administering examinations as described in this section shall comply with subsection B of

this section through a verbal explanation of the provisions of 18VAC120-30-210 and 18VAC120-30-220.

**18VAC120-30-220. Examination standards of practice.**

A. The examiner shall comply with the following standards of practice and shall disclose to each examinee the provisions of this subsection and shall not proceed to examine or continue the examination if it is or becomes apparent to the examiner that the examinee does not understand any of these disclosures:

1. All questions to be asked during the polygraph test(s) shall be reduced to writing and read to the examinee.
2. The examinee or the examiner may terminate the examination at any time.
3. If the examination is within the scope of § 40.1-51.4:3 of the Code of Virginia, the examiner shall explain the provisions of that statute to the examinee.
4. No questions shall be asked concerning any examinee's lawful religious affiliations, lawful political affiliations, or lawful labor activities. This provision shall not apply to any such affiliation which is inconsistent with the oath of office for public law-enforcement officers.
5. The examinee shall be provided the full name of the examiner and the name, address, and telephone number of the department.
6. During no part of a preemployment polygraph examination shall the examiner ask questions concerning an examinee's sexual preferences or sexual activities except as in accordance with § 40.1-51.4:3 or 54.1-1806 of the Code of Virginia.

B. An examiner shall not perform more than 12 polygraph examinations in any 24-hour period.

C. An examiner shall not ask more than 16 questions per chart on a single polygraph test. Nothing in this subsection shall prohibit an examiner from conducting more than one polygraph test during a polygraph examination.

D. An examiner shall allow on every polygraph test a minimum time interval of 10 seconds between the examinee's answer to a question and the start of the next question.

E. An examiner shall record at a minimum the following information on each polygraph test chart produced:

1. The name of the examinee;
2. The date of the examination;
3. The time that each test begins;
4. The examiner's initials;
5. Any adjustment made to component sensitivity;
6. The point at which each question begins and each answer is given;
7. Each question number; and
8. Each answer given by the examinee.

F. An examiner shall render only three evaluations of polygraph tests:

1. Deception indicated;
2. No deception indicated; or
3. Inconclusive.

An examiner may include in his report any information revealed by the examinee during the polygraph examination.

Nothing in this section shall prohibit an examiner from explaining the meaning of the above evaluations.

G. An examiner shall not render a verbal or written report based upon polygraph test chart analysis without having conducted at least two polygraph tests charts. Each relevant question shall have been asked at least once on each of at least two polygraph tests charts.

H. An examiner may make a hiring or retention recommendation for the examiner's ~~full-time~~ employer provided the hiring or retention decision is not based solely on the results of the polygraph examination.

**18VAC120-30-230. Records.**

The licensed polygraph examiner or registered polygraph examiner intern shall maintain the following for at least one year from the date of each polygraph examination:

1. Polygraphic charts;
2. Questions asked during the examination;
3. A copy of the results and the conclusions drawn;
4. A copy of ~~any~~ every written report provided in connection with the examination; and
5. ~~Tape~~ Electronic recordings of examinations made in compliance with subsection C of 18VAC120-30-200.

**18VAC120-30-240. ~~Grounds for fines, denial, suspension or revocation of licenses or denial or withdrawal of school approval~~ Prohibited acts.**

The department may fine, deny, suspend, or revoke any license or registration, or deny or withdraw school approval upon a finding that the applicant, licensee, registrant, or school:

1. Has presented false or fraudulent information when applying for any license or registration, renewal of license or registration, or approval;
2. Has violated, aided, or abetted others to violate Chapters 1 through 3 of Title 54.1 or §§ 54.1-1800 through 54.1-1806 of the Code of Virginia, or of any other statute applicable to the practice of the profession herein regulated, or of any provisions of this chapter;
3. ~~Has been convicted of any misdemeanor directly related to the occupation or any felony.~~ Having been convicted or found guilty, regardless of the manner of adjudication, in any jurisdiction of the United States of any misdemeanor or felony. Review of convictions shall be subject to the requirements of § 54.1-204 of the Code of Virginia. Any pleas of nolo contendere shall be considered a conviction



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# Regulations

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for the purposes of this ~~section~~ subsection. The record of a conviction authenticated in such form as to be admissible in evidence under the laws of the jurisdiction where the conviction occurred shall be forwarded to the board within ~~40~~ 30 days of entry and shall be admissible as prima facie evidence of such conviction;

~~4. Has made any misrepresentation or false promise or caused to be published any advertisement that is false, deceptive, or misleading;~~

~~5. 4.~~ Has allowed one's license or registration to be used by anyone else;

~~6. 5.~~ Has failed, within a reasonable period of time 21 days, to provide any records or other information requested or demanded by the department;

~~7. 6.~~ Has displayed professional incompetence or negligence in the performance of polygraphy; or

~~8. 7.~~ Has violated any provision of 18VAC120-30-220.

8. Failure of the regulant, school's owner, or instructor to maintain for a period of one year from the date of each administered polygraph examination a complete and legible copy of all documents relating to the polygraph examination including, but not limited to, examination questions, results, conclusions drawn, and written or electronic reports;

9. Failure to inform the board in writing within 30 days that the regulant, school's owner, or instructor has pleaded guilty or nolo contendere or was convicted and found guilty of any felony or of a Class 1 misdemeanor or any misdemeanor conviction for activities carried out while engaged in the practice of polygraphy.

10. Refusing or failing, upon request, to produce to the board, or any of its agents, any document, book, or record, or copy of it in the regulant's or school's owner's possession concerning all records for which the regulant, school's owner, or instructor is required to maintain.

11. Failing to respond to an investigator or providing false, misleading, or incomplete information to an investigator seeking information in the investigation of a complaint filed with the board against the regulant, school's owner, or instructor.

## Part VI

### Approval of Polygraph School

#### **18VAC120-30-260. Approval of polygraph school curriculum.**

Schools seeking approval of their polygraph curriculum shall submit the application for approval of a polygraph school to the department for consideration. The application shall include:

1. The name and address of the school;
2. The name and address of the proprietor, partnership, corporation or association if different from the school name;

3. The owners of the school;

4. The names and qualifications of the instructors which shall be indicated on instructor qualifications form; and in a format approved by the advisory board; and

5. The subject courses and the number of instruction hours assigned to each.

#### **18VAC120-30-270. Minimum requirements for school curriculum.**

A. There must be one type of ~~accepted~~ polygraph instrument per three students in the course.

B. To receive approval, the institution must offer a minimum of 240 hours of instruction, unless the school has obtained approval from the department for less than the minimum hours of course instruction. The following subject areas must be included in the school's curriculum:

1. Polygraph theory;
2. Examination techniques and question formulation;
3. Polygraph interrogation;
4. Case observation;
5. Polygraph case practice;
6. Chart interpretation;
7. Legal aspects of polygraph examination;
8. Physiological aspects of polygraphy;
9. Psychological aspects of polygraphy;
10. Instrumentation;
11. History of polygraph; ~~and~~
12. Reviews and examinations; ~~and~~
13. Ethics as it relates to polygraphy.

C. Out-of-state schools seeking approval of their curriculum which has been approved by their state must have the appropriate regulatory agency of their state certify such approval to the department.

#### **18VAC120-30-300. Periodic requalification for continued course approval.**

At times established by the department, or during the random audit of any course, the department may require that schools that have previously obtained course approval, provide the department with evidence, in a form set forth by the department, that they continue to comply with the requirements of 18VAC120-30-260, 18VAC120-30-270 and 18VAC120-30-280. Failure to continue to comply with the department's requirements or respond to such a request may result in the department withdrawing its approval.

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

General Assembly Building, 2nd Floor, Richmond, Virginia 23219.

FORMS (18VAC120-30)

~~Internship Completion and License Exam Form, 16EXINT (rev. 8/07).~~

~~License/Intern Registration Application, 16LIC (rev. 8/07).~~

~~Polygraph School Curriculum Approval Application, 16SCHL (rev. 11/02).~~

~~Supervisor Endorsement Form, 16SEND (rev. 11/02).~~

[Internship Completion and License Exam Form, 16EXINT \(rev. 9/12\).](#)

[License/Intern Registration Application, 16LIC \(rev. 9/12\).](#)

[Polygraph School Curriculum Approval Application, 16SCHL \(rev. 9/12\).](#)

[Supervisor Endorsement Form, 16SEND \(rev. 9/12\).](#)

VA.R. Doc. No. R10-2217; Filed September 18, 2012, 8:27 a.m.

**BOARD FOR WATERWORKS AND WASTEWATER WORKS OPERATORS AND ONSITE SEWAGE SYSTEM PROFESSIONALS**

**Fast-Track Regulation**

**Title of Regulation: 18VAC160-20. Board for Waterworks and Wastewater Works Operators and Onsite Sewage System Professionals Regulations (amending 18VAC160-20-10, 18VAC160-20-97).**

**Statutory Authority: §§ 54.1-201 and 54.1-2301 of the Code of Virginia.**

**Public Hearing Information: No public hearings are scheduled.**

**Public Comment Deadline: November 7, 2012.**

**Effective Date: December 1, 2012.**

**Agency Contact: Trisha Henshaw, Executive Director, Board for Waterworks and Wastewater Works Operators and Onsite Sewage System Professionals, 9960 Mayland Drive, Suite 400, Richmond, VA 23233, telephone (804) 367-8595, FAX (866) 350-5354, or email waterwasteoper@dpor.virginia.gov.**

**Basis: Subdivision 5 of § 54.1-201 of the Code of Virginia states that the board has the power and duty to promulgate regulations in accordance with the Administrative Process Act (§ 2.2-4000 et seq. of the Code of Virginia) necessary to assure continued competency, to prevent deceptive or misleading practices by practitioners, and to effectively administer the regulatory system administered by the regulatory board.**

Section 54.1-2301 D of the Code of Virginia states that, "The Board, in consultation with the Board of Health, shall adopt regulations for the licensure of (i) onsite soil evaluators; (ii) installers of alternative onsite sewage systems, as defined in § 32.1-163; and (iii) operators of alternative onsite sewage systems, as defined in § 32.1-163. Such regulations shall

include requirements for (a) minimum education and training, including approved training courses; (b) relevant work experience; (c) demonstrated knowledge and skill; (d) application fees to cover the costs of the program, renewal fees, and schedules; (e) the division of onsite soil evaluators into classes, one of which shall be restricted to the design of conventional onsite sewage systems; and (f) other criteria the Board deems necessary."

The proposed language will reflect current procedures consistent with the Virginia Department of Health (VDH) that pertain to the issuance of permits obtained by contractors for the installation of sewage systems, completion statements submitted to VDH by the contractor after the installation, and inspection report and completion statements submitted to VDH by a licensed soil evaluator or Virginia-licensed professional engineer. The requirement to provide these documents for an installer license will sufficiently demonstrate the individual's installation experience without overburdening him with unnecessary documents such as a system operation permit.

**Purpose:** The changes to the regulations are necessary to allow individuals currently working in the water, wastewater, soil evaluation, sewage installation, or sewage operation industry to continue to work if under the direct supervision of a licensed individual. Licensees will supervise both individuals who are seeking experience for licensure as well as individuals who work in the industry but are not seeking licensure. Evaluation, installation, and operation duties will continue to be controlled by a properly licensed person in order to continue to safeguard the public, but persons who are unlicensed, and work under the direct supervision of a licensee will not be mandated to apply for licensure should they choose not to.

One goal of the proposed language includes amending the current requirements for documenting installation experience to make them more consistent with the true-to-life procedures in the onsite sewage system industry. Currently, a contractor completion statement and a separate AOSE/PE inspection report and completion statement is required by VDH after a system installation is complete.

In the proposed language, a sewage system installer license applicant would be required to submit copies of the contractor completion statements, corresponding inspection report and completion statements, and a signed statement from a supervisor within the company that performed the installation. This process is a standard that would apply to all installer applicants seeking to prove their qualifications for sewage system installation licensure. The applicant would merely need to provide copies of documents that are already required by VDH and kept as public records after the installation of a system.

Another goal of the proposed language is to allow technically qualified persons to obtain the installer license by proving their experience of installing systems without limiting them to

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# Regulations

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the time period during which the contractor may or may not have had the SDS specialty on the contractor license. The current requirements preclude individuals from licensure who might otherwise be qualified, but whose firm may just not have had the SDS endorsement on the firm's contractor license during the time period of the employee's experience. The proposed language resolves this issue by separating the experience of the employee from the SDS endorsement on the firm's contractor license. The applicant must have certification of his experience and proof that the firm, of which he is either an employee or a member of responsible management, has a proper Virginia contractor license with the SDS specialty at the time of his individual installer application. This accomplishes two things: it allows minimally qualified individuals to meet the requirements for licensure while simultaneously ensuring continued compliance of existing system installation contractors in Virginia.

Rationale for Using Fast-Track Process: This fast-track rulemaking process is noncontroversial because it is less restrictive than the existing regulation language for the following reasons:

1. The current definitions of "direct supervisor" and "direct supervision" make a licensee responsible for the activities of an individual who is supposed to intend to become licensed. The proposed amendments to the language will alleviate the licensee of having to ascertain whether or not his supervised employees intend to apply for a license, but it continues to assure the public protection because the licensed supervisor is still responsible for all activities of the unlicensed individual.
2. The proposed change to the document requirements for an installer license applicant will require him to produce only the contractor completion statement and the corresponding inspection report, which he can obtain from VDH. This documentation is more valid proof to the board that the individual is competent to install sewage systems than the currently required operation permit, which is issued to the homeowner and does not verify the applicant's installation experience.
3. The current language for installer license applicants requires that their experience was gained while working for a firm that held the SDS specialty on its contractor license at the time of the employee's experience. This technically prevents otherwise qualified persons from obtaining the individual installer license whose firm may not have acquired the SDS specialty on the firm's contractor license. The proposed language allows these individuals' experience to count toward fulfilling the individual installer license requirements, regardless of whether the contracting firm had the SDS specialty at the time, as long as the firm has the SDS specialty at the time that the individual applies for his installer license.

Substance: Substantive changes include removing language from the definitions of "direct supervisor" and "direct

supervision" that indicates that such supervision requires that the supervisee must intend to apply for a license. Entry requirements for installers are less restrictive than the current language and the documentation requirements for installers to prove experience are changed to be consistent with VDH procedures involved in the installation of a sewage system. The changes, although substantive in nature, are less restrictive than current requirements.

Issues: The advantages to the public are less restrictive licensure requirements that still ensure minimum competency within the soil evaluation, septic installation, and septic operation fields.

The primary advantage to the Commonwealth is the continuance of a successful licensure program that meets the needs of protecting the public by ensuring minimum competency within the sewage system industry. Simultaneously, the regulated community is not faced with unnecessary difficulties in obtaining the licensure required to continue to perform its business in the Commonwealth.

The advantages to the public, including the regulated community, are detailed above.

## Department of Planning and Budget's Economic Impact Analysis:

Summary of the Proposed Amendments to Regulation. The Board for Waterworks and Wastewater Works Operators and Onsite Sewage System Professionals (Board) proposes to amend its regulations so that: 1) licensees may supervise the work of unlicensed individuals who are not seeking licensure, 2) the experience requirement for licensure as a sewage system installer can be fulfilled with proof of installation jobs performed whether or not they were performed under a contractor's license with a SDS specialty attached and 3) the experience requirements for licensure as an alternate onsite sewage installer require, as proof of experience, paperwork that is already required by the Virginia Department of Health (VDH) after a system installation is complete.

