



# VIRGINIA

## REGISTER OF REGULATIONS

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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 18 months in duration; however, may be extended for six months under certain circumstances as provided for in § 2.2-4011 D. Emergency regulations are published as soon as possible in the *Register*. During the time the emergency status is in effect, the agency may proceed with the adoption of permanent regulations through the usual procedures. To begin promulgating the replacement regulation, the agency must (i) file the Notice of Intended Regulatory Action with the Registrar within 60 days of the effective date of the emergency regulation and (ii) file the proposed regulation with the Registrar within 180 days of the effective date of the emergency regulation. If the agency chooses not to adopt the regulations, the emergency status ends when the prescribed time limit expires.

## **STATEMENT**

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

## **CITATION TO THE VIRGINIA REGISTER**

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

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

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. Tavenner**; **Christopher R. Nolen**; **J. Jasen Eige** or **Jeffrey S. Palmore**.

Staff of the Virginia Register: **Jane D. Chaffin**, Registrar of Regulations; **Karen Perrine**, Assistant Registrar; **Anne Bloomsburg**, Regulations Analyst; **Rhonda Dyer**, Publications Assistant; **Terri Edwards**, Operations Staff Assistant.

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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 2013 through December 2014

<u>Volume: Issue</u>	<u>Material Submitted By Noon*</u>	<u>Will Be Published On</u>
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
30:7	November 13, 2013	December 2, 2013
30:8	November 26, 2013 ( <b>Tuesday</b> )	December 16, 2013
30:9	December 11, 2013	December 30, 2013
30:10	December 23, 2013 ( <b>Monday</b> )	January 13, 2014
30:11	January 8, 2014	January 27, 2014
30:12	January 22, 2014	February 10, 2014
30:13	February 5, 2014	February 24, 2014
30:14	February 19, 2014	March 10, 2014
30:15	March 5, 2014	March 24, 2014
30:16	March 19, 2014	April 7, 2014
30:17	April 2, 2014	April 21, 2014
30:18	April 16, 2014	May 5, 2014
30:19	April 30, 2014	May 19, 2014
30:20	May 14, 2014	June 2, 2014
30:21	May 28, 2014	June 16, 2014
30:22	June 11, 2014	June 30, 2014
30:23	June 25, 2014	July 14, 2014
30:24	July 9, 2014	July 28, 2014
30:25	July 23, 2014	August 11, 2014
30:26	August 6, 2014	August 25, 2014
31:1	August 20, 2014	September 8, 2014
31:2	September 3, 2014	September 22, 2014
31:3	September 17, 2014	October 6, 2014
31:4	October 1, 2014	October 20, 2014
31:5	October 15, 2014	November 3, 2014
31:6	October 29, 2014	November 17, 2014
31:7	November 12, 2014	December 1, 2014

\*Filing deadlines are Wednesdays unless otherwise specified.

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# PETITIONS FOR RULEMAKING

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## TITLE 18. PROFESSIONAL AND OCCUPATIONAL LICENSING

### BOARD OF DENTISTRY

#### Agency Decision

Title of Regulation: **18VAC60-20. Regulations Governing Dental Practice.**

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

Name of Petitioner: Deborah Hickman.

Nature of Petitioner's Request: To amend 18VAC60-20-72 to allow a dental assistant who holds a valid CDA issued by the Dental Assisting National Board and successfully completes the CRFDA certification to take the examination without attending dental assisting school.

Agency Decision: Request denied.

Statement of Reason for Decision: The petition and related comments were considered by the board at its meeting on September 13, 2013. While the board declined to initiate a rulemaking process, it agreed that the education and training requirements for registration of a dental assistant II should be reviewed. As was learned during the process of promulgating the initial regulations, there are wide variances in the duties of an "expanded duty dental assistant" among the various states. For example, the duties that require an expanded duty assistant to obtain additional training and complete an examination in North Carolina may be performed in Virginia by a dental assistant I. So while the board has denied the request for rulemaking, it has taken the matter under advisement and referred it to a committee for further consideration.

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

VA.R. Doc. No. R13-29; Filed September 13, 2013, 3:51 p.m.

#### Agency Decision

Title of Regulation: **18VAC60-20. Regulations Governing Dental Practice.**

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

Name of Petitioner: Vahid Tavakoli.

Nature of Petitioner's Request: Require all dentists to give a five-year warranty on crowns and bridges to ensure work is durable and thorough.

Agency Decision: Request denied.

Statement of Reason for Decision: The petition and all related comments were considered by the board at its meeting on September 13, 2013. Board members concurred that there are

many reasons for the failure rate of a crown or bridge. Clinical studies show that the main reason for the need to replace a dental restoration is often tooth decay, for which there are many risk factors. A warranty requirement would be untenable and virtually impossible to enforce. Therefore, the board declined to initiate a rulemaking process and voted to retain regulations as currently written.

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

VA.R. Doc. No. R13-30; Filed September 13, 2013, 3:48 p.m.

#### Agency Decision

Title of Regulation: **18VAC60-20. Regulations Governing Dental Practice.**

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

Name of Petitioner: Deborah Hickman.

Nature of Petitioner's Request: To amend regulations pertaining to requirements for dental assistants II to add another pathway for registration.

Agency Decision: Request denied.

Statement of Reason for Decision: The petition and related comments were considered by the board at its meeting on September 13, 2013. While the board declined to initiate a rulemaking process, it agreed that the education and training requirements for registration of a dental assistant II should be reviewed. As was learned during the process of promulgating the initial regulations, there are wide variances in the duties of an "expanded duty dental assistant" among the various states. For example, the duties that require an expanded duty assistant to obtain additional training and complete an examination in North Carolina may be performed in Virginia by a dental assistant I. So while the board has denied the request for rulemaking, it has taken the matter under advisement and referred it to a committee for further consideration.

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

VA.R. Doc. No. R13-31; Filed September 13, 2013, 3:51 p.m.

#### Agency Decision

Title of Regulation: **18VAC60-20. Regulations Governing Dental Practice.**

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

Name of Petitioner: Terry Dickinson, DDS

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## Petitions for Rulemaking

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Nature of Petitioner's Request: To amend regulations for unprofessional conduct to specify that a dentist cannot: (i) offer rebates or split fees or commissions for services rendered to a patient with any person other than a partner, employee, or employer; nor (ii) directly or indirectly receive a fee or other consideration to or from a third party for the referral of a patient or client.

Agency Decision: Request denied.

Statement of Reason for Decision: The petition and related comments were considered by the board at its meeting on September 13, 2013. It was generally agreed that the issue should be addressed, but it is unclear that the board has statutory authority to promulgate a regulation with such a prohibition. The board was given a copy of provisions in the Medical Practice Act (§§ 54.1-2962 and 54.1-2962.1) as examples of language in the Code of Virginia. So while the board denied the request for rulemaking at this time, it has taken the matter under advisement and referred it to a committee for further consideration.

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

VA.R. Doc. No. R13-32; Filed September 13, 2013, 3:49 p.m.

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# NOTICES OF INTENDED REGULATORY ACTION

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## TITLE 11. GAMING

### CHARITABLE GAMING BOARD

#### **Withdrawal of Notice of Intended Regulatory Action**

Notice is hereby given in accordance with § 2.2-4007.01 of the Code of Virginia that the Charitable Gaming Board has WITHDRAWN the Notice of Intended Regulatory Action for **11VAC15-40, Charitable Gaming Regulations**, which was published in [29:18 VA.R. 2196 May 6, 2013](#). This action is being withdrawn due to the board authorizing the filing of a new notice stating that an advisory panel will be named to assist staff with drafting technical requirements associated with network bingo.

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](mailto:erin.williams@vdacs.virginia.gov).

VA.R. Doc. No. R13-3652; Filed September 12, 2013, 4:31 p.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

### MARINE RESOURCES COMMISSION

#### Final Regulation

**REGISTRAR'S NOTICE:** 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.

**Title of Regulation:** **4VAC20-260. Pertaining to Designation of Seed Areas and Clean Cull Areas (amending 4VAC20-260-20 through 4VAC20-260-60; adding 4VAC20-260-15).**

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

**Effective Date:** October 1, 2013.

**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](mailto:betty.warren@mrc.virginia.gov).

#### Summary:

*The amendments (i) provide an alternate culling and inspection process that makes it lawful for oysters harvested by hand from seaside of the Eastern Shore to be maintained in bags, sacks, or baskets, from time of harvest to time of sale, without those oysters having to be placed in a loose pile aboard a vessel, and (ii) define "basket" as a circular container with a straight mesh side, a straight bottom, and certain minimum dimensions.*

#### **4VAC20-260-15. Definition.**

The following word and term when used in this chapter shall have the following meaning unless the context clearly indicates otherwise:

"Basket" means a circular container with straight mesh sides and a straight bottom. A basket shall have the following minimum dimensions, all measured from inside to inside: 17 inches across the top, 13.5 inches across the bottom, and 20.5 inches diagonally from the inside chine to the top.

#### **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 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.

#### **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. From the seaside of the Eastern Shore, 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.~~

A. It shall be unlawful for any person to take any oysters that measure less than three inches in length from clean cull areas.

B. In the James River seed areas, there shall be no size limit on oysters harvested for replanting, but it shall be unlawful for any person to market any seed oysters for direct human consumption.

C. In the James River seed areas, it shall be unlawful for any person to harvest oysters for direct consumption that are contained in shells that are less than three inches in length.

D. From the seaside of the Eastern Shore, it shall be unlawful for any person to harvest oysters for direct consumption that are contained in shells that are less than three inches in length.

E. There shall be no minimum size limit for oysters raised in aquaculture cages by licensed aquaculture operations.

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

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

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

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

~~D. On~~ From the seaside of Eastern Shore, if more than a four-quart measure of any ~~combination~~ combined quantity of undersized (less than three inches) oysters less than three inches and shells of any size are found per bushel of clean cull oysters inspected by a police officer, it shall constitute a violation of this chapter.

E. Any oysters less than the minimum cull size or any amount of shell that exceeds the culling standard shall be returned immediately to the natural beds, rocks, or shoals from where they were taken.

F. Oysters less than the minimum cull size that are attached closely on the shell of a marketable oyster need not be

removed, but shall be considered part of the culling tolerance during inspection.

**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, except as described in subsection B of this section, and subject to inspection by any Marine Resources Commission law enforcement officer, or in only one basket upon the culling board, and culled by hand at the location of harvest.~~

1. Culled oysters shall be transferred immediately from the culling board to either the inside open part of the boat, a loose pile, or baskets, but only one transfer method may be used on any boat or vessel in any one day.

a. Oysters shall not be stored in both a loose pile and in baskets.

b. A single basket may be on board any boat during transfer of culled oysters from the culling board to the inside open part of the boat in a loose pile.

2. The entire harvest shall be subject to inspection, as provided in subsection F of this section.

B. Any oysters taken lawfully by hand from natural public beds, rocks, or shoals from the seaside of the Eastern Shore, and held in sacks, bags, or containers, shall be culled when taken and placed in those sacks, bags, or containers for inspection by any ~~Marine Resources Commission law enforcement~~ police officer as described in subsection G of this section.

C. 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.

D. 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 E 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.

E. 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.

~~F. 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, except as described in subsection G of this section.~~

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# Regulations

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F. Oysters may be inspected by any police officer according to any one of the following provisions:

1. For any oysters transferred from the culling board to the inside open part of the boat, vehicle, or trailer, or a loose pile, any police officer may use a shovel to take at least one bushel of oysters to inspect, at random, provided that the entire bushel shall be taken from one place in the open pile of oysters.

2. For any oysters transferred from the culling board to one or more baskets, any police officer may select one or more baskets of oysters, empty the contents of those baskets in a loose pile and use a shovel to take, at random, at least one bushel of oysters for inspection.

G. In the inspection of oysters harvested by hand from waters of the seaside of the Eastern Shore, the ~~law-enforcement~~ police officer may select any sacks, bags, or containers at random to establish a full metallic measuring bushel for purposes of inspection.

#### **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 € D 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 € D 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 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. R14-3804; Filed September 12, 2013, 12:00 p.m.

### **Final Regulation**

**REGISTRAR'S NOTICE:** 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.

**Title of Regulation:** **4VAC20-720. Pertaining to Restrictions on Oyster Harvest (amending 4VAC20-720-20, 4VAC20-720-40, 4VAC20-720-70, 4VAC20-720-80, 4VAC20-720-100).**

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

**Effective Date:** October 1, 2013.

**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](mailto:betty.warren@mrc.virginia.gov).

#### **Summary:**

*The amendments (i) change the description of the Rappahannock River Rotation Area 4 to remove an oyster bar in the Corrotoman River, Middle Ground Rock; (ii) establish the open oyster harvest season for areas in the Chesapeake Bay and its tributaries, the Potomac River tributaries, and the seaside of the Eastern Shore; (iii) establish gear restrictions for clean cull oysters; and (iv) establish that any registered commercial fishermen licensee who has paid the oyster resource user fee harvesting from areas described in 4VAC20-720-40 B 2 through 16 may harvest or possess the eight bushels limit, and registered commercial fishermen licensees who have paid the oyster resource user fee harvesting by oyster dredge in the area described in 4VAC20-720-40 B 17 may harvest or possess the eight bushels limit.*

#### **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.

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) Area" or "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., 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.

"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°

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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.

"Milford Haven" means that area of Milford Haven inside of Public Ground 7 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 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~~ 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.

"Oyster resource user fee" means a fee that must be paid each calendar year by anyone who grows, harvests, shucks, packs, or ships oysters for commercial purposes.

"Pocomoke and Tangier Sounds Management Area (~~PTSMA~~)" Area or "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.; thence southerly to the north end of Watts Island, Latitude 37° 48.7757800' N., Longitude 75° 53.5994100' W.; thence westerly to a point, Latitude 37° 48.4429100' N., Longitude 75° 56.4883600' W.; thence northerly to a point, Latitude 37° 53.3633500' N., Longitude 75° 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° 54.6136000' N., Longitude 75° 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° 48.4715943' N., Longitude 75° 46.9955932' W.; thence northerly to Guilford Flats Junction Light Flashing 2+1 Red "GF", Latitude 37° 50.9533300' N., Longitude 75° 46.6416700' W.; thence northwesterly to Messongo Creek Entrance Buoy Green Can "1", Latitude 37° 52.1000000' N., Longitude 75° 47.8083300' W.; thence northwesterly to Pocomoke Sound Shoal Flashing Light Red "8", Latitude 37° 52.4583300' N., Longitude 75° 49.4000000' W.; thence northwesterly to the house on Great Fox Island, Latitude 37° 53.6946500' N., Longitude 75° 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 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.

"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 southwest 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~~ 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

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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 southeasterly 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 southwest 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 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 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° 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

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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 "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.; 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.

#### **4VAC20-720-40. 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, ~~2012~~ 2013, through April 30, ~~2013~~ 2014.
2. James River Area and the Thomas Rock Area (James River): November 1, ~~2012~~ 2013, through January 31, ~~2013~~ 2014.
3. York River Rotation Area 1 ~~2~~: January 1, ~~2013~~ 2014, through February 28, ~~2013~~ 2014.
4. Milford Haven: December 1, ~~2012~~ 2013, through February 28, ~~2013~~ 2014.
5. Deep Rock Area: December 1, ~~2012~~ 2013, through February 28, ~~2013~~ 2014.
- ~~6. Rappahannock River Rotation Area 5: October 1, 2012, through November 30, 2012.~~
- ~~7. Rappahannock River Rotation Area 3: November 1, 2012, through December 31, 2012.~~
6. Rappahannock River Rotation Area 2: November 1, 2013, through December 31, 2013.

7. Rappahannock River Rotation Area 4: October 1, 2013, through November 30, 2013.

~~8. Rappahannock River Area 7: December 1, 2012~~ January 1, 2014, through ~~January 31, 2013~~ February 28, 2014.

9. Rappahannock River Area 8: December 1, ~~2012~~ 2013, through January 31, ~~2013~~ 2014.

10. Rappahannock River Area 9: November 1, ~~2012~~ 2013, through December 31, ~~2012~~ 2013.

11. Great Wicomico River Area: December 1, ~~2012~~ 2013, through January 31, ~~2013~~ 2014.

12. Upper Chesapeake Bay - Blackberry Hangs Area: December 1, ~~2012~~ 2013, through January 31, ~~2013~~ 2014.

13. Little Wicomico River: October 1, ~~2012~~ 2013, through December 31, ~~2012~~ 2013.

14. Coan River: October 1, ~~2012~~ 2013, through December 31, ~~2012~~ 2013.

15. Yeocomico River: October 1, ~~2012~~ 2013, through December 31, ~~2012~~ 2013.

16. Nomini Creek: October 1, ~~2012~~ 2013, through December 31, ~~2012~~ 2013.

17. Pocomoke and Tangier Sounds Rotation Area ~~2~~ 1: December 1, ~~2012~~ 2013, through February 28, ~~2013~~ 2014.

18. Seaside of the Eastern Shore (for clean cull oysters only): November 1, ~~2012~~ 2013, through February 28, ~~2013~~ 2014.