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

Estimated Economic Impact. Under current regulations, the definitions of direct supervision and direct supervisor only allow licensees to supervise nonlicensed individuals who are working to qualify for licensure. The Board proposes to modify these definitions so that licensees can supervise unlicensed individuals whether or not they ever plan on becoming licensed. Since the licensee supervisors are now, and will continue to be, responsible for the work of any individuals that they supervise, it is likely that no entity will incur extra costs on account of this regulatory change. Regulated entities will benefit from the removal of this restriction because it will open up a wider pool of possible employees for their businesses. Individuals who might be interested in this type of employment, but who do not want to work toward licensure, will also benefit from this regulatory

change will allow them to work under the supervision of a licensee.

Current regulations require that applicants for licensure as onsite sewage system installers have experience installing onsite sewage systems either under the supervision of a contractor with a sewage disposal system (SDS) specialty or actually working as a contractor with an SDS specialty. Because the Board has had contractor applicants who have a proven record of successfully installing onsite sewage systems during a time when they did not have an SDS specialty attached to their license, the Board proposes to change licensure requirements. Under the proposed regulations, applicants for licensure only have to either have a contractor's license with an SDS specialty, or be working for a contractor with an SDS specialty, at the time they apply for licensure rather than when all experience requirements were met. Contractors who meet the requirements for an SDS specialty can obtain it by filling out a form and paying a \$40 fee. Since all onsite sewage systems are inspected after they are completed, there is likely no public health consequence to allowing less restrictive provisions for gaining experience. Applicants will likely benefit from this proposed change as it will allow them to use all of their experience without having to discount jobs that were not done under a contractor's SDS specialty.

Current regulations that govern licensure for alternate onsite sewage system installers require proving successful completion of a certain number of onsite or alternate onsite sewage systems installations. The Board currently requires, as proof of completed jobs, paperwork that might be difficult or impossible for applicants to obtain. To solve this problem, the Board proposes to require only the same paperwork that is also required by the Virginia Department of Health (VDH) to prove successful completion of sewage systems jobs. This change will benefit applicants who will no longer be required to provide papers that they don't have or can't get.

**Businesses and Entities Affected.** The Department of Professional and Occupational Regulation (DPOR) reports that there are currently 104 licensed sewage systems installers and 1,459 contractors with SDS specialties in the Commonwealth. All of these individuals, as well as any individuals who may wish to be licensed by the Board in the future, will be affected by these proposed regulations.

**Localities Particularly Affected.** No locality will be particularly affected by this proposed regulatory action.

**Projected Impact on Employment.** This regulatory action will likely have no impact on employment in the Commonwealth.

**Effects on the Use and Value of Private Property.** This regulatory action will likely have no effect on the use or value of private property in the Commonwealth.

**Small Businesses: Costs and Other Effects.** Small businesses in the Commonwealth are unlikely to incur any costs on account of this regulatory action.

**Small Businesses: Alternative Method that Minimizes Adverse Impact.** Small businesses in the Commonwealth are unlikely to incur any costs on account of this regulatory action.

**Real Estate Development Costs.** This regulatory action will likely have no effect on real estate development costs in the Commonwealth.

**Legal Mandate.** The Department of Planning and Budget (DPB) has analyzed the economic impact of this proposed regulation in accordance with § 2.2-4007.04 of the Administrative Process Act and Executive Order Number 36 (06). Section 2.2-4007.04 requires that such economic impact analyses include, but need not be limited to, the projected number of businesses or other entities to whom the regulation would apply, the identity of any localities and types of businesses or other entities particularly affected, the projected number of persons and employment positions to be affected, the projected costs to affected businesses or entities to implement or comply with the regulation, and the impact on the use and value of private property. Further, if the proposed regulation has adverse effect on small businesses, § 2.2-4007.04 requires that such economic impact analyses include (i) an identification and estimate of the number of small businesses subject to the regulation; (ii) the projected reporting, recordkeeping, and other administrative costs required for small businesses to comply with the regulation, including the type of professional skills necessary for preparing required reports and other documents; (iii) a statement of the probable effect of the regulation on affected small businesses; and (iv) a description of any less intrusive or less costly alternative methods of achieving the purpose of the regulation. The analysis presented above represents DPB's best estimate of these economic impacts.

**Agency's Response to Economic Impact Analysis:** The Board for Waterworks and Wastewater Works Operators and Onsite Sewage System Professionals concurs with the economic impact analysis prepared by the Department of Planning and Budget.

**Summary:**

*The proposed amendments change the definitions of "direct supervisor" and "direct supervision," allowing licensees to supervise the work of unlicensed individuals who are not seeking licensure. Also, the requirements for applicants for an individual sewage system installer license have been modified to reflect current industry procedures consistent with the Virginia Department of Health. The experience requirement for the individual sewage system installer license has also been changed to allow an individual's installation experience to fulfill the requirement for licensure as long as the applicant's firm is properly licensed as a Virginia contractor with the specialty of sewage disposal systems at the time which he applies for the installer license.*

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# Regulations

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## Part I Definitions

### 18VAC160-20-10. Definitions.

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

"Alternative onsite sewage system" means a treatment works that is not a conventional onsite sewage system and does not result in a point source discharge.

"Alternative onsite sewage system installer" means an individual licensed by the board to construct, install, and repair conventional and alternative onsite sewage systems.

"Alternative onsite sewage system operator" means an individual licensed by the board to operate and maintain conventional and alternative onsite sewage systems.

"Alternative onsite soil evaluator" means an individual licensed by the board to evaluate soils and soil properties in relationship to the effect of these properties on the use and management of these soils as the locations for conventional and alternative onsite sewage systems, to certify in accordance with applicable state regulations and local ordinances that sites are suitable for conventional and alternative onsite sewage systems, and to design conventional and alternative onsite sewage systems suitable for the soils.

"Authorized onsite soil evaluator" or "AOSE" means an individual holding an authorized onsite soil evaluator certification issued by the Virginia Department of Health that was valid on June 30, 2009.

"Board" means the Board for Waterworks and Wastewater Works Operators and Onsite Sewage System Professionals or any successor agency.

"Category" means waterworks operator, wastewater works operator, onsite soil evaluator, onsite sewage system installer, and onsite sewage system operator.

"Classification" means the divisions within each category of waterworks and wastewater works operators' licenses into classes where Class "1" represents the highest classification.

"Classified facility" means a waterworks that has been granted a classification by the Virginia Department of Health or a wastewater works that has been granted a classification by the Virginia Department of Environmental Quality.

"Contact hour" means 50 minutes of participation in a structured training activity.

"Continuing Professional Education (CPE)" means participation in a structured training activity that enables a licensee to maintain and increase the competence required to assure the public's protection.

"Conventional onsite sewage system" means a treatment works consisting of one or more septic tanks with gravity, pumped, or siphoned conveyance to a gravity distributed subsurface drain field.

"Conventional onsite sewage system installer" means an individual licensed to construct, install, and repair conventional onsite sewage systems.

"Conventional onsite sewage system operator" means an individual licensed by the board to operate and maintain a conventional onsite sewage system.

"Conventional onsite soil evaluator" means an individual licensed by the board to evaluate soils and soil properties in relationship to the effects of these properties on the use and management of these soils as the locations for conventional and alternative onsite sewage systems, to certify in accordance with applicable state regulations and local ordinances that sites are suitable for conventional and alternative onsite sewage systems, and to design conventional onsite sewage systems suitable for the soils.

"Department" means the Virginia Department of Professional and Occupational Regulation.

"Direct supervision" means being responsible for the compliance with this chapter by any unlicensed individual who, ~~for the purpose of obtaining the necessary competence to qualify for licensure,~~ is engaged in activities requiring an operator, installer, or evaluator license.

"Direct supervisor" means a licensed operator, installer, or evaluator who undertakes the supervision of an unlicensed individual engaged in activities requiring a license ~~for the purpose of obtaining the competence necessary to qualify for licensure and who.~~ The direct supervisor shall be responsible for the unlicensed individual's full compliance with this chapter.

"Distance learning" means participation in a training activity, with or without interaction with an instructor, that utilizes DVD's, videos, or other audio/visual materials, or is computer-based. Documentation of distance learning must meet the requirements of 18VAC160-20-109 D.

"Experience" means time spent learning how to physically and theoretically operate the waterworks, wastewater works, or onsite sewage system as an operator-in-training or time spent operating a waterworks or wastewater works for which the operator is currently licensed for the purpose of obtaining the necessary competence to qualify for a specific license. Experience also means the time spent under the direct supervision of an authorized onsite soil evaluator, onsite soil evaluator licensee, onsite sewage system installer licensee or onsite site sewage system operator licensee for the purpose of obtaining the necessary competence to qualify for a specific license.

"Interim license" means a method of regulation whereby the board authorizes an unlicensed individual to engage in activities requiring a specific license provided for in this chapter for a limited time to obtain the necessary competence to qualify for that specific license.

"Interim licensee" means an individual holding a valid interim license.

"Licensed operator" means an operator with a license in the category of onsite sewage systems operator, waterworks operator, or wastewater works operator. For waterworks operators and wastewater works operators, the license classification must be equal to or higher than the classification of the waterworks or wastewater works being operated.

"Licensee" means an individual holding a valid license issued by the board.

"Licensure" means a method of regulation whereby the Commonwealth, through the issuance of a license, authorizes a person possessing the character and minimum skills to engage in the practice of a profession or occupation that is unlawful to practice without a license.

"Maintenance" or "maintain" means performing adjustments to equipment and controls and in-kind replacement of normal wear and tear parts such as light bulbs, fuses, filters, pumps, motors, or other like components. Maintenance includes pumping the tanks or cleaning the building sewer on a periodic basis. Maintenance shall not include replacement of tanks, drain field piping, distribution boxes, or work requiring a construction permit and a licensed onsite sewage system installer.

"Nonclassified facility" means a facility located in Virginia that has not been classified by the Virginia Department of Health or a facility that has not been classified by the Virginia Department of Environmental Quality.

"Onsite sewage system" means a conventional onsite sewage system or an alternative onsite sewage system.

"Operate" means any act of an individual that may impact on the finished water quality at a waterworks, the plant effluent at a wastewater works, or the effluent at an onsite sewage system.

"Operating staff" means individuals employed or appointed by an owner to work at a waterworks or wastewater works.

"Operator" means any individual employed or appointed by any owner, and who is designated by such owner to be the person in responsible charge, such as a supervisor, a shift operator, or a substitute in charge, and whose duties include testing or evaluation to control waterworks, wastewater works operations, or to operate onsite sewage systems. Not included in this definition are superintendents or directors of public works, city engineers, or other municipal or industrial officials whose duties do not include the actual operation or direct supervision of waterworks or wastewater works.

"Operator-in-training" means an individual employed by an owner to work under the direct supervision and direction of an operator holding a valid license in the proper category and classification for the purpose of gaining experience and knowledge in the duties and responsibilities of an operator of a waterworks, wastewater works, or onsite sewage system. An operator-in-training is not an operator.

"Owner" means the Commonwealth of Virginia, or any political subdivision thereof, any public or private institution, corporation, association, or any other entity organized or existing under the laws of this Commonwealth or of any other state or nation, or any person or group of persons acting individually or as a group, who own, propose to own, manage, or maintain waterworks, wastewater works, or onsite sewage systems.

"Provisional licensee" means an individual holding a valid provisional license issued by the board.

"Provisional licensure" or "provisional license" means a method of regulation whereby the Commonwealth recognizes an individual as having met specific standards but who is not authorized to operate a classified facility until he has met the remaining requirements for licensure and has been issued a license.

"Renewal" means continuing the effectiveness of a license for another period of time.

"Responsible charge" means the designation by the owner of any individual to have the duty and the authority to operate a waterworks, wastewater works, or onsite sewage system.

"Sewage" means water-carried and nonwater-carried human excrement, kitchen, laundry, shower, bath or lavatory wastes separately or together with such underground, surface, storm or other water and liquid industrial wastes as may be present from residences, buildings, vehicles, industrial establishments or other places.

"Sewage handler" means any person who removes or contracts to remove and transports by vehicle the contents of any septic tank, sewage treatment plant, privy, holding tank, portable toilet, or other treatment or holding device, or any sewage, septage or sewage sludges and who is permitted under the Sewage Handling and Disposal Regulations (12VAC5-610) or successor regulation.

"Sewerage system" means pipelines or conduits, pumping stations and force mains, and all other construction, devices and appliances appurtenant thereto, used for the collection and conveyance of sewage to a treatment works or point of ultimate disposal, as defined in the Sewage Handling and Disposal Regulations (12VAC5-610).

"Structured training activity" means a formal educational process designed to permit a participant to learn a given subject or subjects through interaction with an instructor in a course, seminar, conference, or other performance-oriented format, or distance learning.

"Training credit or education credit" means a unit of board-approved training or formal education completed by an individual that may be used to substitute for experience when applying for a license. Formal education used to meet a specific education requirement for license entry cannot also be used as a training credit for experience substitution.

"Transportation" means the vehicular conveyance of sewage, as defined in § 32.1-163 of the Code of Virginia.

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# Regulations

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"Treatment works" means any device or system used in the storage, treatment, disposal or reclamation of sewage or combinations of sewage and industrial wastes including, but not limited to, pumping, power and other equipment and appurtenances, septic tanks and any works, including land, that are or will be (i) an integral part of the treatment process or (ii) used for ultimate disposal of residues or effluent resulting from such treatment.

"VDH" means Virginia Department of Health.

"Wastewater works" means a system of (i) sewerage systems or sewage treatment works serving more than 400 persons, as set forth in § 62.1-44.18 of the Code of Virginia; (ii) sewerage systems or sewage treatment works serving fewer than 400 persons, as set forth in § 62.1-44.18 of the Code of Virginia, if so certified by the State Water Control Board; and (iii) facilities for discharge into state waters of industrial wastes or other wastes, if certified by the State Water Control Board.

"Wastewater works operator" means any individual employed or appointed by any owner, who is designated by such owner to be the person in responsible charge, such as a supervisor, a shift operator, or a substitute in charge, and whose duties include testing or evaluation to control wastewater works operations. Superintendents or directors of public works, city engineers, or other municipal or industrial officials whose duties do not include the actual operation or direct supervision of wastewater works are not included in this definition.

"Waterworks" means a system that serves piped water for drinking or domestic use to (i) at least 15 connections or (ii) at least 25 of the same individuals for more than six months out of the year. The term waterworks shall include all structures, equipment, and appurtenances used in the storage, collection, purification, treatment and distribution of pure water, except the piping and fixtures inside the building where such water is delivered.

"Waterworks operator" means any individual employed or appointed by any owner, who is designated by such owner to be the person in responsible charge, such as a supervisor, a shift operator, or a substitute in charge, and whose duties include testing or evaluation to control waterworks operations. Superintendents or directors of public works, city engineers, or other municipal or industrial officials whose duties do not include the actual operation or direct supervision of waterworks are not included in this definition.

## **18VAC160-20-97. Qualifications for licensure - onsite sewage system installers.**

A. Each applicant shall make application in accordance with 18VAC160-20-76 and shall meet the specific entry requirements provided for in this section for the license desired.

B. Each applicant holding a valid interim onsite sewage system installer license shall submit documentation of

compliance with the continuing professional education requirements of this chapter at the time of application.