#### **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. 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 .

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

C. It shall be unlawful to harvest oysters in the Rappahannock River Rotation Areas ~~3 and 5~~ 2 and 4, the Rappahannock River Areas 7 and 8, James River Area, Thomas Rock Area, Upper Chesapeake Bay Blackberry Hangs Area, York River Rotation Area ~~1~~ 2, and Great Wicomico ~~Areas~~ River Area, 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 17, except by an oyster dredge.

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

**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 16 shall be eight bushels per registered commercial fisherman licensee who has paid the oyster resource user fee. It shall be unlawful for any registered commercial fisherman licensee to harvest or possess more than 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 16 shall be determined as the number of registered commercial fisherman licensees who have paid the oyster resource user fee on board the vessel multiplied by eight bushels with a maximum daily landing and possession limit of 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 17, where harvesting is allowed by oyster dredge, there shall be a daily harvest and possession limit of eight bushels of clean cull oysters per registered commercial fisherman licensee who has paid the oyster resource user fee. It shall be unlawful for any registered commercial fisherman licensee to harvest or possess more than 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 who have paid the oyster resource user fee on board the vessel multiplied by eight bushels with a maximum daily landing and possession limit of 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.~~

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

A. The marine police officer at the point of seed harvest may require that ~~an~~ a marine police officer be present during the seed planting. When this is required, it will be specified on the seed transfer permit. If ~~an~~ a marine police 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 April 30. It shall be unlawful to reharvest these seed oysters prior to May 1.

VA.R. Doc. No. R14-3803; Filed September 12, 2013, 11:56 a.m.

**TITLE 12. HEALTH**

**STATE BOARD OF HEALTH**

**Final Regulation**

**REGISTRAR'S NOTICE:** The State Board of Health is claiming an exclusion from the Administrative Process Act in accordance with § 2.2-4006 A 4 a of the Code of Virginia, which excludes regulations that are necessary to conform to changes in Virginia statutory law where no agency discretion is involved. The State Board of Health will receive, consider, and respond to petitions by any interested person at any time with respect to reconsideration or revision.

**Title of Regulation:** **12VAC5-371. Regulations for the Licensure of Nursing Facilities (amending 12VAC5-371-160).**

**Statutory Authority:** §§ 32.1-12 and 32.1-127 of the Code of Virginia.

**Effective Date:** November 8, 2013.

**Agency Contact:** Carrie Eddy, Policy Analyst, Department of Health, 3600 West Broad Street, Richmond, VA 23230, telephone (804) 367-2157, FAX (804) 367-2149, or email carrie.eddy@vdh.virginia.gov.

**Summary:**

*Pursuant to Chapter 320 of the 2013 Acts of Assembly, the amendment requires that each nursing facility maintain a liability insurance coverage minimum of \$1 million and professional liability coverage at least equal to the recovery limit set forth in § 8.01-581.15 of the Code of Virginia to compensate residents and individuals harmed resulting from a facility's negligence or criminal act.*

**12VAC5-371-160. Financial controls and resident funds.**

A. All financial records, including resident funds, shall be kept according to generally accepted accounting principles (GAAP).

B. Each nursing facility shall maintain liability insurance coverage in a minimum of \$1 million and professional liability coverage in an amount at least equal to the recovery limit set forth in § 8.01-581.15 of the Code of Virginia to compensate residents or individuals for injuries and losses resulting from the negligent or criminal acts of the facility.

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Failure to maintain minimum insurance shall result in revocation of the facility's license.

~~B. C.~~ Nursing facilities choosing to handle resident funds shall:

1. Comply with § 32.1-138 A 7 of the Code of Virginia regarding resident funds;
2. Purchase a surety bond or otherwise provide assurance for the security of all personal funds deposited with the facility; and
3. Provide for separate accounting for resident funds.

~~C. D.~~ In the event the facility is sold, the nursing facility shall provide written verification that all resident funds have been transferred and shall obtain a signed receipt from the new owner. Upon receipt, the new owner shall provide an accounting of resident funds.

~~D. E.~~ In the event of a resident's death or discharge with funds deposited with the facility, the nursing facility shall, within 30 days, give a final accounting of those funds to the individual administering the resident's estate and, if appropriate, refund any moneys due.

VA.R. Doc. No. R14-3690; Filed September 4, 2013, 6:46 p.m.

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## TITLE 18. PROFESSIONAL AND OCCUPATIONAL LICENSING

### BOARD OF DENTISTRY

#### Proposed Regulation

Title of Regulation: **18VAC60-20. Regulations Governing Dental Practice (amending 18VAC60-20-10, 18VAC60-20-30, 18VAC60-20-107, 18VAC60-20-108, 18VAC60-20-110, 18VAC60-20-120, 18VAC60-20-135; repealing 18VAC60-20-140).**

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

Public Hearing Information:

December 6, 2013 - 9 a.m. - Perimeter Building Conference Center, 9960 Mayland Drive, Henrico, VA

Public Comment Deadline: December 6, 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](mailto:sandra.reen@dhp.virginia.gov).

Basis: Regulations are promulgated under the general authority of § 54.1-2400 of the Code of Virginia, which provides the Board of Dentistry the authority to promulgate regulations to administer the regulatory system. Section 54.1-2709.5 of the Code of Virginia requires permits for sedation and anesthesia for any dentist who administers or prescribes medication or administers nitrous oxide/oxygen or a combination of a medication and nitrous oxide/oxygen for the

purpose of inducing anxiolysis or minimal sedation in a dental office.

Purpose: The intent of the regulatory action is compliance with the statutory mandate of Chapter 526 of the 2011 Acts of the Assembly to require any dentist who provides or administers sedation or anesthesia in a dental office to obtain either a conscious/moderate sedation permit or a deep sedation/general anesthesia permit issued by the board and to establish reasonable education, training, and equipment standards for safe administration and monitoring of sedation and anesthesia to patients in a dental office.

Dentists who meet current qualifications of education and training are qualified for permits under the proposed 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 until September 14, 2014, 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 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, and 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.

To protect the health and safety of patients who receive conscious/moderate sedation or deep sedation/general anesthesia, the Board of Dentistry and the Department of Health Professions sought legislative action in the 2011 General Assembly to authorize the issuance of permits for provision or administration of sedation or anesthesia in dental offices.

In recent years, the use of sedation and anesthesia in dental practices has increased significantly and the offer of sedation dentistry is frequently used in advertising to attract patients. Sedation and anesthesia are provided by dentists to reduce patient anxiety about undergoing dental treatment and to eliminate pain during the procedure. The use of such controlled substances brings with it the risks of adverse reactions and even death. Current regulations require dentists

to have appropriate training, trained auxiliary personnel, and patient monitoring equipment in order to administer sedation and anesthesia. Dentists are also required to report adverse patient reactions to such administration. Based on the current legal authority of the Board of Dentistry, compliance with these requirements to ensure patient safety is only checked by the board after a complaint or an adverse reaction report is received.

Authorizing the board to require dentists in the Commonwealth to obtain a permit to administer conscious/moderate sedation and deep sedation/general anesthesia in a dental practice advances patient safety by enabling proactive oversight by the board through periodic inspections. The permits enable the board to implement a periodic inspection program of the practices where sedation and anesthesia are administered to verify that (i) the treating dentist has the necessary education and training to safely administer controlled substances and to perform lifesaving interventions when adverse reactions occur; (ii) required patient monitoring and safety equipment is present and maintained in working order, and that personnel are properly trained in its use; and (iii) auxiliary personnel have the required training and are assigned duties within the parameters established in the regulations.

Based on data collected by the American Association of Dental Boards (AADB) and reported in the 2010 edition of the AADB Composite, Virginia is currently one of only four states that do not require dentists to obtain permits to administer conscious/moderate sedation and deep sedation/general anesthesia in a dental practice. The board has determined that the proposed regulations, which replace emergency regulations, are necessary to accord patients in Virginia the level of protection provided by the vast majority of other states.

Substance: The substantive 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.

Issues: The primary advantage to the public is greater patient safety and accountability in the provision of sedation and anesthesia in dental offices. There are no disadvantages; persons who are currently qualified will be able to obtain permits or will have adequate time to obtain the required coursework and equipment for monitoring and emergency management. There are no advantages or disadvantages to the Commonwealth; the board set the application and renewal fee

with the goal of covering expenditures related to sedation and anesthesia permits.

Department of Planning and Budget's Economic Impact Analysis:

Summary of the Proposed Amendments to Regulation. Pursuant to Chapter 526 (Senate Bill 1146) of the 2011 Acts of the Assembly, the Board of Dentistry proposes to establish a permit program for dentists who provide or administer conscious/moderate sedation or deep sedation/general anesthesia in a dental office.

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

Estimated Economic Impact. Sedation and anesthesia are provided by dentists to reduce patient anxiety about undergoing dental treatment and to eliminate pain during the procedure. According to the Department of Health Professions (DHP), the use of sedation and anesthesia in dental practices has increased significantly and the offer of "sedation dentistry" is frequently used in advertising to attract patients in recent years. The use of controlled substances in dentistry brings with it the risks of adverse reactions and even death.

Since 2007, the Board has received 10 reports of patients needing emergency or follow-up care after receiving dental treatment under sedation or anesthesia. While seven of these incidents were minor in nature, three were highly publicized critical incidents involving children. Each of those three incidents resulted in the death of a child. Through its investigation, the Board has learned that children under the age of 12 are particularly susceptible to having extreme adverse reactions to sedation and anesthesia. The Board also found that the treating dentists failed to properly monitor and record vital signs and pulse oximetry readings. In at least one of these cases, excessive medication was administered, the sedatives were administered by unlicensed personnel and the parents were left alone with their unmonitored children following administration of the pre-operative medications. Additionally, the Board found that Virginia is currently one of only four states that do not require dentists to obtain permits to administer sedation and anesthesia in a dental practice.

Also, the Board has received three petitions for rulemaking advocating for regulatory changes in the area of sedation and anesthesia (one in 2008 and two in 2009) and numerous public comments made at Board meetings asking the Board to update and strengthen its regulations for administration. Two of the petitions for rulemaking specifically advocate that dentists be required to prove they have the training required to administer sedation and anesthesia through a registration or permit process and further encourage periodic inspection of dental practices using sedation and anesthesia. When these petitions were considered, the Board was advised by legal counsel that legislative authority was needed before permits could be required.

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Current regulations have required dentists to have appropriate training, trained auxiliary personnel and patient monitoring equipment in order to administer sedation and anesthesia. Dentists have been also required to report adverse patient reactions to such administration. However, based on the pre-emergency legal authority of the Board, compliance with these requirements to ensure patient safety was only checked by the Board after a complaint or an adverse reaction report is received.

As a result, in 2011, legislation was introduced at the request of DHP and the Board to establish a permit program for administration of sedation and anesthesia in dentistry. The legislation required that the Board promulgate emergency regulations which became effective September 14, 2012.

The proposed regulations will permanently replace emergency regulations currently in effect. The proposed regulations do not introduce any new education or training requirements for administration of sedation and anesthesia in a dental practice. They, however, require a dentist to obtain a permit to practice sedation or anesthesia dentistry. The Board proposes to establish a \$100 annual permit fee for both types of permits. A \$35 late fee is also proposed, which is consistent with fee structures of other regulated professions. It is not known at this time whether these fees will be sufficient to cover the Board's administrative expenses associated with issuance of permits, inspections, and taking corrective actions.

The emergency regulations require all dentists who administer moderate sedation/conscious sedation or deep sedation/general anesthesia in dental offices to obtain a permit by March, 2013. Dentists who were "self-certified" (no formal education or training required) prior to January 1989 will be allowed to hold a temporary permit until September 14, 2014, to allow adequate time to obtain the appropriate qualifications for administration of conscious/moderate sedation. As of March 18, 2013, there were 132 moderate/conscious and 18 deep sedation/general anesthesia permits issued. Many additional permit applications are expected to be received by DHP before the deadline. However, the Board has no estimate of the number of permits that will be issued before the end of March, 2013.

In addition, the proposed regulations require certain equipment to be able to administer sedation or anesthesia. The additional emergency equipment that must be available in the areas where patients are sedated and recover from sedation or anesthesia include a defibrillator, an electrocardiographic monitor (EKG)<sup>1</sup>, a suction apparatus, a temperature measuring device, a throat pack, and a precordial or pretracheal stethoscope. The cost of this equipment represents additional compliance costs to the dentists wishing to administer sedation and anesthesia in their office. According to DHP, an EKG machine and a stethoscope are the most expensive equipment costing approximately \$2,000 and \$700, respectively.

The emergency regulations required an EKG machine for any type of moderate sedation while these permanent proposed regulations do not require an EKG machine for moderate sedation administered in a single dose by an enteral method. Thus, a number of dentists may have already acquired an EKG machine due to the equipment requirements set out in the emergency regulations that may not be required to have it under the proposed permanent regulations. While these dentists have already incurred the additional compliance costs, some of them may choose to sell their EKG machines to recover some of their original purchase costs.

The main expected benefit of the proposed permit program is to strengthen compliance with the existing requirements. Sedation and anesthesia permits are expected to advance patient safety by enabling proactive oversight by the Board through periodic inspections. The permits will enable the Board to implement a periodic inspection program of the practices where sedation and anesthesia are administered to verify that 1) the treating dentist has the necessary education and training to safely administer controlled substances and to perform life saving interventions when adverse reactions occur; 2) required patient monitoring and safety equipment is present, is maintained in working order, and that personnel are properly trained in its use; and 3) auxiliary personnel have the required training and are assigned duties within the parameters established in the regulations.

Given the significant risk of death due to errors in administration of sedation and anesthesia and follow up care, to the extent that the permit program will reduce this risk, the proposed amendments should create a net benefit.

**Businesses and Entities Affected.** The proposed regulations will specifically affect dentists who wish to administer sedation and anesthesia in their offices. As of March 18, 2013, there are 132 moderate/conscious and 18 deep sedation/general anesthesia permits issued. Many additional permit applications are expected to be received by DHP before the deadline. However, the Board has no estimate of the number of permits that will be issued before the end of March, 2013.

**Localities Particularly Affected.** The proposed regulations apply throughout the Commonwealth.

**Projected Impact on Employment.** The proposed regulations will require dentists wishing to administer sedation and anesthesia in their offices to pay for the permit fee and purchase necessary equipment if they do not currently have it. Added compliance costs may discourage sedation and anesthesia dentistry by a small margin and reduce supply of sedation and anesthesia dentistry services. However, this possible change in supply is not likely to cause a significant reduction in employment.

**Effects on the Use and Value of Private Property.** Added compliance costs due to the permit fees and the required equipment would negatively affect profitability of dentists

administering sedation and anesthesia in their offices and consequently their asset values.

**Small Businesses: Costs and Other Effects.** There are 3,049 dental offices in Virginia. All of these dental practices are small businesses. The proposed changes will add to their compliance costs in terms of the permit fees and cost of the required equipment if they wish to use sedation and anesthesia in their practice.

**Small Businesses: Alternative Method that Minimizes Adverse Impact.** There is no known alternative method that minimizes the 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, a determination of the public benefit, the projected number of businesses or other entities to whom the regulation would apply, the identity of any localities and types of businesses or other entities particularly affected, the projected number of persons and employment positions to be affected, the projected costs to affected businesses or entities to implement or comply with the regulation, and the impact on the use and value of private property. Further, if the proposed regulation has an adverse effect on small businesses, § 2.2-4007.04 requires that such economic impact analyses include (i) an identification and estimate of the number of small businesses subject to the regulation; (ii) the projected reporting, recordkeeping, and other administrative costs required for small businesses to comply with the regulation, including the type of professional skills necessary for preparing required reports and other documents; (iii) a statement of the probable effect of the regulation on affected small businesses; and (iv) a description of any less intrusive or less costly alternative methods of achieving the purpose of the regulation. The analysis presented above represents DPB's best estimate of these economic impacts.

<sup>1</sup> EKG is not required for moderate sedation administered in a single dose by an enteral method.

**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 Dental Practice), relating to permits for sedation and anesthesia.

**Summary:**

*Pursuant to Chapter 526 of the 2011 Acts of the Assembly, the proposed amendments regulate provision of permits for dentists who provide or administer conscious/moderate sedation or deep sedation/general anesthesia in a dental*

*office. The proposed amendments (i) define words and terms used in sedation and anesthesia regulations; (ii) establish general provisions pertaining to administration of sedation and anesthesia, including recordkeeping, reporting, emergency management, and continuing education requirements; (iii) require dentists who administer deep sedation/general anesthesia and conscious/moderate sedation to obtain permits from the Board of Dentistry; (iv) set out requirements pertaining to the delegation of administration of deep sedation, general anesthesia, and conscious/moderate sedation; (v) set forth the equipment that must be maintained in working order and immediately available to areas where patients will be sedated and treated and where patients will recover; and (vi) establish requirements for the monitoring and discharge of patients.*

Part I  
General Provisions

**18VAC60-20-10. Definitions.**

A. 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.~~

~~"Deep sedation/general anesthesia" 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.~~

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"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.

"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.

"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.

B. The following words and terms relating to supervision as used in this chapter shall have the following meanings unless the context clearly indicates otherwise:

"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 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.

C. The following words and terms relating to sedation or anesthesia as used in the chapter shall have the following meanings unless the context clearly indicates otherwise:

"Conscious/moderate sedation" or "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. Reflex withdrawal from a painful stimulus is not considered a purposeful response. No interventions are required to maintain a patent airway, and spontaneous ventilation is adequate. Cardiovascular function is usually maintained.

"Deep sedation" means a drug-induced depression of consciousness during which patients cannot be easily aroused but respond purposefully following repeated or painful stimulation. Reflex withdrawal from a painful stimulus is not considered a purposeful response. 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.

"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 ventilator 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.

"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 drug-induced state during which patients respond normally to verbal commands. Although cognitive function and physical coordination may be impaired, airway reflexes, and ventilator and cardiovascular functions are unaffected. Minimal sedation includes "anxiolysis" (the diminution or elimination of anxiety through the use of pharmacological agents in a dosage

that does not cause depression of consciousness) and includes "inhalation analgesia" (the inhalation of nitrous oxide and oxygen to produce a state of reduced sensibility to pain without the loss of consciousness).

~~"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.~~

"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 (18VAC60-20-107 et seq.).

"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.~~

"Titration" means the incremental increase in drug dosage to a level that provides the optimal therapeutic effect of sedation.

**18VAC60-20-30. Other fees.**

A. Dental licensure application fees. The application fee for a dental license by examination, a 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 faculty 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. Mobile dental clinic or portable dental operation. The application fee for registration of a mobile dental clinic or portable dental operation shall be \$250. The annual renewal fee shall be \$150 and shall be due by December 31. A late fee of \$50 shall be charged for renewal received after that date.

L. 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.

M. 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 or any level of sedation by:
    - a. A dentist after he has documented a consultation with their primary care physician or other medical specialist

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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 any level 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 unlikely an unintended reduction of or loss of consciousness when 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 treatment to be performed;
4. Preoperative vital signs;
5. A record of the name, dose, 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 years 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 intended and was prepared to provide, the dentist

shall stop the dental treatment 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.

H. Reporting of adverse reactions. A written report shall be submitted to the board by the treating dentist within 30 days following any mortality or morbidity that directly results from the administration of any level of sedation or anesthesia and that occurs in the facility or during the first 24 hours immediately following the patient's departure from the facility.

I. Continuing education. A dentist who administers or a dental hygienist who monitors patients under general anesthesia, deep sedation, or conscious sedation shall complete four hours every two years of approved continuing education directly related to administration or monitoring of such anesthesia or sedation as part of the hours required for licensure renewal as specified in 18VAC60-20-50.

**18VAC60-20-108. Administration of minimal sedation (anxiolysis or inhalation analgesia).**

A. Education and training requirements. A dentist who utilizes anxiolysis or inhalation analgesia shall have training in and knowledge of:

1. Medications used, the appropriate dosages and the potential complications of administration.
2. Physiological effects of nitrous oxide and potential complications of administration.

B. Equipment requirements. A dentist who utilizes anxiolysis or inhalation analgesia or who directs the administration of inhalation analgesia by a dental hygienist shall maintain the following equipment in his office and be trained in its use:

1. Blood pressure monitoring equipment.
2. Positive pressure oxygen.
3. Mechanical (hand) respiratory bag.

C. Monitoring requirements.

1. The treatment team for anxiolysis shall consist of the dentist and a second person in the operatory with the patient to assist, monitor and observe the patient. Once the administration of anxiolysis has begun, the dentist shall ensure that a person qualified in accordance with 18VAC60-20-135 is present with the patient at all times to determine the level of consciousness by continuous visual monitoring of the patient.
2. A dentist or a dental hygienist who utilizes inhalation analgesia shall ensure that there is continuous visual monitoring of the patient to determine the level of consciousness.
3. If inhalation analgesia is used, monitoring shall include making the proper adjustments of nitrous oxide machines

at the request of or by the dentist or a dental hygienist qualified in accordance with requirements of 18VAC60-20-81 to administer nitrous oxide during administration of the sedation and observing the patient's vital signs.

4. If any other pharmacological agent is used in addition to nitrous oxide/oxygen and a local anesthetic, requirements for the induced level of sedation must be met.

D. Discharge requirement. The dentist shall ensure that the patient is not discharged to his own care until he exhibits normal responses.

**18VAC60-20-110. Requirements to administer for the administration of deep sedation/general anesthesia.**

A. Educational requirements. After March 31, 2013, no dentist may administer 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 that 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 that 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 or 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 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~~ The deep sedation/general anesthesia permit or AAOMS certificate required under subsection A of this section shall be posted along with the dental license and current registration with the Drug Enforcement Administration, the certificate of education required under subsection A of this section. All licenses and permits must be current.

**E. Delegation of administration.**

1. A dentist who does not hold a permit 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 who does not hold a permit 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 who does hold a permit 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;

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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 C 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 anesthetize 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 years or older; or

b. A dental hygienist, dental assistant, registered nurse, or licensed practical nurse to administer Schedule VI topical oral anesthetics.

4. A dentist who delegates administration of deep sedation/general anesthesia shall ensure that:

a. All equipment required in subsection F of this section is present, in good working order, and immediately available to the areas where patients will be sedated and treated and will recover; and

b. Qualified staff is on site to monitor patients in accordance with requirements of subsection G of this section.

~~D.~~ F. Emergency Required 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, ~~and~~ immediate establishment of an airway and cardiopulmonary resuscitation, ~~and~~. He shall maintain have available the following emergency equipment in the dental facility sizes for adults or children as appropriate for the patient being treated and shall maintain it in 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~~ masks;

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 at least 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~~ treatment. The second person may be the health professional delegated to administer sedation or anesthesia.

2. Monitoring of the patient ~~under~~ undergoing deep sedation/general anesthesia, including direct, visual observation of the patient by ~~a~~ one member of the treatment team, is to begin prior to induction ~~of anesthesia~~ and shall take place continuously following induction, during the dental procedure, and during 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. EKG readings and baseline vital signs shall be taken and recorded prior to administration of any controlled drug at the facility to include: temperature, blood pressure, pulse, oxygen saturation, respiration, and heart rate. The EKG readings and 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.

b. A secured intravenous line must be established during induction and maintained through recovery.

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. The patient shall be discharged with a responsible individual who has been instructed with regard to the patient's care.

**18VAC60-20-120. Requirements to administer for administration of conscious/moderate sedation.**

A. After March 31, 2013, no dentist may administer 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 that 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 that 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 as evidenced by a certificate of completion posted with the dental license (ACLS) for Health Professionals or Pediatric Advanced Life Support (PALS) for Health Professionals, and current registration with the Drug Enforcement Administration.

G. Posting. 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 shall be posted along with the dental license and registration with the Drug Enforcement Administration. All licenses and permits must be current.

H. Delegation of administration.

1. A dentist who does not hold a permit to administer conscious/moderate sedation shall only use the services of

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a permitted dentist or an anesthesiologist to administer such sedation in a dental office. In a licensed outpatient surgery center, a dentist who does not hold a permit 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 dentist who holds a permit may administer or use the services of the following personnel to administer conscious/moderate sedation:

a. A dentist with the training required by subsection E of this section to administer by an enteral method;

b. A dentist with the training required by subsection D 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 D or E 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 D of this section.

3. If minimal sedation is self-administered by or to a patient age 13 years or older 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 years and younger prior to his arrival at the dentist office or treatment facility.

4. Preceding the administration of conscious/moderate sedation, a permitted dentist may use the services of the following personnel under indirect supervision to administer local anesthesia to anesthetize 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 years or older; or

b. A dental hygienist, dental assistant, registered nurse, or licensed practical nurse to administer Schedule VI topical oral anesthetics.

5. A dentist who delegates administration of conscious/moderate sedation shall ensure that:

a. All equipment required in subsection I of this section is present, in good working order, and immediately available to the areas where patients will be sedated and treated and will recover; and

b. Qualified staff is on site to monitor patients in accordance with requirements of subsection J of this section.

E. **Emergency Required** 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~~ have available the following ~~emergency airway~~ emergency airway equipment in the ~~dental facility~~ dental facility sizes for adults or children as appropriate for the patient being treated and shall maintain it in 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~~ masks;

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. Suction apparatus;

12. Temperature measuring device;

13. Throat pack;

14. Precordial and pretracheal stethoscope; and

15. Electrocardiographic monitor, if a patient is receiving parenteral administration of sedation or if the dentist is using titration.

F. **J.** Monitoring requirements.

1. The ~~administration~~ treatment team for conscious sedation shall at least 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 treatment. The second person may be the health professional delegated to administer sedation.

2. Monitoring of the patient ~~under conscious~~ undergoing conscious/moderate sedation, including direct, visual observation of the patient by ~~a~~ one member of the treatment team, is to begin prior to administration of sedation, or if medication is self-administered by the patient, ~~when the patient arrives~~ immediately upon the patient's arrival at the dental office and shall take place continuously during the dental ~~procedure~~ treatment and

during 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 evaluated 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; and

b. Blood pressure, oxygen saturation, pulse, and heart rate shall be monitored continually during the administration and recorded every five minutes.

**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. The patient shall be discharged with a responsible individual who has been instructed with regard to the patient's care.

**18VAC60-20-135. Ancillary personnel ~~Personnel assisting in sedation or anesthesia.~~**

~~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 health care 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).

**18VAC60-20-140. ~~Report of adverse reactions. (Repealed.)~~**

~~A written report shall be submitted to the board by the treating dentist within 30 days following any mortality or morbidity which directly results from the administration of local anesthesia, general anesthesia, conscious sedation, or nitrous oxide oxygen inhalation analgesia and which occurs in the facility or during the first 24 hours immediately following the patient's departure from the facility.~~

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

FORMS (18VAC60-20)

[Application Requirements for Dentists and Application for License to Practice Dentistry \(rev. 11/10\)](#)

[Application Requirements and Application for Restricted Dental Volunteer License/Restricted Dental Hygiene License \(rev. 11/10\)](#)

[Requirements and Instructions for a Temporary Resident's License to Persons Enrolled in Advanced Dental Education Programs and Application for Temporary Resident's License \(rev. 2/10\)](#)

[Application Requirements and Application for Teacher's License or Full-Time Faculty License \(rev. 11/10\)](#)

[Application Requirements for Dental Hygienists and Application for Licensure to Practice Dental Hygiene \(rev. 11/10\)](#)

[Application Requirements for Registration as a Dental Assistant II \(rev. 3/11\)](#)

[Application for Registration to Practice as a Dental Assistant II \(eff. 3/11\)](#)

[Form A, Certification of Dental Assisting Education \(eff. 3/11\)](#)

[Form B, Certification of Employment \(eff. 3/11\)](#)

[Form C, Certification of Authorization to Perform Expanded Duties as a Dental Assistant II \(eff. 3/11\)](#)

[Instructions for Reinstatement of License and Reinstatement Application for Dental/Dental Hygiene Licensure \(rev. 2/10\)](#)

[Instructions for Application for Reactivation of License and Application for Reactivation of License \(rev. 2/10\)](#)

[Application for Certification to Perform Cosmetic Procedures \(rev. 2/10\)](#)

[Oral and Maxillofacial Surgeon Registration of Practice \(rev. 2/10\)](#)

[Oral and Maxillofacial Surgeon Reinstatement of Registration of Practice \(rev. 2/10\)](#)

[Application for Registration for Volunteer Practice \(rev. 8/08\)](#)

[Sponsor Certification for Volunteer Registration \(rev. 8/08\)](#)

[Application for Registration of a Mobile Dental Facility or Portable Dental Operation \(eff. 6/10\)](#)

[Application for a Permit to Administer Conscious/Moderate Sedation \(rev. 10/12\)](#)

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# Regulations

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## [Application for a Permit to Administer Deep Sedation/General Anesthesia \(rev. 10/12\)](#)

VA.R. Doc. No. R13-2984; Filed September 18, 2013, 11:46 a.m.

### **Notice of Extension of 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.

**Expiration Date Extended Through:** March 13, 2014.

On September 13, 2013, the Governor approved the Board of Dentistry's request to extend the expiration date of the above-referenced emergency regulation as provided in § 2.2-4011 D of the Code of Virginia. The emergency regulation was published in 29:3 VA.R. 578-585 October 8, 2012. The regulation implements § 54.1-2709.5 of the Code of Virginia, which requires dentists who provide or administer sedation or anesthesia in a dental office to obtain a permit issued by the Board of Dentistry.

**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 19, 2013, 4:00 p.m.

## **BOARD OF MEDICINE**

### **Proposed 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.

**Public Hearing Information:**

October 24, 2013 - 8:45 a.m. - 9960 Mayland Drive, Perimeter Center, 2nd Floor Conference Room, Richmond, VA

**Public Comment Deadline:** December 6, 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](mailto:william.harp@dhp.virginia.gov).

**Basis:** Regulations are promulgated under the general authority of § 54.1-2400 of the Code of Virginia, which provides the Board of Medicine the authority to promulgate regulations to administer the regulatory system. Section 54.1-2957.16 of the Code of Virginia requires that the Board of Medicine promulgate regulations for the licensure of behavior analysts and assistant behavior analysts.

**Purpose:** The intent of the Board of Medicine is to adopt regulations for the licensure of behavior analysts and assistant behavior analysts as mandated by Chapter 3 of the 2012 Acts

of Assembly. The regulation sets out criteria for licensure, fees for applicants and licensees, renewal and continuing education requirements, rules for supervision, and professional standards of practice. The board has adopted regulations that are consistent with standards and criteria of the Behavior Analyst Certification Board (BACB), the professional credentialing body of applied behavior analysis, and with rules for other professions currently licensed by the Board of Medicine. It is the intent and goal of the regulation that behavior analysts and assistant behavior analysts who are currently certified by the BACB and who engage in the ethical, professional practice of applied behavior analysis be able to continue providing services to those children diagnosed with autism spectrum disorder as licensees of the Board of Medicine.

Since behavior analysts and assistant behavior analysts seeking licensure are providing services to a very vulnerable population (including children with autistic spectrum disorder), the board has adopted regulations for ethical practice and supervisory responsibilities that may protect the health and safety of those clients. Specific criteria for supervision by behavior analysts and standards of professional conduct for both types of licensee will provide a framework for ethical, responsible practice in which the welfare of the client is foremost.

**Substance:** The regulation establishes (i) criteria for licensure, (ii) requirements for fees and applications, (iii) provisions for renewal and reinstatement of licensure, (iv) standards of practice, (v) procedures for the supervision of assistant behavior analysts, and (vi) criteria for supervision of unlicensed individuals who assist in the provision of applied behavior analysis.

**Issues:** The primary advantage to the public is a regulatory standard by which to judge minimal competency to practice behavior analysis. Additionally, third party payers are required to cover behavior analysis services for children with autism, so there is a financial benefit to licensure. The autism community has expressed concern that board regulations may restrict the use of unlicensed persons acting under the supervision of a licensed behavior analyst. The board has reiterated in the adoption of proposed regulations that it believes tasks may be delegated within the provisions of law and regulation to persons who are appropriately trained and supervised. There are no particular 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. As mandated by Chapter 3 of the 2012 Acts of the Assembly, the Board of Medicine (Board) proposes to promulgate new regulations that will govern the licensure of behavior analysts and assistant behavior analysts.

Result of Analysis. There is insufficient information to ascertain whether benefits will outweigh costs for these proposed regulations.

Estimated Economic Impact. Prior to General Assembly action in 2012, there was no requirement that individuals who provided behavior analysis services for autistic children be licensed. In 2011, the General Assembly mandated that health insurance cover these services but did not require that behavior analysts be licensed. The General Assembly passed legislation in 2012 to mandate licensure for these entities and to require that the Board promulgate emergency regulations for this licensure program. Pursuant to Chapter 3 of the 2012 Acts of the Assembly, the Board promulgated emergency regulations that became final September 19, 2012, and now proposes to promulgate replacement regulations that will govern the licensure of behavior analysts and assistant behavior analysts after the emergency regulations expire on September 18, 2013.

As mandated by Chapter 3, the Board's regulations will require applicants for initial licensure to be certified by the Behavior Analyst Certification Board (BACB) as certified behavior analysts if they are seeking licensure as behavior analysts, or as certified assistant behavior analysts if they are seeking licensure as assistant behavior analysts. In addition to providing documentation of current certification and filling out an application for licensure, behavior analysts will have to report any past or pending disciplinary actions in any other jurisdiction and pay a licensure fee of \$130. Assistant behavior analysts will have to submit all of the same documentation as behavior analysts and pay an initial licensure fee of \$70.