### C. Specific entry requirements.

1. Conventional onsite sewage system installer. Each individual applying for an initial conventional onsite sewage system installer license shall pass a board-approved examination and shall meet one of the following requirements:

a. Have two years of full-time experience successfully installing alternative or conventional onsite sewage systems during the last four years under the direct supervision of a properly licensed contractor holding a sewage disposal system (SDS) specialty issued by the Virginia Board for Contractors and be currently employed by a firm holding a current and valid Virginia contractor license with the sewage disposal system (SDS) specialty; ~~or~~

b. Have two years of full-time experience successfully installing alternative or conventional onsite sewage systems during the last four years as a properly licensed contractor holding a sewage disposal system (SDS) specialty issued by the Virginia Board for Contractors and be a member of responsible management in a firm holding a current and valid Virginia contractor license with the sewage disposal system (SDS) specialty; ~~or~~

c. Have two years of full-time experience successfully installing alternative or conventional onsite sewage systems during the last four years working under the direct supervision of, or working as, a properly licensed Virginia contractor with the sewage disposal system (SDS) specialty; or

e- d. Have documentation certifying that the applicant is competent to install conventional onsite sewage systems. Certification must be provided by any combination of three of the following individuals:

- (1) VDH Authorized Onsite Soil Evaluators (AOSE) for work performed prior to July 1, 2009;
- (2) Licensed interim onsite soil evaluators;
- (3) Licensed conventional or alternative onsite soil evaluators;
- (4) Licensed conventional or alternative onsite sewage system installers; or
- (5) Virginia licensed professional engineers.

2. Conventional onsite sewage system installer. The examination requirement provided for in subdivision 1 of this subsection shall not apply to applicants seeking initial licensure as a conventional onsite sewage system installer provided that:

a. The applicant is able to satisfactorily demonstrate that he has been actively engaged in performing the duties of a conventional onsite sewage system installer, as defined in this chapter, for at least eight years within the 12-year

period immediately preceding the date of application. Documentation of being actively engaged in performing the duties of a conventional onsite sewage system installer, as defined in this chapter, for at least eight years within the 12-year period immediately preceding the date of application shall be provided by one or more of the following:

- (1) VDH Authorized Onsite Soil Evaluator (AOSE) for work performed prior to July 1, 2009;
- (2) Licensed interim onsite soil evaluator;
- (3) Licensed conventional or alternative onsite soil evaluator;
- (4) Licensed conventional or alternative onsite sewage system installer; or
- (5) Virginia licensed professional engineer; and

b. The department receives a completed application no later than June 30, 2016. An individual who fails to have his application in the department's possession by June 30, 2016, shall be required to pass the board-approved examination provided for in subdivision 1 of this subsection.

3. Alternative onsite sewage system installer. Each individual applying for an initial alternative onsite sewage system installer license shall pass a board-approved examination and shall meet one of the following requirements:

- a. Provide contractor completion statements and ~~associated operation permits issued by the VDH~~ each corresponding professional engineer's or onsite soil evaluator's inspection report and completion statement for work performed after June 30, 2009. Where applicable, a VDH inspection report shall accompany the corresponding contractor completion statement in lieu of a professional engineer's or a non-VDH onsite soil evaluator's inspection report and completion statement. The contractor completion statements and permits must verify that the applicant had successfully installed 36 onsite sewage systems during the preceding three years, six of which must be alternative systems. All ~~contractor completion statements and associated VDH operation permits~~ professional engineer, onsite soil evaluator, and VDH inspection reports and completion statements shall be certified by either a licensed alternative onsite soil evaluator, ~~a licensed conventional or alternative onsite sewage system installer~~ an authorized VDH employee, or a Virginia licensed professional engineer, as appropriate;
- b. Provide contractor completion statements and ~~associated operation permits issued by the VDH~~ each corresponding AOSE/professional engineer inspection report and completion statement for work performed on or before June 30, 2009. The contractor completion statements and permits must verify that the applicant successfully installed 12 alternative onsite sewage

systems during the past three years. All ~~contractor completion statements and associated VDH operation permits~~ AOSE/professional engineer inspection report and completion statements shall be certified by either an authorized onsite soil evaluator or a Virginia licensed professional engineer;

c. Have two years of full-time experience successfully installing sewage systems as a properly licensed contractor holding a sewage disposal system (SDS) specialty issued by the Virginia Board for Contractors, be a member of responsible management in a firm holding a current and valid Virginia contractor license with the sewage disposal system (SDS) specialty, and provide certification by at least three interim or alternative onsite soil evaluator licensees, Virginia-licensed professional engineers, or any combination thereof, that the applicant is competent to install alternative onsite sewage systems;

d. Have two years of full-time experience successfully installing sewage systems under the direct supervision a properly licensed contractor holding a sewage disposal system (SDS) specialty issued by the Virginia Board for Contractors, be currently employed by a firm holding a current and valid Virginia contractor license with the sewage disposal system (SDS) specialty, and provide certification by at least three interim or alternative onsite soil evaluator licensees, Virginia-licensed professional engineers, or any combination thereof, that the applicant is competent to install alternative onsite sewage systems; ~~or~~

e. Have two years of full-time experience successfully installing sewage systems during the last four years working under the direct supervision of, or working as, a properly licensed Virginia contractor with the sewage disposal system (SDS) specialty, and provide certification by at least three interim or alternative onsite soil evaluator licensees, Virginia-licensed professional engineers, or any combination thereof, that the applicant is competent to install alternative onsite sewage systems; ~~or~~

~~or~~ f. Have two years of full-time experience as a licensed or interim licensed conventional onsite sewage system installer and provide certification by at least three interim or alternative onsite soil evaluator licensees, Virginia-licensed professional engineers, or any combination thereof, that the applicant is competent to install alternative onsite sewage systems.

If the applicant is not listed on the completion statement but did perform the installation, then the individual named on the contractor's completion statement and associated operation permit issued by the VDH may certify the applicant's work performed on an alternative onsite sewage system that was installed prior to June 30, 2009, provided that the application is received by the department no later than June 30, 2010. Each applicant applying under subdivision 2 a or b of this



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# Regulations

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subsection shall provide written and signed verification from a supervisor within the company which is listed on each contractor completion statement. The verification must explicitly show that the applicant was employed by the company that performed the installation as well as show that the applicant himself performed the installation.

D. Education and training substitution. Each individual applying for a conventional or an alternative onsite sewage system installer license may receive credit for up to half of the experience required by this section for:

1. Satisfactory completion of postsecondary courses in wastewater, biology, chemistry, geology, hydraulics, hydrogeology, or soil science at the rate of one month per semester hour or two-thirds of a month per quarter hour; or
2. Satisfactory completion of board-approved onsite sewage system installer training courses at the rate of one month for each training credit earned. Up to one training credit is awarded for each 10 hours of classroom contact time or for each 20 hours of laboratory exercise and field trip contact time. No credit towards training credits is granted for breaks, meals, receptions, and time other than classroom, laboratory and field trip contact time.

V.A.R. Doc. No. R13-2270; Filed September 13, 2012, 3:46 p.m.

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## TITLE 20. PUBLIC UTILITIES AND TELECOMMUNICATIONS

### STATE CORPORATION COMMISSION

#### Proposed Regulation

**REGISTRAR'S NOTICE:** The State Corporation Commission is claiming an exemption from the Administrative Process Act in accordance with § 2.2-4002 A 2 of the Code of Virginia, which exempts courts, any agency of the Supreme Court, and any agency that by the Constitution is expressly granted any of the powers of a court of record.

**Title of Regulation:** 20VAC5-201. Rules Governing Utility Rate Applications and Annual Informational Filings (amending 20VAC5-201-10, 20VAC5-201-20, 20VAC5-201-50, 20VAC5-201-90).

**Statutory Authority:** §§ 12.1-13 and 56-585.1 of the Code of Virginia.

**Public Hearing Information:**

November 19, 2012 - 10 a.m. - State Corporation Commission, Tyler Building, 1300 East Main Street, Richmond, VA

**Public Comment Deadline:** November 9, 2012.

**Agency Contact:** Tim Lough, Special Projects Engineer, Division of Energy Regulation, State Corporation

Commission, P.O. Box 1197, Richmond, VA 23218, telephone (804) 371-9590, FAX (804) 371-9350, or email tim.lough@scc.virginia.gov.

**Summary:**

*Section 56-585.1 A 2 c of the Code of Virginia establishes a performance incentive for investor-owned incumbent electric utilities, which authorizes the State Corporation Commission to increase or decrease a utility's combined rate of return on common equity by up to 100 basis points for generating plant performance, customer service, and operating efficiency as compared to nationally recognized standards determined by the commission to be appropriate for such purposes. The proposed amendments implement the performance incentives by requiring investor-owned incumbent electric utilities to file data pertaining to their generating plant performance, customer service, and operating efficiency with their biennial review applications.*

AT RICHMOND, SEPTEMBER 14, 2012

COMMONWEALTH OF VIRGINIA, ex rel.  
STATE CORPORATION COMMISSION

CASE NO. PUE-2012-00021

Ex Parte: In re: In the matter of adopting rules and regulations for consideration of the Performance Incentive authorized by § 56-585.1 A 2 c of the Code of Virginia

#### ORDER FOR NOTICE AND HEARING

Section 56-585.1 A 2 c of the Code of Virginia ("Code") establishes a Performance Incentive for investor-owned incumbent electric utilities, which authorizes the State Corporation Commission ("Commission") to increase or decrease a utility's combined rate of return on common equity by up to 100 basis points for superior or inferior performance when providing regulated electric service in the Commonwealth. Specifically, pursuant to § 56-585.1 A 2 c of the Code, the Commission has the discretion: (1) to apply or not apply a Performance Incentive and (2) to increase or decrease an investor-owned incumbent electric utility's combined rate of return on common equity based on the generating plant performance, customer service, and operating efficiency of the utility, as compared to nationally recognized standards determined by the Commission to be appropriate for such purposes.

On March 5, 2012, the Commission issued an Order Initiating Rulemaking Proceeding in this case ("Order"). In its Order, the Commission directed the Commission Staff ("Staff"), with appropriate input from stakeholders and other interested persons, to develop the specific performance metrics and nationally recognized standards that the Commission should consider when determining whether a positive or negative Performance Incentive should be applied, as authorized by § 56-585.1 A 2 c of the Code. The Commission further directed the Staff to draft proposed rules

and regulations to implement the Performance Incentive authorized by § 56-585.1 A 2 c of the Code ("Proposed Rules") and to submit the same to the Commission for further consideration on September 5, 2012. In its Order, the Commission also found that a mechanical, formulaic approach that limits the Commission's discretion when considering a positive or negative Performance Incentive should not be included in the Proposed Rules.

On September 5, 2012, the Staff filed Proposed Rules developed through input from stakeholders and other interested persons, as well as a report describing, among other things, the Staff's consideration of such comments when developing the Staff's Proposed Rules. Under the Staff's proposal, Schedule 49 in 20 VAC 5-201-90 of the Commission's Rules Governing Utility Rate Applications and Annual Informational Filings<sup>1</sup> would be revised to specify the minimum filing requirements for investor-owned incumbent electric utilities filing a biennial review application. Current Schedule 49 would then be incorporated into 20 VAC 5-201-90 as new Schedule 50. Consistent with the Commission's Order, the Proposed Rules preserve the Commission's discretion to award a positive or negative Performance Incentive depending on the evidence presented in each case.

NOW THE COMMISSION, upon consideration of the foregoing, is of the opinion and finds that the public should be afforded notice and an opportunity to comment on the Staff's Proposed Rules. However, we further find that the Staff's Proposed Rules should be revised prior to the publication of public notice in order to include additional data relevant to our determination of whether a positive or negative Performance Incentive should be applied. Specifically, we find that the heading labeled "Other Performance Data" on page A-42 of the Staff's Proposed Rules should be relabeled "Additional Data." In addition, we find that the Staff's Proposed Rules should be revised to require investor-owned incumbent electric utilities to file additional data with their biennial review applications detailing: (i) the proposed basis point increase in the combined rate of return on common equity and the revenue requirement impact of the utility's proposed Performance Incentive, if applicable; (ii) the specific actions undertaken by the utility to improve generating plant performance, customer service, and operating efficiency; (iii) the incremental costs of any such actions undertaken by the utility to improve such performance; and (iv) the specific benefits, financial and otherwise, that customers receive as a result of such actions to improve generating plant performance, customer service, and operating efficiency. This additional information will allow the Commission to review the costs incurred by a utility to improve generating plant performance, customer service, and operating efficiency, as well as any benefits to ratepayers as a result of such expenditures. A copy of the Proposed Rules, as modified by the Commission, is attached hereto.

We further find that a hearing should be convened to consider the Proposed Rules, as modified herein, and that

interested persons should be allowed to comment on the Proposed Rules, as modified by the Commission, in writing, electronically, or during the hearing. Finally, we find that the Commission's Division of Information Resources should cause the Proposed Rules, as modified by the Commission, to be published in the Virginia Register of Regulations.

Accordingly, IT IS ORDERED THAT:

(1) The Commission's Division of Information Resources shall forward a copy of this Order for Notice and Hearing, including a copy of the Proposed Rules, as modified by the Commission, to the Registrar of Regulations for publication in the Virginia Register of Regulations.

(2) The Commission's Division of Information Resources shall make a downloadable version of this Order and the Proposed Rules, as modified by the Commission, available for access by the public on the Commission's website: <http://www.scc.virginia.gov/case>. A copy of this Order and the Proposed Rules, as modified by the Commission, also shall be available for public inspection at the Commission's Document Control Center, located on the first floor of the Tyler Building, 1300 East Main Street, Richmond, Virginia 23219, between the hours of 8:15 a.m. and 5 p.m., Monday through Friday, excluding holidays. In addition, the Clerk of the Commission shall make a copy of this Order and the Proposed Rules, as modified by the Commission, available, free of charge, in response to any written request for the same.

(3) A public hearing shall be convened on November 19, 2012, at 10 a.m., in the Commission's Courtroom, Second Floor, Tyler Building, 1300 East Main Street, Richmond, Virginia 23219, to consider the Proposed Rules, as modified by the Commission, and to receive comments from interested persons.

(4) On or before October 5, 2012, the Commission's Division of Information Resources shall publish the following notice as classified advertising in newspapers of general circulation throughout the Commonwealth of Virginia:

NOTICE TO THE PUBLIC OF A PROCEEDING TO ESTABLISH RULES AND REGULATIONS TO IMPLEMENT THE PERFORMANCE INCENTIVE AUTHORIZED BY § 56-585.1 A 2 C OF THE CODE OF VIRGINIA

CASE NO. PUE-2012-00021

Section 56-585.1 A 2 c of the Code of Virginia ("Code") establishes a Performance Incentive for investor-owned incumbent electric utilities, which authorizes the State Corporation Commission ("Commission") to increase or decrease a utility's combined rate of return on common equity by up to 100 basis points for superior or inferior performance when providing regulated electric service in the Commonwealth. Specifically, pursuant to § 56-585.1 A 2 c of the Code, the Commission has the

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# Regulations

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discretion: (1) to apply or not apply a Performance Incentive and (2) to increase or decrease an investor-owned incumbent electric utility's combined rate of return on common equity based on the generating plant performance, customer service, and operating efficiency of the utility, as compared to nationally recognized standards determined by the Commission to be appropriate for such purposes.

The Commission has initiated a proceeding to establish regulations regarding the specific performance metrics and nationally recognized standards that the Commission should consider when determining whether a positive or negative Performance Incentive should be applied, as authorized by § 56-585.1 A 2 c of the Code. In the context of this proceeding and with the input of stakeholders and other interested persons, the Staff of the Commission has prepared proposed rules to implement the Performance Incentive authorized by § 56-585.1 A 2 c of the Code ("Proposed Rules"). However, the Staff's Proposed Rules have been modified by the Commission to require investor-owned incumbent electric utilities to file additional information on the costs, benefits, and revenue requirement impact of any request for a Performance Incentive for generating plant performance, customer service, and operating efficiency.