In order to gain certification as a behavior analyst, the BACB requires that applicants have a masters degree in behavior analysis or another natural science, education, human services, engineering, speech/language therapy, occupational therapy, clinical social work, or clinical, counseling or school psychology. In addition to, or as part of, the educational requirements to become certified as a behavior analyst, applicants must either complete 225 classroom hours of graduate level instruction in specified subjects or complete one academic year as a full time faculty member at a college or university during which the applicant must conduct and publish research in behavior analysis. Prospective behavior analysts must also meet one of three experience requirements. They must either: 1) complete 1500 hours of supervised independent fieldwork with supervisors supervising at least once every two weeks for at least 5% of the total number of fieldwork hours, 2) complete 1,000 hours of a practicum in a university practicum program with at least 7.5% of hours directly supervised or 3) complete 750 hours of an intensive practicum program with at least 10% of hours directly supervised.

In order to gain certification as an assistant behavior analyst, the BACB requires that applicants have a bachelors degree in

behavior analysis or another natural science, education, human services, engineering, speech/language therapy, occupational therapy, clinical social work, or clinical, counseling or school psychology. In addition to, or as part of, the educational requirements to become certified as an assistant behavior analyst, applicants must complete 135 classroom hours of college instruction in specified subjects. Prospective assistant behavior analysts must also meet one of three experience requirements. They must either: 1) complete 1,000 hours of supervised independent fieldwork with supervisors supervising at least once every two weeks for at least 5% of the total number of fieldwork hours, 2) complete 670 hours of a practicum in a university practicum program with at least 7.5% of hours directly supervised or 3) complete 500 hours of an intensive practicum program with at least 10 of hours directly supervised.

The Board proposes to require licensed behavior analysts and assistant behavior analysts to renew their licenses every two years. To qualify for active license renewal, behavior analysts must complete 24 hours of continuing education and submit a fee of \$135; assistant behavior analysts must complete 16 hours of continuing education and submit a fee of \$70. Licensees only have to attest to the completion of continuing education but must keep all records of completed education and supply them to the Board within 30 days if requested. Licensees will have the option of maintaining current inactive licensure by paying \$70 for behavior analysts, or \$35 for assistant behavior analysts. Licensees will have one license cycle (two years) to renew late by paying an additional late renewal fee of \$50 or \$30, respectively. Licensees will have to pay \$10 for a letter of good standing or verification to another state, \$5 for a duplicate license, \$15 for a duplicate wall certificate, and \$35 returned check fee if a check written to the Board is returned due to insufficient funds. Individuals who allow their licenses to lapse for more than two years will have to reinstate their licenses by paying a fee of \$180 for behavior analysts, or \$90 for assistant behavior analysts. Licensees whose licenses are revoked will have to pay a fee of \$2,000 to reinstate their licenses.

The Board proposes to not require licensees to also maintain active certification with BACB, but individuals who are reactivating a license or reinstating a license that has lapsed for more than two years will have to prove active practice in another jurisdiction (and prove 12 hours of continuing education for every year a Virginia license has lapsed, not to exceed 36 hours) or recertify with BACB before they can become actively licensed again. BACB charges \$100 for behavior analysts and \$65 for assistant behavior analysts to renew certification biennially. BACB also requires that behavior analysts complete 36 hours of continuing education every three years and requires assistant behavior analysts to complete 24 hours of continuing education every three years.

Requiring licensure for behavior analysts, as well as requiring health insurance plans to cover their services, will benefit users of these services as their out of pocket expenditures will

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# Regulations

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likely go down. There might also be intangible benefits that accrue to families of autistic children, and perhaps even to their communities, if behavior analysis services allow these children to better function in society. These benefits must be weighed against costs that are likely to be driven up on both the demand and the supply side of the market for these services.

Research shows that decreasing the cost share that recipients of health care services pay (i.e. requiring insurance to cover these services) will lead to them using more of those services than they previously did and perhaps more services than are actually needed.<sup>1</sup> The increased costs of additional services used will be borne by the whole pool of insured individuals rather than by the recipient of the services purchased. This increase in demand would tend to increase the cost of services and, in an equilibrating market, will tend to increase the quantity of services supplied. That is, when individuals can make more money providing behavior analysis services, more individuals would normally enter the market and provide those services. However, the requirement that applicants for initial licensure be certified by BACB may serve as a significant barrier to entry into this market. Since there may be individuals who could very ably provide these services without meeting BACBs costly certification requirements, such as a masters degree to be a behavior analyst and a bachelors degree to be an assistant to a behavior analyst, the requirement that licensees obtain BACB certification may create a scarcity of providers wherein parents of autistic children would find it more difficult to obtain behavior analysis services. Costs on the supply side of this market may drive up the costs associated with getting and maintaining licensure and by costs associated with having to deal with insurance companies (recordkeeping costs, cost of time to fill out paperwork, etc.).

**Businesses and Entities Affected.** The Department of Health Professions (DHP) reports the number of individuals who worked as behavior analysts before licensure was required, and who have been or will be affected by these proposed regulations, is unknown. DHP reports that 174 behavior analysts and 24 assistant behavior analysts have been licensed by the Board since emergency regulations were promulgated.

**Localities Particularly Affected.** No locality will be particularly affected by this proposed regulatory action.

**Projected Impact on Employment.** This proposed regulatory action may cut the number of individuals who work as behavior analysts and assistant behavior analysts.

**Effects on the Use and Value of Private Property.** The legislation that mandates these proposed regulatory changes will likely drive up the costs of acquiring behavior analysis services.

**Small Businesses: Costs and Other Effects.** DHP reports that most affected entities are either independently practicing, and would qualify as small businesses, or work for schools.

**Small Businesses: Alternative Method that Minimizes Adverse Impact.** DHP reports that most affected entities are either independently practicing, and would qualify as small businesses, or work for schools. Licensure is currently very proscribed by the legislation that mandates it. There is little the Board can do to lower costs without legislative changes.

**Real Estate Development Costs.** This regulatory action will likely have no effect on real estate development costs in the Commonwealth.

## References.

Brook, Robert, et al. "Does Free Care Improve Adults' Health? Results From a Randomized Clinical Trial". *New England Journal of Medicine*. December 8, 1983.

Liebowitz, Stanley. "Why Health Care Costs Too Much". *Cato Policy Analysis No. 211*. June 23, 1994. <http://www.cato.org/pubs/pa211.htm>.

Newhouse, Joseph, et al. "Some Interim Results from a Controlled Trial of Cost Sharing In Health Insurance". *New England Journal of Medicine*. December 17, 1981.

"Paying for Health Services". *American College of Healthcare Executives*. [http://www.ache.org/pdf\\_preface/SampleGatewayChapter.pdf](http://www.ache.org/pdf_preface/SampleGatewayChapter.pdf).

**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> The Newhouse study found, for instance, that total expenditures on health care were 50% higher when individuals were subject to no cost sharing than when they were responsible for paying 95% of their health care expenditures (up to \$1,000 per year ) out of pocket. The Newhouse study concluded that additional services used were likely a mix of high-value services that did

improve health outcomes and low- value services that did not. Additionally, the Brook study found that free medical care did not appear to improve health outcomes for those receiving that care.

Agency's Response to Economic Impact Analysis: The Board of Medicine concurs with the economic impact analysis of the Department of Planning and Budget for 18VAC85-150, Regulations Governing the Practice of Behavior Analysis, as revised on May 7, 2013.

Summary:

*Pursuant to Chapter 3 of the 2012 Acts of the Assembly, the Board of Medicine is required to promulgate regulations to license behavior analysts and assistant behavior analysts. The proposed regulation establishes (i) criteria for licensure, (ii) requirements for fees and applications, (iii) provisions for renewal and reinstatement of licensure, (iv) standards of practice, (v) procedures for the supervision of assistant behavior analysts, and (vi) criteria for 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 license, 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 license, 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.

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# Regulations

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## 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 that 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 that 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 license 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 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.

D. 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.

E. Failure to comply with these requirements may subject the licensee to disciplinary action by the board.

F. 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.

G. The board may grant an exemption from 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 years or becomes emancipated, with a minimum time for record retention

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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 that 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:**

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 a subordinate 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-7b(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 practitioner-client 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.

**NOTICE:** The following forms used in administering the regulation were filed by the agency. The forms are not being published; however, online users of this issue of the Virginia Register of Regulations may click on the name of a form with a hyperlink to access it. The forms are also available from the agency contact or may be viewed at the Office of the

Registrar of Regulations, General Assembly Building, 2nd Floor, Richmond, Virginia 23219.

FORMS (18VAC85-150)

Application to Practice as a Behavior Analyst or Assistant Behavior Analyst ([apply online](#))

[Behavior Analyst - Form A, Claims History \(09/2013\)](#)

[Assistant Behavior Analyst - Form A, Claims History \(09/2013\)](#)

[Behavior Analyst and Assistant Behavior Analyst - Form B \(09/2013\)](#)

[Behavior Analyst - Form C \(09/2013\)](#)

[Assistant Behavior Analyst - Form C \(09/2013\)](#)

[Instructions for Completing an Assistant Behavior Analyst Licensure Reinstatement Application \(09/2013\)](#)

VA.R. Doc. No. R13-3281; Filed September 18, 2013, 11:47 a.m.

**Notice of Extension of 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.

**Expiration Date Extended Through:** March 18, 2014.

On September 13, 2013, the Governor approved the Board of Medicine's request to extend the expiration date of the above-referenced emergency regulation as provided in § [2.2-4011 D](#) of the Code of Virginia. The emergency regulation was published in [29:3 VA.R. 592-596 October 8, 2012](#). The regulation implements Chapter 3 of the 2012 Acts of Assembly, which requires licensure of behavior analysts and assistant behavior analysts.

**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 19, 2013, 4:00 p.m.

**BOARD OF NURSING**

**Fast-Track Regulation**

**Title of Regulation: 18VAC90-20. Regulations Governing the Practice of Nursing (amending 18VAC90-20-300).**

**Statutory Authority:** §§ 54.1-2400 and 54.1-3005 of the Code of Virginia.

**Public Hearing Information:** No public hearings are scheduled.

**Public Comment Deadline:** November 6, 2013.

**Effective Date:** November 21, 2013.

**Agency Contact:** Jay P. Douglas, R.N., Executive Director, Board of Nursing, 9960 Mayland Drive, Suite 300,

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Richmond, VA 23233-1463, telephone (804) 367-4515, FAX (804) 527-4455, or email jay.douglas@dhp.virginia.gov.

**Basis:** Regulations are promulgated under the general authority of Chapter 24 (§ 54.1-2400 et seq.) of Title 54.1 of the Code of Virginia. Section 54.1-2400 provides the Board of Nursing the authority to promulgate regulations to administer the regulatory system.

**Purpose:** The purpose of the regulatory action is to establish that unprofessional conduct includes failure to comply with Code of Virginia requirements for nurses to report evidence of child abuse or elder abuse of which they become aware in the course of their professional duties. Registered and licensed professional nurses are already mandated reporters according to the Code of Virginia, but there are no specific grounds for disciplinary action for failure to comply with reporting requirements. Consequently, the board determined that such an action should constitute unprofessional conduct under statute and regulation that may be cited as an allegation in a notice for hearing for a disciplinary proceeding. A nurse who fails to report evidence of abuse may jeopardize the health and safety of a child or an elder who is at risk of harm.

**Rationale for Using Fast-Track Process:** Following a report of suspected child abuse and child trafficking, the Attorney General recommended that affected boards include in their regulatory text specific language to take disciplinary action against their licensees for failure to report. Action to amend regulations was considered urgent to protect the public. Since nurses are already mandated reporters, there should be no controversy.

**Substance:** 18VAC90-20-300 is amended to add failure to report evidence of child abuse or elder abuse, as required by the Code of Virginia, to the definition of unprofessional conduct as grounds for disciplinary action.

**Issues:** The primary advantage to the public is the ability of the board to take disciplinary action if a nurse fails to report and thereby facilitates the abuse of a child or an elder. There are no disadvantages. 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. The Board of Nursing (Board) proposes to add the following to the definition of unprofessional conduct as grounds for disciplinary action: 1) failure to report evidence of child abuse or neglect, and 2) failure to report evidence of elder abuse or neglect. The reporting requirements are already contained within the Code of Virginia,<sup>1</sup> but are not currently enumerated in this regulation's list of grounds for disciplinary action. The Office of the Attorney General suggested that boards who administer professions to which this reporting requirement pertains specifically include such language in their regulatory text. This action is being taken to implement that recommendation.

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

**Estimated Economic Impact.** As referred to above, licensed nurse practitioners, registered nurses and licensed practical nurses are already required by statute to report evidence of child abuse or neglect as well as evidence of elder abuse or neglect. Further, § 54.1-3007 of the Code of Virginia states that the Board may take disciplinary action for unprofessional conduct. Given that the Code already requires the reporting of evidence of abuse or neglect, failure to report can reasonably be considered unprofessional conduct which could be considered grounds for discipline. Thus the proposal to add failure to report evidence of child abuse or neglect and failure to report evidence of elder abuse or neglect to the definition of unprofessional conduct is beneficial in that it adds clarity to the definition, but does not otherwise effectively change the law.

**Businesses and Entities Affected.** The proposed amendment potentially applies to the 6,525 licensed nurse practitioners, 90,050 registered nurses and 31,020 licensed practical nurses in the Commonwealth.

**Localities Particularly Affected.** The proposed amendment does not disproportionately affect particular localities.

**Projected Impact on Employment.** The proposed amendment is unlikely to significantly affect employment.

**Effects on the Use and Value of Private Property.** The proposed amendment is unlikely to significantly affect the use and value of private property.

**Small Businesses: Costs and Other Effects.** The proposed amendment is unlikely to significantly affect small businesses.

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

**Real Estate Development Costs.** The proposed amendment will not affect real estate development costs.

**Legal Mandate.** The Department of Planning and Budget (DPB) has analyzed the economic impact of this proposed regulation in accordance with § 2.2-4007.04 of the Administrative Process Act and Executive Order Number 14 (10). Section 2.2-4007.04 requires that such economic impact analyses include, but need not be limited to, the projected number of businesses or other entities to whom the regulation would apply, the identity of any localities and types of businesses or other entities particularly affected, the projected number of persons and employment positions to be affected, the projected costs to affected businesses or entities to implement or comply with the regulation, and the impact on the use and value of private property. Further, if the proposed regulation has adverse effect on small businesses, § 2.2-4007.04 requires that such economic impact analyses include (i) an identification and estimate of the number of small businesses subject to the regulation; (ii) the projected

reporting, recordkeeping, and other administrative costs required for small businesses to comply with the regulation, including the type of professional skills necessary for preparing required reports and other documents; (iii) a statement of the probable effect of the regulation on affected small businesses; and (iv) a description of any less intrusive or less costly alternative methods of achieving the purpose of the regulation. The analysis presented above represents DPB's best estimate of these economic impacts.

<sup>1</sup> The requirement to report evidence of child abuse or neglect is contained within § 63.2-1509 of the Code of Virginia while the requirement to report evidence of elder abuse or neglect is contained within § 63.2-1606 of the Code of Virginia.

Agency's Response to Economic Impact Analysis: The Board of Nursing concurs with the analysis of the Department of Planning and Budget on proposed amendments to 18VAC90-20-300.

Summary:

*The amendments add failure to report evidence of child abuse or elder abuse, as required by §§ 63.2-1509 and 63.2-1606 of the Code of Virginia, to the definition of unprofessional conduct for nurses as grounds for disciplinary action.*

Part V  
Disciplinary Provisions

**18VAC90-20-300. Disciplinary provisions.**

A. The board has the authority to deny, revoke or suspend a license or multistate licensure privilege issued, or to otherwise discipline a licensee or holder of a multistate licensure privilege upon proof that the licensee or holder of a multistate licensure privilege has violated any of the provisions of § 54.1-3007 of the Code of Virginia. For the purpose of establishing allegations to be included in the notice of hearing, the board has adopted the following definitions:

1. Fraud or deceit in procuring or maintaining a license means, but shall not be limited to:
  - a. Filing false credentials;
  - b. Falsely representing facts on an application for initial license, reinstatement or renewal of a license; or
  - c. Giving or receiving assistance in the taking of the licensing examination.
2. Unprofessional conduct means, but shall not be limited to:
  - a. Performing acts beyond the limits of the practice of professional or practical nursing as defined in Chapter 30 (§ 54.1-3000 et seq.) of Title 54.1 of the Code of Virginia, or as provided by §§ 54.1-2901 and 54.1-2957 of the Code of Virginia;

- b. Assuming duties and responsibilities within the practice of nursing without adequate training or when competency has not been maintained;
  - c. Obtaining supplies, equipment or drugs for personal or other unauthorized use;
  - d. Employing or assigning unqualified persons to perform functions that require a licensed practitioner of nursing;
  - e. Falsifying or otherwise altering patient, employer, student, or educational program records, including falsely representing facts on a job application or other employment-related documents;
  - f. Abusing, neglecting or abandoning patients or clients;
  - g. Practice of a clinical nurse specialist beyond that defined in 18VAC90-20-290;
  - h. Representing oneself as or performing acts constituting the practice of a clinical nurse specialist unless so registered by the board;
  - i. Delegating nursing tasks to an unlicensed person in violation of the provisions of Part VIII (18VAC90-20-420 et seq.) of this chapter;
  - j. Giving to or accepting from a patient or client property or money for any reason other than fee for service or a nominal token of appreciation;
  - k. Obtaining money or property of a patient or client by fraud, misrepresentation or duress;
  - l. Entering into a relationship with a patient or client that constitutes a professional boundary violation in which the nurse uses his professional position to take advantage of the vulnerability of a patient, a client or his family, to include but not limited to actions that result in personal gain at the expense of the patient or client, a nontherapeutic personal involvement or sexual conduct with a patient or client;
  - m. Violating state laws relating to the privacy of patient information, including but not limited to § 32.1-127.1:03 of the Code of Virginia;
  - n. Providing false information to staff or board members in the course of an investigation or proceeding; ~~or~~
  - o. Failing to report evidence of child abuse or neglect as required in § 63.2-1509 of the Code of Virginia or elder abuse or neglect as required in § 63.2-1606 of the Code of Virginia; or
  - ~~or~~ p. Violating any provision of this chapter.
- B. Any sanction imposed on the registered nurse license of a clinical nurse specialist shall have the same effect on the clinical nurse specialist registration.

VA.R. Doc. No. R14-2975; Filed September 13, 2013; 3:31 p.m.



## TITLE 22. SOCIAL SERVICES

### STATE BOARD OF SOCIAL SERVICES

#### Fast-Track Regulation

**Title of Regulation: 22VAC40-191. Background Checks for Child Welfare Agencies (amending 22VAC40-191-10 through 22VAC40-191-60, 22VAC40-191-90).**

**Statutory Authority:** §§ 63.2-217 and 63.2-901.1 of the Code of Virginia.

**Public Hearing Information:** No public hearings are scheduled.

**Public Comment Deadline:** November 6, 2013.

**Effective Date:** December 1, 2013.

**Agency Contact:** Karen Cullen, Department of Social Services, Division of Licensing Programs, 801 East Main Street, Richmond, VA 23219, telephone (804) 726-7152, FAX (804) 726-7132, TTY (800) 828-1120, or email karen.cullen@dss.virginia.gov.

**Basis:** Section 63.2-217 of the Code of Virginia provides the board the general authority for the development of regulations to carry out the purposes of Title 63.2 of the Code of Virginia. Section 63.2-1734 of the Code of Virginia gives the board authority to adopt regulations for persons and agencies required to be licensed under Title 63.2 of the Code of Virginia.

**Purpose:** This regulatory action implements amendments by the 2012 Session of the General Assembly related to barrier crimes in § 63.2-1719 of the Code of Virginia; adds state law requirements (§ 63.2-901.1 of the Code of Virginia) to the section on approvals of adoptive and foster parents by child-placing agencies; and includes licensed child day centers as facilities covered by the regulation (as a result of amendments to § 63.2-1734 of the Code of Virginia by the 2012 Session of the General Assembly). The amendments are necessary to make the requirements of the regulation consistent with the requirements of state law and to make technical corrections. The amendments are designed to increase the department's ability to protect the health, safety, and welfare of the public.

**Rationale for Using Fast-Track Process:** Section 2.2-4012.1 of the Code of Virginia allows state agencies to use a fast-track rulemaking process to expedite regulatory changes that are expected to be noncontroversial. The amendments to the regulation incorporate requirements of state law and make technical corrections. As a result, no objections are anticipated.

This action is necessary due to changes to the Code of Virginia effective July 1, 2012, abolishing the Child Day-Care Council and giving the board the authority to adopt regulations for licensed child day centers. The Child Day-Care Council had adopted a regulation identical to this regulation, so the inclusion of child day centers to the entities

regulated by this regulation will not change the background check requirements for licensed child care centers.

**Substance:** The amendments incorporate additional barrier crimes effective July 1, 2012, listed in § 63.2-1719 of the Code of Virginia into the regulation; add an exception for the approval of kinship foster care parents; and add state law requirements for background checks prior to approval of adoptive and foster parents by licensed child-placing agencies. Amendments also add licensed child day centers as facilities covered by this regulation.

**Issues:** The advantage of this regulatory action to the agency and to the public is that it makes the requirements of the regulation consistent with the requirements of state law and clarifies the requirements for regulated entities and licensing staff. There are no disadvantages to the public or the Commonwealth.

**Department of Planning and Budget's Economic Impact Analysis:**

Summary of the Proposed Amendments to Regulation. The State Board of Social Services (Board) proposes to amend its regulations that govern criminal and abuse or neglect background checks to comport with recent legislative changes and to rearrange and change regulatory language so that requirements are easier to find and understand. In order to comply with legislative changes, the Board proposes to:

1. Add licensed child day centers to the entities that must comply with these regulations,
2. Add extortion by threat and felony violation of a protective order to the list of barrier crimes that would normally preclude entities from being approved as a foster or adoptive parent or from getting Board licensure,
3. Delete a requirement that prospective adoptive or foster parents and birth parents who have not retained legal custody of their child(ren) in foster care undergo a state criminal background check in addition to a federal criminal background check and add a requirement that these same entities undergo a search of child abuse and neglect registries maintained by any states in which they have resided for the prior five years,
4. Add a requirement that other adults living in a prospective foster or adoptive home sign a sworn statement or affirmation that they have not committed a crime that would preclude them living with the foster or adoptive child and that they undergo a search of child abuse registries in Virginia as well as any other states where they have lived in the prior five years,
5. Add letters from the Department of Social Services' Office of Background Investigations to the list of acceptable proof of satisfactory passing background checks,
6. Slightly relax criminal background prohibitions on approval of kinship care so that such care can be approved as long as at least 10 years has passed since

felony conviction on drug possession charges or misdemeanor conviction for arson and

7. Slightly relax hiring standards for licensed child day centers so that someone with a misdemeanor assault conviction that is at least 10 years old may be hired.

**Result of Analysis.** Benefits likely outweigh costs all proposed changes.

**Estimated Economic Impact.** Many of the changes that the Board proposes for these regulations will not alter how Board staff conducts background checks. For instance, the State Department of Social Services has changed the name of the division that conducts background investigations and now proposes to change regulatory language to reflect that. Changes like these are likely to have no costs attached. To the extent that these changes clarify the requirements of these regulations, regulated entities will benefit from them.

In addition to these instructive changes, the Board proposes several substantive changes that are solely to make these regulations comport with the Code of Virginia (these changes are listed in the preceding section of this economic analysis). No entity is likely to incur additional costs on account of these changes being added to regulatory language because these entities are already required to adhere to requirements in the Code of Virginia (COV). To the extent that these changes in regulatory language harmonize these regulations with the COV, affected entities will benefit from not having two sources of authority giving them different information about what is required of them.

**Businesses and Entities Affected.** These proposed regulatory changes will affect 2,503 licensed child day centers, 1,558 licensed day homes, one licensed day home system and the 100 day homes that it has approved, one licensed independent foster home, 76 licensed child placing agencies and 1,121 voluntarily registered family day homes.

**Localities Particularly Affected.** No locality will be particularly affected by this proposed regulatory action.

**Projected Impact on Employment.** This proposed regulatory action is unlikely to have any effect on employment in the Commonwealth.

**Effects on the Use and Value of Private Property.** These proposed regulatory changes are unlikely to affect the use or value of private property in the Commonwealth.

**Small Businesses: Costs and Other Effects.** No small business is likely to incur any costs on account of this regulatory action.

**Small Businesses: Alternative Method that Minimizes Adverse Impact.** No small business is likely to incur any costs on account of this regulatory action.

**Real Estate Development Costs.** This regulatory action will likely have no effect on real estate development costs in the Commonwealth.

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

**Agency's Response to Economic Impact Analysis:** The Department of Social Services concurs with the economic impact analysis prepared by the Department of Planning and Budget.

**Summary:**

*Pursuant to the 2012 Acts of Assembly, this regulatory action (i) conforms the definition of barrier crimes to the amendments made by Chapter 383; (ii) addresses the abolition of the Child Day-Care Council and the new authority granted to the State Board of Social Services in Chapters 803 and 835 by adding licensed child day centers to the chapter; and (iii) adds a variance allowing the placement of a child with a kinship foster care provider in certain circumstances pursuant to Chapter 568. The action also modifies the requirements for background checks prior to placement of a child in a foster care placement with a birth parent or prior to approval of a prospective foster or adoptive parent or other adults living in the prospective foster or adoptive home by a licensed child-placing agency in accordance with § 63.2-901.1 of the Code of Virginia, and makes technical corrections and clarifying changes.*

**22VAC40-191-10. Defining words and phrases.**

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

"Agent" means a person who ~~aets~~ is empowered to act on behalf of, ~~or is an employee or volunteer with~~ the applicant

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that is an association, partnership, limited liability company, business trust, public agency, or corporation in matters relating to a child welfare agency.

"Applicant" means the person or persons applying for approval as a (i) licensed family day home; (ii) licensed family day system; (iii) licensed child-placing agency; (iv) licensed independent foster home; (v) voluntarily registered family day home; (vi) family day home approved by a licensed family day system; (vii) foster and adoptive home approved by a licensed child-placing agency; ~~or~~ (viii) religious exempt child day center or (ix) licensed child day center. In the case of a sole proprietorship, the applicant is the individual owner. In the case of a partnership, the applicants are all the partners. ~~If the applicant is a corporation, limited liability company, public agency or similar entity, the applicant must designate at least one individual who must comply with the applicant's obligation on its behalf. If the applicant is a corporation, association, or business trust, the applicants are officers. If the applicant is a limited liability company, the applicants are the members or managers. If the applicant is a public agency, the applicant is the person responsible for the overall operation of the public agency.~~

"Approved" means having obtained the status of approval through the process required in Minimum Standards for Licensed Family Day-Care Systems (22VAC 40-180) (22VAC40-120) or Minimum Standards for Licensed Child-Placing Agencies (22VAC40-130) (22VAC40-131). Approved facilities are ~~(i) family day homes approved by licensed family day systems and (ii). Approved foster and adoptive homes~~ parents include resource, foster, adoptive, treatment foster, and short-term foster parents and families approved by licensed child-placing agencies.

"Background checks" means a sworn statement or affirmation, a criminal history record report, and a child protective services central registry check.

"Barrier crime" means a conviction identified at § 63.2-1719 in the Code of Virginia. The convictions, and Code of Virginia references, are: a felony violation of a protective order as set out in § 16.1-253.2, murder or manslaughter as set out in Article 1 (§ 18.2-30 et seq.), malicious wounding by mob as set out in § 18.2-41, abduction as set out in subsection A or B of § 18.2-47, abduction for immoral purposes as set out in § 18.2-48, assault and bodily woundings as set out in Article 4 (§ 18.2-51 et seq.), robbery as set out in § 18.2-58, carjacking as set out in § 18.2-58.1, extortion by threat as set out in § 18.2-59, felony stalking as set out in § 18.2-60.3, a felony violation of a protective order as set out in § 18.2-60.4, sexual assault as set out in Article 7 (§ 18.2-61 et seq.) of Chapter 4 of Title 18.2, arson as set out in Article 1 (§ 18.2-77 et seq.) of Chapter 5 of Title 18.2, burglary as set out in Article 2 (§ 18.2-89 et seq.) of Chapter 5 of Title 18.2, any felony violation relating to possession or distribution of drugs as set out in Article 1 (§ 18.2-247 et seq.) of Chapter 7 of Title 18.2, drive-by shooting as set out in § 18.2-286.1, use of

a machine gun in a crime of violence as set out in § 18.2-289, aggressive use of a machine gun as set out in § 18.2-290, use of a sawed-off shotgun in a crime of violence as set out in subsection A of § 18.2-300, failure to secure medical attention for an injured child as set out in § 18.2-314, pandering as set out in § 18.2-355, crimes against nature involving children as set out in § 18.2-361, incest as set out in § 18.2-366, taking indecent liberties with children as set out in § 18.2-370 or § 18.2-370.1, abuse and neglect of children as set out in § 18.2-371.1, obscenity offenses as set out in § 18.2-374.1, possession of child pornography as set out in § 18.2-374.1:1, electronic facilitation of pornography as set out in § 18.2-374.3, abuse and neglect of incapacitated adults as set out in § 18.2-369, employing or permitting a minor to assist in an act constituting an offense under Article 5 (§ 18.2-372 et seq.) of Chapter 8 of Title 18.2 as set out in § 18.2-379, delivery of drugs to prisoners as set out in § 18.2-474.1, escape from jail as set out in § 18.2-477, felonies by prisoners as set out in § 53.1-203; or an equivalent offense in another state.

"Board" means State Board of Social Services.

"Central registry" means the record of founded complaints of child abuse and neglect maintained by the Department of Social Services.

"Central registry finding" means the record of founded complaints of child abuse and neglect for an individual.

"Central Criminal Records Exchange" or "CCRE" means the information system containing conviction data of crimes committed in Virginia. The system is maintained by the Department of State Police.

"Child day program" means a regularly operating service arrangement for children where, during the absence of a parent or guardian, a person or organization has agreed to assume responsibility for the supervision, protection, and well-being of a child under the age of 13 for less than a 24-hour period.

"Child-placing agency" means any person or agency licensed to place children in foster homes, adoptive homes or independent living arrangements pursuant to § 63.2-1819 of the Code of Virginia or a local board that places children in foster homes or adoptive homes pursuant to §§ 63.2-900, 63.2-903 and 63.2-1221 of the Code of Virginia. Officers, employees, or agents of the Commonwealth, or any locality acting within the scope of its authority as such, who serve as or maintain a child-placing agency, are not required to be licensed.

"Child welfare agency" means a child day center, child-placing agency, children's residential facility, family day home, family day system, or independent foster home. For purposes of this regulation, the requirements for child welfare agencies also apply to foster or adoptive homes requesting approval or with approval by child-placing agencies and ~~foster~~ family day homes requesting approval or with approval by family day systems.

"Commissioner" means the Commissioner of the Virginia Department of Social Services or his designee.

"Contract agency" means an entity with which the facility or a parent has an agreement to provide services to a child or children while attending the facility.

"Contract employee" means a person with whom the facility or a parent has an agreement to provide services to a child or children while attending the facility.

"Contracting organization" means an agency that has been designated by the Department of Social Services to administer the voluntary registration program for family day homes.

"Criminal history record check" means the process the Department of State Police uses to generate a criminal record report on a person. The check may be a state check generated solely through the Central Criminal Records Exchange or a check forwarded through the Central Criminal Records Exchange to the Federal Bureau of Investigation for the purpose of obtaining national criminal history record information.

"Criminal history record report" means either the criminal record clearance or the criminal history record issued by the Central Criminal Records Exchange, Department of State Police. The report identifies convictions within the Commonwealth.

"Department" means the Department of Social Services.

"Department representative" means an employee of the department who carries out regulatory duties or an agency acting as an authorized agent of the department carrying out approval functions. Licensed family day systems have authority to approve family day homes. Licensed child-placing agencies have authority to approve foster and adoptive parents.

"Disqualifying background" means (i) having been the subject of a founded complaint of child abuse or neglect even if his record has been purged from the Child Abuse and Neglect Central Registry system, (ii) a barrier crime conviction, or (iii) any other felony not included in the definition of "barrier crime," unless five years have elapsed since the conviction. For the purpose of this regulation, no person is considered to be the subject of a founded complaint of child abuse or neglect until a decision upholding the finding has been rendered by the hearing officer after the administrative hearing, provided the person complies with the requirements for requesting an administrative hearing. No person is considered to be the subject of a founded complaint of child abuse or neglect if the child abuse or neglect finding is overturned by an administrative hearing or a subsequent court decision.

"Employee" means a person hired by a facility or with whom the facility has an employment agreement. A provider assistant in a family day home is considered an employee in this chapter.

"Facility" means (i) a licensed family day home; (ii) a licensed family day system; (iii) a licensed child-placing agency; (iv) a licensed independent foster home; (v) a voluntarily registered family day home; (vi) a family day home approved by a licensed family day system; (vii) a ~~foster and adoptive home approved by a licensed child-placing agency~~ licensed child day center; (viii) a religious exempt child day center; and (ix) an applicant seeking a waiver in order to establish one of the above listed entities.

"Family day home" means a child day program offered in the residence of the provider or the home of any of the children in care for one through 12 children under the age of 13, exclusive of the provider's own children and any children who reside in the home, when at least one child receives care for compensation. The provider of a licensed or registered family day home must disclose to the parents or guardians of children in their care the percentage of time per week that persons other than the provider will care for the children. Family day homes serving six through 12 children, exclusive of the provider's own children and any children who reside in the home, must be licensed. However, no family day home shall care for more than four children under the age of two, including the provider's own children and any children who reside in the home, unless the family day home is licensed or voluntarily registered. However, a family day home where the children in care are all grandchildren of the provider is not required to be licensed.