The Commission issued an Order for Notice and Hearing ("Order") in this proceeding that, among other things, scheduled a public hearing on November 19, 2012, at 10 a.m., in the Commission's second floor courtroom located in the Tyler Building, 1300 East Main Street, Richmond, Virginia 23219, to consider the Proposed Rules, as modified by the Commission, and to receive comments from interested persons. Any person desiring to testify as a public witness at this hearing should appear fifteen (15) minutes prior to the starting time of the hearing and contact the Commission's Bailiff. Individuals with disabilities who require an accommodation to participate in the hearing should contact the Commission at least seven (7) days before the scheduled hearing at 1-800-552-7945 (voice) or 1-804-371-9206 (TDD).

Copies of the Commission's Order and the Proposed Rules, as modified by the Commission, are available for public inspection at the Commission's Document Control Center, located on the first floor of the Tyler Building, 1300 East Main Street, Richmond, Virginia 23219, between the hours of 8:15 a.m. and 5 p.m., Monday through Friday, excluding holidays. Interested persons also may download unofficial copies from the Commission's website: <http://www.scc.virginia.gov/case>. In addition, interested persons may request a copy of the Order and the Proposed Rules, as modified by the Commission, by submitting a written request to Joel H. Peck, Clerk, State Corporation Commission, c/o Document Control Center, P.O. Box 2118, Richmond, Virginia 23218-2118.

On or before November 9, 2012, any interested person wishing to comment on the Proposed Rules, as modified by the Commission, may file such comments with Joel H. Peck, Clerk, State Corporation Commission, c/o Document Control Center, P.O. Box 2118, Richmond, Virginia 23218-2118. Interested persons desiring to submit comments electronically may do so on or before November 9, 2012, by following the instructions available on the Commission's website: <http://www.scc.virginia.gov/case>. All comments shall refer to Case No. PUE-2012-00021.

## STATE CORPORATION COMMISSION

(5) On or before November 9, 2012, any interested person wishing to comment on the Proposed Rules, as modified by the Commission, may file such comments with Joel H. Peck, Clerk, State Corporation Commission, c/o Document Control Center, P.O. Box 2118, Richmond, Virginia 23218-2118. Interested persons desiring to submit comments electronically may do so on or before November 9, 2012, by following the instructions available on the Commission's website: <http://www.scc.virginia.gov/case>. All comments shall refer to Case No. PUE-2012-00021.

(6) This matter is continued generally pending further order of the Commission.

AN ATTESTED COPY hereof shall be sent to the Clerk of the Commission to all persons on the official Service List in this proceeding. The Service List is available from the Clerk of the Commission, c/o Document Control Center, 1300 East Main Street, First Floor, Tyler Building, Richmond, Virginia 23219. A copy also shall be sent to the Commission's Office of General Counsel and Divisions of Energy Regulation and Utility Accounting and Finance.

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<sup>1</sup> 20 VAC 5-201-10 et seq.

### **20VAC5-201-10. General filing instructions.**

A. An applicant shall provide a notice of intent to file an application pursuant to 20VAC5-201-20, 20VAC5-201-40, 20VAC5-201-60 and 20VAC5-201-85 to the commission 60 days prior to the application filing date.

B. Applications pursuant to 20VAC5-201-20 through 20VAC5-201-70 shall include:

1. The name and post office address of the applicant and the name and post office address of its counsel.
2. A full clear statement of the facts that the applicant is prepared to prove by competent evidence.
3. A statement of details of the objective or objectives sought and the legal basis therefore.
4. All direct testimony by which the applicant expects to support the objective or objectives sought.
5. Information or documentation conforming to the following general instructions:

a. Attach a table of contents of the company's application, including exhibits.

b. Each exhibit shall be labeled with the name of the applicant and the initials of the sponsoring witness in the upper right hand corner as shown below:

Exhibit No. (Leave Blank)

Witness: (Initials)

Statement or

Schedule Number

c. The first page of all exhibits shall contain a caption that describes the subject matter of the exhibit.

d. If the accounting and statistical data submitted differ from the books of the applicant, then the applicant shall include in its filing a reconciliation schedule for each account or subaccount that differs, together with an explanation describing the nature of the difference.

e. The required accounting and statistical data shall include all work papers and other information necessary to ensure that the items, statements and schedules are not misleading.

C. These rules do not limit the commission staff or parties from raising issues for commission consideration that have not been addressed in the applicant's filing before the commission. Except for good cause shown, issues specifically decided by commission order entered in the applicant's most recent rate case may not be raised by staff or interested parties in Earnings Test Filings made pursuant to 20VAC5-201-10, 20VAC5-201-30 or 20VAC5-201-50.

D. An application filed pursuant to 20VAC5-201-20, 20VAC5-201-30, 20VAC5-201-40, 20VAC5-201-60, 20VAC5-201-70, 20VAC5-201-80 or 20VAC5-201-85 shall not be deemed filed per Chapter 10 (§ 56-232 et seq.) or Chapter 23 (§ 56-576 et seq.) of Title 56 of the Code of Virginia unless it is in full compliance with these rules.

E. The commission may waive any or all parts of these rate case rules for good cause shown.

F. Where a filing contains information that the applicant claims to be confidential, the filing may be made under seal provided it is simultaneously accompanied by both a motion for protective order or other confidential treatment and an additional five copies of a redacted version of the filing to be available for public disclosure. Unredacted filings containing the confidential information shall, however, be immediately available to the commission staff for internal use at the commission.

G. Filings containing confidential (or redacted) information shall so state on the cover of the filing, and the precise portions of the filing containing such confidential (or redacted) information, including supporting material, shall be clearly marked within the filing.

H. Applicants shall file electronic media containing an electronic spreadsheet version of Schedules 1-5, 8-28, 36, 40, and ~~49~~ 50, as applicable, with the Division of Public Utility

Accounting, the Division of Economics and Finance and the Division of Energy Regulation or the Division of Communications, as appropriate. Such electronic media containing calculations derived from formulas shall be provided in an electronic spreadsheet including all underlying formulas and assumptions. Such electronic spreadsheet shall be commercially available and have common use in the utility industry. Additional versions of such schedules shall be made available to parties upon request.

I. All applications, including direct testimony and Schedules 1-28, 30-39, and ~~41-49~~ 41-50, as applicable, shall be filed in an original and 12 copies with the Clerk of the Commission, c/o Document Control Center, P.O. Box 2118, Richmond, Virginia 23218. One copy of Schedules 29 and 40 shall be filed with the Clerk of the Commission. Applicants may omit filing Schedule 29 with the Clerk of the Commission in Annual Informational Filings. Additional copies of such schedules shall be made available to parties upon request.

Two copies of Schedules 29 and 40 shall be submitted to the Division of Public Utility Accounting or the Division of Communications, as appropriate. Two copies of Schedule 40 shall be submitted to the Division of Energy Regulation.

J. For any application made pursuant to 20VAC5-201-20 and 20VAC5-201-40 through 20VAC5-201-85, the applicant shall serve a copy of the information required in ~~20VAC5-201-10~~ subsection A and subdivisions B 1 through B 3 of this section, upon the attorney and chairman of the board of supervisors of each county (or equivalent officials in the counties having alternate forms of government) in this Commonwealth affected by the proposed increase and upon the mayor or manager and the attorney of every city and town (or equivalent officials in towns and cities having alternate forms of government) in this Commonwealth affected by the proposed increase. The applicant shall also serve each such official with a statement that a copy of the complete application may be obtained at no cost by making a request therefor orally or in writing to a specified company official or location. In addition, the applicant shall serve a copy of its complete application upon the Division of Consumer Counsel of the Office of the Attorney General of Virginia. All such service specified by this rule shall be made either by (i) personal delivery or (ii) first class mail, to the customary place of business or to the residence of the person served.

K. Nothing in these rules shall be interpreted to apply to applications for temporary reductions of rates pursuant to § 56-242 of the Code of Virginia.

**20VAC5-201-20. General and expedited rate increase applications.**

A. An application for a general or expedited rate increase pursuant to Chapter 10 (§ 56-232 et seq.) of Title 56 of the Code of Virginia for a public utility having annual revenues exceeding \$1 million, shall conform to the following requirements:

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# Regulations

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1. Exhibits consisting of Schedules 1-43 and the utility's direct testimony shall be submitted. Such schedules shall be identified with the appropriate schedule number and shall be prepared in accordance with the instructions contained in 20VAC5-201-90.

2. An applicant subject to § 56-585.1 of the Code of Virginia shall file Schedules 45 and 47 in addition to the schedules required in ~~20VAC5-201-20~~ subdivision A 1 of this section in accordance with the instructions accompanying such schedules in 20VAC5-201-90.

3. An exhibit consisting of additional schedules may be submitted with the utility's direct testimony. Such exhibit shall be identified as Schedule ~~49~~ 50 (this exhibit may include numerous subschedules labeled ~~49A~~ 50A et seq.).

B. The selection of a historic test period is up to the applicant. However, the use of overlapping test periods will not be allowed.

C. Applicants meeting each of the four following criteria may omit Schedules 9-18 in rate applications: (i) the applicant is not subject to § 56-585.1 of the Code of Virginia, (ii) the applicant is not currently bound by a performance-based regulation plan authorized by the commission pursuant to § 56-235.6 of the Code of Virginia that includes an earnings sharing mechanism or other attribute for which the commission has directed the performance of an Earnings Test, (iii) the applicant has no Virginia jurisdictional regulatory assets on its books, and (iv) the applicant is not seeking to establish a regulatory asset.

D. If not otherwise constrained by law or regulatory requirements, an applicant who has not experienced a substantial change in circumstances may file an expedited rate application as an alternative to a general rate application. Such application need not propose an increase in regulated operating revenues. If, upon timely consideration of the expedited application and supporting evidence, it appears that a substantial change in circumstances has taken place since the applicant's last rate case, then the commission may take appropriate action, such as directing that the expedited application be dismissed or treated as a general rate application. Prior to public hearing, and subject to applicable provisions of law, an application for expedited rate increase may take effect within 30 days after the date the application is filed. Expedited rate increases may also take effect in less than 12 months after the applicant's preceding rate increase so long as rates are not increased as a result thereof more than once in any calendar year. An applicant making an expedited application shall also comply with the following rules:

1. In computing its cost of capital, as prescribed in Schedule 3 in 20VAC5-201-90, the applicant, other than those utilities subject to § 56-585.1 of the Code of Virginia, shall use the equity return rate approved by the commission and used to determine the revenue requirement in the utility's most recent rate proceeding.

2. An applicant, in developing its rate of return statement, shall make adjustments to its test period jurisdictional results only in accordance with the instructions for Schedule 25 in 20VAC5-201-90.

3. The applicant may propose new allocation methodologies, rate designs and new or revised terms and conditions provided such proposals are supported by appropriate cost studies. Such support shall be included in Schedule 40.

E. Rates authorized to take effect 30 days following the filing of any application for an expedited rate increase shall be subject to refund in a manner prescribed by the commission. Whenever rates are subject to refund, the commission may also direct that such refund bear interest at a rate set by the commission.

## **20VAC5-201-50. Biennial review applications.**

A. A biennial review application filed pursuant to § 56-585.1 of the Code of Virginia shall include the following:

1. Exhibits consisting of Schedules 3, 6-7, 9-18, 40a and 44 as identified in 20VAC5-201-90 shall be submitted with the utility's direct testimony for each of the two successive 12-month test periods.

2. Exhibits consisting of Schedules 1-2, 4-5, 8, 19-34, 36-39, 40b-d, 41-43, 45, and 47 as identified in 20VAC5-201-90, shall be submitted with the utility's direct testimony for the second of the two successive 12-month test periods.

3. An exhibit consisting of Schedule 35 shall be filed with the commission no later than April 30 each year.

4. An exhibit consisting of Schedule 49 shall be submitted with the utility's direct testimony.

~~4.~~ 5. An exhibit consisting of additional schedules may be submitted with the utility's direct testimony. Such exhibit shall be identified as Schedule ~~49~~ 50 (this exhibit may include subschedules as needed labeled ~~49A~~ 50A et seq.).

~~5.~~ 6. A reconciliation of Schedules 19 and 22 to the statement of income and comparative balance sheet contained in FERC Form No. 1.

B. The assumed rate year for purposes of determining ratemaking adjustment in Schedules 21 and 24, as identified in 20VAC5-201-90, shall begin on December 1 of the year following the two successive 12-month test periods.

## **20VAC5-201-90. Instructions for schedules and exhibits for Chapter 201.**

The following instructions for schedules and exhibits including those specifically set forth in 20VAC5-201-95 (Schedules 1-14), 20VAC5-201-100 (Schedules 15-22) and 20VAC5-201-110 (Schedules 23-28, 40 and 44) are to be used in conjunction with this chapter:

<b>EDITOR'S NOTICE:</b> Schedules 1 through 48 of 20VAC5-201-90 are not being amended and are not printed in this issue of the Virginia Register of Regulations.
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**Schedule 49 - Data Pertaining to Nationally Recognized Standards for Generating Plant Performance, Customer Service, and Operating Efficiency**

Instructions: Investor-owned incumbent electric utilities subject to § 56-585.1 A 2 c of the Code of Virginia shall file the information listed in paragraph (a), and paragraph (b) if applicable, of this schedule, using the definitions provided below. Unless otherwise specified, the minimum filing requirements shall include annual weighted averages, separately, for each of the most recent consecutive six years of data including the biennial period under review. Where weighted averages are not available, simple averages are acceptable. Averages shall be identified as weighted or simple. Where six years of data is not available when filed, the reason shall be stated and the data shall be provided as soon as it becomes available, if at all. In the IOU's initial filing under these rules, the IOU may propose and support a different benchmark group for each operating efficiency performance measure. Once the commission establishes a benchmark group for an operating efficiency performance measure, the benchmark group shall apply to the operating efficiency performance measure in all of the IOU's future filings under these rules unless otherwise ordered by the commission. To the extent practical, data should be obtained from publically available sources such as SEC, FERC, EIA, and RTO. In the event the required filing information is not available, the IOU shall note the omission and state the reason.

Definitions for Schedule 49:

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

"Average retail price" or "total average retail rate" means total annual revenues per annual kWh of sales as reported to EEL.

"Average speed of answer" or "ASA" means the average time in seconds that callers experience in a queue to reach an agent or to initiate a transaction through an interactive voice response system.

"Benchmark group" means one of the following groups of investor-owned electric utilities proposed by the IOU for an operating efficiency performance measure: MACRUC, ROE Peer Group, RTO, SEARUC, and SEE. The IOU may propose and support the use of an alternative group of investor-owned electric utilities determined by an independent expert to be a valid comparable group.

"Btu" means British thermal unit.

"EEI" means the Edison Electric Institute.

"EIA" means the United States Energy Information Administration.

"Equivalent availability factor" or "EAF" means the fraction of a given operating period in which a generating unit is

available without any outages and equipment or seasonal deratings.

"Equivalent forced outage rate on demand" or "EFORD" means a measure of the probability that a generating unit will not be available due to forced outages or forced deratings when there is demand on the unit to generate. When used as a measure of historical performance, EFORD is calculated as the percentage of total demand time that a unit was unavailable due to forced outages or deratings.

"FERC" means the Federal Energy Regulatory Commission or its successor agency.

"FERC Form 1" means 18 CFR 141.1, FERC Form No. 1, Annual Report of Major Electric Utilities, Licensees, and Others.

"Fleet maintenance cost" means the sum of all plants' maintenance costs from FERC Form 1, pages 402 and 403, lines 29-33.

"Heat rate" or "HR" means how efficiently a generator converts heat energy from fuel into electrical energy. Heat rate is calculated by dividing the thermal energy consumption by the electric energy generated (Btu/kWh).

"IOU" means investor-owned incumbent electric utility.

"Interactive voice response" or "IVR" means a technology that automates the interaction between the utility and its customer.

"ITP" means the NRC's industry trends program.

"kWh" means kilowatt-hour.

"Large coal plant or plants" means a location having coal-fired generation capacity of greater than 400 MW, excluding coal units with capacities of less than 200 MW.

"MACRUC utility" means a regulated investor-owned electric utility having generation, transmission, and distribution business within the member states of the Mid-Atlantic Conference of Regulatory Utilities Commissioners or its successor organization.

"MW" means megawatt.

"MWh" means megawatt-hour.

"NERC" means the North American Electric Reliability Corporation or its successor organization.

"Net capacity factor (nuclear)" or "NCF (nuclear)" means the fraction of net energy generated by a nuclear unit compared to the energy it could have generated if operated at the net maximum dependable capacity for a year.

"NRC" means the United States Nuclear Regulatory Commission or its successor agency.

"O&M" means operations and maintenance.

"O&M efficiency" means total electric O&M expense (from FERC Form 1, page 323, line 198) as a percent of total assets (from FERC Form 1, page 111, line 85) (or \$ per MWh or \$ per customer).

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# Regulations

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"Plant production cost" means total production expense per MWh of net output.

"PWR" means pressurized water reactor.

"ROE peer group" means the investor-owned electric utilities defined under § 56-585.1 A 2 b of the Code of Virginia.

"RTO" means the regional transmission organization of which the IOU is a member.

"SEARUC utility" means a regulated investor-owned electric utility having generation, transmission, and distribution business within the member states of the Southeastern Association of Regulatory Utility Commissioners or its successor organization.

"SEC" means the United States Securities and Exchange Commission.

"SEE utility" means a regulated investor-owned electric utility member of the Southeastern Electric Exchange or its successor organization having generation, transmission, and distribution business.

"Service level" means the percentage of calls that are answered by a call center agent or an IVR within 30 seconds.

"System average interruption duration index" or "SAIDI" means the total duration of interruption for the average customer on an annual basis. SAIDI equals the sum of customer interruption durations divided by the average total number of customers served.

"System average interruption frequency index" or "SAIFI" means the average number of interruptions that a customer would experience on an annual basis, expressed as a number. SAIFI equals the sum of customer interruptions divided by an average total number of customers served.

"XEFORd" means a measure of the probability that a generating unit will not be available due to forced outages or forced deratings when there is demand on the unit to generate which is the same as EFORd, but excludes events that are designated as outside management's control.

## Filing Requirements:

(a) IOUs subject to § 56-585.1 A 2 c of the Code of Virginia shall file the following data for the IOU and, separately, for each of the additional listed entities:

### Generating plant performance

1. EFORd for the system fleet and nonnuclear fleet for NERC and the RTO, weighted by the IOU's generation capacity per class;

2. EFORd for each of the following generation class categories for NERC and the RTO: fossil all fuel types, fossil coal primary, fossil coal primary 200-599 MW, fossil coal primary 600 MW plus, fluidized bed, combined cycle, gas turbine, and pumped storage;

3. XEFORd for the RTO;

4. EAF for each of the following generation class categories for NERC and the RTO: fossil all fuel types, fossil coal primary, fossil coal primary 200-599 MW, fossil coal primary 600 MW plus, fluidized bed, combined cycle, gas turbine, and pumped storage; and

5. Average heat rates for United States coal (steam turbine) fleet and natural gas (combined cycle) fleet as reported by EIA.

### Customer service

1. SAIDI both including and excluding major storms (or major events) for each RTO utility and each MACRUC or SEARUC utility with more than 500,000 customers;

2. SAIFI both including and excluding major storms (or major events) for each RTO utility and each MACRUC or SEARUC utility with more than 500,000 customers;

3. ASA or service level both including and excluding calls handled by an IVR for each RTO utility and each MACRUC or SEARUC utility with greater than 500,000 customers;

4. J.D. Power and Associates Electric Utility Residential Customer Satisfaction Study index ranking for the IOU's region and segment; and

5. J.D. Power and Associates Electric Utility Business Customer Satisfaction Study index ranking for the IOU's region and segment.

### Operating efficiency

1. Total average retail rates for the South Atlantic (as defined by EEL), the United States, and each utility in the proposed benchmark group;

2. O&M efficiency for each utility in the proposed benchmark group;

3. Large coal plant production costs for each utility in the proposed benchmark group; and

4. Combined cycle plant production costs for each utility in the proposed benchmark group.

### Additional data

1. Identify the proposed return on equity basis point increase and the revenue requirement impact associated with the proposed performance incentive award;

2. For the biennial period under review, identify the specific actions taken by the IOU to improve generating plant performance, customer service, and operating efficiency and the incremental costs associated with such specific actions;

3. Identify, explain, and quantify to the extent possible the specific benefits (financial and otherwise) that customers received during the previous biennial review period as a result of the specific actions taken by the IOU to improve generating plant performance, customer service, and operating efficiency;

4. Fleet maintenance costs and total electricity generated;

5. Total distribution reliability improvement expense and distribution circuit miles; and

6. Total routine, tree removal, and hot spot trimming expense and miles of right-of-way managed.

(b) In addition to the information required in paragraph (a) of this schedule, IOUs subject to § 56-585.1 A 2 c of the Code of Virginia that own and operate nuclear power plants shall file the following data for the IOU and, separately, for each of the additional listed entities:

1. NCF (nuclear) for the United States nuclear industry and 800-999 MW PWRs;

2. NCF (nuclear) top quartile, median, and bottom quartile over the most recent three-year period (including the two years of the biennial period under review, if available) for the United States nuclear industry and 800-999 MW PWRs;

3. Most recent three-year average (including the two years of the biennial period under review, if available) and ranking by NCF (nuclear) of the top ranked PWR and each of the IOU's nuclear power plant units;

4. Nuclear plant production cost for 800-999 MW PWRs and each of the IOU's nuclear power stations; and

5. NRC ITP indicators for the IOU and nuclear industry (automatic reactor scrams while critical and significant events).

**Schedule 49 50 - Additional Schedules**

Reserved for additional exhibits presented by the applicant to be labeled Schedule 49 50 et seq.

V.A.R. Doc. No. R13-3389; Filed September 17, 2012, 3:26 p.m.

**TITLE 24. TRANSPORTATION AND MOTOR VEHICLES**

**BOARD OF TOWING AND RECOVERY OPERATORS**

**Emergency Regulation**

Title of Regulation: 24VAC27-30. **General Regulations for Towing and Recovery Operators (amending 24VAC27-30-20).**

Statutory Authority: § 46.2-2809 of the Code of Virginia.

Effective Dates: September 19, 2012, through December 31, 2012.

Agency Contact: Barbara Drudge, Interim Executive Director, Board for Towing and Recovery Operators, c/o Virginia Department of Motor Vehicles, P.O. Box 27412, Richmond, VA 23269, telephone (804) 367-0714, FAX (804) 367-7018, or email barbara.drudge@btro.virginia.gov.

Preamble:

*This action has been determined to be an emergency situation pursuant to § 2.2-4011 of the Code of Virginia. The General Assembly determined that the Board of Towing and Recovery Operators will be abolished effective January 1, 2013, and required tow and recovery operators to be licensed through January 1, 2013. In order to modify tow and recovery operator license fees currently based upon a 12-month license, the board needs to develop regulations to address modification of tow and recovery operator's licensing fees for the balance of the licensing term requirement. These regulations set forth the authority of the board for modifications of tow and recovery operator license fee.*

*The Board of Towing and Recovery Operators determined that the issuance of a tow and recovery operator license for less than a 12-month term would create a financial hardship on those tow and recovery operators applying for a license and, therefore, modification of the licensing fees would allow the tow and recovery operators to be refunded any sum over the prorated licensing fees due at application. The tow and recovery operators subject to a refund are required to follow the board's statute, regulations, and disciplinary processes during the period of license. The tow and recovery operators support modification of licensing fees.*

**24VAC27-30-20. Fees.**

A. The following fees shall be applicable:

License Item	Fee
Initial license/application fee (includes the fee for one driver authorization)	
Class A operators	\$500
Class B operators	\$250 for up to two trucks plus \$50 for each additional truck exceeding two trucks up to a cap of \$500
Annual license renewal, Class A operator (includes the fee for one driver authorization)	\$500
Annual license renewal, Class B operator (includes the fee for one driver authorization)	\$250 for up to two trucks plus \$50 for each additional truck exceeding two trucks up to a cap of \$500
Annual tow truck decal, per vehicle	\$10
Annual driver authorization document application fee, per driver	\$50



# Regulations

Late renewal (operator, truck decal and driver)	150% of renewal fee
Reinstatement following revocation or suspension of license	\$1,000
Verification of licensure to another jurisdiction or government entity	\$25
Returned check	\$35
Duplicate copy of license, tow truck decal or driver authorization document	\$10
Temporary trip permit (each permit)	\$50

B. All fees shall be nonrefundable except as specifically authorized by the board as to operator licensing fees only, whose fees may be prorated for a partial year on a month-remaining basis through December 31, 2012. Upon completion of the operator application requirements, the board shall issue a refund for any prorated operator licensing fee. Any renewal operator license received after the expiration date of the license shall be subject to the late renewal fees based upon a 12 month license fee calculation. Upon completion of the initial and renewal operator license application requirements, the board shall issue a license for a period less than 12 months.

VA.R. Doc. No. R13-3294; Filed September 19, 2012, 10:25 a.m.

## COMMONWEALTH TRANSPORTATION BOARD

### Final Regulation

**REGISTRAR'S NOTICE:** The Commonwealth Transportation Board is claiming an exemption from the Administrative Process Act in accordance with (i) § 2.2-4002 B 3 of the Code of Virginia, which exempts regulations relating to the location, design, specifications, or construction of public buildings or other facilities and (ii) § 2.2-4002 B 4 of the Code of Virginia, which exempts regulations relating to grants of state or federal funds or property.

**Title of Regulation:** 24VAC30-271. Economic Development Access Fund Policy (amending 24VAC30-271-20).

**Statutory Authority:** § 33.1-12 of the Code of Virginia.

**Effective Date:** September 17, 2012.

**Agency Contact:** Jennifer DeBruhl, Local Assistance Director, Department of Transportation, 1401 E. Broad St., Richmond, VA 23219, telephone (804) 786-0334, FAX (804) 786-2603, or email jennifer.debruhl@vdot.virginia.gov.

#### Summary:

*Amendments to this regulation (i) allow for funding costs associated directly with program administration, outreach, and management to be allowed prior to Commonwealth Transportation Board approval provided that they are not expected to exceed 1.0% of the allocation annually; (ii)*

*eliminate the current prohibition against government facilities being eligible for funding as qualifying establishments to increase the number of potential candidates for program funds; (iii) eliminate an obsolete reference to repealed regulation 24VAC30-450; (iv) allow credit for locally-funded public infrastructure improvements and buildings, including revised language to indicate that some locality-provided improvements can be used to meet investment requirements; and (v) increase maximum allocations for road construction- the proposed change involves allowing an allocation of up to \$1 million per year for a megasite (MEI project), with a local match of a half million, with one additional allocation of \$1 million with a local match of a half million allowed in a subsequent year.*

#### 24VAC30-271-20. General provisions.

A. The use of economic development access funds shall be limited to:

1. Providing adequate access to economic development sites on which new or substantially expanding manufacturing, processing ~~and~~, research, and development facilities; distribution centers; regional service centers; corporate headquarters or other establishments that also meet basic employer criteria as determined by the Virginia Economic Development Partnership (VEDP) in consultation with the Virginia Department of Business Assistance (DBA); ~~and~~
2. Improving existing roads that may not be adequate to serve the establishments as described in subdivision 1 of this subsection; ~~and~~
3. Providing for costs associated directly with program administration and management of project requests prior to board approval with such costs not expected to exceed 1.0% of the allocation annually.

B. Economic development access funds shall not be used for the acquisition of rights of way or adjustment of utilities. These funds are to be used only for the actual construction and engineering of a road facility adequate to serve the traffic generated by the new or expanding eligible establishments.

C. Economic development access funds may not be used for the construction of access roads to schools, hospitals, libraries, airports, armories, speculative office buildings, shopping centers, apartment buildings, professional offices, residential developments, churches, hotels, motels, ~~government installations~~, or similar facilities, whether public or private. (Access roads to licensed, public-use airports, while provided for in § 33.1-221 of the Code of Virginia, are funded and administered separately through 24VAC30-450, ~~Airport Access Funding~~.)

D. No cost incurred prior to the board's approval of an allocation from the economic development access funds may be reimbursed by such funds. Economic development access funds shall be authorized only after certification that the

economic development establishment as listed or meeting the criteria as described will be built under firm contract, or is already constructed, or upon presentation of acceptable surety in accordance with § 33.1-221 A of the Code of Virginia.

E. When an eligible establishment is not yet constructed or under firm contract and a local governing body guarantees by bond or other acceptable surety that such will occur, the maximum time limit for such bond shall be five years, beginning on the date of the allocation of the economic development access funds by the Commonwealth Transportation Board. At the end of the five-year period, the amount of economic development access funds expended on the project and not justified by eligible capital outlay of one or more establishments acceptable to the board shall be reimbursed to the Virginia Department of Transportation (VDOT) voluntarily by the locality or by forfeiture of the surety. In the event that, after VDOT has been reimbursed, but still within 24 months immediately following the end of the five-year period, the access funds expended come to be justified by eligible capital outlay of one or more eligible establishments, then the locality may request a refund of one-half of the sum reimbursed to VDOT, which request may be granted if funds are available, on a first-come, first-served basis in competition with applications for access funds from other localities.

F. Economic development access funds shall not be used to construct or improve roads on a privately owned economic development site. Nor shall the construction of a new access road to serve any economic development site on a parcel of land that abuts a road constituting a part of the systems of state highways or the road system of the locality in which it is located be eligible for economic development access funds, unless the existing road is a limited access highway and no other access exists. Further, where the existing road is part of the road system of the locality in which it is located, or the secondary system of state highways, economic development access funds may be used to upgrade the existing road only to the extent required to meet the needs of traffic generated by the new or expanding eligible establishment.

In the event an economic development site has access according to the foregoing provisions of this chapter, but it can be determined that such access is not adequate in that it does not provide for safe and efficient movement of the traffic generated by the eligible establishment on the site or that the site's traffic conflicts with the surrounding road network to the extent that it poses a safety hazard to the general public, consideration will be given to funding additional improvements. Such projects shall be evaluated on a case-by-case basis upon request, by resolution, from the local governing body. Localities are encouraged to establish planning policies that will discourage incompatible mixes such as industrial and residential traffic.

G. Not more than \$500,000 of unmatched economic development access funds may be allocated in any fiscal year

for use in any county, city or town that receives highway maintenance payments under § 33.1-41.1 of the Code of Virginia. A town whose streets are maintained under either § 33.1-79 or § 33.1-82 of the Code of Virginia shall be considered as part of the county in which it is located. The maximum eligibility of unmatched funds shall be limited to 20% of the capital outlay of the designated eligible establishments and certain investment by the locality in the land or the building, or both, on the site occupied by the designated eligible establishment. The unmatched eligibility may be supplemented with additional economic development access funds, in which case the supplemental access funds shall be not more than \$150,000, to be matched dollar-for-dollar from funds other than those administered by the board. ~~The supplemental economic development access funds over and above the unmatched eligibility shall be limited to 20% of the capital outlay of the designated eligible establishments as previously described.~~ Such supplemental funds shall be considered only if the total estimated cost of eligible items for the economic development access improvement exceeds \$500,000.

If an eligible site is owned by a regional industrial facility authority, as defined in § 15.2-6400 of the Code of Virginia, funds may be allocated for construction of an access road project to that site without penalty to the jurisdiction in which the site is located. This provision may be applied to one regional project per fiscal year in any jurisdiction with the same funding limitations as prescribed for other individual projects.