"Family day system" means any person who approves family day homes as members of its system; who refers children to available family day homes in that system; and who, through contractual arrangement, may provide central administrative functions including, but not limited to, training of operators of member homes; technical assistance and consultation to operators of member homes; inspection, supervision, monitoring, and evaluation of member homes; and referral of children to available health and social services.

"Good character and reputation" means that the person (i) maintains business, professional, family, and community relationships that are characterized by honesty, fairness, truthfulness and dependability and (ii) has a history or pattern of behavior that demonstrates that the person is suitable and able to care for, guide, supervise, and protect children.

"Independent foster home" means a private family home in which any child, other than a child by birth or adoption of such person, resides as a member of the household and has been placed there independently of a child-placing agency except (i) a home in which are received only children related by birth or adoption of the person who maintains such home and children of personal friends of such person and (ii) a home that receives a child or children committed under the provisions of subdivision A 4 of § 16.1-278.2, subdivision 6 of § 16.1-278.4 or subdivision A 13 of § 16.1-278.8 of the Code of Virginia.

"Involved in the day-to-day operations" means:

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1. In a supervisory or management position, making daily decisions regarding the operation of the facility;
2. Counted by the facility for purposes of staff-to-children ratios;
3. Providing casework services for a child-placing agency;
4. Employed by a licensed family day system as a home visitor; or
5. Having access to child-related and client-related records or to facility personnel records.

"Licensed" means having met the requirements of and obtained licensure as a licensed family day-care system, licensed independent foster home, licensed private child-placing agency, or licensed family day home.

"Living in" means to reside in a place for an extended or permanent period of time.

"Local agency" means local department of social services.

"May" means has permission.

"Must" means the action is a requirement.

"Must not" means the action is prohibited.

"National criminal background check" means criminal history record information from the Federal Bureau of Investigation.

"Offense" means a (i) conviction of a barrier crime, (ii) conviction of any other felony not included in the definition of barrier crime unless five years have elapsed since conviction, or (iii) founded complaint of child abuse or neglect within or outside the Commonwealth. Convictions include prior adult convictions and juvenile convictions or adjudications of delinquency based on a crime that would be a felony if committed by an adult within or outside the Commonwealth.

"Other felony" means conviction for any felony in the last five years that is not a barrier crime felony.

"Parent-volunteer" means someone supervising, without pay, a group of children that includes the parent-volunteer's own child in a program that operates no more than four hours per day, provided that the parent-volunteer works under the direct supervision of a person who has received a clearance pursuant to § 63.2-1720 or § 63.2-1724 of the Code of Virginia.

"Registered" means having obtained the status of registration through the process required in Voluntary Registration of Family Day Homes—Requirements for Providers (22VAC40-180).

"Registered family day home" means any family day home that has met the standards for voluntary registration for such homes pursuant to regulations adopted by the board and that has obtained a certificate of registration from the commissioner.

"Religious exempt center" means an unlicensed child day center operated or conducted under the auspices of a religious

institution that has filed with the commissioner a satisfactory annual statement of intent to operate a child day center and other information as specified in § 63.2-1716 of the Code of Virginia and has a letter of exemption from the commissioner.

"Search of central registry" means the process the Virginia Department of Social Services' Child Protective Services Unit uses to generate a central registry report on a person.

"Sex offense felony for family day homes" means conviction of a felony in violation of §§ 18.2-48, 18.2-61, 18.2-63, 18.2-64.1, 18.2-67.1, 18.2-67.2, 18.2-67.3, 18.2-67.5, 18.2-355, 18.2-361, 18.2-366, 18.2-369, 18.2-370, 18.2-370.1, 18.2-371.1 or § 18.2-374.1 of the Code of Virginia that prohibits a sex offender or founded child abuser from residing in a family day home, whether or not the home is regulated or subject to regulation. The descriptions of the Code of Virginia sections are abduction; actual or attempted rape; carnal knowledge of a child between 13 and 15 years of age; carnal knowledge of a juvenile under the purview of the Juvenile and Domestic Relations District Court, or juvenile committed to the custody of the State Department of Juvenile Justice; actual or attempted forcible sodomy or object sexual penetration; aggravated sexual battery; attempted sexual battery; taking or detaining a person or consenting to the taking of a person for prostitution or unlawful sexual intercourse; crimes against nature; incest; abuse and neglect of incapacitated adults; taking indecent liberties with children; abuse and neglect of children; indecent liberties by a person in a custodial or supervisory relationship; and production, publication, sale, possession with intent to distribute, financing, etc. of sexually explicit items.

"Sworn statement or affirmation" means a statement completed by a person attesting to whether he has ever been (i) convicted of or the subject of pending charges of any crime within or outside the Commonwealth or an equivalent offense outside the Commonwealth or (ii) the subject of a founded complaint of child abuse or neglect within or outside the Commonwealth. Additionally for family day homes, the provider affirms if he, or any person known to the provider who resides in the home, has a sex offense conviction or is the subject of a founded complaint of child abuse or neglect within or outside the Commonwealth. Any person making a false statement regarding any such offense shall be guilty of a Class 1 misdemeanor pursuant to §§ 63.2-1720 and 63.2-1721 of the Code of Virginia.

~~"22 VAC"~~ "22VAC" means ~~Chapter Title 22~~ Chapter Title 22 of the Virginia Administrative Code. This is the social services ~~chapter title~~.

"Visit" means a stay or sojourn as a guest for no longer than 30 calendar days.

"Volunteer" means a person who provides services without pay and who is alone with a child or children in performance of his duties.

**22VAC40-191-20. Describing background checks.**

A. The background checks covered by this regulation are:

1. Sworn statement or affirmation;
2. Criminal history record check;
3. National criminal background check; and
4. Central registry search.

B. The provisions for background checks are in §§ 63.2-1704, 63.2-1720, 63.2-1721, 63.2-1722, 63.2-1724, and 63.2-1727 of the Code of Virginia.

C. Provisions for enforcement of background check regulations and other licensing, registration, and approval standards are in Chapter 17 (§ 63.2-1700 et seq.) of Title 63.2 of the Code of Virginia.

D. The sworn statement or affirmation is a written document in which a person must disclose any criminal conviction and any pending criminal charges within or outside Virginia.

1. For the purposes of this regulation, conviction includes any juvenile conviction or determination of delinquency if the offense involved would be a felony if committed by an adult within or outside Virginia.
2. The person must also disclose any instance of being the subject of a founded complaint of child abuse or neglect within or outside Virginia.
3. The person must use either the model form prepared by the department or use a self-created form that includes all of the information that appears on the model form.

The department provides the model sworn statement or affirmation form on its website. Requesters are permitted to submit copies of the form. The person who signs the sworn statement or affirmation affirms the truth of the statement.

E. The criminal history record check is the process of the Department of State Police to generate a criminal record report on a person. The report must be either the criminal record clearance or the criminal history record. The criminal record clearance shows whether the person is guilty of:

1. A barrier crime, as defined in § 63.2-1719 of the Code of Virginia; and/or
2. Any other felony not included in the definition of barrier crime unless five years have elapsed since the conviction.

The criminal history record report shows all convictions.

F. The person must use the form and process of the Central Criminal Records Exchange (CCRE) of the Department of State Police for this check. The Department of State Police provides original criminal history record check forms to facilities upon receipt of request. The Department of State Police also provides website access to this form for facilities that are noncriminal justice inquiry interface users. The CCRE verifies criminal history record reports.

G. The national criminal background check is the process of obtaining criminal history record information from the

Federal Bureau of Investigation through the Central Criminal Records Exchange.

1. The person must submit to fingerprinting and provide personal descriptive information.
2. The person must use the process of the Central Criminal Records Exchange to request and receive a national criminal background check.

H. The search of the central registry is a check to determine if the person has ever been the subject of a founded complaint of child abuse or neglect in Virginia.

I. The person must use the form and process of the ~~Child Protective Services (CPS) Unit of the department~~ department's Office of Background Investigations (OBI). The department provides the central registry request form on its website. Requesters are permitted to submit copies of this form. ~~The CPS Unit~~ OBI verifies child protective services central registry check findings.

The department and registering and approval agencies provide copies of all forms in application packets.

**22VAC40-191-30. Identifying the facilities that are not covered by this regulation.**

A. ~~Licensed child day centers; certified~~ Certified preschools or nursery schools operated by accredited private schools that are accredited in accordance with § ~~63.2-1715~~ 63.2-1717 of the Code of Virginia; children's residential facilities; and family day homes that are not required to be licensed, registered, or approved are not covered by this regulation.

~~Exception: The waiver requirements found in 22VAC40-191-90 through 22VAC40-191-150 do apply to licensed child day centers. All other background checks requirements for licensed child day centers are in 22VAC15-50.~~

B. Background check requirements for certified preschool or nursery school programs operated by accredited private schools are at § 63.2-1717 of the Code of Virginia.

C. Background check requirements for children's residential facilities, including child-caring institutions, are ~~in~~ 22VAC42-40 and in § 63.2-1726 of the Code of Virginia.

D. Background check requirements for child day centers or family day homes that are not licensed, registered, approved, or exempt from licensure and receive federal, state or local child care funds are at § 63.2-1725 of the Code of Virginia.

**22VAC40-191-40. Identifying who is covered by this regulation.**

A. This regulation applies to:

1. Licensed family day homes;
2. Licensed family day systems;
3. Family day homes approved by family day systems;
4. Licensed child-placing agencies;
5. Licensed independent foster homes;
6. Foster and adoptive homes approved by child-placing agencies;

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7. Voluntarily registered family day homes; ~~and~~  
 8. Religious exempt child day centers; and  
 9. Licensed child day centers.

B. Except as provided in 22VAC40-191-50 A, no person with a disqualifying background who has not been granted a waiver according to 22VAC40-191-90 may operate or volunteer or work at a facility governed by this chapter.

~~B. C.~~ Background checks are required at the time of initial application.

1. These background checks are required at the time of initial application for licensure, registration, or approval:

Who	What	When
a. Any applicant	Sworn statement or affirmation, search of central registry, and criminal history record check	Upon application for licensure or registration as a child welfare agency
b. Any agent at the time of application who is or will be involved in the day-to-day operations of the child welfare agency or who is or will be alone with, in control of, or supervising one or more of the children	Same	Same
c. Any other adult living in the home of an applicant for licensure or registration as a family day home, or any existing employee or volunteer	Same	Upon application for licensure or registration as a family day home
d. Prospective foster or adoptive parent	Sworn statement or affirmation, search of central registry, <del>criminal history record check,</del> search of child abuse and neglect registry	<del>Upon request for</del> <u>Prior to approval by child-placing agency</u>

	<u>maintained by any other state in which the individual has resided in the last five years,</u> and national criminal background check	
e. Birth parent of a child in a foster care placement <u>(unless the birth parent has revoked an entrustment agreement pursuant to § 63.2-1223 or 63.2-1817 of the Code of Virginia, or a local board or birth parent revokes a placement agreement while legal custody remains with the parent, parents, or guardians pursuant to § 63.2-900 of the Code of Virginia)</u>	Sworn statement or affirmation, search of central registry, <del>criminal history record check</del> search of child abuse and neglect registry <u>maintained by any other state in which the individual has resided in the last five years,</u> and national criminal background check	Prior to placement of a child with birth parent
f. Other adults <u>living in a prospective foster or adoptive home</u>	<u>Sworn statement or affirmation, search of central registry, search of child abuse and neglect registry maintained by any other state in which the individual has resided in the last five years,</u> and national criminal background check	<u>Prior to approval by child-placing agency</u>

f. <del>g.</del> Operator of family day home requesting approval by family day system	Sworn statement or affirmation, search of central registry, and criminal history record check	Upon request for approval by family day system
<del>g. h.</del> Any other adult residing in the family day home requesting approval and any employee or volunteer of a family day home	Same	Upon request by operator for approval by family day system

~~h. Exception: In emergency circumstances involving subdivisions 1 d and 1 e of this subsection, a child-placing agency may place a child after receipt of a sworn statement or affirmation, search of the central registry, and criminal history record report.~~

~~(1) Within three days of placing a child, a child-placing agency must require the individual for whom a criminal history record check was requested to submit to fingerprinting and provide the personal descriptive information necessary to obtain a national criminal background check.~~

~~(2) The child must be removed from the home immediately if any adult resident fails to provide fingerprints and permission to perform a national criminal history record check when requested.~~

2. These background checks are required at the time of initial application for religious exemption status:

Who	What	When
Any person who will be expected to be alone with one or more children enrolled in a religious exempt child day center except a parent-volunteer, as defined in this regulation, or a parent or guardian who may be left alone with his or her own child	Documentary evidence of sworn statement or affirmation, search of the central registry, and criminal history record check	With the written request for religious exemption status

~~C. D.~~ Background checks are required after the initial licensure, registration, approval, or receipt of religious exemption status.

1. These background checks are required after initial licensure, registration, or approval:

Who	What	When
a. New person designated as applicant, licensee, registrant, <u>family day home operator</u> approved <del>individual</del> <u>by a family day system</u> , or agent who is or will be involved in the day-to-day operations of the facility or who is or will be alone with, in control of, or supervising one or more of the children	Sworn statement or affirmation	Whenever an applicant, licensee, approved <del>individual</del> <u>family day home operator</u> , or registrant changes
	Search of central registry and criminal history record check	Before the end of 30 days after the change
b. Any employee of a licensed, registered, and approved facility who is involved in the day-to-day operations or who is alone with, in control of, or supervising one or more children	Sworn statement or affirmation	Prior to first day of employment at the facility
	Search of central registry and criminal history record check	Before 30 days of employment at the facility ends
c. Any applicant, licensee, <u>family day home operator</u> approved <del>individual</del> <u>by a family day system</u> , agent, employee, volunteer, and person living in the <u>family day home</u> who is required to have background checks	Sworn statement or affirmation, search of central registry and criminal history record check	Before three years since the dates of the last sworn statement or affirmation, most recent central registry finding and most recent criminal history record check report

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<p>d. Voluntary registration provider, provider assistant, substitute provider, if any, and any adult residing in the home</p>	<p>Sworn statement or affirmation, search of central registry and criminal history record check</p>	<p>90 days before the date of application for renewal of the current certificate of registration (The application for renewal must be received by the contracting organization no later than 45 days before the expiration of the current certificate of registration.)</p>	<p>g. All adult household members residing in the home of the <del>individual with whom the child is to be placed</del> foster parent approved by a licensed child-placing agency, foster parent in an independent foster home, or an adoptive parent approved by a licensed child-placing agency, until the adoption is final</p>	<p><del>National criminal background check</del> <u>Sworn statement or affirmation, search of central registry, and criminal history record check</u></p>	<p><del>If child-placing agency staff believe it is necessary</del> <u>Before three years since the dates of the last sworn statement or affirmation, most recent central registry finding, and most recent criminal history record check report or national criminal background check</u></p>								
<p>e. Volunteer at licensed, registered, or approved facility who will be alone with any child in the performance of duties, excluding a parent-volunteer for children attending a licensed, registered, or approved program</p>	<p>Sworn statement or affirmation</p>	<p>Prior to first day of service at the facility</p>	<p><del>h. A person whose most recent background checks were before 1990 must request new checks by the end of December 2004. A person whose most recent background checks were from 1991 through 1995 must request new checks by the end of December 2005. A person whose most recent background checks were from 1996 to the present must request new checks by the end of December 2006, or before five years since the dates of the last sworn statement or affirmation, most recent central registry finding and most recent criminal history record check report, whichever is the shorter period of time.</del></p> <p>2. These background checks are required after receipt of the initial religious exemption status letter.</p> <p>Annually, prior to the expiration date in the current exemption letter, the religious exempt child day center must file with the department documentary evidence that the center is in compliance with the following:</p>										
<p>f. Foster parent <del>or other adult member of the household</del> <u>approved by a licensed child-placing agency, in an independent foster home, or an adoptive parent approved by a licensed child-placing agency, until the adoption is final</u></p>	<p><del>Search</del> <u>Sworn statement or affirmation, search of central registry, and criminal history record check</u></p>	<p><del>If child-placing agency staff believe it is necessary</del> <u>Before three years since the dates of the last sworn statement or affirmation, most recent central registry finding, and most recent criminal history record check report or national criminal background check</u></p>				<table border="1"> <thead> <tr> <th>Who</th> <th>What</th> <th>When</th> </tr> </thead> <tbody> <tr> <td rowspan="2">Prospective employee, volunteer, or any other person who is expected to be alone with one or more children enrolled in the religious exempt child day center</td> <td>Sworn statement or affirmation</td> <td>Before employment or commencement of service at the facility</td> </tr> <tr> <td>Search of central registry and criminal history record <del>clearance</del> check, as requested by the individual</td> <td>Within 30 days of employment or commencement of service</td> </tr> </tbody> </table>	Who	What	When	Prospective employee, volunteer, or any other person who is expected to be alone with one or more children enrolled in the religious exempt child day center	Sworn statement or affirmation	Before employment or commencement of service at the facility	Search of central registry and criminal history record <del>clearance</del> check, as requested by the individual
Who	What	When											
Prospective employee, volunteer, or any other person who is expected to be alone with one or more children enrolled in the religious exempt child day center	Sworn statement or affirmation	Before employment or commencement of service at the facility											
	Search of central registry and criminal history record <del>clearance</del> check, as requested by the individual	Within 30 days of employment or commencement of service											

except a parent-volunteer, or a parent or guardian who may be left alone with his or her own child			<del>foster home, or An adoptive home approved by a licensed child-placing agency, until the adoption is final</del>		home or a person in the home becoming 18 years old
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3. Background checks are required for independent contract employees and employees hired by a contract agency.

If a licensed, registered, or approved facility uses independent contract employees or contract employees hired by a contract agency who will be involved in the day-to-day operations of the facility or who will be alone with, in control of, or supervising one or more children, the facility must:

- a. Obtain background checks according to the above requirements for employees, or view the original required background checks maintained by the contract employee or contract agency;
- b. Accept all satisfactory background checks dated less than six months before independent contract employees or contract employees hired by contract agencies begin providing services at facilities;
- c. Make copies, and keep them at the licensed, registered, or approved facilities. Staff must write on the copies of the criminal record reports that they are photocopies of originals that facility staff verified; and
- d. Provide a sworn statement or affirmation, search of central registry and criminal history record check before three years since the dates of the last sworn statement or affirmation, most recent central registry finding and most recent criminal history record check report.

4. A person 18 years of age and older must have background checks:

Who	What	When
<u>a.</u> Person living in: The home of an applicant*; <u>or</u> The home of a licensed or registered family day home provider; A <del>foster home approved by a licensed child-placing agency;</del> An independent	Sworn statement or affirmation	When person age 18 years or older begins residing in the home or when a person in the home becomes 18 years old
	Search of central registry and criminal history record check, as requested by the individual	Within 30 days of <del>an 18-year-old</del> <u>a person 18 years of age or older</u> beginning to reside in the

b. Person living in the home of (i) a foster parent approved by a licensed child-placing agency, (ii) a foster parent in an independent foster home, or (iii) until the adoption is final, an adoptive parent approved by a licensed child-placing agency

Sworn statement or affirmation

When a person age 18 years or older begins residing in the home or when a person in the home becomes 18 years old

Search of central registry, search of child abuse and neglect registry maintained by any other state in which the individual has resided in the last five years, and national criminal background check

Within 30 days of a person 18 years of age or older beginning to reside in the home or a person in the home becoming 18 years old

\*Note: This does not apply to applicants for family day systems, licensed child-placing agencies, ~~and child day centers,~~ or to religious exempt child day centers.

5. A person 14 years of age and older must have a search of the central registry and make the information available for regulatory purposes:

Who	What	When
a. Person living in: An applicant's home, Home of a licensed or registered family day home provider, A foster home approved by a licensed child-placing agency, An independent	Child protective services central registry check	Within 30 days of a 14-year-old beginning to reside in the home or a person in the home becoming 14 years old

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foster home, or An adoptive home approved by a licensed child-placing agency, until the adoption is final		
b. Exception: A person 14 years of age <u>up</u> to 18 years of age who is placed in <u>a</u> <u>an approved foster or adoptive</u> home by a child-placing agency is not required to have a search of the central registry.		

6. A facility must not accept a required criminal history record report or a central registry finding from an applicant, licensee, registrant, or other person required to obtain background checks that is dated more than 90 days prior to the date of employment, volunteering, residing in the home, or approving a family day home or foster or adoptive home.

7. Exception: See provisions for contracting agencies ~~at~~ in subdivision ~~€~~ 3 of this ~~section~~ subsection.

8. The department must not accept a required criminal history record report or a central registry finding from an applicant, licensee, registrant, or person who signs the statement of intent to operate a religious exempt center that is dated more than 90 days prior to date of licensure, registration, approval or exemption, or from the date when the person designated as the applicant or licensee changes.

9. The background checks remain valid at the facility if no more than 12 consecutive months have passed from when a person (i) began a leave of absence from that facility; (ii) was terminated from employment at that facility; or (iii) was transferred to a facility owned and operated by the same employer or entity, unless there is a criminal conviction or a founded complaint of child abuse and neglect during that period.

## 22VAC40-191-50. Explaining requirements for satisfactory background checks.

A. The department and registering and approving authorities must require documentation of satisfactory background checks for applicants, agents, employees, volunteers, and others living in family day homes and foster and adoptive homes as specified in 22VAC40-191-40.

1. A satisfactory sworn statement or affirmation is:
  - a. A fully completed original that states that the person:
    - (1) Does not have a criminal conviction that is a barrier crime or is any felony conviction within the last five years; and
    - (2) Is not the subject of a founded complaint of child abuse or neglect within or outside the Commonwealth; and

- b. When there is no other knowledge that the individual has an unsatisfactory background.

Criminal convictions include prior adult convictions and juvenile convictions or adjudications of delinquency based on a crime that would be a felony if committed by an adult within or outside the Commonwealth. Convictions also include convictions in other states that are equivalent to those specified in this section.

2. A satisfactory central registry finding is one in which:
  - a. A copy of the department's child protective services check form is returned to the requesting agency or state or local Department of Social Services indicating that, as of the date on the reply, the individual whose name was searched is not identified in the Central Registry of Founded Child Abuse/Neglect Investigations as an involved caregiver with a founded disposition of child abuse/neglect; and
  - b. There is no other knowledge that the individual has a founded disposition in Virginia or elsewhere.
3. A satisfactory criminal history record check report is one in which:
  - a. An original hard copy or Internet inquiry reply from the Department of State Police is returned to the agency, individual or authorized agent making the request with:
    - (1) No convictions indicated; or
    - (2) Convictions indicated, but no barrier crimes or other felony convictions in the last five years; ~~and~~
  - b. A letter is received from the Office of Background Investigations with a finding of "eligible"; and
  - ~~b. c.~~ There is no other knowledge that the individual has a barrier crime, or other felony conviction in the past five years, in Virginia or elsewhere.

The facility must have viewed an original criminal history record report maintained by a contract employee or contract agency that is dated less than six months before the independent contract employee or contract employee is hired by a contract agency begins providing services at the facility. (See also 22VAC40-191-90.)

4. A child-placing agency may approve as an adoptive or foster parent an applicant convicted of not more than one misdemeanor of assault and battery, as defined in § 18.2-57 of the Code of Virginia, not involving abuse, neglect or moral turpitude, or a minor, provided 10 years have elapsed following the conviction.
5. A child-placing agency may approve as a foster parent an applicant convicted of statutory burglary for breaking and entering a dwelling home or other structure with intent to commit larceny who has had his civil rights restored by the Governor, provided 25 years have elapsed following the conviction.
6. A child-placing agency must consider the results of background checks on a birth parent prior to placing the

child of the birth parent with the birth parent, when the child is in a foster care placement (unless the birth parent has revoked an entrustment agreement pursuant to § 63.2-1223 or 63.2-1817 of the Code of Virginia or a local board or the birth parent revokes a placement agreement with legal custody remaining with the parent, parents, or guardians pursuant to § 63.2-900 of the Code of Virginia).

7. No petition for adoption shall be granted if an adoptive parent has been convicted of a sexually violent offense or an offense requiring registration pursuant to § 9.1-902 of the Code of Virginia.

8. A child-placing agency may approve as an adoptive or foster parent an applicant convicted of felony possession of drugs, who has had his civil rights restored by the Governor, provided 10 years have elapsed following the conviction.

9. A child-placing agency may approve as a kinship foster care parent an applicant convicted of the following offenses, provided that 10 years have elapsed from the date of the conviction and the local board or child-placing agency makes a specific finding that approving the kinship foster care placement would not adversely affect the safety and well-being of the child: (i) a felony conviction for possession of drugs as set out in Article 1 (§ 18.2-247 et seq.) of Chapter 7 of Title 18.2 of the Code of Virginia, but not including a felony conviction for possession of drugs with the intent to distribute; (ii) a misdemeanor conviction for arson as set out in Article 1 (§ 18.2-77 et seq.) of Chapter 5 of Title 18.2; or (iii) an equivalent offense in another state.

10. A licensed child day center may hire for compensated employment persons who have been convicted of not more than one misdemeanor assault as defined in § 63.2-57 of the Code of Virginia if 10 years have elapsed following the conviction, unless the person committed such offense while employed in a child day center or the object of the offense was a minor.

**B. Background checks results are not open ended.**

1. When a minor living in a family day home turns 18, the operator is responsible for making sure that the 18-year-old complies with all background check requirements for adults pursuant to 22VAC40-191-40 D 4. (22VAC40-191-40 C 4)

2. Operators must submit new background checks as part of the renewal application packages of registered family day homes. With the exception of those facilities that are exempt per § 63.2-1716 of the Code of Virginia, background checks are required every three years for all other persons required to have background checks pursuant to 22VAC40-191-40 D. (See 22VAC40-191-40 C.)

3. If a person leaves a facility and the criminal history record report or central registry check finding is less than 91 days old, the person must be permitted to take the report

or reports with him. The facility must keep a copy of any report a person takes and write on it that it is a copy, and that the original of any criminal history record report was verified.

4. Unless there is a criminal conviction or a founded complaint of child abuse and neglect during that period, a background check remains valid at a facility if no more than 12 consecutive months have passed from when a person:

- a. Began a leave of absence from that facility;
- b. Was terminated from employment at that facility; or
- c. Was transferred to a center owned and operated by the same employer or entity.

5. The facility, department, or registering or approving authority may require a new background check relevant to this suspicion if there is reason to suspect that a person who has submitted acceptable background checks, as required by this regulation, has:

- a. A barrier crime conviction in Virginia or elsewhere;
- b. A felony conviction that is not for a barrier crime within the last five years in Virginia or elsewhere; or
- c. A founded complaint of child abuse and neglect in Virginia or elsewhere.

6. When the facility, department, or registering or approving authority chooses to require a new background check:

- a. The facility, department, or registering or approving authority may allow the person to continue the same relationship with the child welfare agency until the child care provider or licensing, registering, or approval authority receives the new Virginia background check information or equivalent documentation from another state; or
- b. If there is reason to suspect that a person has a barrier crime conviction, a felony conviction in the last five years, or has a founded complaint of child abuse and neglect, the facility, department, or registering or approving authority may require that the person not be alone with children, even if the documentation is not Virginia background check information or equivalent information from another state.

~~C. With the exception of those facilities that are exempt per § 63.2-1716 of the Code of Virginia, waivers~~ **Waivers** of some criminal convictions are possible. Refer to 22VAC40-191-90 through 22VAC40-191-130 for an explanation of the waiver.

**22VAC40-191-60. Explaining consequences of unsatisfactory background checks results.**

A. Applicants are denied licensure, registration or approval when there are unsatisfactory background checks results for:

- 1. Applicants as a child welfare agency;

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# Regulations

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2. Agents at the time of application who are or will be involved in the day-to-day operations of the child welfare agency or who are or will be alone with, in control of, or supervising one or more of the children;

3. Any other adult, or any child aged 14 or older, living in the home of an applicant for licensure or registration as a family day home with an unsatisfactory central registry finding;

4. Any other adult, or any child aged 14 or older, living in a foster home, or in the home of adoptive parents, until the adoption is final with an unsatisfactory central registry finding;

5. Prospective foster or adoptive parents approved by child-placing agencies; and

6. Prospective family day home operators and family members seeking approval by family day systems.

B. An employee or volunteer of a licensed or registered child welfare agency or of a family day home approved by a family day system must not be employed or provide volunteer service until the agency or home has the person's completed sworn statement or affirmation.

C. An employee or volunteer of a licensed or registered child welfare agency, or of a family day home approved by a family day system, must be denied continued employment or volunteer service if:

1. The licensed or registered child welfare agency or family day system does not have an original criminal history record report within 30 days of employment or volunteer service; or

2. The licensed or registered child welfare agency or family day system does not have a central registry finding within 30 days of employment or volunteer service.

D. No violation will occur and an employee may continue to work, provide service, or live in a licensed, registered, or approved family day home if the facility has documentation that the criminal history record request, or the request for search of the central registry, was submitted within seven calendar days of the person being employed or volunteering, but the report is not returned within 30 calendar days.

1. If a requested report was sent within seven calendar days but was not returned within 30 calendar days, the requester must contact within four working days:

a. The Central Criminal Records Exchange of the Department of State Police; or

b. ~~The Child Protective Services Unit of the department~~ department's Office of Background Investigations.

2. If the request was not received, the requestor must submit another request within five working days after the contact.

3. This provision also applies to someone beginning to live in a family day home after licensure, registration or approval is given or a child who becomes 18 years of age.

It also applies to a child protective services central registry check for a person who becomes 14 years of age.

E. If the department or a local agency becomes aware that a person covered by this regulation has a disqualifying background, the department or local agency may release this information to facilities that are covered by this regulation. Those facilities must not further disseminate this information.

This provision also applies to a new adult beginning to live in a family day home or a child living in a family day home who becomes 18 years of age after licensure, registration or approval is given. It also applies to a child protective services central registry clearance for a person who becomes 14 years of age.

F. Licensed, registered, or approved facilities must inform compensated employees and volunteers that the facilities are requesting child protective services registry checks and criminal history record reports for them.

G. A facility may choose to request a national criminal background check, instead of the criminal history record check, for employees and volunteers.

1. The facility must adhere to Department of State Police requirements for obtaining fingerprints, in accordance with § 19.2-392.02 of the Code of Virginia.

2. The department, family day system, and child-placing agency will accept a national criminal background check result of "qualified" from the Department of State Police.

3. If the screening result is "disqualified," the facility must obtain a satisfactory criminal history record check from the Central Criminal Record Exchange for the person if:

a. The facility wishes to employ the person or approve the person as a volunteer; ~~or~~

b. The entity wishes the department to issue a license or registration; or

c. The facility wishes a family day system or child-placing agency to issue an approval.

H. The facility may also require a background check from another state per the provisions in subdivision B 5 of 22VAC40-191-50.

I. A facility that does not comply with this regulation may have its licensure, registration, approval, or religious exempt status revoked or denied.

J. If a facility has knowledge that a person required to have a background check has an offense, and this person has neither a waiver nor an exception per 22VAC40-191-50 A, and the facility refuses to separate the person from employment, service, or residence in a family day home, then licensure, registration, or approval must be revoked or denied.

## **22VAC40-191-90. Identifying who may apply for a waiver.**

A. Any person who wants to operate or to volunteer or work at a facility covered by this regulation, ~~with the exception of those facilities that are exempt per § 63.2-1716 of the Code of~~

~~Virginia~~, but who is disqualified because of a criminal conviction, or a criminal conviction in the background check of any other adult living in a family day home governed by this regulation, may apply in writing to the commissioner of the department for a waiver.

~~B. The requirements found in 22VAC40-191-100 through 22VAC40-191-150 also apply to licensed child day care centers.~~

~~C. A person may apply for a waiver~~ B. The commissioner may grant a waiver if:

1. A nonbarrier crime felony conviction occurred less than five years previously and the commissioner determines that the person is of good moral character and reputation and the waiver would not adversely affect the safety and well-being of the children in the person's care; or

2. Any other adult living in the home of a family day home applicant or provider has been convicted of not more than one misdemeanor offense of assault and battery or assault and battery against a family or household member. ~~(See as set out in §§ 18.2-57 and 18.2-57.2 of the Code of Virginia.)~~ provided five years have elapsed following the conviction and the department has conducted a home study that includes, but is not limited to:

a. An assessment of the safety of the children placed in the home and

b. A determination that the offender is now a person of good moral character and reputation.

The other adult must not be an assistant or substitute provider. ~~See 22VAC40-191-50 A for an exception that applies to prospective adoptive parents.~~

~~D. Except as provided in 22VAC40-191-50 A, no person guilty of a barrier crime may operate or volunteer or work at a licensed child care center or facility governed by this regulation.~~

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

## FORMS (22VAC40-191)

~~Name Search Request Form for Criminal History Record and/or Sex Offender and Crimes Against Minors Registry Search, SP-230 (rev. 7/99).~~

~~Virginia Department of Social Services/Child Protective Services Request for Search of the Central Registry and Release of Information Form, 032-02-151/5 (eff. 2/02).~~

[Criminal History/Sex Offender and Crimes Against Minors Registry Search Form, SP-230 \(rev. 12/2012\)](#)

[Virginia Department of Social Services/Child Protective Services Central Registry Release of Information Form, 032-02-151-09 \(rev. 11/2009\)](#)

[Sworn Statement or Affirmation for Child Day Programs, 032-05-0160-08-eng \(06/2013\)](#)

[Sworn Statement or Affirmation for Child-Placing Agencies, 032-05-0974-03-eng \(06/2013\)](#)

[Sworn Statement or Affirmation for Foster and Adoptive Parents, Adult Household Members, 032-05-0973-03-eng \(06/2013\)](#)

VA.R. Doc. No. R14-3322; Filed September 12, 2013; 9:46 a.m.