H. Notwithstanding the provisions of this section, for Major Employment and Investment (MEI) projects as defined in § 2.2-2260 of the Code of Virginia and administered by the VEDP, the locality may receive up to the maximum unmatched allocation and matched allocation for a design-only project. The local governing body shall guarantee by bond or other acceptable surety that plans for a MEI project will be developed to standards acceptable to VDOT.

In addition, for projects utilizing economic development access funds to serve approved MEI projects, the locality may receive up to the maximum unmatched allocation and an additional \$500,000 matched allocation for a road construction project. Project allocations for a given MEI project may be cumulative for not more than two years.

~~H. I.~~ Eligible items of construction and engineering shall be limited to those that are essential to providing an adequate facility to serve the anticipated traffic while meeting all appropriate Commonwealth Transportation Board and state policies and standards. However, additional pavement width or other features may be eligible where necessary to qualify the road facility in a city or town for maintenance payments under § 33.1-41.1 of the Code of Virginia.

~~I-I.~~ J. Except as provided for in subsection H of this section pertaining to MEI projects, it is the intent of the board that economic development access funds not be anticipated from

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# Regulations

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year to year. Unused eligibility cannot be allowed to accumulate and be carried forward from one fiscal year to another.

~~J. K.~~ The Commonwealth Transportation Board will consult and work closely with the ~~Virginia Economic Development Partnership (VEDP)~~ VEDP and the ~~Department of Business Assistance (DBA)~~ DBA in determining the use of economic development access funds and will rely on the recommendations of the VEDP and the DBA in making decisions as to the allocation of these funds. In making its recommendations to the board, the VEDP and the DBA will take into consideration the impact of the proposed facility on the employment and tax base of both the area in which the facility is to be located and the Commonwealth of Virginia.

~~K. L.~~ Prior to the formal request for the use of economic development access funds to provide access to new or expanding eligible establishments, the location of the access road shall be submitted for approval by VDOT. VDOT shall take into consideration the cost of the facility as it relates to the location and as it relates to the possibility of the future extension of the road to serve other possible eligible establishments, as well as the future development of the area traversed.

~~L. M.~~ Prior to the board's allocation of funds for such construction or road improvements to an eligible economic development establishment proposing to locate or expand in a county, city or town, the governing body shall by resolution request the access funds and shall be responsible for the preliminary negotiations with the eligible establishment and others who may be interested. Engineers of VDOT will be available for consultation with the governing bodies and others, and may prepare surveys, plans, engineering studies, and cost estimates.

~~M. N.~~ The Commissioner of Highways is directed to establish administrative procedures to assure ~~adherence to and compliance with~~ the provisions of this chapter and legislative directives are adhered to and complied with.

VA.R. Doc. No. R13-3226; Filed September 17, 2012, 11:13 a.m.

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# GENERAL NOTICES/ERRATA

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## STATE CORPORATION COMMISSION

### Bureau of Insurance

September 14, 2012

Administrative Letter 2012-09

TO: All Carriers Licensed to Market Credit Life Insurance or Credit Accident and Sickness Insurance in Virginia and Interested Parties

RE: Credit Life Insurance and Credit Accident and Sickness Insurance Premium Rates

Effective January 1, 2013

On July 26, 2012, the Virginia State Corporation Commission (the "Commission") issued an Order Adopting Adjusted Prima Facie Rates for the Triennium Commencing January 1, 2013, Case No. INS-2012-00014. All insurers licensed to market credit life insurance or credit accident and sickness insurance in Virginia were mailed a copy of the Order and the adopted rates on August 2, 2012. Pursuant to § 38.2-3725 D and E of the Code of Virginia, the adjusted prima facie rates for the triennium commencing January 1, 2013 will remain in effect until January 1, 2016.

Each company marketing credit life insurance or credit accident and sickness insurance in Virginia must submit the rates and refund formulas applicable to the upcoming triennium to the Bureau for approval. Each filing should include the following information:

- The specific single premium and monthly outstanding balance (MOB) rates and rate formulas, and examples of the rate formulas;
- All refund formulas, including examples;
- Any other information required to document the development of the rates and refund formulas;
- The date of previously approved formulas;
- The form number to which each rate or formula will apply; and
- A description of the referenced forms.

A request for approval of a deviated premium rate or rates to be effective on or after January 1, 2013 may be included as part of the filing referenced above. It should be noted that previously approved deviated premium rates can only be used through December 31, 2012, in accordance with § 38.2-3728 C 1 of the Code of Virginia.

The filing requirements for credit life insurance and credit accident and sickness insurance filings may be found on the Bureau's website at: [http://www.scc.virginia.gov/division/boi/co/health/lh\\_check.asp](http://www.scc.virginia.gov/division/boi/co/health/lh_check.asp)

My staff will review filings as promptly as possible; however, companies that delay making filings after December 1, 2012 cannot be assured that our review will be completed by January 1, 2013. Any insurer that has not received the Bureau's approval of its rates and refund formulas on or before January 1, 2013 must cease marketing credit life insurance or credit accident and sickness insurance in Virginia as of January 1, 2013 and must cease charging premiums for existing MOB contracts as of January 1, 2013 until such date that it has received the Commission's approval, as noted above.

Any questions with regards to any of the above matters should be directed to Amanda G. McCauley, Senior Insurance Market Examiner, Life and Health Division, telephone (804) 371-0034, or email [amanda.mccauley@scc.virginia.gov](mailto:amanda.mccauley@scc.virginia.gov).

/s/ Jacqueline K. Cunningham  
Commissioner of Insurance

## DEPARTMENT OF ENVIRONMENTAL QUALITY

### Notice of Bacteria TMDL Modification of Lower Mattaponi, Lower Pamunkey, and Upper York Rivers in King William, New Kent, and King and Queen Counties and the Town of West Point

The Department of Environmental Quality (DEQ) seeks public comment from interested persons on 25 proposed modifications of the Total Maximum Daily Loads (TMDLs) developed for impaired segments of the Lower Mattaponi River (VAP-F25E-01), Lower Pamunkey River (VAP-F14E-03), and the Upper York River (VAP-F26E-05 and VAP-F26E-20). The TMDL was approved by the Environmental Protection Agency on July 28, 2010 and is available at: <http://www.deq.virginia.gov/portals/0/DEQ/Water/TMDL/apptmdls/yorkrvr/yorkpamunkmatta.pdf>. To view the proposed revised TMDL pages and the modification letter to EPA explaining each intended modification along with page numbers modified, please visit: <http://www.deq.virginia.gov/Programs/Water/WaterQualityInformationTMDLs/TMDL/TMDLDevelopment/DocumentationforSelectTMDLs.aspx>. The proposed modifications were first public noticed this past August and a minimum 30-day public comment period was observed. DEQ has provided an additional public comment opportunity from October 8, 2012, through November 9, 2012, to allow interested persons additional time to comment and review proposed TMDL modifications.

Changes 1-5 are with regard to the Lower Mattaponi River Enterococci TMDL segment (VAP-F25E-01).

(1) A Single Family Home - General Permit (VAG404212) discharges ≤1000 gallons per day (GPD) to a non-tidal tributary of the Lower Pamunkey River, called Un-named Tributary (UT) to Olsson's Pond, was mistakenly given a waste load allocation (WLA) based on 60 GPD (or 0.00006

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## General Notices/Errata

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million gallons per day (MGD)) in the Lower Mattaponi River Enterococci (recreational use) TMDL. The facility should have been allocated in the Lower Pamunkey River Enterococci TMDL. DEQ proposes to correct the Lower Mattaponi TMDL by removing the waste load allocation for Enterococci. This load will be moved to future growth and may be used by future permittees in this segment. The details regarding the re-allocation of the WLA for this permittee within the Lower Pamunkey segment and how the facility will maintain compliance with the Lower Pamunkey River TMDL are noted in the section below.

(2) The Hampton Roads Sanitation District (HRSD) West Point Sewage Treatment Plant (STP) (VA0075434) is a VPDES minor municipal plant with a design flow of 0.60 million gallons per day (MGD) which discharges to the Lower Mattaponi River. The WLA in the TMDL was based on the Single Sample Instantaneous Maximum standard of 104 (cfu/100mL) Enterococci, when it should have been based on the geometric mean (GM) standard of 35 (cfu/100mL) Enterococci. The geometric mean standard is the appropriate standard and results in a smaller WLA for Enterococci for the facility. DEQ proposes to correct the Lower Mattaponi River Enterococci TMDL by revising the facility's WLA to accommodate this facility at a maximum design flow of 0.60 MGD and an Enterococci GM standard of 35 cfu/100mL.

(3) The original Future Growth amount was equal to five times the load of municipal discharger HRSD West Point (VA0075434), based on the Single Sample Instantaneous Maximum Standard of 104 cfu/100mL Enterococci. This was equal to 0.01% of the TMDL, which is inadequate to address potential future permitting needs of this segment. DEQ proposes to increase the Future Growth value to 0.76% of the TMDL.

(4) The revisions noted in 1-3 above, result in an increase in the Total WLA and a decrease in the Load Allocation (LA) values.

(5) Finally, DEQ has added tables within the TMDL document to reflect both the Annual and Daily WLA, LA, and TMDL values for the Lower Mattaponi River Enterococci TMDL.

In summary, the changes noted above were necessary to correct TMDL development errors, address insufficient future growth values for future permitting needs, and to express the loadings in both annual and daily values as required by EPA.

Changes 6-11 are with regard to the Lower Pamunkey River Enterococci TMDL segment (VAP-F14E-03).

(6) A Single Family Home - General Permit (VAG404212) discharges  $\leq 1000$  gallons per day (GPD) to a non-tidal tributary of the Lower Pamunkey River, Un-named Tributary (UT) to Olssen's Pond. This permit was mistakenly given a

waste load allocation (WLA) based on 60 GPD (or 0.00006 million gallons per day (MGD)) in the Lower Mattaponi River Enterococci (recreational use) TMDL, but should have been allocated in the Lower Pamunkey River Enterococci TMDL. DEQ proposes to allocate a WLA for this facility in the Lower Pamunkey Enterococci TMDL. This is a facility which uses chlorination in a contact tank, followed by dechlorination, meets Virginia's Single Family Home - General Permit limits for discharges to non-tidal freshwater, and the facility outfall is located more than 2.75 miles upstream of the Enterococci impairment on the Lower Pamunkey River mainstem. Compliance of this facility with the WLA for Enterococci will be met through compliance with existing E. coli permit limit protections. Compliance of this facility with the existing permit limits will neither cause nor contribute to the downstream Enterococci bacteria impairment in the Lower Pamunkey River.

(7) Parham Landing Waste Water Treatment Plant (WWTP) (VA0088331) is a VPDES major municipal plant with a design flow of 2 MGD. However, the WLA in the Lower Pamunkey River Enterococci TMDL was based on the Single Sample Instantaneous Maximum standard of 104 (cfu/100mL) Enterococci, when it should have been based on the geometric mean (GM) standard of 35 (cfu/100mL) Enterococci. The WLA was also allocated at the incorrect design flow of 0.568 MGD. DEQ proposes to revise the Lower Pamunkey Enterococci TMDL by correcting the facility's WLA to accommodate this facility at a maximum design flow of 2 MGD and an Enterococci GM standard of 35 cfu/100mL. While the geometric mean standard reduced the WLA, the correct design flow of the facility increased it; however, DEQ believes compliance of this facility with the existing permit limit will neither cause nor contribute to the Enterococci bacteria impairment in the Lower Pamunkey River.

(8) The Rock-Tenn West Point Mill (VA0003115) is a VPDES major industrial facility with a design flow of 23 MGD which discharges to the Lower Pamunkey River. This facility was recently identified as a source of bacteria in the Lower Pamunkey River and should receive an allocation in the Enterococci TMDL. DEQ proposes to correct the Lower Pamunkey River Enterococci TMDL by allocating a WLA to accommodate this facility at a maximum design flow of 23 MGD and the Enterococci GM standard of 35 cfu/100mL. This facility's permit is currently under permit review, will include a limit based on the Enterococci geometric mean standard (35 cfu/100ml) and is expected to be public noticed and reissued later this year. The permit will include a compliance schedule to ensure the bacteria limits for Enterococci are met. Compliance of this facility with the Enterococci permit limit will neither cause nor contribute to the impairment in the Lower Pamunkey River.

(9) The original Future Growth allocated was equal to five times the load of the municipal discharger, Parham Landing

WWTP (VA0088331) at the Single Sample Instantaneous Maximum standard of 104 cfu/100mL Enterococci. This is equal to 0.01% of the TMDL, which is inadequate to address potential future permitting needs of this segment. DEQ proposes to increase the Future Growth to 0.74% of the TMDL.

(10) The revisions noted in 6-9 above, result in an increase in the Total WLA and a decrease in the Load Allocation (LA) values.

(11) Finally, DEQ has added tables within the TMDL document to reflect both the Annual and Daily WLA, LA, and TMDL values for the Lower Pamunkey River Enterococci TMDL.

In summary, the changes noted above were necessary to correct TMDL development errors, include a WLA for a newly identified bacteria source, address insufficient future growth values for future permitting needs, and express the loadings in both annual and daily values as required by EPA.

Changes 12-18 are with regard to the Upper York River Enterococci TMDL segment (VAP-F26E-05).

(12) A Single Family Home - General Permit (VAG404212) discharges  $\leq 1000$  gallons per day (GPD) to a non-tidal tributary of the Lower Pamunkey River, Un-named Tributary (UT) to Olsson's Pond. This facility should have received a WLA in the Upper York River segment in order to account for incoming load because sources in the Lower Pamunkey River Enterococci TMDL were used as inputs in the Upper York Enterococci TMDL development. DEQ proposes to allocate a WLA for this facility in the Upper York Enterococci TMDL, based on the geometric mean (GM) (35 cfu/100ml) standard. This is a facility which uses chlorination in a contact tank, followed by dechlorination, meets Virginia's Single Family Home - General Permit limits for discharges to non-tidal freshwater, and the facility outfall is greater than 5 miles upstream of the Upper York River Enterococci impairment. Compliance of this facility with the daily WLA for Enterococci will be met through compliance with existing E. coli permit limit protections. Compliance of this facility with the existing permit limits will neither cause nor contribute to the downstream Enterococci bacteria impairment in the Upper York River.

(13) The HRSD West Point STP (VA0075434) is a VPDES minor municipal plant with a design flow of 0.60 million gallons per day (MGD) which discharges to the Lower Mattaponi River. The WLA in the TMDL was based on the Single Sample Instantaneous Maximum standard of 104 (cfu/100mL) Enterococci, when it should have been based on the geometric mean (GM) standard of 35 (cfu/100mL) Enterococci. The geometric mean standard is the appropriate standard and results in a smaller WLA for Enterococci for the facility. DEQ proposes to correct the Upper York River

Enterococci TMDL by revising the facility's WLA to accommodate this facility at a maximum design flow of 0.60 MGD and the Enterococci GM standard of 35 cfu/100mL. Compliance of this facility with the existing permit limits will neither cause nor contribute to the downstream Enterococci bacteria impairment in the Upper York River.

(14) Parham Landing WWTP (VA0088331) is a VPDES major municipal plant with a design flow of 2 MGD. However, the facility's WLA in the Upper York River Enterococci TMDL was based on the Single Sample Instantaneous Maximum standard of 104 (cfu/100mL) Enterococci, when it should have been based on the geometric mean (GM) standard of 35 (cfu/100mL) Enterococci. The WLA was also allocated at the incorrect design flow of 0.568 MGD. DEQ proposes to correct the Upper York River Enterococci TMDL by revising the facility's WLA to accommodate this facility at a maximum design flow of 2 MGD and the Enterococci GM standard of 35 cfu/100mL. While the geometric mean standard reduced the WLA, the correct design flow of the facility increased it; however, DEQ believes compliance of this facility with the existing permit limit will neither cause nor contribute to the Enterococci bacteria impairment in the Upper York River.