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# GENERAL NOTICES/ERRATA

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## STATE AIR POLLUTION CONTROL BOARD

### Proposed Ozone Advance Plan for Caroline County

Notice of action: The Department of Environmental Quality (DEQ) is seeking comments and announcing a public hearing on a proposed plan to promote continued compliance with the national ambient air quality standard (NAAQS) for ozone in Caroline County. This ozone advance action plan is a plan developed by the Commonwealth in order to meet its overall clean air goals under the federal Clean Air Act by attaining and maintaining the ambient air quality standards promulgated by the U.S. Environmental Protection Agency (EPA) under the Act.

Purpose of notice: DEQ is seeking comments on the overall plan.

Public comment period: October 7, 2013, to November 6, 2013.

Public hearing: November 5, 2013, at 10 a.m. in Conference Room A, Department of Environmental Quality, 629 East Main Street, Richmond, VA 23218.

Description of proposal: On May 21, 2012, EPA designated Caroline County as attainment for the 2008 NAAQS. To help ensure continued clean air, county leaders have worked cooperatively with DEQ and a number of stakeholders to create the plan, which details the numerous clean air programs that are in place and will be implemented to reduce substances that contribute to the formation of ozone. Air quality in the area will continue to improve through the implementation of these programs. Major stakeholders in this process include Caroline County, FAMPO; Virginia Department of Mines, Minerals and Energy; Virginia Department of Transportation; Fort A.P. Hill; Dominion Virginia Power; Virginia Clean Cities Coalition; and GWRideConnect. Actions taken as part of the plan, and various upwind reductions of ozone and particulate matter, will continue to improve air quality well into the future.

Federal information: This notice is being given to provide the general public with the opportunity to provide input on the plan. Ozone advance action plans are voluntary plans developed in cooperation with EPA and are intended to enable the Commonwealth to meet its general federal requirement to attain and maintain the NAAQS; however, there is no mandatory requirement for this type of plan to undergo public comment.

How to comment: DEQ accepts written comments by email, fax, and postal mail. In order to be considered, comments must include the full name, address, and telephone number of the person commenting and be received by DEQ no later than the last day of the comment period. DEQ prefers that comments be provided in writing, along with any supporting information. Comments on the plan must be submitted to Doris A. McLeod, Air Quality Planner, Office of Air Data

Analysis and Planning, Department of Environmental Quality, 629 East Main Street, P.O. Box 1105, Richmond, VA 23218, telephone (804) 698-4197, FAX (804) 698-4510, or email [doris.mcleod@deq.virginia.gov](mailto:doris.mcleod@deq.virginia.gov). All materials received are part of the public record.

To review the proposal: The proposal and any supporting documents are available on the DEQ Air Public Notices for Plans website at <http://www.deq.state.va.us/Programs/Air/PublicNotices/airplansandprograms.aspx>. The documents may also be obtained by contacting the DEQ representative named above. The public may review the documents between 8:30 a.m. and 4:30 p.m. of each business day until the close of the public comment period at the following DEQ locations:

- 1) Main Street Office, 629 East Main Street, 8th Floor, Richmond, VA, telephone (804) 698-4070, and
- 2) Northern Regional Office, 13901 Crown Court, Woodbridge, VA, telephone (703) 583-3800.

Contact Information: Doris A. McLeod, Department of Environmental Quality, 629 East Main Street, P.O. Box 1105, Richmond, VA 23218, telephone (804) 698-4197, FAX (804) 698-4510, or email [doris.mcleod@deq.virginia.gov](mailto:doris.mcleod@deq.virginia.gov).

### State Implementation Plan Proposed Revision - Richmond Air Quality Plan, Stage II

Notice of action: The Department of Environmental Quality (DEQ) is announcing an opportunity for public comment on a proposed plan to attain and maintain the national ambient air quality standard (NAAQS) for ozone in the Richmond-Petersburg Ozone Attainment/Maintenance Area. The Commonwealth intends to submit the plan as a revision to the Commonwealth of Virginia State Implementation Plan (SIP) in accordance with the requirements of § 110(a) of the federal Clean Air Act. The SIP is the plan developed by the Commonwealth in order to fulfill its responsibilities under the Act to attain and maintain the ambient air quality standards promulgated by the U.S. Environmental Protection Agency (EPA).

Purpose of notice: DEQ is seeking comments on the overall plan and on the issue of whether the plan will enable the Richmond-Petersburg area to continue to meet the ozone NAAQS.

Public comment period: October 7, 2013, to November 6, 2013.

Public hearing: A public hearing will be conducted on November 5, 2013, in Conference Room A, Department of Environmental Quality, 629 East Main Street, Richmond, Virginia at 1:30 p.m. Directions may be found at <http://www.deq.virginia.gov/Locations/CentralOffice.aspx>.

Description of proposal: The proposed revision revises the Richmond-Petersburg area's ozone maintenance plans such

that Stage II vapor recovery systems on gasoline dispensing stations are no longer required beginning on January 1, 2017.

The Richmond-Petersburg area was originally designated as a moderate nonattainment area for the 1991 ozone NAAQS of 0.012 parts per million (ppm). The area's air quality improved, and a redesignation request and maintenance plan were approved by EPA on November 17, 1997. On April 30, 2004, EPA designated the area as a moderate nonattainment area for the 1997 ozone NAAQS of 0.08 ppm. Again the area qualified for attainment status, and EPA approved a redesignation request and maintenance plan on June 1, 2007. Both maintenance plans contained emission reductions from the implementation of Stage II vapor controls. Since the most recent maintenance plan was developed and approved, the area has been attaining the current, more-protective ozone NAAQS of 0.075 ppm. EPA has also determined that Stage II, which controls vapors emitted from gasoline pumps, is incompatible with and less effective in controlling vapors than onboard refueling vapor recovery, which controls vapors in individual vehicles. The Commonwealth has determined that Stage II is no longer needed in the area's maintenance plan, which is approved into the Virginia SIP at 40 CFR 52.2420(e).

Removing this requirement does not interfere with maintenance of any ozone NAAQS. In addition to the incompatibility between Stage II controls and vehicles equipped with onboard refueling vapor recovery systems, volatile organic compound (VOC) reductions from other sources of emissions more than compensate for any emissions reductions that might be lost from the removal of Stage II requirements. Modeling studies also show that reductions in nitrogen oxides (NO<sub>x</sub>) are 10 to 1,000 times more effective than VOC reductions in lowering ozone concentrations in the Richmond-Petersburg area. Therefore, this SIP revision satisfies EPA's requirements regarding the removal of Stage II vapor recovery requirements and § 110(l) of the federal Clean Air Act.

Federal information: This notice is being given to satisfy the public participation requirements of federal regulations (40 CFR 51.102). The proposal will be submitted as a revision to the Commonwealth of Virginia SIP under § 110(a) of the federal Clean Air Act in accordance with 40 CFR 51.104. DEQ plans to submit all provisions of the proposal as a revision to the Commonwealth of Virginia SIP.

How to comment: DEQ accepts written comments by email, fax, and postal mail. In order to be considered, comments must include the full name, address, and telephone number of the person commenting and be received by DEQ on the last day of the comment period. All materials received are part of the public record.

To review proposal: The proposal and any supporting documents are available on the DEQ Air Public Notices for Plans website at

<http://www.deq.state.va.us/Programs/Air/PublicNotices/airplansandprograms.aspx>. The documents may also be obtained by contacting the DEQ representative named below. The public may review the documents between 8:30 a.m. and 4:30 p.m. of each business day until the close of the public comment period at the following DEQ locations:

- 1) Main Street Office, 629 East Main Street, 8th Floor, Richmond, VA, telephone (804) 698-4070, and
- 2) Piedmont Regional Office, 4949-A Cox Road, Glen Allen, VA, telephone (804) 527-5020.

Contact Information: Doris A. McLeod, Department of Environmental Quality, 629 East Main Street, P.O. Box 1105, Richmond, VA 23218, telephone (804) 698-4197, FAX (804) 698-4510, or email [doris.mcleod@deq.virginia.gov](mailto:doris.mcleod@deq.virginia.gov).

### STATE LOTTERY DEPARTMENT

#### Director's Orders

The following Director's Orders of the State Lottery Department were filed with the Virginia Registrar of Regulations on September 9, 2013. The orders may be viewed at the State Lottery Department, 900 East Main Street, Richmond, VA, or at the office of the Registrar of Regulations, 201 North 9th Street, 2nd Floor, Richmond, VA.

#### Director's Order Number Seventy-Five (13)

Virginia's Instant Game Lottery 1442 "5X the Money" Final Rules for Game Operation (effective September 3, 2013)

#### Director's Order Number Seventy-Six (13)

Virginia's Instant Game Lottery 1461 "7X the Money" Final Rules for Game Operation (effective September 3, 2013)

#### Director's Order Number Seventy-Nine (13)

Virginia's "Megaply It!" Consumer Promotion Final Rules for Operation (effective September 3, 2013)

#### Director's Order Number Eighty (13)

Virginia Lottery's "Mega Millions Subscriptions Giveaway" Sweepstakes Final Rules for Operation (effective September 3, 2013)

#### Director's Order Number Eighty-Two (13)

"Redskins Game Ticket/Hospitality Tent Chain Account Sales Contests Retailer Incentive Promotion" Virginia Lottery Retailer Incentive Program Requirements (effective August 27, 2013)

#### Director's Order Number Eighty-Three (13)

"Simon Malls Employee Promotion" Virginia Lottery Retailer Incentive Program Requirements (effective August 27, 2013)

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## General Notices/Errata

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### Director's Order Number Eighty-One (13)

Certain Virginia Instant Game Lotteries; End of Games.

In accordance with the authority granted by §§ 2.2-4002 B 15 and 58.1-4006 A of the Code of Virginia, I hereby give notice that the following Virginia Lottery instant games will officially end at midnight on August 16, 2013:

Game 1162	\$120 Million Cash Blowout ( <b>TOP</b> )
Game 1229	\$200,000 Jackpot ( <b>TOP</b> )
Game 1355	10 X the Money ( <b>TOP</b> )
Game 1393	Monopoly
Game 1399	5 X the Money ( <b>TOP</b> )
Game 1421	Pet Lovers

The last day for lottery retailers to return for credit unsold tickets from any of these games will be September 20, 2013. The last day to redeem winning tickets for any of these games will be February 12, 2014, 180 days from the declared official end of the game. Claims for winning tickets from any of these games will not be accepted after that date. Claims that are mailed and received in an envelope bearing a postmark of the United States Postal Service or another sovereign nation of February 12, 2014, or earlier, will be deemed to have been received on time. This notice amplifies and conforms to the duly adopted State Lottery Board regulations for the conduct of lottery games.

This order is available for inspection and copying during normal business hours at the Virginia Lottery headquarters, 900 East Main Street, Richmond, Virginia, and at any Virginia Lottery regional office. A copy may be requested by mail by writing to Director's Office, Virginia Lottery, 900 East Main Street, Richmond, Virginia 23219.

This Director's Order is effective on the date of its signing and shall remain in full force and effect unless amended or rescinded by further Director's Order.

/s/ Paula I. Otto  
Executive Director  
August 28, 2013

### **STATE WATER CONTROL BOARD**

#### **Proposed Consent Special Order for B & V Exhaust Systems, Inc.**

An enforcement action has been proposed for B & V Exhaust Systems, Inc. for alleged violations that occurred at 3904 D Jefferson Davis Highway, Richmond, VA. The State Water Control Board proposes to issue a consent special order to B & V Exhaust Systems, Inc. to address noncompliance with State Water Control Board law. A description of the proposed action is available at the DEQ office named below or online at [www.deq.virginia.gov](http://www.deq.virginia.gov). Cynthia Akers will accept comments by email at [cynthia.akers@deq.virginia.gov](mailto:cynthia.akers@deq.virginia.gov), FAX

at (804) 527-5106, or postal mail at Department of Environmental Quality, Piedmont Regional Office, 4949-A Cox Road, Glen Allen, VA 23060, from October 7, 2013, to November 8, 2013.

#### **Proposed Consent Order for Tazewell County Public Service Authority**

An enforcement action has been proposed for the Tazewell County Public Service Authority for violations in Tazewell County. The proposed consent order addresses violations of the State Water Control Law and VPDES Permit No. VA0064271 at the Claypool Hill Sewage Treatment Plant. 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). Ralph T. Hilt will accept comments by email at [ralph.hilt@deq.virginia.gov](mailto:ralph.hilt@deq.virginia.gov), FAX at (276) 676-4899, or postal mail at Department of Environmental Quality, Southwest Regional Office, 355-A Deadmore Street, Abingdon, VA 24210, from October 8, 2013, to November 6, 2013.

#### **Public Comment Opportunity - Virginia Stormwater Management Handbook (2nd Edition, 2013)**

The department invites public comment on a final draft of the Virginia Stormwater Management Handbook, 2nd Edition, 2013, (Handbook). This Handbook has been developed over the past few years to provide guidance pertaining to modified Virginia Stormwater Management Program (VSMP) Permit Regulations adopted in October 2011 and required to be implemented beginning on July 1, 2014. The draft Handbook is subdivided into chapters and chapter appendices, each provided as a separate PDF file on the department's Stormwater Management Guidance webpage. The department considers the new Handbook to be a substantial improvement in the level and quality of guidance provided, with many new topics addressed, more and better graphics, and up-to-date site design examples, among other new elements. DEQ is also asking for comments on amending the Virginia Stormwater Management Regulations to incorporate the updated Virginia Runoff Reduction Method (VRRM) Spreadsheet described in Chapter 12 of the draft Handbook. The Virginia Stormwater Management Regulations require using the Virginia Runoff Reduction Method Spreadsheet or other equivalent methodology to determine compliance with water quality design criteria for regulated land-disturbing activities. The current method required by the regulation is dated March 2011. An improved version was completed in spring of 2013, correcting some calculation formula errors and providing a summary tab, simplifying access to the calculated results.

The department will receive comments regarding the draft Handbook and the updated VRRM Spreadsheet for 30 days. Comments must be received by 11:59 p.m. on October 23, 2013. All comments should be sent to the contact listed below.

Contact Information: Scott Crafton, Department of Environmental Quality, 629 East Main Street, P.O. Box 1105, Richmond, VA 23218, telephone (804) 698-4082, FAX (804) 698-4032, or email [scott.crafton@deq.virginia.gov](mailto:scott.crafton@deq.virginia.gov).

## VIRGINIA CODE COMMISSION

### Notice to State Agencies

**Contact Information:** *Mailing Address:* Virginia Code Commission, General Assembly Building, 201 North 9th Street, 2nd Floor, Richmond, VA 23219; *Telephone:* Voice (804) 786-3591; 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/connect/commonwealth-calendar>.

**Cumulative Table of Virginia Administrative Code Sections Adopted, Amended, or Repealed:** A table listing regulation sections that have been amended, added, or repealed in the *Virginia Register of Regulations* since the regulations were originally published or last supplemented in the print version of the Virginia Administrative Code is available at <http://register.dls.virginia.gov/documents/cumultab.pdf>.

**Filing Material for Publication in the Virginia Register of Regulations:** Agencies use the Regulation Information System (RIS) to file regulations and related items for publication in the *Virginia Register of Regulations*. The Registrar's office works closely with the Department of Planning and Budget (DPB) to coordinate the system with the Virginia Regulatory Town Hall. RIS and Town Hall complement and enhance one another by sharing pertinent regulatory information.

## ERRATA

### SAFETY AND HEALTH CODES BOARD

**Title of Regulation:** **16VAC25-175. Federal Identical Construction Industry Standards.**

**Publication:** 30:1 VA.R. 63 September 9, 2013

**Correction to Final Regulation:**

Page 63, Title of Regulation should read

**16VAC25-175. Federal Identical Construction Industry Standards (amending 16VAC25-175-1926.952, 16VAC25-175-1926.1400).**

VA.R. Doc. No. R14-3833; Filed September 13, 2013, 11:35 a.m.

### STATE WATER CONTROL BOARD

**Title of Regulation:** **9VAC25-32, Virginia Pollution Abatement (VPA) Permit Regulation.**

**Publication:** 29:24 VA.R. 3085-3236 July 29, 2013

**Correction to Final Regulation:**

Page 3203, 9VAC25-32-560 B 3 c, change lines 1 and 2 to read:

[ ~~d. Application frequency~~ c. **Infrequent application** ].

[ (1) ] For ~~infrequent~~ applications, [ **Infrequent** ] If biosolids

VA.R. Doc. No. R08-1248; Filed August 28, 2013, 11:26 a.m.