(15) The Rock-Tenn West Point Mill (VA0003115) is a VPDES major industrial facility with a design flow of 23 MGD which discharges to the Lower Pamunkey River. This facility was recently identified as a source of bacteria in the Lower Pamunkey River and should receive a WLA in the Upper York segment to account for the incoming load because sources in the Lower Pamunkey River Enterococci TMDL were used as inputs in the Upper York Enterococci TMDL development. DEQ proposes to revise the Upper York Enterococci TMDL by allocating a WLA to accommodate this facility at a maximum design flow of 23 MGD and the Enterococci GM standard of 35 cfu/100mL. This facility's permit is currently under permit review, will include a limit based on the Enterococci geometric mean standard (35 cfu/100ml) and is expected to be public noticed and reissued later this year. The permit will include a compliance schedule to ensure the bacteria limits for Enterococci are met. Compliance of this facility with the Enterococci permit limit will neither cause nor contribute to the impairment in the Upper York River.

(16) The original Future Growth allocated was equal to the sum of five times the load of the municipal dischargers HRSD West Point STP (VA0075434) and Parham Landing WWTP (VA0088331) at the Single Sample Instantaneous Maximum standard of 104 cfu/100mL Enterococci, equal to 0.01% of the TMDL, which is inadequate to address potential future permitting needs of this segment. DEQ proposes to increase the Future Growth to 0.75% of the TMDL.

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## General Notices/Errata

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(17) The revisions noted in 12-16 above, result in an increase in the Total WLA and a decrease in the Load Allocation (LA) values.

(18) Finally, DEQ has added tables within the TMDL document to reflect both the Annual and Daily WLA, LA, and TMDL values for the Upper York River Enterococci TMDL.

In summary, the changes noted above were necessary to correct TMDL development errors, include a WLA for a newly identified bacteria source, address insufficient future growth values for future permitting needs, and to express the loadings in both annual and daily values as required by EPA.

Changes 19-25 are with regard to the Upper York River Fecal Coliform TMDL segment (VAP-F26E-20).

(19) A Single Family Home - General Permit (VAG404212) discharges  $\leq 1000$  gallons per day (GPD) to a non-tidal tributary of the Lower Pamunkey River, Un-named Tributary (UT) to Olsson's Pond. The facility received a WLA in the Upper York River Fecal Coliform (shellfish) TMDL based on the 90th Percentile Fecal Coliform Standard of 49 Most Probable Number (MPN) per 100mL when it should have been based on a 200 MPN/100mL, which is the concentration used to model protective areas below dischargers to shellfish growing areas by the Virginia Department of Health. The WLA was also based on the incorrect design flow of the facility 60 GPD (or 0.00006 million gallons per day (MGD)). DEQ proposes to correct the Upper York River Fecal Coliform TMDL by revising the WLA at a design flow of 1000 GPD and a Fecal Coliform concentration of 200 MPN/100mL. This is a facility which uses chlorination in a contact tank, followed by dechlorination, meets Virginia's Single Family Home - General Permit limits for discharges to non-tidal freshwater, and the facility outfall is greater than 5 miles upstream of the Upper York River Fecal Coliform impairment. Compliance of this facility with the WLA for Fecal Coliform will be met through compliance with existing *E. coli* permit limit protections. Compliance of this facility with the existing permit limits will neither cause nor contribute to the downstream Fecal Coliform impairment in the Upper York River.

(20) The HRSD West Point STP (VA0075434) is a VPDES minor municipal plant with a design flow of 0.60 million gallons per day (MGD) which discharges to the Lower Mattaponi River. The facility should have received a WLA for Fecal Coliform based on 200 MPN/100mL, which is the concentration used to model protective areas below dischargers to shellfish growing areas by the Virginia Department of Health. DEQ proposes to correct the Upper York River Fecal Coliform TMDL by allocating a WLA to accommodate this facility at a maximum design flow of 0.60 MGD and a Fecal Coliform concentration of 200 MPN/100mL. Compliance of this facility with the existing permit limits for fecal coliform will neither cause nor

contribute to the downstream Fecal Coliform impairment in the Upper York River.

(21) Parham Landing WWTP (VA0088331) is a VPDES major municipal plant with a design flow of 2 MGD which discharges to the Lower Pamunkey River. The facility should have received a WLA for Fecal Coliform based on 200 MPN/100mL, which is the concentration used to model protective areas below dischargers to shellfish growing areas by the Virginia Department of Health. DEQ proposes to correct the Upper York River Fecal Coliform TMDL by allocating a WLA to accommodate this facility at a maximum design flow of 2 MGD and a Fecal Coliform concentration of 200 MPN/100mL. The facility has an existing permit limit for Enterococci to meet the current Water Quality Standard for recreational use. Due to the protectiveness of the Enterococci discharge limits and the outfall location, which is over 5.5 miles upstream of the Upper York River shellfish impairment for Fecal Coliform, compliance of this facility with the Upper York Fecal Coliform WLA will be met through the existing Enterococci permit limit protections. Compliance of this facility with the existing permit limits will neither cause nor contribute to the downstream Fecal Coliform bacteria impairment in the Upper York River.

(22) The Rock-Tenn West Point Mill (VA0003115) is a VPDES major industrial facility with a design flow of 23 MGD which discharges to the Lower Pamunkey River. This facility was recently identified as a source of bacteria in the Lower Pamunkey River segment and should receive a WLA in the Upper York Fecal Coliform (shellfish) TMDL, as bacteria sources in the Lower Pamunkey River Enterococci TMDL were used as inputs in the Upper York Fecal Coliform (shellfish) TMDL development. DEQ proposes to revise the Upper York Fecal Coliform TMDL by allocating a WLA to accommodate this facility at a maximum design flow of 23 MGD and a Fecal Coliform concentration of 200 MPN/100mL. The facility's effluent is categorized as a non-sewage discharge containing Enterococci. The facility is receiving a WLA for Enterococci in both the Lower Pamunkey and Upper York Enterococci TMDLs (noted in above sections). Wood-pulp facilities have historically had an issue of false-positive results when analyzed for Fecal Coliform. Due to the nature of the discharge and protectiveness of the Enterococci discharge limits and given that the outfall is located over 1 mile upstream of the Upper York shellfish impairment for fecal coliform, compliance of this facility with the Upper York Fecal Coliform WLA will be met through the existing Enterococci permit limit protections. This facility's permit is currently under permit review, will include a limit based on the Enterococci geometric mean standard (35 cfu/100ml) and is expected to be public noticed and reissued later this year. The permit will include a compliance schedule to ensure the bacteria limits for Enterococci are met. Compliance of this facility with the existing permit limits is not expected to cause or contribute to



the downstream Fecal Coliform bacteria impairment in the Upper York River.

(23) The original Future Growth allocated was equal to 1.0% of the TMDL. DEQ proposes to increase the daily Future Growth to 1.6% of the TMDL, which will more adequately address potential future permitting needs of this segment.

(24) The revisions noted in 19-23 above, result in an increase in the Total WLA and a decrease in the Load Allocation (LA) values.

(25) Finally, DEQ has added tables within the TMDL document to reflect both the Annual and Daily WLA, LA, and TMDL values for the Upper York River Fecal Coliform (shellfish) TMDL.

In summary, the changes noted above were necessary to correct TMDL development errors, include a WLA for a newly identified bacteria source, address insufficient future growth values for future permitting needs, and express the loadings in both annual and daily values as required by EPA.

The changes noted above to the Lower Mattaponi Enterococci, Lower Pamunkey Enterococci, York Enterococci and shellfish TMDLs are less than <1.0%, respectively for each TMDL and will neither cause nor contribute to the non-attainment of each impaired segment.

The public comment period for these modifications will end on Friday November 9, 2012. Please send comments to Margaret Smigo, Department of Environmental Quality, Piedmont Regional Office, 4969-A Cox Road, Glen Allen, VA 23060, email [margaret.smigo@deq.virginia.gov](mailto:margaret.smigo@deq.virginia.gov), or FAX (Attn. Margaret Smigo) at (804) 527-5106. Following the comment period, a modification letter and comments received will be sent to EPA for final approval. To request a copy of the full proposed TMDL modification, please see the link: <http://www.deq.virginia.gov/Programs/Water/WaterQualityInformationTMDLs/TMDL/TMDLDevelopment/DocumentationforSelectTMDLs.aspx> or contact Margaret Smigo.

**DEPARTMENT OF FORENSIC SCIENCE**

**Approval of Field Tests for Detection of Drugs**

In accordance with 6VAC40-30, Regulations for the Approval of Field Tests for Detection of Drugs, and under the authority of the Code of Virginia, the following field tests for detection of drugs are approved field tests:

ODV INCORPORATED  
13386 INTERNATIONAL PARKWAY  
JACKSONVILLE, FLORIDA 32218-2383

**ODV NarcoPouch**

Drug or Drug Type:

- Heroin
- Amphetamine
- Methamphetamine
- 3,4-Methylenedioxymethamphetamine (MDMA)
- Cocaine Hydrochloride
- Cocaine Base
- Barbiturates
- Lysergic Acid Diethylamide (LSD)
- Marijuana
- Hashish Oil
- Marijuana
- Hashish Oil
- Phencyclidine (PCP) Reagent
- Heroin
- Methamphetamine
- 3,4-Methylenedioxymethamphetamine (MDMA)
- Heroin
- Diazepam
- Ketamine
- Ephedrine
- gamma – Hydroxybutyrate (GHB)

**ODV NarcoTest**

Drug or Drug Type:

- Heroin

Manufacturer's Field Test:

- 902 – Marquis Reagent
- 902 – Marquis Reagent
- 902 – Marquis Reagent
- 902 – Marquis Reagent
- 904 or 904B – Cocaine HCl and Base Reagent
- 904 or 904B – Cocaine HCl and Base Reagent
- 905 – Dille-Koppanyi Reagent
- 907 – Ehrlich's (Modified) Reagent
- 908 – Duquenois – Levine Reagent
- 908 – Duquenois – Levine Reagent
- 909 – K N Reagent
- 909 – K N Reagent
- 914 – PCP Methaqualone
- 922 – Opiates Reagent
- 923 – Methamphetamine/Ecstasy Reagent
- 923 – Methamphetamine/Ecstasy Reagent
- 924 – Mecke's (Modified) Reagent
- 925 – Valium/Ketamine Reagent
- 925 – Valium/Ketamine Reagent
- 927 – Ephedrine Reagent
- 928 – GHB Reagent

Manufacturer's Field Test:

- 7602 – Marquis Reagent



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## General Notices/Errata

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Amphetamine  
Methamphetamine  
3,4-Methylenedioxyamphetamine (MDMA)  
Barbiturates  
Lysergic Acid Diethylamide (LSD)  
Marijuana  
Hashish Oil  
Marijuana  
Hashish Oil  
Cocaine Hydrochloride  
Cocaine Base  
Phencyclidine (PCP)  
Heroin  
Methamphetamine  
3,4-Methylenedioxyamphetamine (MDMA)  
Heroin  
Diazepam  
Ketamine  
Ephedrine  
gamma – Hydroxybutyrate (GHB)  
SIRCHIE FINGERPRINT LABORATORIES  
100 HUNTER PLACE  
YOUNGSVILLE, NORTH CAROLINA 27596

### **NARK**

#### Drug or Drug Type:

Narcotic Alkaloids  
Heroin  
Morphine  
Amphetamine  
Methamphetamine  
Opium Alkaloids  
Heroin  
Morphine  
Amphetamine  
Methamphetamine  
3,4-Methylenedioxyamphetamine (MDMA)  
Meperidine (Demerol) (Pethidine)  
Heroin  
Morphine  
Cocaine Hydrochloride  
Cocaine Base  
Procaine  
Tetracaine  
Barbiturates  
Heroin  
Morphine  
Amphetamine  
Methamphetamine  
Lysergic Acid Diethylamide (LSD)  
Marijuana  
Hashish  
Hashish Oil  
Tetrahydrocannabinol (THC)  
Marijuana  
Hashish

7602 – Marquis Reagent  
7602 – Marquis Reagent  
7602 – Marquis Reagent  
7605 – Dille-Koppanyi Reagent  
7607 – Ehrlich's (Modified) Reagent  
7608 – Duquenois Reagent  
7608 – Duquenois Reagent  
7609 – K N Reagent  
7609 – K N Reagent  
7613 – Scott (Modified) Reagent  
7613 – Scott (Modified) Reagent  
7614 – PCP Methaqualone Reagent  
7622 – Opiates Reagent  
7623– Methamphetamine/Ecstasy Reagent  
7623– Methamphetamine/Ecstasy Reagent  
7624 – Mecke's Reagent  
7625 – Valium/Ketamine Reagent  
7625 – Valium/Ketamine Reagent  
7627 – Chen's Reagent - Ephedrine  
7628 – GHB Reagent

#### Manufacturer's Field Test:

1 – Mayer's Reagent  
1 – Mayer's Reagent  
1 – Mayer's Reagent  
1 – Mayer's Reagent  
1 – Mayer's Reagent  
2 – Marquis Reagent  
2 – Marquis Reagent  
2 – Marquis Reagent  
2 – Marquis Reagent  
2 – Marquis Reagent  
2 – Marquis Reagent  
2 – Marquis Reagent  
2 – Marquis Reagent  
2 – Marquis Reagent  
3 – Nitric Acid  
3 – Nitric Acid  
4 – Cobalt Thiocyanate Reagent  
4 – Cobalt Thiocyanate Reagent  
4 – Cobalt Thiocyanate Reagent  
4 – Cobalt Thiocyanate Reagent  
5 – Dille-Koppanyi Reagent  
6 – Mandelin Reagent  
6 – Mandelin Reagent  
6 – Mandelin Reagent  
6 – Mandelin Reagent  
7 – Ehrlich's Reagent  
8 – Duquenois Reagent  
8 – Duquenois Reagent  
8 – Duquenois Reagent  
8 – Duquenois Reagent  
9 – NDB (Fast Blue B Salt) Reagent  
9 – NDB (Fast Blue B Salt) Reagent

Hashish Oil  
 Tetrahydrocannabinol (THC)  
 Cocaine Base

9 – NDB (Fast Blue B Salt) Reagent  
 9 – NDB (Fast Blue B Salt) Reagent  
 13 – Cobalt Thiocyanate/Crack Test

**NARK II**

Drug or Drug Type:

Narcotic Alkaloids  
 Heroin  
 Morphine  
 Amphetamine  
 Methamphetamine  
 3,4-Methylenedioxyamphetamine (MDMA)  
 Morphine  
 Heroin  
 Barbiturates  
 Lysergic Acid Diethylamide (LSD)  
 Marijuana  
 Hashish  
 Hashish Oil  
 Tetrahydrocannabinol (THC)  
 Cocaine Hydrochloride  
 Cocaine Base  
 Phencyclidine (PCP)  
 Opiates  
 Heroin  
 Morphine  
 Heroin  
 3,4-Methylenedioxyamphetamine (MDMA)  
 Pentazocine  
 Ephedrine  
 Diazepam  
 Methamphetamine  
 Narcotic Alkaloids  
 Heroin  
 Morphine  
 Amphetamine  
 Methamphetamine  
 3,4-Methylenedioxypropylvalerone (MDPV)  
 4-Methylmethcathinone (Mephedrone)  
 ARMOR HOLDINGS, INCORPORATED  
 13386 INTERNATIONAL PARKWAY  
 JACKSONVILLE, FLORIDA 32218-2383

Manufacturer's Field Test:

01 – Marquis Reagent  
 01 – Marquis Reagent  
 01 – Marquis Reagent  
 01 – Marquis Reagent  
 01 – Marquis Reagent  
 01 – Marquis Reagent  
 02 – Nitric Acid  
 02 – Nitric Acid  
 03 – Dille-Koppanyi Reagent  
 04 – Ehrlich's Reagent  
 05 – Duquenois – Levine Reagent  
 05 – Duquenois – Levine Reagent  
 05 – Duquenois – Levine Reagent  
 05 – Duquenois – Levine Reagent  
 07 – Scott's (Modified) Reagent  
 07 – Scott's (Modified) Reagent  
 09 – Phencyclidine Reagent  
 10 – Opiates Reagent  
 10 – Opiates Reagent  
 10 – Opiates Reagent  
 11 – Mecke's Reagent  
 11 – Mecke's Reagent  
 12 – Talwin/ Pentazocine Reagent  
 13 – Ephedrine Reagent  
 14 – Valium Reagent  
 15 – Methamphetamine (Secondary Amines Reagent)  
 19 – Mayer's Reagent  
 19 – Mayer's Reagent  
 19 – Mayer's Reagent  
 19 – Mayer's Reagent  
 19 – Mayer's Reagent  
 24 – MDPV (Bath Salts) Reagent  
 25 – Mephedrone (Bath Salts) Reagent

**NIK**

Drug or Drug Type:

Heroin  
 Amphetamine  
 Methamphetamine  
 3,4-Methylenedioxyamphetamine (MDMA)  
 Morphine  
 Barbiturates  
 Lysergic Acid Diethylamide (LSD)  
 Marijuana  
 Hashish Oil  
 Tetrahydrocannabinol  
 Cocaine Hydrochloride  
 Cocaine Base

Manufacturer's Field Test:

Test A 6071 – Marquis Reagent  
 Test A 6071 – Marquis Reagent  
 Test A 6071 – Marquis Reagent  
 Test A 6071 – Marquis Reagent  
 Test B 6072 – Nitric Acid Reagent  
 Test C 6073 – Dille-Koppanyi Reagent  
 Test D 6074 – LSD Reagent System  
 Test E 6075 – Duquenois – Levine Reagent  
 Test E 6075 – Duquenois – Levine Reagent  
 Test E 6075 – Duquenois – Levine Reagent  
 Test G 6077 – Scott (Modified) Reagent  
 Test G 6077 – Scott (Modified) Reagent

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## General Notices/Errata

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Cocaine Hydrochloride

Cocaine Base

Phencyclidine (PCP)

Heroin

Heroin

gamma – Hydroxybutyrate (GHB)

Ephedrine

Pseudoephedrine

Diazepam

Methamphetamine

3,4-Methylenedioxymethamphetamine (MDMA)

Methadone

MISTRAL SECURITY INCORPORATED

7910 WOODMONT AVENUE SUITE 820

BETHESDA, MARYLAND 20814

Drug or Drug Type:

Heroin

Amphetamine

Methamphetamine

Marijuana

Hashish Oil

Methamphetamine

Heroin

Marijuana

Hashish Oil

Cocaine Hydrochloride

Cocaine Base

Marijuana

Phencyclidine

Amphetamine

Ketamine

Methamphetamine

Ephedrine

Heroin

Methadone

Buprenorphine

Opium

Phenobarbital

Marijuana

Phencyclidine

Cocaine Hydrochloride

Cocaine base

Buprenorphine

Cocaine Hydrochloride

Cocaine base

Ephedrine

Ketamine

Heroin

Lysergic Acid Diethylamide (LSD)

Methadone

Methamphetamine

Heroin

Methadone

Lysergic Acid Diethylamide

Methamphetamine

6500 or 6501 – Cocaine ID Swab

6500 or 6501 – Cocaine ID Swab

Test J 6079 – PCP Reagent System

Test K 6080 – Opiates Reagent

Test L 6081 – Brown Heroin Reagent System

Test O 6090 – GHB Reagent

Test Q 6085 – Ephedrine Reagent

Test Q 6085 – Ephedrine Reagent

Test R 6085 – Valium Reagent

Test U 6087 – Methamphetamine Reagent

Test U 6087 – Methamphetamine Reagent

Test W 6088 – Mandelin Reagent System

Manufacturer's Field Test:

Detect 4 Drugs Aerosol

Detect 4 Drugs Aerosol

Detect 4 Drugs Aerosol

Detect 4 Drugs Aerosol

Detect 4 Drugs Aerosol

Meth 1 and 2 Aerosol

Herosol Aerosol

Cannabispray 1 and 2 Aerosol

Cannabispray 1 and 2 Aerosol

Coca-Test Aerosol

Coca-Test Aerosol

Pen Test – D4D

Pen Test – D4D

Pen Test – D4D

Pen Test – D4D

Pen Test – D4D

Pen Test – D4D

Pen Test – D4D

Pen Test – D4D

Pen Test – D4D

Pen Test – D4D

Pen Test – Barbitusol

Pen Test – Cannabis Test

Pen Test – Coca Test

Pen Test – Coca Test

Pen Test – Coca Test

Pen Test – C&H Test

Pen Test – C&H Test

Pen Test – C&H Test

Pen Test – C&H Test

Pen Test – C&H Test

Pen Test – C&H Test

Pen Test – C&H Test

Pen Test – C&H Test

Pen Test – C&H Test

Pen Test – Herosol

Pen Test – Herosol

Pen Test – LSD Test

Pen Test – Meth/X Test

3,4-Methylenedioxyamphetamine (MDMA)  
Morphine  
Opium  
Diazepam  
Ephedrine  
Pseudoephedrine

JANT PHARMACAL CORPORATION  
16255 VENTURA BLVD., #505  
ENCINO, CA 91436

Formerly available through:  
MILLENNIUM SECURITY GROUP

**Accutest IDenta**

Drug or Drug Type:

Marijuana  
Hashish Oil  
Heroin  
Cocaine Hydrochloride  
Cocaine Base  
3,4-Methylenedioxyamphetamine (MDMA)

Methamphetamine  
COZART PLC  
92 MILTON PARK  
ABINGDON, OXFORDSHIRE ENGLAND OX14 4RY

Drug or Drug Type:

Cocaine  
Lynn Peavey Company  
10749 West 84th Terrace  
Lexexa, KS 66214

**QuickCheck**

Drug or Drug Type:

Marijuana  
Marijuana  
Hashish Oil  
Hashish Oil  
Heroin  
Heroin  
Cocaine Hydrochloride  
Cocaine Base  
Methamphetamine  
Methamphetamine  
MDMA  
MDMA

M.M.C. INTERNATIONAL B.V.  
FRANKENTHALERSTRAAT 16-18  
4816 KA BREDA  
THE NETHERLANDS

Drug or Drug Type:

Heroin  
Morphine  
Amphetamine  
Methamphetamine  
Codeine  
Marijuana  
Hashish Oil  
Cocaine Hydrochloride

Pen Test – Meth/X Test  
Pen Test – Opiatest  
Pen Test – Opiatest  
Pen Test – BZO  
Pen Test – Ephedrine  
Pen Test – Ephedrine

Manufacturer's Field Test:

Marijuana/Hashish (Duquenois-Levine Reagent)  
Marijuana/Hashish (Duquenois-Levine Reagent)  
Heroin Step 1 and Step 2  
Cocaine/Crack Step 1 and Step 2  
Cocaine/Crack Step 1 and Step 2  
MDMA Step 1 and Step 2  
Methamphetamine Step 1 and Step 2

Manufacturer's Field Test:

Cocaine Solid Field Test

Manufacturer's Field Test:

Marijuana – 10120  
Marijuana – 10121  
Marijuana – 10120  
Marijuana – 10121  
Marquis – 10123  
Heroin - 10125  
Cocaine – 10124  
Cocaine – 10124  
Meth/Ecstasy – 10122  
Marquis – 10123  
Meth/Ecstasy – 10122  
Marquis – 10123

Manufacturer's Field Test:

Opiates/Amphetamine Test (Ampoule)  
Opiates/Amphetamine Test (Ampoule)  
Opiates/Amphetamine Test (Ampoule)  
Opiates/Amphetamine Test (Ampoule)  
Opiates/Amphetamine Test (Ampoule)  
Cannabis Test (Ampoule)  
Cannabis Test (Ampoule)  
Cocaine/Crack Test (Ampoule)

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## General Notices/Errata

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Cocaine base  
Heroin  
Ketamine  
Methadone  
Methamphetamine  
3,4-Methylenedioxymethamphetamine (MDMA)  
Morphine  
Heroin  
Ephedrine  
Pseudoephedrine  
Pentazocine  
Buprenorphine  
Gamma butyrolactone (GBL)  
Gamma hydroxybutyric acid (GHB)  
Oxycodone  
Oxymetholone  
Testosterone  
Methandrostenolone  
Phenylacetone  
Lysergic Acid Diethylamide (LSD)  
Phencyclidine (PCP)  
Methaqualone  
Amobarbital  
Pentobarbital  
Phenobarbital  
Secobarbital  
Propoxyphene  
Diazepam  
Cocaine Hydrochloride  
Cocaine base  
Cocaine Hydrochloride  
Cocaine base  
Morphine  
Heroin  
3,4-Methylenedioxymethamphetamine (MDMA)  
Methamphetamine  
Amphetamine

Cocaine/Crack Test (Ampoule)  
Heroin Test (Ampoule)  
Ketamine Test (Ampoule)  
Methadone Test (Ampoule)  
Crystal Meth/XTC Test (Ampoule)  
Crystal Meth/XTC Test (Ampoule)  
M&H Test (Ampoule)  
M&H Test (Ampoule)  
Ephedrine HCL Test (Ampoule)  
Ephedrine HCL Test (Ampoule)  
Pentazocine Test (Ampoule)  
Buprenorphine HCL Test (Ampoule)  
GBL Test (Ampoule)  
GHB Test (Ampoule)  
Oxycodone Test (Ampoule)  
Steroids Test B (Ampoule)  
Steroids Test B (Ampoule)  
Steroids Test B (Ampoule)  
PMK/BMK(BMK) Test (Ampoule)  
LSD Test (Ampoule)  
PCP Test (Ampoule)  
Methaqualone Test (Ampoule)  
Barbiturates Test (Ampoule)  
Barbiturates Test (Ampoule)  
Barbiturates Test (Ampoule)  
Barbiturates Test (Ampoule)  
Propoxyphene Test (Ampoule)  
V&R Test (Ampoule)  
Cocaine/Crack Test (Spray)  
Cocaine/Crack Test (Spray)  
Cocaine Trace Wipes  
Cocaine Trace Wipes  
Opiate Cassette  
Opiate Cassette  
MDMA/Ecstasy Cassette  
Methamphetamine Cassette  
Amphetamine Cassette

### STATE LOTTERY DEPARTMENT

#### Director's Orders

The following Director's Orders of the State Lottery Department were filed with the Virginia Registrar of Regulations on September 18, 2012. The orders may be viewed at the State Lottery Department, 900 East Main Street, Richmond, VA, or at the office of the Registrar of Regulations, 910 Capitol Street, 2nd Floor, Richmond, VA.

#### Director's Order Number Ninety (12)

Virginia Lottery's "HASBRO™" Official Sweepstakes Rules (effective September 7, 2012)

#### Director's Order Number Ninety-Eight (12)

Virginia Lottery's "Play for Keeps Sweeps" Official Sweepstakes Requirements (effective September 13, 2012)

#### Director's Order Number One Hundred Two (12)

"Seibert's Buy \$5 Mega Millions Get Free Serious Java" Virginia Lottery Promotion Requirements (effective on the date of its signing and shall remain in full force and effect until ninety (90) days after the conclusion of the Incentive Program, unless otherwise extended by the Director.)

### STATE BOARD OF SOCIAL SERVICES

#### Notice of Periodic Review

Pursuant to Executive Order 14 (2010) and §§ 2.2-4007.1 and 2.2-4017 of the Code of Virginia, the Board of Social Services is conducting a periodic review of 22VAC40-12, Public Participation Guidelines.

The review of this regulation will be guided by the principles in Executive Order 14 (2010) and § 2.2-4007.1 of the Code of Virginia.

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The purpose of this review is to determine whether this regulation should be terminated, 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 8, 2012, and ends October 29, 2012.

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 Karin Clark, Regulatory Coordinator, 801 East Main Street, Richmond, VA 23219, telephone (804) 726-7017, FAX (804) 726-7906, email [karin.clark@dss.virginia.gov](mailto:karin.clark@dss.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 the periodic review will be posted on the Town Hall and published in the Virginia Register of Regulations.

#### Notice of Periodic Review

Pursuant to Executive Order 14 (2010) and §§ 2.2-4007.1 and 2.2-4017 of the Code of Virginia, the State Board of Social Services is conducting a periodic review of 22VAC40-295, Temporary Assistance for Needy Families.

The review of this regulation will be guided by the principles in Executive Order 14 (2010) and § 2.2-4007.1 of the Code of Virginia.

The purpose of this review is to determine whether this regulation should be terminated, 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 8, 2012, and ends October 29, 2012.

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 Mark Golden, TANF Manager, 801 East Main Street, Richmond, VA 23219,

telephone (804) 726-7385, FAX (804) 726-7357, or email [mark.golden@dss.virginia.gov](mailto:mark.golden@dss.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 the periodic review will be posted on the Town Hall and published in the Virginia Register of Regulations.

#### STATE WATER CONTROL BOARD

##### Consent Special Order for Dupont Teijin Films U.S. Limited Partnership

An enforcement action has been proposed for DuPont Teijin Films U.S. Limited Partnership for alleged violations at DuPont Teijin Films, Hopewell Site at 3600 Discovery Drive, Chesterfield, VA. The State Water Control Board proposes to issue a consent special order to DuPont Teijin Films U.S. Limited Partnership to address noncompliance with State Water Control Board law. A description of the proposed action is available at the Department of Environmental Quality office named below or online at [www.deq.virginia.gov](http://www.deq.virginia.gov). Gina Pisoni will accept comments by email at [gina.pisoni@deq.virginia.gov](mailto:gina.pisoni@deq.virginia.gov), FAX (804) 527-5106, or postal mail Department of Environmental Quality, Piedmont Regional Office, 4949-A Cox Road, Glen Allen, VA 23060, from October 8, 2012, to November 8, 2012.

#### VIRGINIA CODE COMMISSION

##### Notice to State Agencies

**Contact Information:** *Mailing Address:* Virginia Code Commission, 910 Capitol Street, General Assembly Building, 2nd Floor, Richmond, VA 23219; *Telephone:* Voice (804) 786-3591; FAX (804) 692-0625; *Email:* [varegs@dls.virginia.gov](mailto: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/cmsportal3/cgi-bin/calendar.cgi>.

**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/cumultab.htm>.

**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

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## General Notices/Errata

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complement and enhance one another by sharing pertinent regulatory information.

### ERRATA

#### STATE BOARD OF HEALTH

Title of Regulation: **12VAC5-31. Virginia Emergency Medical Services Regulations.**

Publication: 29:1 VA.R. 32-103 September 10, 2012.

Correction to Final Regulation:

Page 91-92, 12VAC5-31-1552 A, replace

"4. Complete a minimum of 12 hours of instructor focused continuing education.

5. Submit an EMS education coordinator application to include endorsement from an EMS Physician."

with

"[ ~~4. Complete a minimum of 12 hours of instructor focused continuing education.~~

~~5.~~ 4. ] Submit an EMS education coordinator application to include endorsement from an EMS Physician."

VA.R. Doc. No. R08-877; Filed September 20, 2012, 4:06 p.m.